IN THE SUPREME COURT OF FLORIDA

CASE NO, 70,751

JORGE ZERQUERA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

FILED
SID J. WHITE
OCT 24 1988
CLERK, SUPREME COURT
By ______ Deputy Clerk

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AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

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BRIEF OF APPELLEE

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INTRODUCTION

The symbol "App." refers to the appendix filed with this brief. Otherwise the State adopts the reference symbols used in the Brief of Appellant. The parties will be referred to as the defendant and the State, and Scott Puttkamer, the co-defendant/chief state witness, will be referred to as Scott.

STATEMENT OF THE CASE

The state accepts the defendant's Statement of the Case as generally accurate, but states pursuant to Rule 9.210(c) of the Florida Rules of Appellate Procedure the following additions, exceptions and amplifications:

On January 9, 1985, the State indicted the defendant and Scott on four counts (R.1-3). Counts I and II charged them with the first degree murder of Robert Shane, a cab driver, in violation of §§782.04 and 775.087, Fla.Stat. (1984) and with the robbery of Robert Shane, in violation of $812.13, Fla.Stat.(1975). (R.1-2) Count III charged the defendant and Scott with grand theft, second degree relating to the Super Yellow Cab Robert Shane had been driving, in violation of $812.014, Fla.Stat. (1982). Counts IV and V charged the defendant and Scott with arson, second degree and tampering with evidence, in violation of §806.01(2), Fla.Stat. (1979) and 918.13, Fla.Stat. (1972) respectively, in connection with the destruction of Robert Shane's cab. (R.1-3).

On June 3, 1985, Zerquera moved to suppress his confession on the basis that, inter alia, his Miranda rights were not scrupulously honored. (R.33-38). On the same date, Zerquera filed a Motion for Severance based on mutually antagonistic defenses. (R.31-32).

On October 4, 1985, the trial court held a suppression hearing. (SR.1-125). Through the testimony of the Hialeah police detectives who obtained the defendant's confession, Officers Porth and Venema, the State adduced testimony regarding how they came to believe the defendant had some information about the Shane murder, how they located the defendant, and how the defendant came to give a lengthy and detailed confession. (SR.1-77). The defendant testified in his own behalf, (SR.77-111). After argument of the parties, the trial judge reserved ruling on the motion to suppress until the transcript of the suppression hearing could be transcribed and reviewed. (SR.124).

On December 12, 1985, the trial judge denied the defendant's motion to suppress, (T.502).

On December 16, 1985, Scott's motion to suppress came on for hearing. (T.513-599, 620-631). The prosecutor and attorneys for Scott were present. (T.512). Counsel for the defendant requested not to be present so that he could handle another case in another courtroom on that day, (T.608).

On February 3, 1986, the State filed a motion in limine to prevent the defense from making direct or indirect mention during trial of Scott Puttkamer's polygraph examination on the ground of irrelevance and unfair prejudice. (R.45-46). In a second motion in limine filed the same day, the State sought to prevent the defense's mentioning at trial how Puttkamer came to tell Hialeah Police Detective Porth information about the Shane murder. (R.47-48). The grounds stated were irrelevance and unfair prejudice. (R.47).

On February 10, 1986, the State filed a motion in limine seeking an instruction that the defense not comment directly or indirectly on a codefendant's failure to testify or produce evidence, on the grounds of irrelevance and unfair prejudice. (R.82-83). On the same date, a motion hearing transpired. The trial court granted the State's motion in limine regarding polygraph evidence, but denied in part the motion in limine regarding the Williams Rule Evidence. (T.647, 648).

On February 3, 1986, Scott's attorneys objected to the use at trial of the State's physical evidence: a brown suitcase belonging to Scott, a plastic container with .22 bullets and casings in it, on the grounds that they constituted untimely discovery. (T.652-65). The following colloquy recounted in pertinent part illustrates what transpired:

MR. WILLIAMS: Because they have turned up additional evidence today, we are in a position of having to ask the court to exclude the evidence or grant us time to investigate the evidence to determine what value it has and what circumstances [surrounding] the search and seizure of the evidence which would also probably cause us to file a motion to suppress that evidence.

. . .

[PROSECUTOR]: The items of evidence of which *Mr,* Williams speaks are -- it's a little plastic package -- I can show it to the Court -- plastic package containing check stubs, .22 caliber bullets and a little plastic box.

. . .

This is the evidence, It's the check stubs of *Mr.* Puttkamer's name typewritten on them and the box containing .22 caliber derringer ammunition and as well as 22 caliber long ammunition, and as well as a .22 filing case. The filings were found during the search of the room by a gentleman by the name of *Mr.* Phillip Hayle.

Mr. Hayle's name is mentioned and the search is mentioned in a police report filed by Detective [Cole] of the Miami Police Department on page -- excuse me -- beginning on page one.

THE COURT: Wait a second. Is this police report in the possession of the defense?

MR. WILLIAMS: Not that I am aware of,

[PROSECUTOR]: The police report was apparently submitted on discovery by one of the assistant state attorneys handling the burglary case and should be in *Mr,* Landau's possession.

[MR. LANDAU]: It's not in my possession, When I asked Detective [Cole] about any type of search during my discovery deposition of him, relevant to this particular murder case, he told me they might have found something but everything was returned to the proper owner and it was left at that. At no time was I made aware of these particular items.

(T.653-55).

THE COURT: Was there a search warrant for the residence of one Phillip Hayle?

[Prosecutor]: No, Judge. Mr. Hayle gave consent, according to the detectives.

If I could explain the circumstances to you as I was beginning to do. Detectives Venima and Porth contacted Mr. Coal and asked him to go to this Phillip Hayle's residence. Mr. Hayle did give consent to search items. Certain items found in his residence included a brown leather or vinyl suitcase which is noted in Detective Coal's report. If Mr. Landau doesn't have it, then he doesn't have it, Judge.

One of the items noted was this brown leather suitcase. It was then brought to the Hialeah Police Department by Detective Coal and turned over to Detective Phillip Kalow of the Hialeah Police Department who kept it there for Detective Venema so Detective Venema could examine it.

Inside the suitcase was found this package with the bullets and the check stubs.

THE COURT: And it was the defendant's suitcase by reason of--

[PROSECUTOR]: Well, it was found in another man's apartment, and inside this brown suitcase was found the defendant's property.

Second thing is these bullets that were found. There was mention of a bullet lineup during the course of the deposition of, I believe it was Detective Venima and also Detective Porth. By bullet lineup I mean one of the witnesses in this case named Karen Heart, who's the girlfriend of Jorge Zerquera, claimed to have seen the ammunition that was used to kill the victim.

Then what Detective Venema did was he got a bunch of different caliber ammunition, I believe one of the bullets, .22 derringer ammunition, and showed it to her and she decided it was the ammunition.

