IN THE SUPREME COURT OF FLORIDA

**BRODERICK WENDELL MONLYN,**

Appellant,

v. Case No. 82,779

**STATE OF FLORIDA,**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR MADISON COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

This summary of the facts is offered to supplement and clarify Monlyn's factual statement.

About 10:30 a.m. on October 8, 1992 the victim's wife found his body in a barn on their farm and called 911. (R 785-86).[1] The Madison County Sheriff's Office responded to the emergency call. At trial Deputy Ben Stewart narrated a videotape of the crime scene (R 817 et seq.) and described finding various items, including the shotgun with which Monlyn beat the victim to death, inside a hay baler. (R 836-49). The victim's missing truck was later located in Lake City (R 1148), and Monlyn was found at a former girlfriend's home around 3:00 a.m., October 9, and arrested. (R 1159-60).

The state charged Monlyn with one count of first-degree premeditated murder, one count of armed robbery, and one count of armed kidnapping. (R 2441). At trial the medical examiner described how the victim was bound, i.e., his hands were bound with two bindings (R 916, 921), his legs were tied to his belt (R 916), his wrists were tied to his ankles both in front and in back (R

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[1] "R" refers to the record on appeal, volumes I through XX, pages 1 through 3082. "SR" refers to the volume of supplemental record, pages 1 through 58.

919), and he had been gagged. (R 927, 931). The medical examiner found the cause of death to be "multiple blunt impact to the head, with skull fractures and lacerations of the brain and hemorrhaging." (R 933). The victim suffered twenty-two lacerations to the head (R 933), with at least three of the blows having been fatal. (R 938). A blow to the face that broke the victim's upper jaw would have incapacitated him without rendering him unconscious. (R 945-46). Two skull fractures, separate from the blow to the face, would have rendered him unconscious "right away." (R 939-40). The victim also suffered at least ten defensive wounds. (R 955).

A Florida Department of Law Enforcement (FDLE) officer participated in searching the home where Monlyn was found and seized the clothing and shoes he was wearing when he killed the victim. (R 1162). FDLE serologists testified that blood found on those clothes was consistent with the victim's. (R 1258-59; 1290). Another FDLE expert testified that the shotgun used to beat the victim to death was capable of being fired. (R 1214). Yet another FDLE expert testified that the gag used on the victim and some of the bindings came from a towel found in the victim's truck. (R 1352).

Jerome Blackshear testified that he went fishing with Monlyn

at one of the victim's stock ponds in 1990. (R 996). While they were there, the victim drove up and told them to leave. (R 1001). When Monlyn pulled a pistol from his pocket, Blackshear hit his hand. (R 1002). As they were leaving, Monlyn said: "I could have got him." (R 1002). Monlyn then fired five shots toward the victim, who hid behind his truck. (R 1003). Blackshear saw the victim and his wife about thirty minutes later and apologized for trespassing. (R 1004). The victim's wife confirmed this. (R 1942). Blackshear also testified that, when he saw Monlyn at the Holmes Correctional Institute in February 1992, Monlyn told him that he intended to kill the victim. (R 1008-09).

John Craddock testified that he met Monlyn in the Madison County jail.[2] (R 1054). Monlyn told Craddock that he planned to break out of jail, kill the first person he saw with a shotgun, and take that person's vehicle. (R 1059-60). Monlyn escaped the day after telling Craddock this. (R 1060).

Darrell Adams, Monlyn's cousin, testified that, after escaping

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[2] Monlyn has been in state prison five times: 10/20/82 to 7/24/84; 6/11/87 to 2/17/88; 1/16/91 to 9/3/91; 1/16/92 to 5/19/92; 2/17/93 to present. (R 2224-25). The Department of Corrections (DOC) released him from prison on September 3, 1991 (R 1744), but he was back in prison on January 16, 1992. (R 1745). DOC released him on May 19, 1992. (R 1745). Monlyn was arrested again on September 29, 1992 (R 1746) and escaped from jail on October 6, 1992. (R 1430).

from jail, Monlyn told him he intended to rob the victim and steal his truck and money. (R 1106). Adams also testified that he gave Monlyn food, clothes, and cigarettes. (R 1107-08).

Brenda Baggs West, Monlyn's former girlfriend, testified that she met Monlyn by chance in Lake City on October 8 and that he followed her home on a bicycle. (R 1129-30). Monlyn told her that he had broken out of jail and that he had $200. (R 1131). She left Monlyn at her trailer and went to White Springs. (R 1136). West gave the police permission to search her trailer. (R 1137).

Monlyn testified in his own defense. He claimed that he never intended to harm the victim. (R 1430, 1477, 1503). He admitted stealing the murder weapon from his uncle's truck. (R 1431). He stated that the victim surprised him in the barn (R 1461), that he was afraid the victim would shoot him (R 1464), and described the struggle during which the victim was beaten. (R 1463 et seq.). Monlyn denied making the statements to Blackshear and Craddock (R 1502) and said that his cousin Darrell was lying. (R 1531).

The jury convicted Monlyn of all three counts as charged. (R 2205). At the penalty phase the state introduced a certified copy of Monlyn's 1987 robbery conviction (R 2214-15) and then relied on the evidence and testimony presented during the guilt phase to prove other aggravators. (R 2216). A Department of Corrections

officer and Monlyn's mother, aunt, and grandmother testified on his behalf. The jury unanimously recommended that Monlyn be sentenced to death. (R 2370). The trial court sentenced Monlyn to death, finding that the five aggravators (prior conviction of violent felony; committed during a robbery or kidnapping; pecuniary gain; heinous, atrocious or cruel (HAC); and cold, calculated, and premeditated (CCP)) were not outweighed by the four nonstatutory mitigators (affectionate and considerate toward family; helpful to others; good adjustment to prison; behaved well at trial). (R 3030-40). The court sentenced Monlyn to life imprisonment, to be served consecutive to the sentence for first-degree murder, for the armed robbery conviction and to life imprisonment, to be served consecutive to the first two sentences, for the armed kidnapping conviction. (R 3041).

## SUMMARY OF THE ARGUMENT

Issue I: The trial court did not err in allowing the medical examiner to express his opinion that the fatal blows were administered after the victim was bound and gagged. Even if error occurred, it was harmless.

Issue II: Monlyn failed to preserve this issue. The trial court, however, did not err in overruling his objection to a question asked of Monlyn during cross-examination.

Issue III: The trial court properly denied Monlyn's motions for mistrial regarding the state's cross-examination of him.

Issue IV: Monlyn did not preserve any complaints about the victim's widow testifying as to his habit of carrying large amounts of cash. The issue also has no merit.

Issue V: Rather than being improper, the prosecutor's comment that Monlyn complains about was fair comment on the evidence. If error did occur, it was harmless.

Issue VI: The court properly allowed a state witness to testify that Monlyn told him he was going to escape from jail, kill the first person he met, and steal that person's vehicle.

Issue VII: The trial court properly refused to give a requested instruction on circumstantial evidence.

Issue VIII: The court properly refused to give Monlyn's

requested instruction on reasonable doubt. The evidence supports Monlyn's convictions, and they should be affirmed.

