IN THE SUPREME COURT OF FLORIDA

MICHAEL MORDENTI,

Appellant,

v.

Case No. 78,753

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case and facts. Where amplification or explanation is needed appellee will address in the argument sections.

SUMMARY OF THE ARGUMENT

1. No fundamental error occurred below in permitting the prosecution by two assistant state attorneys who are married to each other. Moreover, any appellate complaint was unpreserved by objection below.

2. Appellant's complaint regarding juror Haight has not been preserved for appellate review by objection below. Additionally, it is meritless.

3. The lower court did not err reversibly in allowing the victims' mother to identify the victim; nor was there error in allowing photos of the victim to help explain the medical examiner's testimony.

4. No reversible error appears on this point. Appellant's possession of untraceable weapons was relevant to his ability to dispose of the murder weapon after use. No impermissible Williams-rule evidence was introduced.

5. The lower court did not err in giving the amended "HAC" jury instruction; it is not the same instruction condemned in Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992).

6. Appellant sought no relief below after the prosecutor explained the "con artist" reference in closing argument; the claim is not preserved for appeal.

7. Appellant's acquiescence after informing the trial court the was aware of the law and withdrawal of consideration of the mitigating factor precludes appellate review.

8. Appellant agreed to the trial court's instructing the jury on both CCP and financial gain aggravators. Thus, he may not complain on appeal. Such multiple factors can be appropriate.

9. The death sentence is not disproportionate for the triggerman in an execution-style contract killing, especially where as here, the proffered mitigating evidence was extremely weak.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY PERMITTING THE HUSBAND AND WIFE PROSECUTORS TO TRY THE CASE.

This is truly one of the least significant contentions to grace this Honorable Court. Appellant does not allude to any place in the record wherein he might have complained to the lower court about this remarkable fact and indeed couches his argument in terms of fundamental error. This Court in Sanford v. Rubin, 237 So.2d 134 (Fla. 1970) has warned that appellate courts should exercise its discretion under the doctrine of fundamental error very guardedly. Appellant does not tell us whether the trial judge should have ordered the prosecutors to divorce in order to continue to work together on the case. Or whether the trial court should have, sua sponte, declared a mistrial in the midst of the trial with all the attendant double jeopardy consequences in event that an appellate court subsequently decides that it was not absolutely necessary to do so.

Appellant asserts "Mordenti's counsel did not, like the prosecutors, have the benefit of being married one to the other" (Brief P. 37). Appellee will accept the trial defense counsel Atti and Watts were not identically so situated but fails to see the debilitating disadvantage conferred upon them. They were not outnumbered and whatever tensions or disagreements that routinely occur in the trial setting can be left at the courthouse and not

carried home with them. The advantage, if any lies with the defense.

Appellant has failed to demonstrate fundamental error.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY FAILING TO REPLACE JUROR HAIGHT.

The record reflects that at the beginning of voir dire on July 8, 1991, juror Haight stated:

> "My grocery manager is on vacation right now, so my store that I work at is running with two managers, and I think it would be impossible for them to run it for that long of a period on just the two managers." (R 29)

Defense counsel interposed no comment.

The next day, prior to the beginning of the first witness' testimony, Mr. Haight informed the court:

> "Work is telling me I still have to work.
>
> THE COURT: When is it that you're going to work?
>
> JUROR: This evening. They wanted me to work last night and I said, 'work?' And they wanted me to work tonight until I get out of here, until -- when ever which is usually midnight. I told them I wasn't real crazy about that.
>
> THE COURT: I don't blame you. I don't think that's fair, either. That's Winn Dixie?
>
> JUROR: Um-hum.
>
> THE COURT: That says a lot for Winn Dixie.
>
> JUROR: I talked to my supervisor. He said that I shouldn't be closing, but it sounded like he still wanted me to work, too, you know.
>
> THE COURT: Um-hum. Okay."

(R 270- 271)

Again, the defense counsel interposed no complaint, objection or comment. He did not even urge any error in this regard in his motion for new trial. (R 1736 - 1737)

There is nothing in the record to suggest that juror Haight could not perform his function as a juror; he did so and this claim is meritless as well as having been defaulted for the failure to assert below in the trial court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

ISSUE III

WHETHER THE TRIAL COURT ERRED BY ALLOWING TESTIMONY OF THE VICTIM'S MOTHER AS TO IDENTITY AND BY ADMITTING PHOTOS OF THE VICTIM.