I did look through the deposition. No question was asked as to where the ammunition came from by the defense. The only other thing that I could say, that property is here today. I have showed it to the defense counsel and I already indicated in my discovery response way back on January the 28th of 1985, indicated that.

THE COURT: Way back then?

[PROSECUTOR]: Way back then. I indicated there were tangible materials or objects obtained or belonging to the accused, and those items are available by contacting the undersigned attorney.

Anticipating the problem, I advised Mr. Landau, *Mr,* Jacob and Mr. Williams this morning that was made available back in '85 and informed them they were able to see it. I will also inform the Court I will be seeking to call Detective Kalow to the property given by Detective Coal.

MR. WILLIAMS: And let the record

> reflect he is now supplying us with
> this witness per discovery.
>
> (T.656-59).

The trial judge granted the defense approximately one week to allow defense counsel to investigate the evidence. (T.667). The defendant's counsel was not present on this date.

On February 4, 1986, defense counsel deposed the two key officers and learned that the bullets and casings were found with the paycheck stubs in a plastic bag. (A.10). Scott's attorneys filed a motion to exclude, to dismiss, for sanctions, and for an evidentiary hearing. (R.429-432).

On February 10, 1986, the motion came on for a hearing. (S.R.126-152). Mr. Landau and Mr. Williams argued the motion to exclude and dismiss. (S.R.128-146). Mr. Jacobs and the defendant were not present. (SR.128). The trial court suppressed the evidence. (S.R.147-148). Scott's motion for severance was denied. (T.50). At the request of the defendants, all reference to the ingestion of drugs and alcohol was prohibited. (S.R.150). Mr, Jacobs arrived. (S.R.152). The trial court ruled on the State's motion in limine regarding the propriety of comment of one co-defendant on the other co-defendant's failure to testify, (S.R.153-54). The Court ruled that the defense would be prohibited from comment on the failure of a co-defendant to testify, but

reserved rulings on the possible issue of denial of right of cross-examination until the decision whether or not a defendant would testify would be made. (S.R.153-54).

On February 5, 1986, the trial court continued its pretrial conference. (T.688). The trial court ruled that Scott's confession was admissible at trial subject to a few deletions which were stated on the record. (T.688-690). Mr. Landau moved to exclude any reference to Scott's use of illegal drugs. (T.691-92). The Court granted the motion. (T.691-92).

On February 13, 1986, the joint trial began. (R.87). A jury panel of six was selected and sworn since the prosecutor had announced that the death penalty was not being sought. (T.668).

After the prosecutor presented his opening argument, Howard Landau, Scott's attorney, presented his opening argument. On several occasions he indicated that the jury would have to conclude, based on the evidence, that Zerquera is the one who is guilty. (App.III, 20-21). As a result of the accusations against Zerquera, the attorney for Zerquera moved for a severance based upon Bruton violations and antagonistic defenses. (App.III, 21). Zerquera's attorney argued:

> "They're going to say my cleint is the guy who had the gun and I'm going to say their guy had the gun. It is clearly antagonistic in terms of premeditated first degree murder. My client would not be able to get a fair trial. Not only is he being prosecuted by the prosecutor, he is also being prosecuted by two Public Defenders." (App.III, 21).

After lengthy arguments about the need for severance, the trial judge announced:

> "A granting of severance is not like finding the Defendant not guilty or dismissing the case, you understand, it just gives another trial. I'm going to grant the motion. We're still going to proceed with this trial against--well, --" (App.III, 40).

At this point, the prosecutor responded:

> "I think we have to proceed with Mr. Puttkamer on the basis of your ruling that Mr. Zerquera has already been prejudiced by the opening argument." (App.III, 40).

The Court agreed. (App.III, 40). The judge then announced that Zerquera's trial would proceed after Puttkamer's. (App.III, 40-41).

The Court then recessed for an hour and upon resuming, co-defendant Puttkamer announced that he was entering a plea to reduced charges and was agreeing to testify against Zerquera. (App.III, 48 et. seq.).

The prosecutor announced the plea agreement as follows:

> [PROSECUTOR]: Your Honor, the State and the Defense counsel for the defendant, Scott David Puttkamer, has entered into plea negotiations in this case. Negotiations are as follows: In return for Mr. Puttkamer's plea of guilty to a reduced charge of Count One from first degree murder and in return for his plea of guilty to a reduced charge of armed robbery with a firearm, to robbery with a weapon, and in return for the State -- as part of the plea, we will nolle pros Count Three, Four and Five. That's grand theft, arson, and the defendant would be sentenced to a term of years not less then ten to life. As part of the negotiations, the defendant would agree to testify truthfully against the co-defendant, Jorge Zerquera. That is the agreement with Mr. Landau and Mr. DiGregory.
>
> MR. WILLIAMS: The automobile theft would be no action.
>
> MR. DIGREGORY: We're not going to do anything with the automobile theft or car burglary at this time. Is that satisfactory?
>
> MR. WILLIAMS: Yes.
>
> MR. LANDAU: What Mr. DiGregory has represented to me is satisfactory. We've discussed this with our client and he told us that this is what he wants.
>
> (T.162-63).

The trial court accepted the guilty plea and set a date for sentencing. (T.168-181).

After the plea colloquy, the prosecutor stated:

> "I'm not sure if we can get the other Defendant [Zerquera] and go with this jury, although he's been severed out, There's no need for severance anymore. I don't know if that's an option that we have or not." (App.III, 60-61).

The judge indicated that Zerquera's attorney would want to depose Puttkamer, Zerquera's attorney agreed and the prosecutor stated:

> "Since the basis of the severance was Mr. Landau's remark about Mr. Jacob's client [Zerqueral, then we can't very well use that jury." (App.III, 61).

Without objection by the defendant, the Court discharged the jury. (App.III, 61).

On April 22, 1986, before Circuit Judge Amy Steele Donner, Zerquera argued that the State should be precluded from seeking the death penalty against Zerquera in the new trial. (App.III, 68-71), The State responded that based on the new evidence from Puttkamer, it now had enough evidence to seek the death penalty, (App.III, 72-73). The judge announced that the State would be precluded from death qualifying a jury at the new trial. (App.III, 72-73),

On May 9, 1986, Judge Donner entered an Order Prohi-

biting the State from seeking the death penalty. (App.III, 78). The order provided:

> 1. Before the defendant went to trial with his co-defendant the State announced that it would not seek the death penalty. A non-death qualified jury was therefore picked to try the case.
>
> 2. The renewed motions for severance filed by the defendant and his co-defendant were granted after the co-defendant's opening argument. The defendant was then told by the prosecutor that it would be in defendant's interest to have a new trial with a different jury. Relying upon the prosecutor's representation that defendant did not object to a new jury.
>
> 3. The co-defendant then pled guilty and will now testify against the defendant at his trial. The co-defendant will testify that the defendant was the person who fired the fatal shot. Such evidence was not available to the State before the co-defendant's plea.
>
> 4. Since the State induced the defendant to forego trial by a jury which could not recommend the death penalty it is estopped from seeking the death penalty in this case.
>
> 5. As an independent ground for prohibiting the State from seeking the death penalty the court finds, after consideration of the potential aggravating and mitigating circumstances, that a jury could not validly recommend the death penalty in this case.
>
> 6. As a further independent ground for prohibiting the State from seeking the death penalty, the Court finds that, if the State were permitted, now, to death qualify a

> jury, the defendant could seek relief, if convicted, under Florida Rule of Criminal Procedure 3.850, alleging ineffective assistance of counsel. (App. 78-79).