Issues IX and X: If Monlyn preserved his complaint about the constitutionality of the CCP instruction, any error was harmless because this murder was CCP under any definition. Any error in finding CCP was harmless because eliminating that factor would leave four aggravators to be weighed against inconsequential nonstatutory mitigators. Monlyn's death sentence is both proportionate and appropriate.

Issue XI: The trial court properly instructed the jury on the HAC aggravator, and the facts support finding HAC.

Issue XII: Monlyn failed to preserve his complaint about the trial court not defining mitigation, and this claim also has no merit.

Issue XIII: No improper doubling of aggravators occurred, and the trial court properly refused to give Monlyn's requested instruction on doubling.

## ARGUMENT

### ISSUE I

WHETHER THE TRIAL COURT ERRED REGARDING THE MEDICAL EXAMINER'S TESTIMONY.

Monlyn argues that the trial court erred in allowing the medical examiner to testify that the fatal blows occurred after Monlyn bound and gagged the victim. There is no merit to this claim.

The victim was bound and gagged when found. The cause of death was blunt trauma from more than twenty blows to the head. The victim also sustained ten defensive wounds. The medical examiner testified that the blow to the victim's face that broke his jaw and separated it from the palate took "a lot of force" and would have incapacitated the victim but probably did not cause unconsciousness "right away." (R 946). The two skull fractures, on the other hand, would have rendered the victim unconscious "right away." (R 939, 940).

When asked if he had an opinion of when the victim was bound and gagged, the medical examiner responded: "Well, it must have been put there before the infliction of the other blows." (R 956). When asked why he reached that opinion, the medical examiner stated: "Well, as I said, Mr. Watson died of several blows to the

head, and I don't know which came first. And there is no rhyme or reason for me or anybody else to tie up a person who is already dead or dying, unconscious. He's not fighting." (R 956). Monlyn objected that this response was speculative and went beyond the doctor's expertise. (R 956-57). The prosecutor responded that the witness was "entitled to express his opinion based on all of the evidence," and the court allowed the testimony "up to this point." (R 957). The medical examiner responded affirmatively when the prosecutor asked, "based on your experience and training as a forensic pathologist, you believe that other blows were inflicted after the gag and the ligatures were placed on him; is that correct?" (R 957).

Monlyn now argues that the medical examiner's testimony on direct examination was outside his area of expertise and impermissibly invaded the province of the jury. As this Court has stated many times: "The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge whose decision will not be reversed absent a clear showing of error." Terry v. State, 668 So. 2d 954, 960 (Fla. 1996); Geralds v. State, 674 So. 2d 96 (Fla. 1996). Monlyn has shown no abuse of discretion here.

Monlyn's reliance on Johnson v. State, 393 So. 2d 1069 (Fla.

1980),cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981), Shaw v. State, 557 So. 2d 77 (Fla. 1st DCA), review denied, 569 So. 2d 1280 (Fla. 1990), and Drew v. State, 551 So. 2d 563 (Fla. 4th DCA 1989), is misplaced because those cases are factually distinguishable from the instant case. Other cases, however, are more like this case. For example in Jones v. State, 440 So. 2d 570 (Fla. 1983), this Court agreed with the trial court that a nonexpert could testify that a high-powered rifle made a mark on a window sill. In Dragon v. Grant, 429 So. 2d 1329 (Fla. 1st DCA 1983), the court held that a police officer could testify about a car accident, even though not an accident-reconstruction expert, because his experience qualified him to form an opinion. Similarly, in Peacock v. State, 160 So. 2d 541 (Fla. 1st DCA 1964), cert. denied, 168 So. 2d 148 (Fla. 1965), the district court agreed with the trial court that a deputy could give nonexpert testimony about tire tracks.

These cases, as well as Geralds and Terry, recognize that there are subjects "upon which an intelligent person with some degree of experience - qualifications possessed by the witness - may and should be permitted to testify, leaving to the jury, as is its exclusive province, the determination of the credence and weight to be given thereto." Peacock, 160 So. 2d at 543. The

medical examiner's testimony meets at least this standard, and the trial court properly allowed that testimony.

Even if admitting this testimony were found to be error, no relief is warranted in light of other testimony at the trial. On cross-examination the medical examiner reiterated his opinion that the victim would have been rendered unconscious by the blows that caused the two skull fractures (R 968) and would have died within minutes of their being inflicted. (R 980). The defense cross-examined the doctor extensively about his opinion on the sequence of events. (R 980-89). He testified that the defensive wounds meant the victim was not tied up initially and drew the logical conclusion that "common sense would tell me not to tie a person who is already unconscious." (R 980-81). The following exchange also occurred:

> Q. Yes, sir. But at this point, what you're trying to do is to place an interpretation upon the physical evidence that you saw.
>
> A. Well, I'm using my reasoning.
>
> Q. Yes, sir.
>
> A. I have common sense.
>
> Q. And you're using your reasoning as opposed to pointing to a specific piece of physical evidence that does establish that something happened.

> A. Well, it's the common sense of the individual. If you have any common sense, you will know that he was bound and then hit again, because you're not going to gag a person who is not fighting, who is not shouting, who is almost dead.
>
> Q. Now, the common sense that you say you're using at this time, that's not something that's a part of your medical training.
>
> A. Well, a lot of my experience my -- my conclusion sometimes can be said by -- by using some common sense.

(R 987).

Monlyn denied hitting the victim again after tying him up (R 1479; 1573-74), but repeatedly said that the victim was still conscious after being bound. (E.g. 1477-81; 1566-69; 1573-79; 1584-88). On redirect examination he testified that he would not have bound the victim if he had been unconscious. (R 1639). Monlyn acknowledged on recross-examination that there is no need to bind and gag an unconscious person. (R 1640). The defense expert found no physical evidence that the victim was struck after being bound and gagged (R 1695), but admitted that the binding and gagging was consistent with the victim being conscious. (R 1696).

In light of all the testimony, any error in allowing the complained-about testimony would be harmless. See Shaw. Therefore, no relief is warranted.

## ISSUE II

WHETHER THE TRIAL COURT PROPERLY OVERRULED THE OBJECTION TO THE STATE'S CROSS-EXAMINATION OF MONLYN.

Monlyn argues that the trial court erred when it refused to sustain his objection during the state's cross-examination of him. This issue has not been preserved for appeal and, also, has no merit.

The prosecutor asked the medical examiner if he found evidence of the victim's wounds being "caused by anything other than blunt trauma; for example, stab wounds or bites or anything of that nature." (R 955). The examiner answered in the negative and agreed that all of the wounds were consistent with blunt trauma inflicted by the shotgun. (R 955).

On direct examination Monlyn testified that he bit the victim's hand. (R 1474). The prosecutor, on cross-examination, confirmed that Monlyn testified that he bit the victim and then asked: "Now, you heard the medical examiner, Dr. Floro, say that he didn't see any evidence of bite marks or other --." (R 1554). Defense counsel objected that the medical examiner did not testify "one way or the other whether there were bite marks on him." (R 1554). The prosecutor responded that he had phrased the question to the examiner carefully because he knew that Monlyn claimed to

have bitten the victim. (R 1554-55). After further discussion, the court stated: "I'm going with the fact that the doctor said it. You can ask him about it. I'll let you both have that latitude." (R 1556). Questioning then continued about the alleged bite with no further objection.