The record reflects that Isabel Reger testified without objection or complaint by the defense, as to the circumstances surrounding her daughter's visit to the barn on the night she was murdered, her discovery of the body, the description of the man she saw, and her call to 911 for emergency help. She also described the behavior of her son-in-law Larry Royston. (R 311 - 324) Appellant was able to cross examine the witness. (R 326 - 372)

Appellant's failure below to complain about the identification made by Ms. Reger precludes consideration ab initio on appeal. Steinhorst, supra; Occhicone v. State, 370 So.2d 902 (Fla. 1990). Admission of identification testimony from a member of a victim's family is not fundamental error. Welty v. State, 402 So.2d 1159, 1162 (Fla. 1981); Dougan v. State, 470 So.2d 697 (Fla. 1985).

Additionally, as in Welty v. State, 402 So.2d 1159, 1162 (Fla. 1981), the identification testimony was not of such a nature as to evoke sympathy of the jury or prejudice to the defendant; nor can it be said that the testimony was not necessary to establish the identity of the deceased beyond a reasonable doubt. That the prosecutor argued in closing argument (R 1177) that identity was not a problem did not make it a non-problem prior to the proof. This Court observed in Welty:

> "Even though Welty was willing to stipulate to the identity of the victim, this did not prevent the state from presenting additional relevant evidence to prove identity beyond a reasonable doubt."

(text at 1162)

Moreover, it is not clear what non-related individual was available to make the identification testimony at trial. See Lewis v. State, 377 So.2d 640, 643 (Fla. 1979). Additionally, the photo used was not a morgue shot, but a family photo.

Finally, quite apart from the brief, unobjected to identification testimony by Ms. Reger, to the extent that Mordenti is really complaining that this witness should not have been called at all, that claim must fail because the witness significantly discovered the body in the barn, to some extent saw the visitor to the residence and importantly described the reactions of Larry Royston who subsequently became a suspect in the conspiracy-murder with appellant Mordenti.

Error, if any, on this point is harmless; Cheshire v. State, 568 So.2d 908 (Fla. 1990).

Appellant also complains here about the photographs introduced as Exhibits 9A, C, D, E, F, and G (R 425). The prosecutor explained that the photos would be used in conjunction with the testimony of Medical Examiner Dr. Diggs to show the location of the wounds, specifically the lethal wounds and how they were inflicted. The Court agreed to allow photos to aid the testimony of Dr. Diggs, but did not want repetitious ones. (R 419) The state withdrew photo 9B (R 420) The trial court agreed

with the prosecutor that the photos were probative -- they allowed the doctor to point out the location and nature of the wounds and that the state had withdrawn what was repetitive. (R 422) Dr. Diggs then described the wounds (R 422 - 429).

The test of admissibility of photographic evidence is relevance. State v. Wright, 265 So.2d 361 (Fla. 1972); Engle v. State, 438 So.2d 803 (Fla. 1983); Welty v. State,. 402 So.2d 1159 (Fla. 1981); Booker v. State, 397 So.2d 910 (Fla. 1981); Straight v. State, 397 So.2d 903 (Fla. 1981); Jackson v. State, 359 So.2d 1190 (Fla. 1978).

The introduction of photographic evidence is within the trial court's discretion which will not be disturbed on appeal unless there is a showing of clear abuse. Duest v. State, 462 So.2d 446 (Fla. 1985); Brown v. State, 526 So.2d 903 (Fla. 1988); Jackson v. State, 545 So.2d 260 (Fla. 1989); Tompkins v. Dugger, 549 So.2d 1370 (Fla. 1989).

> Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Henderson v. State, 463 So.2d 196, 200 (Fla. 1985).

In Burns v. State, ___ So.2d ___, 16 F.L.W. S389 (Fla. May 16, 1991), this Court opined:

> We also conclude that the trial court did not abuse its discretion in allowing the jury to be shown color slides for the victim taken at the time of the autopsy, as alleged in Claim IV. The test of admissibility of photographic evidence is relevance. Nixon v. State, 572 So.2d 1336, 1342 (Fla. 1990); Haliburton v. State, 561 So.2d 248, 250 (Fla. 1990); petition for cert. filed, (U.S. Jun.