The State filed a petition for writ of mandamus or in the alternative a writ of prohibition seeking to have the trial judge allow the state to seek the death penalty and proceed with the trial of the defendant. (App.III). This Court granted the petition. State v. Donner, 500 So.2d 532 (Fla. 1987).

On February 25, 1987, the trial of defendant Zerquera reconvened. (T.754).

The jury selection contained voir dire regarding the prospective juror's attitudes about the death penalty, and about the fact that one of the state's key witnesses had been a co-defendant who worked out a deal with the State. (T.759-930, 902). One prospective juror, Mr. Vitkovich, stated that he used to drive a cab in New York. (T.891). Vitkovich was not challenged by the defense and was retained as a juror. (T.930). Vitkovich became the jury foreman. (T.1293).

At the close of the State's case, the defendant moved for a judgment of acquittal, which was denied. (T.1185). The defendant then rested without putting on a case. (T.1194). The jury returned a verdict against the defendant, after a little more than four hours deliberation, of guilty as charged on all counts. (T.1293-94).

On March 4, 1987, Scott's sentencing hearing began. (T.1310-18). The sentencing recommendation pertained to Count 1, which was reduced to second degree murder, and Count 11, which was reduced to robbery with a weapon. **(R.439-442A,** T.1310). Counts 111, IV and V were dropped based on Scott's assistance at the defendant's trial and his agreement to testify at the defendant's penalty phase. (T.1310-11). The trial court imposed a ten-year state prison term on each count with a three year minimum mandatory on Count I. (R.442, T.1317).

On March 31, 1987, the trial court held the defendant's penalty phase hearing. (T.1320-1408). Scott testified that the defendant told him that he committed the murder to eliminate Shane as a witness. (T.1342, 1351). Scott further testified that his own sentence was ten years incarceration. (T.1350). On the defendant's behalf, family members and his former landlord testified for the defendant. (T.1365-73). The trial court gave the standard penalty phase jury instruction. (T.1348, 1401-07). The jury returned a verdict of death, eight votes to four. (T.1408).

On May 13, 1987, the defendant's sentencing hearing was held. (T.1411). Sheila Smith, once duly sworn, offered the following testimony to the Court:

> My name is Sheila Smith. I'm Robert Shayne's daughter. I sat through

this trial and I have heard all the defense given for George Zerquera and I would just like to say that he had a family in town. If he was hungry, he could have gone to them. If he needed money to buy food, he should have gotten a job. He could have worked at Burger King or anything but he decided to kill my father.

I believe that before he got in that cab he was going to kill my father. I believe he killed my father -- and I'm sorry for his family, but our family has been through a terrible time with this and I know he said that he was under emotional stress because his father was killed, but how does it feel to have your own father shot in the head and dumped in the street. None of my family has gone out and committed armed robbery or murder because of that and I feel that he should be given the death penalty and if you don't agree with that, I feel you should put him in prison for as long as possible with consecutive sentences for all his crimes to keep him off the street and keep him from doing this to anyone else for as long as you can.

That's all I have to say.

(T.1413-14).

Then the following colloquy transpired:

THE COURT: Well, let me say something to you because I'm sure it was difficult for you to come and talk to me and talk in this courtroom. Whatever the Court rules after hearing all the testimony before today, I understand your pain and suffering and I have great feelings of sympathy for you and your family. I have watched you mother and I believe it's your other sister, at least, I recognize--

> MS, SMITH: Both my sisters.
>
> THE COURT: And their children who have sat here, in affect, year after year because this started last year and perhaps even way before this; I'm not even sure. This is 1987 and this began in 1984 and I know that I've seen you all here for several years and I know your great interest in following this trial and I'm sure it's out of love for your father--
>
> MS. SMITH: Yes,
>
> THE COURT: -- and concern that justice is served.
>
> MS. SMITH: It's not for revenge or not hatred, It's just there is too many criminals on the street now. He's been caught, he's been convicted and I think you should get him off the street so he can't do it again.
>
> THE COURT: Thank you.
>
> (T.1414-15).

The defendant's aunt, Caridad Zerquera, gave testimony for the defendant. (T.1416-17). The attorneys gave argument. (T.1417-27). The defendant addressed the court as follows:

> THE DEFENDANT: If it pleases the Court, your Honor, I'm not an attorney. I have never had any dealings with the judicial system as far as trial is concerned so I'm not aware of what has transpired here. I don't know if my rights have been violated. I really don't know what my rights are.
>
> What I do know is that a murderer will be on the streets in a couple of years on parole and I will be in prison serving his sentence.

> At this point you only have two choices: Life or death; and I'm not going to ask for mercy. All I can say is regardless of which sentence you choose, you're wrong.
>
> Thank you.
>
> (T.1427).

After a momentary recess, the Court announced the following:

> THE COURT: Mr. Zerquera, please come before me.
>
> Mr. Zerquera, perhaps you are right, perhaps that the sentence I do give you will be incorrect. If I sentence you to life imprisonment, the family of Fbbert Shayne will feel that justice has not been served. If I sentence you to death by electricution (sic) you feel that I have sentenced improperly and incorrectly because you feel that you are not the person who committed the crime.
>
> In any event, through your own statements you have admitted that you were on the scene at the crime when Mr. Shayne was murdered. This is one of the most difficult parts of being a judge. You're only 24 years of age and except for this case, it appears that you're not significantly involved with the law: however, balancing this, the family of Fbbert Shayne can never have the love, comfort and protection of a husband, father and grandfather.
>
> In addition, I am sworn to uphold the law of the State of Florida and the death penalty is part of Florida Statutes and is recognized by our courts. The courts have long recognized the jury's recommendation as most persuasive because it is a

> statement from members of the community and how they feel concerning the crime that was tried and the person who was tried for the crime.
>
> I have struggled with this case because of your age, but the crime that was committed was cold and calculating and after spending many weeks and at this time months considering my verdict, the Court hereby sentences you to death by electricution (sic) for the murder of Robert Shayne.
>
> In addition, the Court sentences you to life for the minimum mandatory sentence of 25 years for robbery, 15 years for arson consecutive to that robbery: five years for grand theft consecutive to that arson: and five years for tampering with physical evidence, consecutive to that theft.
>
> May God have mercy on your soul.
>
> (T.1428-29).