Monlyn now claims that the court erred in not sustaining his objection. He relies on Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984), which held that a party cannot ask a witness if another witness lied. This reliance on Boatwright is misplaced.

In Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982), this Court held that "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." As is readily apparent from the record, Monlyn did not make the same claim to the trial court that he advances before this Court. This issue therefore, has not been preserved for appeal and should be denied summarily.

Even if preserved, the issue would have no merit. "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness." § 90.612(2), Fla. Stat. (1993); Geralds v. State, 674 So. 2d 96 (Fla. 1996); Steinhorst. As noted earlier, Monlyn testified

on direct examination that he bit the victim. Thus, questioning him on cross-examination about that bite was proper. Moreover, "'cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief.'" Coco v. State, 62 So. 2d 892, 895 (Fla. 1953) (quoting 58 Am. Jur. Witnesses, § 632 at 352 (1948)); Geralds. Monlyn opened the door to this cross-examination and has shown no abuse of the trial court's discretion in allowing it. This claim, therefore, should be denied.

## ISSUE III

WHETHER THE TRIAL COURT PROPERLY REFUSED TO GRANT A MISTRIAL REGARDING THE STATE'S CROSS-EXAMINATION OF MONLYN.

Monlyn argues that the trial court erred by refusing to grant his motions for mistrial during the state's cross-examination of him. There is no merit to this claim.

This issue centers on two areas of questioning that occurred near the end of the state's cross-examination. During the testimony, Monlyn denied knowing the victim's name, even though he had lived across the road from him for years. (R 1594). The following exchange then occurred:

Q. Now, at the time you were arrested,

you were read an arrest warrant charging you with the murder of Alton Watson.

A. Yes.

Q. And you said you didn't know nothing about it.

A. Yes, I did say that.

Q. You denied any knowledge. You didn't tell them that you were --

A. No.

Q. -- acting to protect yourself.

A. I know I didn't kill nobody. At that time I didn't know I had killed somebody. So I didn't know what they was talking about.

Q. You didn't have any idea what you were being arrested for; is that what you are saying?

A. When they said something about murder, no.

Q. You were read an arrest warrant charging that Broderick Monlyn --

A. Yes.

Q. -- on October the 8th, 1992, murdered Alton Watson.

A. Yes.

Q. Is that right?

A. That's right.

Q. And you denied having any knowledge

of what was contained in that warrant; is that correct?

A. That's correct.

Q. And you are saying here today that the reason you denied it is because you didn't really know who Mr. Watson was?

A. No, I didn't know Mr. Watson, and I didn't know that I had killed somebody. When I left, Mr. Watson was alive, and I didn't know he was hurt a bad as he was.

Q. Well, you didn't say, "Well, I got into a scuffle with a fellow. I don't know his name, and I hit him over the head a few times"?

(R 1594-95). Defense counsel objected and moved for a mistrial, arguing that the prosecutor's final question constituted a comment on Monlyn's right to remain silent. (R 1595-96). The prosecutor responded:

Judge, Mr. Hunt correctly states the law when he indicates that the State cannot use post-arrest silence to impeach testimony given in court. I'm not using silence. There has been no indication that he has indicated his desire to remain silent. He has indicated that he gave a statement inconsistent with what he said here in court. He said that he denied it. And then when I asked him why he denies it, he said, well, he didn't know who it was, and I think that that opens the door for further cross-examination about why he did not tell them then.

Mr. Hunt is correct that I could not introduce evidence that he had ever refused to

> say anything because I cannot use silence, but this is not silence. This is contradictory to the testimony given here in court.

(R 1596-97). The court expressed its concern "that you don't give the impression in your question that he had a duty to explain anything," and concluded: "It's beginning to get to imply that he had some duty, so I will sustain it from going that far." (R 1597).

Defense counsel again moved for a mistrial, arguing that "admonishing the prosecutor not to do it again is insufficient." (R 1598). The prosecutor responded that Monlyn "has not been impeached with post-arrest silence. He has been impeached with post-arrest contradictory statements. The law is very clear that statements in violation of Miranda can be used to impeach a witness once he takes the stand." (R 1599). The court denied a mistrial. (R 1599).

Citing Stone v. State, 548 So. 2d 307 (Fla. 2d DCA 1989), Monlyn argues that the state's "question is fairly susceptible of being interpreted as a comment on [his] right to remain silent." (Initial brief at 27). Stone, however, held that a prosecutor's comment in closing argument could have caused the jury to infer "that appellant's failure to testify was indicative of guilt." Id. at 308. Because the state had not met its burden of demonstrating

harmlessness, the court reversed Stone's conviction.

No such problem occurred in the instant case. Instead, as the prosecutor pointed out, cross-examination extends "to all matters that may modify, supplement, contradict, rebut or make clearer the facts." Geralds v. State, 674 So. 2d 96, 99 (Fla. 1996). Cross-examination is allowed "(1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of the case." Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982). Moreover, as the prosecutor stated, statements that violate Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), can be used to impeach a defendant who testifies. Oregon v. Hass, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975); Willacy v. State, 640 So. 2d 1079 (Fla. 1994). The objected-to question was not a comment on Monlyn's right to remain silent, and Monlyn has demonstrated no error in the trial court's ruling. See Jackson v. State, 522 So. 2d 802 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 153 (1988).

When cross-examination resumed, the following exchange took place:

Q. Mr. Monlyn, I believe you indicated

that when you left there, you didn't realize how badly Mr. Watson was hurt.

A. I didn't know how bad he was hurt.

Q. So you didn't realize that unless he received medical treatment that he would die?

A. No. When I first known it --

(R 1599). Defense counsel objected, arguing that the medical examiner did not testify that the victim would have lived had he received medical help. (R 1599-1600). The court sustained the objection, but told the prosecutor he could ask Monlyn "what his opinion of [the victim's] medical condition was." (R 1601).

Monlyn then moved for a mistrial, accusing the prosecutor of misstating the evidence and overreaching. (R 1601-02). The prosecutor responded:

> This is twice that I've stood up here and listened to Mr. Hunt imply bad faith and deliberate misrepresentation by the State. I resent that. There is no evidence of that. Mr. Hunt has chosen to put his client on the stand now, and he doesn't like vigorous cross-examination.
>
> Now, the State is never going to argue that he would have recovered with medical attention. Mr. Hunt's client testified that when he left him, he didn't think he was in bad shape. And Mr. Hunt has told me that he's going to bring on a medical examiner who will testify that he could be talking, and he could be moving around, and he could be complaining of injuries after receiving those blows.

That's what Mr. Hunt has represented to me.

(R 1603). The court reiterated that it had sustained the objection even though the extent of the victim's injuries was an issue in the trial and told the prosecutor to rephrase the question. (R 1603-04).