> 20, 1990) (No. 90-5512); Gore v. State, 475 So.2d 1205, 1208 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986). The slides were shown to the jury during the medical examiner's testimony to assist him in explaining the nature and location of the victim's injuries and cause of death. See Nixon, 572 So.2d at 1342 (photographs were admissible to assist medical examiner in illustrating nature of wounds and cause of death; see also Haliburton, 561 So.2d at 251; Bush v. State, 461 So.2d 936, 939 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986). Because the slides at issue were not so shocking in nature as to outweigh their relevancy, there was no abuse of discretion in allowing their use.
>
> (16 F.L.W. S at 390).

The instant case involves photos which are even less gruesome than the color photo slides in Burns, supra, and this Court should similarly reject Mordenti's claim.

Appellant is not aided by Czubak v. State, 570 So.2d 925 (Fla. 1990) which involved particularly gruesome photos of the victim's body, (left arm and leg missing, eaten away by dogs; hand eaten away, leg bone exposed where flesh had been eaten away) and in that case there was little or no relevance -- they did not establish identity, because of the decomposed body nor were they probative of the cause of death. Czubak is inapposite.

Appellant's claim is meritless.

ISSUE IV

WHETHER THE LOWER COURT ERRED REVERSIBLY BY ALLEGEDLY ADMITTING EVIDENCE OF APPELLANT'S PRIOR INVOLVEMENT WITH CRIME.

Appellant contends that on three occasions the lower court erred reversibly in allowing prejudicial evidence of appellant's prior involvement with crime: (1) the Gail Mordenti testimony that appellant mentioned "throw away" guns (R 595 - 597), (2) her testimony that appellant dealt with "shady" people (R 612) and (3) Horace Barnes' remark that Mordenti indicated he was in the "mob" (R 747 - 750). Appellant's claim is meritless.

(1) The throwaway piece --

Appellant's ex-wife Gail Mordenti testified without objection that while in Massachusetts appellant suggested she should get a gun and carry a concealed weapon. She got the gun from appellant. (R 586)

The witness explained that Mordenti bought two guns, the serial numbers were in sequence consecutively and that appellant was a gun collector. (R 587) Appellant already had a license in Massachusetts to carry a concealed weapon. (R 588) Subsequently they moved to Florida and started a used gun business. (R 589). Eventually, she obtained a divorce in 1987. (R 591) The witness described again without defense objection, the numerous guns appellant owned (a .38, a .45, a .357 Magnum, a .357 Magnum with long barrel and scope and many rifles, all supposed to be collectors' items) (R 595). She testified without objection -- that Mordenti had guns that weren't registered to him and that he

told her they were "throw away" pieces. Appellant objected when the witness was asked when he told her that. (R 595 - 596) One of Mordenti's objection was "Williams' Rule . . . about the unregistered guns". The trial court denied the objection after learning that the prosecutor was not going to go further into any kind of crime. (R 596 - 597)

Appellant made no complaint of this ruling in his motion for new trial. (R 1780 - 81; R 1550 - 1565)

The witness also testified that she had nothing to do with any of his guns and that Mordenti always carried a gun in his brief case in Florida (R 599).

Appellant cannot complain here that the witness testified that Mordenti owned unregistered guns because appellant did not object to the admissibility of that testimony below and therefore it has not been preserved for appellate review. Steinhorst; Occhicone. If appellant is complaining that the witness' use of the phrase "throw away" piece constitutes impermissible Williams-rule evidence, he is mistaken. The trial court correctly ruled that the objection should be overruled if the prosecutor was not going to pursue any other crime. See Malloy v. State, 382 So.2d 1190, 1192 (Fla. 1979) (circumstances of lounge incident do not establish all the elements of a crime and consequently the question of admissibility of prior criminal acts is not present). To the extent that counsel for appellant is now seeking to "testify" and explain her understanding of the term "throw away" weapon, appellee objects to such appellate proffer of evidence

(whether derived from television or other similar reliable source). The testimony was relevant; the murder weapon was not recovered and appellant had the ability to get rid of unregistered and therefore untraceable weapons.