On May 29, 1987, the trial court entered corrected sentencing orders reflecting that on Count I, the defendant will receive death, on Count 11, a life sentence, on Count 111, five years incarceration, on Count IV, fifteen years incarceration, on Count V, five years incarceration, all to be served consecutively. (R.286-291).

On June 11, 1987, the trial judge filed a written sentencing order which states in pertinent part:

> The Court mindful of the jury recommendation by a vote of 8 to 4 that the defendant be sentenced to death, after having heard all the

evidence and after having carefully considered it, finds the following aggravating circumstances proven beyond and to the exclusion of a reasonable doubt:

1. The capital felony was committed while the defendant was engaged in an armed robbery. F.S. 921.141(5)(d). During the trial, the defendant's confession was introduced into evidence. In it, he admitted participating in the planning to rob the taxi driver victim. He further admitted participating in the actual robbery and the destruction of evidence following its commission. The evidence at trial showed the body of the victim was found with his right rear pocket turned out and that the defendant admitted that approximately $18.00 was taken from the victim. Additionally, Scott Puttkamer testified that the defendant planned the robbery and shot and killed the victim. Finally, the jury found the defendant guilty of Armed Robbery.

2. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. F.S. 921.141(5)(c). During the sentence phase, Scott Puttkamer testified that the defendant admitted that he killed the victim because he wanted no witnesses to the robbery,

The Court makes the following findings with respect to the evidence presented and argued in mitigation:

1, The age of the defendant at the time of the crime. F.S. 921.141(6)(g). The defendant was 21 years old when he shot and killed the victim. The Court finds his age to be a mitigating circumstance.

2. The defendant has no significant history of prior criminal activity. F.S. 921.141(a). The defendant chose not to present evidence or argument concerning this mitigating circum-

stance to the jury because the State had rebuttal evidence in the form of a prior Burglary conviction. Nevertheless, the Court finds this to be a mitigating circumstance because that one conviction does not suggest a significant history of prior criminal activity.

3. The defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor. F.S. 921.141(6) (d). This mitigating factor was not shown, The evidence presented at trial and during the sentencing phase established that it was the defendant who shot and killed the victim. The defendant relies on his own confession in arguing the existence of this mitigating factor. The Court rejects that portion of the confession during which the defendant denies being the shooter and relies upon the testimony of Scott David Puttkamer.

Further, regarding non-statutory mitigating factors, the Court considered the testimony of family members and a friend. The death of his father while the defendant was young in no way explains, excuses or mitigates his responsibility for the crime of premeditated murder,

Finally, this Court has considered the sentence imposed on Scott David Puttkamer of ten years in State prison for his participation in the robbery and murder of the victim. Imposition of the death penalty would not violate the defendant's constitutional rights. Meeks v. State, 339 So.2d 186 (Fla. 1976). In her discretion, the prosecutor may strike a plea bargain with a co-defendant, so that one bearing a greater responsibility for a capital murder can be brought to justice.

Thus, after a careful review of all the evidence, the Court finds that two aggravating circumstances have

been proven beyond and to the exclusion of a reasonable doubt and the Court is reasonably convinced that there are two mitigating circumstances.

Despite the existence of age as a mitigating circumstance, the Court assigns it very little weight. The defendant had already served in the military and the circumstances of the murder, including the prior planning of the robbery and the subsequent destruction of physical evidence, show that the defendant clearly understood the nature and consequences of his actions.

Though the defendant has no prior criminal history, this circumstance, combined with his age at the time of the crime do not outweigh the two aggravating circumstances. Those aggravating circumstances far outweigh the evidence presented in mitigation,

By choosing to commit a robbery, the robber recognizes that he may do violence to his victim in order to achieve his monetary goal, This defendant exhibited a total disregard for human life by not only choosing to commit a robbery with a firearm, but by killing the victim for the sole purpose of eliminating him as a witness. Further, this senseless killing exposes the defendant, despite his age and lack of significant criminal history, as a man who not only has a total disregard for the law, but who will stop at nothing to avoid living within the law. Such behavior is intolerable.

WHEREFORE, IT IS ORDERED that at Count I of the Indictment, the defendant, JORGE ZERQUERA, shall be sentenced to death for the murder of ROBERT SHANE.

(R.293-96).

STATEMENT OF THE FACTS

The State accepts the defendant's Statement of the Facts, as generally accurate, but states pursuant to Rule 9.2110(c) of the Florida Rules of Appellate Procedure the following additions, exceptions and amplications:

1. The State takes exception to all argument the defendant has made in his Statement of the Facts.

2. The facts adduced at the defendant's suppression hearing are as follows, in relevant part:

On Monday, November 19, 1984, at approximately 5:00 a.m., Hialeah Police Detective William Porth received a telephone call from a Miami Springs Police Detective. (T.6). He told Porth that he had a man in custody for car burglary who told him 15 to 20 times that he had information concerning the homicide of Robert Shane. (T.6). The man, Scott Puttkamer, took the telephone and told Porth that he suspected his roommate. (T.7). Scott told Porth that Scott's roommate threatened his life with a gun by saying that the same thing would happen to Scott as had happened to the cab driver. (T.7).

Scott gave a statement in which he said that George, his roommate was involved. (T.7). Scott described George's

height and weight and described him as wearing eyeglasses and being from an area of Boston, Massachusetts. (T.7). Scott said that George threatened him with a .22 magnum derringer by saying that "the same thing could happen to you that will happen to the cab driver." (T.7).

On November 26, 1984, Scott agreed to take a polygraph examination at the Hialeah Police Department. (T.9). Miranda warnings were given and Scott agreed to speak without the presence of counsel. (T.11). Scott was a bad subject for a polygrapher. (T.9). When Scott was shown his polygraph results Scott admitted that he, too, was involved in the Shane murder. (T.10).

Scott was again given Miranda warnings and gave another statement to police. (T.10). This time, Scott admitted on tape that he and George were working in concert. (T.12). Both agreed to rob Shane; both shared in the proceeds. (T.12,13). Because he could not say George's last name, Scott showed the detectives the waistband of the underwear he was wearing. (T.13). Printed on the waistband was the name Zerquera. (T.13).

Porth and Venema began to investigate the information. Porth obtained a copy of the defendant's drivers' license photo. (T.14). He checked motel records since Scott had said that on the day of the incident he and George went back and

forth to and from each other's motel room. (T.14). Porth checked with Massachusetts police. (T.14). Scott's information matched up. (T.14). They began to seek the defendant.

Two days later, Porth and Venema found the defendant at Craftsman Paint and Body Shop, in Hialeah the place where Shane's body was found. (T.16). The defendant was seated on a couch with a companion Karen Hart. (T.17). Porth immediately advised the defendant that he was a police officer. (T.17). Porth told the defendant that he was not under arrest. (T.18). Porth asked the defendant if he would go outside and talk to him. (T.18). The defendant agreed to, and said he would cooperate. (T.18). Once outside, the defendant agreed to accompany the officers to the Hialeah Police Station. (T.20, 81). Porth instructed the defendant not to talk during the ride. (T.20, 81).