Monlyn, however, again moved for a mistrial, claiming that the state was overreaching. (R 1604). The prosecutor responded:

> Judge, I know Mr. Hunt would love it if he could put his client on the stand and have him give a self-serving statement, then with impunity --
>
> . . . . .
>
> -- object to all of the cross-examination. He elected to put his client on the stand. I'm entitled to cross-examine him. This is not improper, and I resent the suggestion -- not the suggestion, but the direct statement that it's overreaching and it's deliberate.

(R 1604-05). The court denied the motion for mistrial and stated that it "doesn't find that it's overreaching in light of the defendant's testimony of the condition in which he left the victim." (R 1605).

Monlyn now argues that the complained-about question encouraged the jury to ignore the testimony and "convict Monlyn of first, rather than second degree murder because he had shown no pity, no interest in saving the man he had beaten." (Initial brief

at 28). There is no merit to this claim.

On direct examination Monlyn testified that he did not mean to hurt the victim. (R 1503). He made this statement after testifying at length as to how he beat the victim, claiming that it all started because the victim surprised him. (R 1461-63). Again, cross-examination is not be confined to the identical details elicited on direct examination. Geralds; Coco v. State, 62 So. 2d 892 (Fla. 1953). The prosecutor did not exceed the bounds of permissible cross-examination.

A motion for mistrial is addressed to the trial court's discretion and should be granted only when a new trial is the only means of assuring a defendant a fair trial. Terry v. State, 668 So. 2d 954 (Fla. 1996); Gorby v. State, 630 So. 2d 544 (Fla. 1993), cert. denied, 115 S. Ct. 99, 130 L. Ed. 2d 48 (1994). A mistrial is not warranted, even if an error occurs, if such error causes no substantial harm. Esty v. State, 642 So. 2d 1074 (Fla. 1994); Breedlove v. State, 413 So. 2d 1 (Fla.), cert. denied, 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d (1982). The prosecutor's questions that Monlyn complains about did not become a feature of the trial, and Monlyn has not demonstrated substantial harm. Monlyn has not shown that the trial court abused its discretion by denying the motions for mistrial, and this issue should be denied.

## ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE VICTIM'S WIFE TO TESTIFY ABOUT THE AMOUNT OF MONEY HE HABITUALLY CARRIED.

In this issue Monlyn claims that the trial court erred in allowing the victim's widow to testify that the victim usually had several hundred dollars in his wallet and "compounded the error by allowing the state to recall her to repeat what she had already said." (Initial brief at 31). This issue has not been preserved for appeal. Even if it were cognizable on appeal, it has no merit.

On direct examination the widow identified her husband's wallet (R 790) and testified that the victim usually cashed a check for several hundred dollars, always kept at least $100 in his wallet, and would have been carrying $200 to $300 on October 8. (R 791). Monlyn did not object to this testimony. In fact, on cross-examination he elicited the response that the victim always carried a large sum of cash. (R 795). On redirect examination the witness testified that the victim made several banking transactions on October 6 and that he always cashed a check when he did so. (R 793).

By failing to object, Monlyn has not preserved for appeal any complaint about letting the witness testify about the amount of cash her husband carried. Even if this point had been preserved,

however, it has no merit. As Monlyn acknowledges (initial brief at 31), testimony about a person's habits is admissible. "Habit evidence is highly probative." Ehrhardt, Florida Evidence § 406.1, 201 n.1 (1995 ed.). Moreover, "[h]abit may be proved by opinion testimony from a witness with adequate knowledge or by proof of specific instances of conduct which have occurred routinely enough to permit the trial judge to make a factual determination, pursuant to section 90.105(1), that a habit has been shown to exist." Id. at 206 (footnote omitted). The witness had been married to the victim for ten years. (R 792). He was a retired accountant (R 776) and was "very accurate" with his financial records. (R 791). Monlyn did not ask the trial court to make the just-mentioned determination, but the witness was well qualified to testify about her husband's habits. He has shown no error in allowing the witness' testimony about her husband's habits.

On direct examination Monlyn testified that he found the victim's wallet on the ground (R 1483) and that it contained several credit cards but no cash. (R 1484). When the state proposed calling the victim's widow to rebut the defense's case, Monlyn objected, arguing that the state was recalling her "primarily for the purpose of eliciting sympathy from the jury." (R 1917). The state responded:

The defendant has testified to a number of things that we would expect Mrs. Watson to contradict. There has been an issue made here as a result of Mr. Hunt's questioning of several witnesses about the fact that law enforcement was not called after this shooting. We expect to show from her testimony that law enforcement was, in fact, called. We expect her testimony to buttress and corroborate the testimony of Jerome Blackshear, that he did, in fact, seek her and Mr. Watson out and apologize after the incident at the fishpond. She will testify that she and Mr. Watson saw three people on the road together with their poles, which contradicts the testimony of Darrell Adams, the defense witness this morning.

The defendant took the stand and testified there were multiple credit cards but no money in Mr. Watson's wallet. She's already testified about his habits with respect to money, but I expect to elicit testimony with respect to credit cards and also further testimony with respect to his habits regarding money.

The defendant testified that he chose this barn because cows could get in the other barns there. We expect to show that cows had access to this and really did not have access to some other barns; and that there were other out-buildings and pertinent structures, not only on the Watson property, but in the neighborhood, that would have provided greater safety and comfort than this particular barn. And also we do, as Mr. Hunt has indicated, expect to show that -- Mr. Watson's habits with respect to this barn, and also his habits with respect to the fishpond. So all of that is to directly rebut the testimony of this defendant.

(R 1919-21). After further argument (R 1921-23), the trial court allowed the witness to testify. (R 1923).

The only part of the witness' rebuttal testimony pertinent to this issue is as follows:

> Q. Now, did your husband normally carry a large number of credit cards in his wallet?
>
> A. No. No, he was not a credit-card person.
>
> Q. He was a money person.
>
> A. Yes.

(R 1945-46). Monlyn did not object to this testimony.

Monlyn complains that this testimony improperly allowed the state to prove armed robbery (initial brief at 33), but he did not preserve the issue of how much money the victim habitually carried and has shown no error in allowing the state to rebut his direct testimony.

Even if the rebuttal testimony should not have been admitted, any error would be harmless. The state charged Monlyn with armed robbery of "a motor vehicle and/or U.S. currency." (R 2441). Monlyn denied intending to rob the victim (R 1503) and argued the same denial. (R 772). The state presented conflicting evidence that Monlyn intended to steal both the victim's truck and his money, however, and the jury need not believe a defendant's version

of the facts. Finney v. State, 660 So. 2d 674 (Fla. 1995). This claim, therefore, should be denied.

**ISSUE V**

WHETHER THE TRIAL COURT PROPERLY DENIED MONLYN'S MOTION FOR MISTRIAL BASED ON A PROSECUTORIAL COMMENT DURING CLOSING ARGUMENT.

Monlyn argues that the trial court committed reversible error by denying his motion for mistrial made during guilt-phase closing argument. There is no merit to this claim.