(2) Gail Mordenti also testified that Larry Royston expressed the desire to get rid of his wife, that he was willing to spend ten thousand dollars and he asked her if she knew anyone who did this (R 611 - 612). The witness added that it occurred to her to ask her ex-husband, appellant Mordenti -- she knew he was dealing with some people who were shady. Appellant's Williams-rule objection was overruled (R 612) and properly so as being acquainted with shady people does not constitute impermissible Williams-rule evidence. Malloy, supra.

(3) Horace Barnes, a federal prison inmate, met appellant in October or November, 1989. He said Mordenti let him know he was in the mob and defense counsel's objection was sustained. (R 749). Defense counsel sought no additional relief -- either a curative instruction or request for mistrial. In his motion for new trial, appellant first claimed that Barnes testified that Mordenti was a member of the mob and had supplied guns to Barnes. (R 1780 - 81) Thereafter, at the hearing on motion for new trial, defense counsel admitted that the allegation in the motion about supplying guns to Barnes was inaccurate. (R 1553) Defense counsel also agreed with the trial court that the jury never heard that appellant was a hit man. (R 1556) Defense counsel added further that Barnes' statement in deposition that Mordenti

was a member of the mob was said jokingly and the court responded that counsel could have cross-examined on that if he wanted and defense counsel represented that they considered and rejected the option of asking for a mistrial. (R 1564)

Appellee would add that the state did not refer to witness Barnes at all in their closing arguments in either the guilt or penalty phases. (R 1176 - 1201; R 1250 - 1270; R 1455 - 1469). This claim is without merit.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BY INSTRUCTING THE JURY ON THE "HAC" AGGRAVATOR.

Appellant is not entitled to relief by reliance on the infamous decision of Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992). There the United States Supreme Court concluded, in summary fashion, that the bare bones instruction to the jury regarding "HAC" as wicked, evil, atrocious or cruel and was so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor.

In contrast, in the instant case, the trial court gave the new and improved definition of HAC:

> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless -- conscienceless or pitiless and was unnecessarily torturous to the victim. (R 1491)

The instant instruction does not suffer from the same vice present in Espinosa, supra; two completely different instructions are at issue and there is no vagueness.

Nor can there be any complaint or argument that the trial judge improperly weighed or considered the HAC factor because the sentencing order recites:

> "However, this Court does not rely on this aggravating circumstance in making its decision. The evidence established that the victim was both stabbed and shot. The victim's death was not instantaneous. Gail Mordenti testified that the defendant told her that the victim put up quite a struggle. The victim was killed on her own property. The mechanism of death was suffocation caused by the victim's blood filling her lungs. The stab wounds were in the front of her body. The victim, in all probability had knowledge of her impending death.
>
> Although this murder is egregious, this Court does not find the killing so torturous to the victim as to set this case apart from the norm of capital felonies.
>
> (emphasis supplied)
> (R 1775 - 1776)

Appellant's reliance on Omelus v. State, 584 So.2d 563 (Fla. 1991), is also misplaced. Mordenti describes Omelus as involving "remarkable similar conditions as those of the case at hand" (Brief p. 59). It is true that both Omelus and the instant case involved contract killings, but there the similarity ends. Omelus hired another (Jones) to kill the victim and not being present was unaware of the manner of death to be employed; consequently, this Court deemed it inappropriate to apply the HAC factor vicariously to one without knowledge of the ability to control the degree of pain inflicted on the victim. Mr. Mordenti, on the other hand, was the "hit man" paid by the absent coconspirator Mr. Royston and it was Mordenti who shot and stabbed the victim.[1]

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[1] If Mordenti does not know the type of murder inflicted (by shooting and stabbing) to avail himself of an "Omelus-defense", he probably would not be competent to stand trial and that

Appellant alludes to certain remarks made by the prosecutor in closing argument (R 1465 - 1469). We note that no objection was interposed below to any of these comments and therefore cannot be challenged initially here. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Additionally, the prosecutor's description of the ambush-style execution or assassination of Thelma Royston is fully supported by the evidence, and to the extent that appellant disagreed with the argument he was able to explain his difference of opinion to the jury. (R 1474 - 1475)

Appellant's claim is without merit.