At the police station the defendant was escorted to the interview room. (T.20). The defendant was not bound or restrained in any way. (T.20, 84). The defendant was given a statement of rights form. (T.20). The defendant read each line on the form aloud and put his initials at the end of each line as he did so. (T.23). One line of the form asked whether an attorney was present and the defendant wrote "No." (T.24).

Porth explained to the defendant that the Hialeah police were investigating auto thefts and the homicide of Robert Shane. (T.24). Porth began by talking about the auto thefts. At first, the defendant said that he did not want to talk about his friends. (T.25). The defendant did not refuse to talk about his own involvement in the auto ring. (T.27-28). Porth testified that the defendant admitted involvement in the auto theft ring. (T.102). Venema testified that the defendant admitted stealing many cars. (T.71). The defendant once told Porth that he did not want to discuss it right now regarding the auto thefts. (T.30, 47-48). The defendant was not continually questioned, but instead, Porth would cease questioning and leave the room off and on leaving the defendant alone or with Venema. (T.30). The defendant continually reassured the officers that he wanted to cooperate. (T.34). The defendant never requested a lawyer. (T.96).

At approximately 3:25 p.m., the defendant agreed to execute a consent form to search his motel room. (T.30). Momentarily thereafter Karen Hart, who had been interviewed by Venema in another room, came in. (T.31). The defendant encouraged Karen Hart to sign the consent form too since they had been sharing the motel room. (T.31). Porth left the defendant and Karen Hart in the room to instruct other officers to effect the search. (T.32).

Porth testified that the defendant continued to appear willing to cooperate and never refused to discuss the homicide. (T.33). Venema testified that at a time when Porth was absent from the room, Venema told the defendant about Scott's statement. (T.58). Venema described the statement as a detailed statement regarding the Shane homicide in which the defendant was named as having pulled the trigger. (T.58). Venema read a few excerpts of Scott's statement to the defendant. (T.58). The defendant said, "I don't want to discuss it." (T.58). Venema then ceased talking, and left the defendant alone in the room, to get a cup of coffee. (T.58-9). Venema testified that he left Scott's statement in the interview room. (T.58). He testified that after five or six minutes he reentered the interview room and the defendant spoke first. (T.60). The defendant said, "Scott puked, huh?" (T.60). Venema responded "Well, he puked 26 pages." (T.60). The defendant then said to Venema to "go get your tape recorder." (T.60). Venema testified that "go get your tape recorder" was said in a way to indicate that the defendant wanted to give a statement. (T.60). Porth testified that Venema told him that the defendant was going to give a statement. (T.35). When Porth and Venema reentered the interview room, there was no pre-interview discussion. (T.35). The tape recorder was turned on and Miranda warnings were given again. (T.36). The defendant indicated on the tape that he understood his rights and wanted to speak without counsel present. (T.38-39).

It was approximately 5:45 p.m. when the taped statement began. (T.44). The prosecutor moved into evidence the defendant's statement. (T.36-38). In the statement, the defendant said that the original intent was to rob Shane, but that Scott shot Shane. (T.63). The defendant did not admit to having murdered Shane. (T.33). The statement which was in greater detail than Scott's had been, was immediately transcribed and then reviewed by the defendant for accuracy. (T.63).

The defendant was never offered any deals. (T.65). The defendant was allowed to use the restrooms and Venema testified that the defendant said that the officers had treated him nicely. (T.65).

The defendant testified at the suppression hearing that he had agreed to go to the police station for questioning. (T.81). He testified that he was told that he was not under arrest. (T.84). He further testified that he did not request a lawyer because he did not want the detectives to think he was afraid of some charge. (T.89, 96). The defendant denied that he ever admitted committing auto thefts. (T.102). The defendant said he made up a story in which he stated that he set the cab on fire. (T.91). The defendant further testified that the detectives never physically harmed him, but treated him well. (T.99-100)

3. At trial, the following evidence was adduced:

On October 31, 1984, Miami Springs Police Officer Valerie Fiallo observed a vehicle in flames. (T.961-63). When the flames were extinguished, the vehicle was discovered to be a Super Yellow Cab. (T.963). Fiallo secured the scene and then called the cab company. (T.964). Armando Hernandez, the cab owner, was called to the scene and identified the cab as his own. (T.969). Hernandez also identified the body as Robert Shane, a cab driver who had been working for him. (T.968,969-70). Officer Timothy Murphy responded to Craftsman Body Shop after receiving a call regarding an injured person. (T.982). Officer Murphy testfied that the victim's pockets were turned out. (T.986). The medical examiner testified that the cause of death was the gunshot wound to the base of the head.

The bullet that caused the death was a .22 magnum bullet fired from a high standard .22 magnum derringer. (T.1028).

Scott testified for the State. He testified that he knew Jorge for four to five months and was roommates with him at the Parkway Motel on October 31, 1984. (T.1080, 1081). He had been out of work for two weeks, and Jorge only worked occassionally at Craftsman Body Shop as a night watchman. Scott testified that neither of them had any money and were hungry. The defendant suggested that they rob a cab driver.

(T.1083-84). Scott had the motel operator call a cab. Scott testified that he directed the cab to the 7-11 across the street from the motel. (T.1084). The defendant got in the back seat behind the driver, Scott got in the back passenger side. The defendant directed the driver to the address of Craftsman, (T.1085, 1086). The defendant talked to Shane as they drove and made jokes, (T.1087). When Shane pulled his cab into the parking lot at Craftsman, the defendant pulled a gun from his waist and shot Shane in the back of the head. (T.1087).

Scott further testified that when he saw Shane fall forward he got out of the cab and ran back to the motel. (T.1087-88). When the defendant got back to the motel he wanted to know if Scott had said anything to the police. (T.1091). Scott testified that the defendant said if Scott should say anything he would be an accessory to murder. (T.1091). The defendant was holding the gun in his hand, pointed it at Scott and threatened him. (T.1091-92). Besides himself and the defendant, Scott testified that there had been no other witnesses to the killing. (T.1094).

Scott testified that he continued to live with the defendant for 2 1/2 weeks until he was arrested on November 19, 1984 fo auto theft. (T.1092-93). Scott testified that he had not been sleeping or eating well due to bad nerves. (T.1095). He told the Miami Springs police that he had

information regarding the Shane killing in order to clear his conscience. (T.1094). Scott testified that the initial statement he gave police was not wholly true. (T.1095). Scott testified that he took a lie detector test, whose results indicated untruthfulness. (T. 1097). Scott then gave another statement in which he admitted that he, too, was involved in the crimes and that the defendant did the killing. (T.1100, 1110). At the time of the confession, no promises, threats or deals were offered or made. (T.1100-01).

Scott told the jury about the plea bargain he struck on February 13, 1986 and the plea he took. (T.1101-02).