The prosecutor made the following statement during closing argument: "Well, I submit to you that he would have done Alton Walton a big favor if he had shot him. It would certainly have been a less painful death, and he would have been -" (R 2070). Monlyn objected and argued that the statement was not a comment on the evidence and was "calculated to inflame the prejudice of this jury against my defendant instead of directly addressing the evidence in the case." (R 2070). Monlyn also moved for a mistrial. The prosecutor responded:

> Mr. Hunt has introduced - the two guns were in the truck of Mr. Watson. Obviously he intended to show that jury that if he really wanted to shoot him, he could have shot him with one of those weapons. Mr. Hunt has elicited through the testimony of several witnesses that that shotgun was capable of shooting him, but he chose another method. And the method he chose was much less humane

> than shooting him. I think it's a proper comment and a reasonable conclusion to be drawn from the evidence.

(R 2071-72). The court denied a mistrial and stated to the prosecutor: "You've covered that ground sufficiently. You don't intend to argue further on that point?" (R 2072). When the prosecutor agreed, the court stated: "Okay. That comment would be admissible in my view of the evidence." (R 2072). The court denied Monlyn's request for a curative instruction, stating: "I think it's fair comment on the evidence, based on the defendant's testimony and the opening statements of both sides and a reasonable view and interpretations of the evidence." (R 2073).

Monlyn has shown no abuse of discretion in the trial court's denial of his motion for mistrial. See Terry v. State, 668 So. 2d 954 (Fla. 1996). Closing argument "must not be used to inflame the minds and passions of jurors." Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1988). Rather, the purpose of such argument "is to review the evidence and explicate those inferences which may reasonably be drawn from the evidence." Id. To that end, wide latitude is allowed; counsel may advance all legitimate arguments and draw logical inferences from the evidence. Bonifay v. State, 21 Fla. L. Weekly S301 (Fla. July 11, 1996); Breedlove v. State, 413 So. 2d 1 (Fla.), cert. denied, 459 U.S. 882, 103 S. Ct. 184, 74

L. Ed. 2d 149 (1983). Furthermore, a prosecutor "is the advocate for the State and has the duty, not only to present evidence in support of the charge, but likewise the duty to advocate with all his talent, vigor and persuasion, the acceptance by the jury of such evidence." Robles v. State, 210 So. 2d 441 (Fla. 1968).

As the prosecutor stated and trial court held, this remark was fair comment on the evidence. In his opening statement defense counsel mentioned that Monlyn possessed a loaded shotgun and then stated that "had Mr. Monlyn's purpose been to kill Mr. Watson, that's the reason he was in that barn, it would have been a simple matter to have shot Mr. Watson. Not only was that particular gun loaded, but in Mr. Watson's truck, right outside the barn, there were two more guns." (R 773). On cross-examination of an FDLE expert counsel elicited the fact that the shotgun Monlyn stole was capable of being fired. (R 1208). In cross-examining the medical examiner defense counsel asked if being shot by a shotgun loaded with bird shot could cause death. (R 967). On direct examination Monlyn admitted that he knew there were guns in the victim's truck. (R 1473). In talking about the guns in Monlyn's uncle's truck defense counsel asked if Monlyn had wanted to harm the victim, and Monlyn responded: "No sir, I could have shot him after I had

possession of the truck."[3] (R 1497). On redirect examination Monlyn responded, "Yes," to counsel's asking him "do you think there would have been an easier way to do it?" (R 1639). Given the medical examiner's testimony about the massive injuries inflicted on the victim when he was beaten to death and the time Monlyn took to kill him, the prosecutor's statement was a fair comment on the evidence. See Jones v. State, 652 So. 2d 346 (Fla. 1995).

This is not a case such as Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), where the prosecutor's argument was riddled with improper comments. Instead, if any error occurred, it would be harmless because "[t]his record establishes to a moral certainty that [Monlyn] killed [the victim], and there is no reasonable probability the verdict would have been different in the absence of this error." Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992); Watts v. State, 593 So. 2d 198 (Fla.), cert. denied, 505 U.S. 1210, 112 S. Ct. 3006, 120 L. Ed. 2d 881 (1992).

Monlyn has demonstrated no reversible error regarding this

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[3] Monlyn was obviously confused about which truck counsel was discussing, but there were several guns both in the uncle's truck and the victim's truck.

claim,[4] and it should be denied.

## ISSUE VI

WHETHER THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF A STATE WITNESS.

Monlyn argues that the trial court erred in allowing state witness John Craddock's testimony about a statement Monlyn made to Craddock. There is no merit to this claim.

Prior to trial, Monlyn moved to suppress numerous statements that he had made to various people. (R 2739-43). The motion included Monlyn's statement to Craddock about "getting a gun, using the gun to kill someone, and getting a vehicle to hit the interstate and leave town." (R 2740). The trial court denied the motion to suppress as to Craddock at a pretrial hearing. (R 40). When Craddock testified, Monlyn objected to the prosecutor's asking Craddock what Monlyn had told him, arguing that Craddock's testimony was irrelevant, immaterial, and self-serving. (R 1055-

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[4] Monlyn makes the following statement regarding the prosecutor's comment: "This improper guilt-phase argument also constituted error in connection with Monlyn's sentencing under Payne v. Tennessee, ___ U.S. ___, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)." (Initial brief at 41 n.7). Monlyn, however, made no objections to victim impact at trial. Moreover, as this Court has stated: "The purpose of an appellate brief is to present arguments in support of the points on appeal." Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1990). By failing to present argument on this claim, Monlyn has waived it.

56). The trial court overruled the objection (R 1058), and Craddock testified that Monlyn told him he planned to escape from jail, catch a ride, kill the first person he saw with a shotgun, and steal that person's vehicle. (R 1059-60).

A trial court's denial of a motion to suppress is presumed correct. Terry v. State, 668 So. 2d 954 (Fla. 1996); Trepal v. State, 621 So. 2d 1361 (Fla. 1993), cert. denied, 114 S. Ct. 892, 127 L. Ed. 2d 85 (1994); Henry v. State, 613 So. 2d 429 (Fla. 1992), cert. denied, 114 S. Ct. 699, 126 L. Ed. 2d 665 (1994); Jones v. State, 612 So. 2d 1370 (Fla. 1992), cert. denied, 114 S. Ct. 112, 126 L. Ed. 2d 78 (1994); Johnson v. State, 608 So. 2d 4 (Fla. 1992), cert. denied, 113 S. Ct. 2366, 124 L. Ed. 2d 273 (1993). An appellate court must interpret the evidence, reasonable inferences, and deductions in a manner most favorable to sustaining the trial court's ruling, Trepal, Johnson, and should defer to the fact-finding authority of the trial court rather than substituting its judgment for the trial court's. Gilbert v. State, 629 So. 2d 957 (Fla. 3d DCA 1993); see Wasko v. State, 505 So. 2d 1314 (Fla. 1987). Moreover, appellate review is limited to determining if the trial court's ruling is supported by competent substantial evidence. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982).