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argument is not advanced by appellant.

ISSUE VI

WHETHER THE LOWER COURT ERRED IN PERMITTING A REFERENCE TO "CON ARTIST" IN THE PROSECUTOR'S CLOSING ARGUMENT.

The record reflects that in the prosecutor's penalty phase closing argument he referred to Mordenti as a car salesman and con artist. (R 1460) Defense counsel asked to approach the bench and objected. (R 1461) The prosecutor responded that he was commenting on Mr. Mordenti's credibility as a witness, that he was "trying to con this jury." Defense counsel then replied:

"I understand. Thank you, Judge." (R 1461)

Whatever may have prompted the objection, appellant was satisfied with the response -- did not ask for any relief -- and implicitly withdrew his objection. He may not now urge error, having been satisfied in the lower court. It was not error for the prosecutor to urge the jury that they not believe he was a nice guy, but rather the man they heard on the tape talking to Gail Mordenti.

ISSUE VII

WHETHER THE LOWER COURT ERRED WHEN IT ALLOWED THE STATE ALLEGEDLY TO "THREATEN" TO REBUT THE MITIGATING FACTOR OF NO SIGNIFICANT HISTORY.

The record reflects that defense counsel noted that he was not aware of any prior convictions and inquired if the prosecutor knew of any. The prosecutor said there were no prior convictions but that if the defense sought to present testimony of no significant criminal history the state would attempt to rebut that. (R 1353 - 54) The prosecutor alluded to many threats made to people, harassing phone calls and his possible involvement in an arson of a former girlfriend's home along with Mordenti's statements implicating himself in that offense. (R 1354 - 55) The court indicated that it would like to see some case law if anyone wanted a ruling. Defense counsel stated that he was familiar with the case law (R 1357) and promptly decided to waive that mitigating factor. (R 1357 - 1358) Mordenti waived any complaint on this point by his tacit acceptance of the prosecutor's argument and withdrawal of consideration of such mitigating evidence, after being aware of the law on the subject.[2] See Lucas v. State, 376 So.2d 1149 (Fla. 1990)(this

[2] Contrary to appellant's suggestion at page 63 the state may offer evidence of prior criminal activity -- irrespective of a conviction -- to rebut Florida Statute 921.141(7)(a). See Washington v. State, 362 So.2d 658 (Fla. 1978); Booker v. State, 397 So.2d 910 (Fla. 1981); Smith v. State, 407 So.2d 894 (Fla. 1981); Lucas v. State, 568 So.2d 18 (Fla. 1990); Walton v. State, 547 So.2d 622 (Fla. 1989).

Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law); see also Lucas v. State, 568 So.2d 18 (Fla. 1990) (defense must share the burden and identify for the Court specific nonstatutory mitigating evidence it seeks to establish). McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980).

ISSUE VIII

WHETHER THE LOWER COURT ERRED WHEN IT INSTRUCTED THE JURY ON BOTH THE "CCP" AGGRAVATOR AND THE FINANCIAL GAIN AGGRAVATOR.

The record reflects that in appellant's submitted sentencing memorandum he did not complain of the aggravating actors of CCP and homicide for pecuniary gain. (R 1761 - 62) And at the time of the conference on jury instructions the following colloquy occurred:

> THE COURT: Okay. Let's discuss the jury instruction, if you don't mind. I have I think a pretty good outline of the jury instructions with a few exceptions, so let me ask you, Mr. Cox or Miss Cox -- who is is going to address this?
>
> Previously you had indicated that the aggravating circumstances that you intended to rely on were that the crime for which the defendant is to be sentenced was committed for financial gain. Is that one of the -- one of the aggravating factors you wish to rely on?
>
> MS. COX: Yes, Your Honor.
>
> THE COURT: Okay. Mr. Watts, do you have any argument about that particular aggravating instruction as to whether it should be given or not?
>
> MR. WATTS: No, Your Honor.
>
> (R 1435 - 1436)
>
> * * *
>
> The final one that you had earlier stated, Miss Cox, that you were going to be asking for was that the defendant or the crime was committed in a cold, calculated, premeditated manner. Is that still the case?
>
> MS. COX: Yes, Your Honor.