Officer Venema testified for the State. He testified that he and detective Porth were partners assigned to the investigation of the Shane homicide (T.1137-38). In the course of his investigation, on November 19, 1984, he was called to the police station because the Miami Springs police had a suspect in custody who claimed to have information about the homicide. (T.1141). The suspect was Scott who agreed to give a statement. (T.1144). In the statement, Scott said things that suggested that he was present at the killing. (T.1143). Venema testified that Scott knew the caliber of the weapon and claimed that he knew from newspaper accounts. (T.1169). That information had never been released to the press (T.1169). In Scott's second statement, Scott admitted his involvement. Scott did not know how to pro-

nounce the defendant's last name, but showed the officer's the name printed inside the waistband of the underwear Scott was wearing (T.1179) and stated that the defendant fired the fatal gunshot. (T.1145). Officer Venema testified that he met the defendant two days later at Craftsman, (T.1146). The defendant agreed to go to the police station. (T.1148). The defendant was taken to the interview room, where he was allowed to look at Scott's statement. (T.1149-52). Venema testified that he left the statement with the defendant and left the room. (T.1152). He testified that when he reentered the room, the defendant asked, "So Scott puked, huh?" (T.1153). Venema answered, "Well he puked 26 pages worth," (T.1153). The defendant next told Venema to go and get his tape recorder (T.1153). Venema testified that in the presence of Porth and himself, the defendant was advised of his Miranda rights on tape and proceeded to give a statement. (T.1154-57), Venema testified that the defendant was alert and not under the influence of drugs or alcohol. (T.1157). He testified that the defendant's demeanor was "more outgoing," very pointed and "more hyper," in contrast with Scott's which was "withdrawn." (T.1157). The defendant seemed calm and gave a statement more exacting in detail than Scott's (T.1157). The prosecutor played the tape of the defendant's statement to the jury. (T.1160). Venema recalled for the jury that where initially the defendant's statement contained the assertion that the murder weapon was the defendant's gun, the defendant later corrected the transcript

by writing in the margin that he lied. (T.1163). The gun was never found. (T.1167).

4. The following evidence was adduced at the sentencing hearing before the jury: Scott testified that the murder was committed to eliminate the victim as a witness. (T.1342, 1351).

POINTS ON APPEAL

I.

WHETHER THE DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED ON THE GROUND THAT HIS INVOCATION OF THE RIGHT TO REMAIN SILENT WAS NOT SCRUPULOUSLY HONORED?

11.

WHETHER THE DEFENDANT WAS DENIED DUE PROCESS OF LAW BASED ON PROSECUTORIAL MISCONDUCT?

III.

WHETHER THE DEFENDANT'S DEATH SENTENCE IS UNCONSITUTIONALLY DISPROPORTIONATE ON THE FACTS OF THE CASE BECAUSE IT IS BASED UPON AN EQUAL NUMBER OF STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES AND SOME NONSTATUTORY CIRCUMSTANCES?

IV.

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY BASED UPON THE NONSTATUTORY AGGRAVATING CIRCUMSTANCES OF THE IMPACT OF THE CRIME ON THE VICTIM'S FAMILY? (Appellant's Issues IV and VII consolidated).

V.

WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST?

VI.

WHETHER THE DEATH PENALTY WAS UNCONSTITUTIONALLY IMPOSED, BASED ON (1) THE SENTENCING JUDGE'S WEIGHING OF THE JURY'S DEATH RECOMMENDATION, AND WHEN THE SENTENCING JUDGE (2) IMPOSED DEATH AFTER HAVING RULED THAT DEATH WAS AN IMPROPER PENALTY UNDER THE FACTS OF THIS CASE, AND (3) IMPOSED DEATH KNOWING THAT THE DEFENDANT WAS ONLY IN JEOPARDY OF THAT PENALTY BECAUSE HE RELIED TO HIS DETRIMENT UPON A MISLEADING STATEMENT FROM THE PROSECUTION?

VII.

WHETHER THE TRIAL COURT ERRED IN IT'S COMMENT TO THE JURY AND IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION?

SUMMARY OF THE ARGUMENT

The defendant's Miranda rights were not violated by the use of his taped statement and, a fortori, the statement was admissible at trial against him. The defendant's right to cut off questioning was scrupulously honored at all times by the police officers since the defendant was timely and properly given Miranda rights, all questioning ceased at the merest suggestion of the defendant's unwillingness to continue to speak, and after a time lapse, it was the defendant who reinitiated discussion.

The defendant's due process rights were not violated by any prosecutorial misconduct. "he defendant has not met his burden of showing that anyone elicited false testimony or in any way tainted the factfinding function of the jury. The defendant relies on naked allegations of prosecutorial bad faith in the face of ample evidence that the defendant had already admitted to being involved in the homicide. The effect of the admission of bullet-related testimony, even if untruthful or misleading, was utterly harmless.

There was ample evidence that the defendant participated in the murder of Robert Shane, composed of the defendant's own statements and those of State witnesses. Under Florida law, sufficient evidence that the defendant was a major participant in the underlying felony satisfies the culp-

ability requirement for the death penalty, even in cases where it is not conclusively shown who pulled the trigger. There was credible evidence that the defendant pulled the trigger. Procedural rulings in the defendant's favor, and evidence adduced in the penalty phase supported the trial court's rejection of the alleged nonstatutory mitigating circumstances.

The record does not support the allegation that the trial court based its death penalty determination on the impact of the crime on the victim's family.

Based on the circumstances of the murder, it happened in a secluded area where there were no witnesses or possible intervenors, and based upon Scott's statements of the defendant's purpose, clear proof beyond a reasonable doubt was shown that the dominant or only motive of the killing was witness elimination.

In addition, the defendant has wholly failed to show error in the trial court's weighing of the jury's death recommendation. The defendant's issue VI points (2) and (3) were decided adversely to the defendant on the State's petition to this Court for a writ of mandamus and is, therefore, res judicata.

This Court has repeatedly held, and the defendant concedes, that claims of unconstitutional sentences based on the ruling in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) lack substantive merit in Florida.

ARGUMENT

I.

THE DEFENDANT'S RIGHTS UNDER MIRANDA WERE SCRUPULOUSLY HONORED BY THE POLICE AND NO VIOLATION OF THOSE RIGHTS IS SUPPORTED BY THIS RECORD.

The admission of the defendant's own statement against him at trial was not a denial of any of the defendant's constitutional rights because the police who procured the statement repeatedly informed the defendant of his rights under Miranda v, Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (Miranda), assured themselves of his understanding of them, and scrupulously cut off questioning at the merest suspicion that the defendant was invoking his right to remain silent.

The United States Supreme Court announced in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) that police may properly resume questioning a defendant after he invoked his right to remain silent. The admissibility of his incriminating statements made after the defendant has expressed a desire to remain silent depends on whether his right to cut off questioning was "scrupulously honored." Mosley, 423 U.S. at 104, 46 L.Ed.2d at 321.