As Monlyn recognizes (initial brief at 42), his statement was admissible as an exception to the hearsay rule. § 90.803(3)(a)(2), Fla. Stat.; see Swafford v. State, 533 So. 2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S. Ct. 1578, 103 L. Ed. 2d 944 (1989). Craddock's testimony was "relevant to a material fact in issue and of sufficient probative value to be admitted." Pittman v. State, 646 So. 2d 167, 171 (Fla. 1994), cert. denied, 115 S. Ct. 1982, 131 L. Ed. 2d 870 (1995). It was also not about a statement so remote in time as to be irrelevant. See Jones v. State, 440 So. 2d 570 (Fla. 1983); King v. State, 436 So. 2d 50 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S. Ct. 1690, 80 L. Ed. 2d 163 (1984). Monlyn has shown no abuse of discretion in the denial of his motion to suppress or in the trial court's allowing Craddock to testify, and this claim should be denied.

## ISSUE VII

WHETHER THE COURT ERRED IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

Monlyn argues that the trial court erred by rejecting his request that the jury be instructed on circumstantial evidence. There is no merit to this claim.

Monlyn filed a written request that the jury be given an instruction defining circumstantial evidence (R 2964) and included

a proposed instruction. (R 2966). At the guilt-phase charge conference, Monlyn orally requested that his proposed instruction on circumstantial evidence be given. (R 2025). The prosecutor argued that such an instruction was not required because this Court had said that circumstantial evidence was covered by other instructions. (R 3026). The judge decided that he would give the standard jury instructions. (R 3027).

This Court eliminated the circumstantial evidence instruction in 1981. In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 595 (Fla.), modified on other grounds, 431 So. 2d 599 (Fla. 1981); Larzelere v. State, 21 Fla. L. Weekly S149 (Fla. March 28, 1996); Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995); Trepal v. State, 621 So. 2d 1361 (Fla. 1993), cert. denied, 114 S. Ct. 892, 127 L. Ed. 2d 85 (1994). Monlyn has demonstrated no abuse of discretion in the trial court's refusal to give his requested instruction on circumstantial evidence. Therefore, this issue has no merit and should be denied.

## ISSUE VIII

WHETHER THE COURT ERRED IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION ON REASONABLE DOUBT.

In this issue, Monlyn argues that the trial court should have

given his special requested instruction on reasonable doubt. There is no merit to this claim.

Monlyn filed a written request for an instruction defining reasonable doubt (R 2964-65) and argued for that instruction at the guilt-phase charge conference. At that conference Monlyn argued that his proposed instruction was mandated by unnamed federal cases. (R 2020). The state responded that the trial court should give the standard jury instruction on reasonable doubt because: "We're not in federal court." (R 2024). The trial court asked if any court had ruled that the standard instruction on reasonable doubt was inaccurate. (R 2024). Monlyn replied that he was unaware of any ruling declaring the standard instruction unconstitutional. (R 2025). The court then stated that it would given the standard instruction. (R 2025).

Monlyn again argues on appeal that the standard reasonable doubt instruction is unconstitutional. This Court, however, has considered this claim frequently and rejected it. Archer v. State, 673 So. 2d 17, 20 (Fla. 1996); Kearse v. State, 662 So. 2d 677, 681 (Fla. 1995); Henry v. State, 649 So. 2d 1361, 1365 n.7 (Fla. 1994), cert. denied, 115 S. Ct. 2591, 132 L. Ed. 2d 839 (1995); Wyatt v. State, 641 So. 2d 355, 359 n.4 (Fla. 1994), cert. denied, 115 S. Ct. 1372, 131 L. Ed. 2d 227 (1995). There is no merit to this

issue, and it should be denied.

Monlyn does not challenge the sufficiency of the evidence regarding his convictions, but they are supported by competent substantial evidence and the state proved that he committed first-degree murder under the theories of both premeditation and felony murder, as well as armed robbery and armed kidnapping. Monlyn moved for a judgment of acquittal, arguing that the state had not proved the charges against him both at the end of the state's case (R 1396-98) and at the end of his case. (R 1912).

Moving for a judgment of acquittal "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974); Taylor v. State, 583 So. 2d 323 (Fla. 1991); see also Orme v. State, 21 Fla. L. Weekly S195 (Fla. May 2, 1996). A judgment of conviction comes to a reviewing court with a presumption of correctness. Terry v. State, 668 So. 2d 954 (Fla. 1996). The state "is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict." Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Holton v. State, 573 So. 2d 283 (Fla. 1990), cert. denied, 500 U.S. 960, 111 S. Ct. 2275, 114 L. Ed. 2d 726 (1991). Furthermore, the jury need not

believe the defendant's version of the facts when the state produces conflicting evidence. Finney v. State, 660 So. 2d 674 (Fla. 1995); Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995); Taylor v. State, 583 So. 2d 323 (Fla. 1991); Cochran. Applying these standards to the instant case, it is obvious that Monlyn's convictions are supported by competent substantial evidence.

At the end of his testimony on direct examination Monlyn stated that he neither intended to kill the victim (R 1503) nor to rob him. (R 1504). Contrary to Monlyn's proclamation, however, Jerome Blackshear testified that Monlyn told him that he was going to kill the victim. (R 1009). John Craddock testified that Monlyn told him that he would get out of jail, catch a ride, kill the first person he saw with a shotgun, and steal that person's vehicle. (R 1059-60). Darrell Adams testified that the night before the murder, Monlyn told him that he intended to rob the victim of his truck and money. (R 1106). As it was entitled to, the jury obviously believed the state's witnesses rather than Monlyn, and the evidence supports his conviction on theories of both premeditation and felony murder.

The convictions of armed robbery and armed kidnapping are also amply supported. Subsection 812.13(1), Florida Statutes, defines

robbery as "the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the killing there is the use of force, violence, assault, or putting in fear." As this Court has stated, it is not required "that the victim be aware that a robbery is being committed if force or violence was used to render the victim unaware of the taking." Jones v. State, 652 So. 2d 346, 349 (Fla. 1995). The evidence showed that Monlyn intended to, and did in fact, commit armed robbery.

The state also proved an armed kidnapping. Monlyn testified that he tied the victim's hands and boots together while they were outside (e.g., R 1570) and that he gagged and further bound the victim after dragging him inside the barn. (R 1585-86). Monlyn denied moving the victim into the barn to hide him (R 1583), but the jury obviously did not believe that denial or his claim that he moved the victim only "to get him off the ground." (R 1583). Monlyn's binding and gagging the victim and dragging him into the barn meets the test of Faison v. State, 426 So. 2d 963, 965-66 (Fla. 1983). The confinement was not slight, inconsequential, or merely incidental to the murder and armed robbery; it was not inherent in the murder and armed robbery; and it made the murder and/or robbery easier to commit. See also Walls v. State, 641 So.

2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995).

The evidence supports Monlyn's convictions beyond a reasonable doubt, and those convictions should be affirmed.

## ISSUES IX and X

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE COLD, CALCULATED, AND PREMEDITATED (CCP) AGGRAVATOR.

Monlyn argues both that the trial court gave the jury an unconstitutional instruction on the CCP aggravator and that the court erred in finding that the aggravator had been established. Assuming that the complaint about the wording of the instruction was preserved for appeal, any error was harmless because the facts support finding CCP in aggravation.