THE COURT: And there is no problem in my giving the cold, calculated, premeditated instruction along with the -- or the aggravation -- aggravating factor along with the fact that the offense for which the defendant is to be sentenced was committed for financial gain?

MS. COX: No.

THE COURT: No double dipping involved?

MR. COX: No, there is no double dipping. I don't have the case with me, but I can provide that over the lunch hour, that they are not necessarily the same thing.

THE COURT: Okay. Mr. Watts, do you have any argument as far is that is concerned?

MR. WATTS: No, Judge, no.

(R 1443 - 1444)

And in closing argument defense counsel conceded the applicability of the CCP factor and the financial gain factor. (R 1473 - 1474)

Thus, appellant has not preserved below and cannot complain here ab initio, when he acquiesced below to these two aggravating factors. See Steinhorst, supra; Lucas v. State, 376 So.2d 1149 (Fla. 1979) (this Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law).

Even if the claim were not procedurally defaulted, this Court has repeatedly upheld death sentences where both CCP and financial gain were found as aggravating factors. See Downs v.

State, 572 So.2d 895, 901 (Fla. 1990); Henry v. State, 586 So.2d 1033 (Fla. 1991); Zeigler v. State, 580 So.2d 127 (Fla. 1991); Reighmann v. State, 581 So.2d 133 (Fla. 1991); Ponticelli v. State, 593 So.2d 483 (Fla. 1991); see also Durocher v. State, 596 So.2d 997 (Fla. 1992); Echols v. State, 484 So.2d 568 (Fla. 1985) (CCP and pecuniary gain aggravating factors upheld against improper doubling up claim).

That the instant homicide was a contract killing does not necessarily embrace both aggravating factors of pecuniary gain and CCP. For example a "hit man" for money may decide to kill his assigned victim at the first opportunity he sees him, without the type of heightened premeditation required to support *F.S. 921.141(5)(i)*,. Just because both statutory aggravating factors may be present does not mean that they are necessarily present. Echols at 575. In the instant case the CCP factor is fortified by appellant's multiple visits to the victim's house to verify the location and determine the best circumstances for killing her. (R 1775)

ISSUE IX

WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

As stated earlier, the instant case was a contract killing and the only contract killing case cited by appellant in his proportionality analysis is Omelus v. State, 584 So.2d 563 (Fla. 1991) and there the Court did not perform a proportionality analysis because it reversed on another basis.

In Downs v. State, 572 So.2d 895, 901 (Fla. 1990), this Court concluded:

> "Finally, we reject the claim that the death penalty is disproportional punishment. First, there is substantial, competent evidence in the record to support the trial court's conclusion that Downs was the triggerman in a cold-blooded contract murder. This Court has affirmed the death sentence in similar cases where the trial court followed the jury's recommendation of death. See *Ventura v. State*, 560 So.2d 217 (Fla. 1990); *Kelley v. State*, 486 So.2d 578 (Fla.), *cert. denied*, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986); *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985). Second, we are satisfied the the penalty is not disproportional when compared to the treatment of co-conspirator Johnson. Disparate treatment of a codefendant renders punishment disproportional if the codefendant is equally culpable. . . . In this case, however, evidence in the record supports the trial's conclusion that Downs was the triggerman and thus was more culpable than Johnson."

(emphasis supplied)

Appellant Mordenti is in the same situation as Downs. He cannot claim the benefit of a proportionality ruling for fitting into the protected categories of domestic violence, heat of

passion or severely mentally disturbed individuals. See Wickham v. State, 593 So.2d 191 (Fla. 1991). And his complain that coconspirator Royston who hired him escaped culpability is lame since Royston committed suicide prior to trial and as Downs teaches, triggermen are more culpable. Gail Mordenti neither killed nor was present at the killing.

Appellant is not entitled to a reduced sentence on the basis that his friend says he is a "nice guy". The trial court considered that and being a nice guy does not outweigh being a contract killer. See Reichmann v. State, 581 So.2d 133 (Fla. 1991).

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, appellee would ask that this Honorable Court affirmed the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Joryn Jenkins, Esq., 1611 South Arrawana Avenue, Tampa, Florida 33629, this 26th day of October, 1992.

OF COUNSEL FOR APPELLEE