The record in this case indicates that the police did scrupulously honor the defendant's rights. The officers informed the defendant of his Miranda rights at the outset by a written form. (T.20). The defendant read it and initialed each line to acknowledge his comprehension. (T.22-23). Only then did the police engage the defendant in a discussion of auto thefts. (T.25). The defendant never cut off questioning about his involvement in auto thefts. (T.25) The defendant's refusal to talk about his friends did not invoke his right to silence regarding his own involvement in either the auto thefts or the homicide. See Vail v. State, 599 P.2d 1371, 1378 (Alaska 1979) (unwillingness to answer questions about co-defendant insufficient to establish invocation).

When the police officer lead into the subject of the homicide, he read a part of Scott's statement illustrating that the police had information concerning his involvement. (T.58). The defendant said he did not want to discuss the homicide. (T.57). The police officer left the statement on the table and left the room. (T.59). Upon reentering the room, the defendant spoke first. (T.59-60). The defendant asked the officer, "So Scott puked, huh?" (T.60). The officer answered, "Well he puked 26 pages." (T.60). The defendant responded "Go get your tape recorder." (T.60). The police scrupulously honored the defendant's right to cut-off questioning with more than due diligence. See United States v. Klein, 592 F.2d 909, 914 (5th Cir. 1979) (defendant's

statement that he did not particularly want to discuss source of cocaine, followed by incriminating admissions held not to be an invocation,) The defendant does not allege that the police conduct was such to overbear his will. The defendant stated that he wanted to talk. (T.39,19). In fact, the evidence showed that the defendant was calm, alert and intelligent. (T.41,54). There were no promises threats or deals made. (T.39, 41). The defendant testified that he was treated well and was told that he was not under arrest. (T.84). He further testified that he told the officers that they had treated him nicely. (T.100).

The defendant was interviewed at the police station because he agreed to accompany the officers there, (T.19, 81). He was not handcuffed at any time, (T.20). The officers requested the defendant not to speak during the ride and admonished the transporting officers not to ask the defendant any questions. (T.20). The defendant told the officers that he wished to cooperate with them. (T.18). Assuming arguendo that the sequence of events do not constitute Miranda rights scrupulously honored, then any error was harmless. The record amply shows that the defendant's statements were not the product of police coercion, but of this own expressed desire to talk. This record does not show constitutional error. See Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

11.

THE DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BECAUSE THE CONDUCT OF THE PROSECUTOR DID NOT SERVE TO ELICIT FALSE OR MISLEADING TESTIMONY OR OTHERWISE TAINT THE FACT-FINDING FUNCTION OF THE JURY,

The defendant argues that through questioning and objecting, the prosecutor elicited from witnesses false and misleading testimony regarding the .22 magnum bullets received into evidence, This Court should reject the defendant's argument since he has not shown any of the testimony to be false or misleading, or to the extent that the evidence was false or misleading, that it was not attributable to the defense.

The prosecutor elicited on direct examination of Scott testimony that Scott was not the one with the gun. (T.118). On cross examination the following transpired:

> [MR. JACOBS]: You are sure you were not the one with the gun?
>
> [SCOTT]: Positive.
>
> [MR. JACOBS]: Were the bullets to the gun found in your belongings?
>
> [PROSECUTOR]: Objection, That's beyond the scope of my direct examination.

[THE COURT]: Sustained.

(T.118).

At a sidebar immediately thereafter, the Court again sustained the objection based on hearsay: the witness had no personal knowledge of where the bullets were found, (T.1120).

The next witness was Officer Venema. (T.1136). The prosecutor did not elicit from him testimony regarding the bullets. During cross-examination, the following transpired:

> [MR. JACOBS]: But he [Scott] denied being the one with the gun?
>
> [VENEMA]: Yes,
>
> [MR. JACOBS]: He denied owning the gun, didn't he.
>
> [VENEMA]: I believe he did, yes.
>
> [MR. JACOBS]: But bullets were found in Scott Puttkamer's belongings, were they not?
>
> [The prosecutor objected and requested a sidebar conference.]
>
> (T.1171).

At sidebar, the prosecutor argued that the defense was going beyond the scope of direct in an attempt to get into evidence that which he could only get by calling the witness as his own. (T.1172). The defendant, through counsel was attempting to avoid losing his opportunity for rebuttal

argument pursuant to Fla.R.Crim.P. 3.250. The trial court ruled that the witness could neither say how he got them or who they belonged to, since the witness had no personal knowledge. (T.1174). Mr. Jacobs then elicited testimony that three days after Scott's arrest, the Hialeah police came into possession of some of Scott's belongings, among which were .22 magnum bullets. (T.1174). On redirect, the prosecutor adduced the witness' testimony that Scott and Zerquera shared things and that the witness did not know if the bullets belonged to Scott. (T.1178).

The prosecutor's statement in closing argument was not improper. The prosecutor was making a comment on the defendant's statement in his confession that he dropped the .22 bullets on the floor of the cab and set the cab on fire. The prosecutor merely argued that if what the defendant had said in his confession were true, then the bullets found in the pouch were wholly unrelated to the crime. (T.1220).

In a criminal trial, whenever the evidence shows that more than one perpetrator participated in a crime, defense counsel can be expected to raise questions about the relative roles and culpability of the other perpetrator and will attack the motives and credibility of any accomplice testifying for the State. Craig v. State, 510 So.2d 857, 864 (Fla. 1987). Such challenges to the state's evidence are quite proper and that is what happened here. The prose-

cutor's argument was merely in response to such arguments and was equally proper. Id. The prosecutor did nothing improper.

Assuming arguendo that some prosecutorial error occurred, it was wholly harmless because the existence of bullets in no way establishes who was the triggerman, the only issue posed by the case in light of the defendant's admission of involvement in the robbery.

III.

THE TRIAL COURT'S IMPOSITION OF THE DEATH PENALTY IS NOT UNCONSTITUTIONALLY DISPROPORTIONATE BASED ON THE FACTS AND CIRCUMSTANCES PRESENTED

A trial court has broad discretion in determining the applicability of mitigating circumstances urged, and where substantial competent evidence supports the trial court's rejection of mitigating circumstances, this Court should affirm. Kight v. State, 512 So.2d 922, 933 (Fla. 1987).