The trial court gave the following CCP instruction: "The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification." (R 2365). This Court held that CCP instruction invalid in Jackson v. State, 648 So. 2d 85 (Fla. 1994), and adopted an interim CCP instruction. In Standard Jury Instructions in Criminal Cases (95-2), 665 So. 2d 212 (Fla. 1995), the Court then adopted a permanent instruction. Monlyn included a proposed CCP instruction in his request for additional

instructions. (R 2983). At the first penalty-phase charge conference Monlyn argued that the CCP aggravator did not apply (SR 42, 45-52) and that the instruction was inadequate. (SR 43-44). At the second charge conference, Monlyn argued only that CCP did not apply on the facts of this case. (R 2285, 2287-97).

The CCP instruction proposed by Monlyn is inadequate. See Street v. State, 636 So. 2d 1297 (Fla. 1994), cert. denied, 116 S. Ct. 591, 133 L. Ed. 2d 505 (1995). The state, therefore, does not concede that the issue of the instruction's wording has been preserved for appeal, but recognizes that this Court may find the argument sufficient to preserve this issue. Assuming that the issue has been preserved, no relief is warranted.

As this Court has held numerous times, error in the CCP instruction is harmless if the facts establish that the murder was cold, calculated, and premeditated. Fennie v. State, 648 So. 2d 95 (Fla. 1994), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995); Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995).[5] The trial court made the following findings as

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[5] Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), is factually distinguishable and does not

to CCP:

> E. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> FINDING:
>
> The evidence produced at the guilt phase established this aggravator beyond any reasonable doubt. The evidence showed that the victim caught the Defendant trespassing at his fish pond approximately one and a half to two years prior to the murder. On this occasion the Defendant produced a pistol and shot at the victim. After this incident the Defendant spent a large portion of the intervening time in prison. While in prison the Defendant told Jerome Blackshear that when he got out of prison he was going to kill the victim. After he was released from prison, the Defendant was arrested and placed in the county jail. While there he told Johnny Craddock that he was going to escape, go home, and get his shotgun, kill the first person he saw, and steal that person's vehicle and leave the area. On the night before the murder, the Defendant told Darryl Adams that he was going to rob the victim of his truck at his barn. The Defendant was at the victim's barn the following morning armed with a shotgun which he had taken to the scene. He then concealed himself in the barn and waited on the victim to come to the barn which was his daily habit. Upon arrival of the victim, the Defendant brutally kidnapped and murdered him and then robbed him of his truck. All of these facts show calculation and the heightened

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support Monlyn's argument (initial brief at 63-65) that instructional error cannot be harmless.

premeditation required to establish this aggravator. They further demonstrate that the Defendant planned to do violence in order to carry out his desire for revenge and to steal the victim's truck. Lamb v. State, 532 So. 2d 1051 (1988); Huff v. State, 495 So. 2d 145 (Fla. 1986); Davis v. State, 461 So. 2d 67 (Fla. 1984); Eutzy v. State, 458 So. 2d 755 (Fla. 1984).

The fact that the Defendant inflicted far more injury to the victim than was necessary to accomplish the theft of his truck demonstrates the existence of this aggravator. Hall v. State, 614 So. 2d 473 (1993). Moreover, the fact that the Defendant was armed throughout the entire event, produced a weapon on [an] unsuspecting victim, made no effort to escape without resorting to the use of violence, and struck the victim numerous times demonstrates the existence of this aggravator. Jackson v. State, 498 So. 2d 406 (Fla. 1986). The fact that the Defendant had had prior difficulty with the victim, laid in wait for him, and had time during the assault, between blows, to contemplate his actions and choose to kill the victim demonstrates the existence of this aggravator. Phillips v. State, 476 So. 2d 194 (Fla. 1985). Also, the fact that the Defendant purposefully chose the victim to be the subject of the attack is proof of this aggravator. Turner v. State, 530 So. 2d 45 (Fla. 1987). The evidence further demonstrated the "coldness" of the Defendant's actions by the fact that he struck Mr. Watson 22 times in the head and face and inflicted 10 defensive wounds to him. There was no evidence that the Defendant had any moral or legal justification for his actions toward the victim. This aggravating circumstance, standing alone, justifies imposition of the death penalty.

(R 3035-37). The trial court properly found this murder to have been committed in a cold, calculated, and premeditated manner because the facts establish this aggravator under any definitions.

The new, permanent CCP instruction defines "cold" as meaning "the murder was the product of calm and cool reflection" and "calculated" as "having a careful plan or prearranged design to commit murder." Standard Jury Instructions, 665 So. 2d at 213. In addition, "a heightened level of premeditation, demonstrated by a substantial period of reflection is required," and "a pretense of moral or legal justification" means "any claim of justification or excuse that, though insufficient to reduce the degree of the murder, nevertheless rebuts the otherwise cold, calculated, and premeditated nature of the murder." Id. at 213-14.

Monlyn argues that the victim surprised him, causing a "ferocious" struggle for the shotgun, that the cases relied on by the trial court do not support the court's findings, and that the murder was committed in a panic or fit of rage. (Initial brief at 67-71). As the trial court found, however, the evidence showed that Monlyn had long planned to exact revenge on the victim by killing him. To that end, he stole his uncle's shotgun and hid on the victim's property even though other hiding places were available. (R 1534). When the victim came into the barn, Monlyn

beat him mercilessly both in the barn and the yard, dragged the victim back into the barn to conceal the crimes, and callously left the victim to die. The deliberate nature of the planning and execution of this murder demonstrate its coldness and that Monlyn had a prearranged design. The lengthy nature of the events leading to the murder and the length of time the beating took establish the required heightened premeditation. Fennie; Wuornos; Walls. Monlyn's claim of self-defense, being purely subjective, does not establish a pretense of moral or legal justification and in light of conflicting evidence could be rejected by the sentencer. Wuornos; Walls.

The time Monlyn had to plan and reflect on this killing, coupled with the ruthless manner in which he committed it, demonstrate that Monlyn murdered the victim in a cold, calculated, and premeditated manner. Fennie; Wuornos; Walls; Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994); Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993); Bruno v. State, 574 So. 2d 76 (Fla.), cert. denied, 502 U.S. 834, 112 S. Ct. 112, 116 L. Ed. 2d 81 (1993). Where there is a legal basis for finding an aggravator this Court will not substitute its judgment for that of the trial court. Occhicone v. State, 570 So. 2d 902 (Fla.

1990), cert. denied, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991). Therefore, the trial court's finding CCP in aggravation should be affirmed.