The appellee argues that the two mitigating factors and the several nonstatutory mitigating factors outweighed the aggravating factors and the sentence therefore should be reversed as disproportionate. On the contrary, the defendant's nonstatutory circumstance of hunger was properly rejected by the Court. There was simply no evidence that the defendant's hunger was such that it had a coercive affect on him. The "deluding effect of drug usage" the defendant now urges as a mitigating factor was a matter excluded from factual development below by the defendant's own motion. (T.128). Consequently, there is no evidentiary support for such a finding. The defendant urges as nonstatutory mitigating factors the defendant's "family qualities" and the "extreme disturbing effect of his father's demise." These factors were not shown to be in any way compelling. The murder committed was not shown to be significantly influenced

by his family life experiences. See also Rogers v. State, 511 So.2d 526, 535 (1987). Id: Lara v. State, 464 So.2d 1173, 1180 (Fla. 1985). The defendant also urges doubt regarding who actually was the triggerman, There was substantial, competent evidence that the defendant pulled the trigger, i.e., Scott's testimony that the defendant shot Shane: Scott's nervous condition, that militates against the likelihood that he was more than a mere follower: the defendant's statement in his confession that it was his gun, and later recantation of that statement: the defendant's near-errors in his statement regarding who was sitting where in the taxi: Scott's testimony that the defendant threatened Scott's life should Scott talk. (T.1081, 1091-92; R.255). On the other hand there was no factual support for factoring Navy service and good behavior in custody into the sentencing calculations because besides evidence that the defendant had been in the Navy and subsequently discharged, there was no factual support for these circumstances. No abuse of discretion is shown on this record.

The two statutory mitigating circumstances found were properly found to be of little weight: age and lack of significant prior criminal history. (R.286-287). The defendant was 24 at the time of the crime, no longer a juvenile. (T.1428). See Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984). The defendant had one prior conviction for burglary, not a clean record. (T.1425).

As a secondary argument the defendant cites the disparate sentences imposed on Scott and himself as evidence of disproportionality. This Court has held that the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such co-perpetrator as compared with that of the capital offender being sentenced are appropriate factors to consider in the sentencing decision. Harmon v. State, 527 So.2d 182, 189 (Fla. 1988) (jury override reversed). The sentencing judge considered and rejected this factor. (R.293-96).

The evidence adduced below indicated that the defendant's culpability was not secondary to, or equal to that of the co-perpetrator. There was ample evidence to show that the defendant was the planner, instigator and prime mover in the murder of Shane. See Craig, supra at 870. Where this is the case, the disparate treatment of Scott is not a factor that requires a trial judge to impose life. Id.

The defendant's argument that death is inappropriate in this case is without merit. Where there is sufficient record support for the jury's conclusion that the defendant actually killed Shane, the death penalty is constitutional. Kight, 512 So.2d at 933; Rogers v. State, 511 So.2d 526 (Fla. 1987).

IV.

THE TRIAL COURT'S DEATH SENTENCE SHOULD BE UPHELD BECAUSE IT WAS NOT BASED ON IMPROPER CONSIDERATION OF THE IMPACT OF THE CRIME ON THE VICTIM'S FAMILY, AND NO ERROR IS PRESERVED FOR REVIEW.

The defendant's failure to timely object to the presentation of victim impact testimony to the sentencing judge precludes appellate review of the issue in this Court. Grossman v. State, ___ So.2d ___ (Fla. Case No. 68,096, opin. filed February 18, 1988).

Alternatively, without conceding error, there was no Booth error made below. Booth v. Maryland, 482 U.S. ____, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987). In Booth, the sentencing jury was allowed to consider a victim impact statement along with other aggravating and mitigating circumstances in considering whether to impose the death penalty for first degree murder. Id. The Booth court announced that such a procedure creates a constitutionally unacceptable risk that a jury may impose death in an arbitrary and capricious manner. Booth 96 L.Ed.2d at 448. This Court has found that where it is the sentencing judge, and not the sentencing jury, that hears the victim impact evidence, the error is harmless where it can be concluded beyond a reasonable doubt that the sentencing judge would have imposed the death penalty in the absence of the victim impact evidence.

Grossman. Here, it can be so concluded. The trial judge's written findings show no reliance, or even a hint of reliance, on the evidence regarding the impact of the murder on Shane's family. Id. Second, the sentencing judge found two valid aggravating factors, the murder occurred during the perpetration of a robbery, and for the purpose of witness elimination. (R.294-96). The jury did not hear the victim impact testimony. The sentencing judge found that the two mitigating circumstances carried very little weight. (R.296). Under the circumstances, the Booth error, if any, was totally harmless. Grossman.

V.

THE TRIAL COURT'S FINDING THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST WAS CORRECT.

The trial court properly found as an aggravating circumstance that the defendant murdered Shane to eliminate him as a witness. The defendant directed Shane to drive to an area he knew to be secluded at night and not likely to have possible witnesses. (T.1086). The defendant had worked at Craftsman as a night watchman. The defendant could have simply put the victim out of the car and left him there, but did not. There was no evidence that the defendant had known Shane and had some reason to want him dead. Scott testified that a couple of days after the killing, the defendant said that witness elimination was his motive for Shane's killing. (T.1342, 1350). Scott also testified that the defendant threatened to kill him too if he talked. (T.1091). The record amply supports the sentencing judge's findings. See Harmon v. State, 527 So.2d 182 (Fla. 1988) (Evidence that the defendant shot the robbery victim dead after the accomplice spoke the defendant's name, held: witness elimination murder); Welty v. State, 402 So.2d 1159 (Fla. 1981) (Evidence that the defendant bludgeoned and burned victim after burglarizing his home and returning for more items, held: witness elimination murder).

VI.

THE DEATH PENALTY WAS NOT UNCONSTITUTIONALLY IMPOSED ON ANY OF THE GROUNDS STATED IN THE COURT'S PRE-TRIAL ORDER REGARDING THE DEATH PENALTY BECAUSE OF THE DOCTRINE OF RES JUDICATA.

The defendant alleges that his sentence should be vacated based upon his detrimental reliance on the findings in the trial court's pre-trial order seeking to preclude the death penalty. This argument has no merit. When this Court issued the decision in State v. Donner, 500 So.2d 532 (Fla. 1987), it determined that the ruling and bases on which it rested were improper. The defendant, therefore, had no grounds to rely on those findings which are now res judicata.

VII.

THE TRIAL COURT CORRECTLY GAVE THE STANDARD PENALTY PHASE JURY INSTRUCTION AND ITS COMMENTS WERE NEITHER INACCURATE NOR MISLEADING.

This Court has repeatedly held that claims of unconstitutional sentences based on the rulings in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) lack substantive merit in Florida. The trial court's comments regarding the jury's advisory role were neither inaccurate nor misleading. Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988).

CONCLUSION

Based upon the foregoing arguments and citations of authorities, the State submits that the convictions and sentences of the trial court should be affirmed.

Respectfully submitted,

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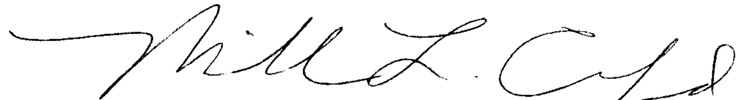
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **PETER RABEN**, Esq., Counsel for Appellant, BRESLIN L. RABEN, P.A., 1870 South Bayshore Drive, Coconut Grove, Florida 33133 on this 19 day of October, 1988.



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