Even if this Court decides that the trial court erred in finding that the CCP aggravator had been established, no relief is warranted. As stated by this Court previously: "If there is no likelihood of a different sentence, the trial court's reliance on an invalid aggravator must be deemed harmless." Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). Striking CCP would leave four valid aggravators, i.e., previous conviction of a violent felony, committed during the commission of a kidnapping, committed for pecuniary gain, and HAC.[6] The trial court found that four nonstatutory mitigators had been established (Monlyn was affectionate and considerate toward his family; Monlyn was helpful to others; Monlyn had made a good adjustment to prison life; and Monlyn's behavior at trial) (R 3038-39), but concluded "that no mitigating circumstances, either statutory or established by testimony in the advisory sentence proceedings, exist to outweigh

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[6] As explained in issue XIII, infra, the trial court properly found both felony murder/kidnapping and pecuniary gain in aggravation.

or offset the aggravating circumstances which have been proven to the Court beyond and to the exclusion of every reasonable doubt." (R 3046).[7] Given the presence of four strong aggravators, the lack of significant mitigators, and the jury's unanimous recommendation of death, there is no reasonable likelihood that Monlyn would have received a sentence of life imprisonment if the CCP aggravator had not been considered. Cf. Geralds v. State, 674 So. 2d 96, 104-05 (Fla. 1996) (no reasonable likelihood of different sentence where striking an aggravator left two aggravators to be weighed against a statutory mitigator and three nonstatutory mitigators); Barwick v. State, 660 So. 2d 685, 697 (Fla. 1995) (no likelihood of different sentence when eliminating CCP left five aggravators to be weighed against "minimal mitigating evidence"); Foster v. State, 654 So. 2d 112, 115 (Fla. 1995) (eliminating CCP was harmless where three strong aggravators remained to be weighed against no statutory mitigators); Fennie, 648 So. 2d at 99 (eliminating CCP would be harmless because "[t]he totality of the aggravating factors and the lack of significant mitigating circumstances conclusively demonstrate that death is the appropriate penalty in

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[7] Monlyn does not challenge the trial court's consideration of the mitigating evidence, and the record supports the trial court's conclusions.

this case"); Pietri v. State, 644 So. 2d 1347, 1354 (Fla. 1994) (striking CCP left three aggravators and, even if trial court had found mitigators, there was no reasonable likelihood of a different sentence), cert. denied, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994) (striking two aggravators was harmless where the three remaining aggravators "far outweigh the minimal mitigating evidence"), cert. denied, 115 S. Ct. 1372, 131 L. Ed. 2d 227 (1995); Peterka v. State, 640 So. 2d 59, 71-72 (Fla. 1994) (striking two aggravators was harmless where three aggravators remained to be weighed against lack of a significant criminal history), cert. denied, 115 S. Ct. 940, 130 L. Ed. 2d 884 (1995); Stein v. State, 632 So. 2d 1361, 1367 (Fla.) (harmless error where four aggravators remained to be weighed against statutory mitigator), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994); Watts v. State, 593 So. 2d 198, 204 (Fla.) (eliminating HAC was harmless where three aggravators remained to be weighed against one statutory mitigator and one nonstatutory mitigator), cert. denied, 505 U.S. 1210, 112 S. Ct. 3006, 120 L. Ed. 2d 881 (1992).

The state established five aggravators or, as explained above, at the least four. Monlyn, on the other hand, established only four nonstatutory mitigators that the trial court found to be worth

little weight. Monlyn does not challenge the proportionality of his death sentence, but a comparison with similar cases demonstrates that his sentence is both proportionate and appropriate. Cf. Geralds, 674 So. 2d at 104-05 (death sentence proportionate when two aggravators weighed against one statutory and three nonstatutory mitigators); Finney v. State, 660 So. 2d 674, 679, 685 (Fla. 1995) (death sentence proportionate where there were three aggravators and five nonstatutory mitigators); Gamble v. State, 659 So. 2d 242, 245 (Fla. 1995) (death sentence proportionate where there were two aggravators, one statutory mitigator, and several nonstatutory mitigators); Bogle v. State, 655 So. 2d 1103, 1105-06, 1109-10 (Fla. 1995) (death sentence proportionate with four aggravators and one statutory and several nonstatutory mitigators); Whitton v. State, 649 So. 2d 861, 864, 867 (Fla. 1994) (death sentence proportionate where five aggravators were weighed against nine nonstatutory, but no statutory, mitigators); Fennie, 648 So. 2d at 204-05 (death sentence proportionate where there were three valid aggravators and statutory and nonstatutory mitigators); Bruno v. State, 574 So. 2d 76, 83 (Fla.) (death sentence proportionate with three aggravators and no statutory mitigators), cert. denied, 502 U.S. 834, 112 S. Ct. 112, 116 L. Ed. 2d 81 (1991). Therefore, Monlyn's death

sentence should be affirmed.

## ISSUE XI

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE HEINOUS, ATROCIOUS, OR CRUEL (HAC) AGGRAVATOR.

Monlyn claims that the trial court gave the jury an unconstitutional HAC instruction. There is no merit to this issue.

The day before the sentencing hearing, Monlyn filed a written objection to the standard HAC instruction (R 2973-76) and two proposed alternative instructions. (R 2972, 2981). At the first penalty-phase charge conference Monlyn argued that the facts did not support HAC and that the HAC instruction was unconstitutional. (SR 32-33). The state responded that the new HAC instruction cured the former one's problems, and the court held it would give the standard instruction. (SR 34). Monlyn renewed his objection to the constitutionality of the HAC instruction at the second penalty-phase charge conference (R 2279-80), and the court again declared it would give the standard instruction. (R 2285). The court then gave the standard instruction. (R 2364-65).

Monlyn recognizes that this Court approved the instruction at issue in this case in Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1991). (Initial brief at

72). Moreover, this Court has been consistent in following Hall. E.g., Finney v. State, 660 So. 2d 674 (Fla. 1995); Johnson v. State, 660 So. 2d 637 (Fla. 1995); Fennie v. State, 648 So. 2d 95 (Fla. 1984), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995); Taylor v. State, 630 So. 2d 1038 (Fla. 1993), cert. denied, 115 S. Ct. 518, 130 L. Ed. 2d 424 (1994). Monlyn has shown no reason why this Court should reconsider this issue, and this claim should be denied as being without merit.

Even if this Court were to find error in the HAC instruction, such error would be harmless because this murder was heinous, atrocious, or cruel under any definition of those terms. This Court has uniformly held that beating deaths are HAC. E.g., Bogle v. State, 655 So. 2d 1103 (Fla. 1995) (seven blows to the head established HAC); Whitton v. State, 649 So. 2d 861 (Fla. 1994) (estimated thirty-minute beating established HAC aggravator); Colina v. State, 634 So. 2d 1077 (Fla.) (beating deaths were HAC), cert. denied, 115 S. Ct. 330, 130 L. Ed. 2d 289 (1994); Penn v. State, 574 So. 2d 1079 (Fla. 1991) (beating victim to death with hammer was HAC); Bruno v. State, 574 So. 2d 76 (Fla.) (beating victim to death with crowbar was HAC), cert. denied, 502 U.S. 834,

112 S. Ct. 112, 116 L. Ed. 2d 81 (1991); Cherry v. State, 544 So. 2d 184 (Fla. 1989) (HAC where victim was literally beaten to death), cert. denied, 494 U.S. 1090, 110 S. Ct. 1835, 108 L. Ed. 2d 963 (1990); Chandler v. State, 534 So. 2d 701 (Fla. 1988) (beating victims to death with baseball bat was HAC), cert. denied, 490 U.S. 1075, 109 S. Ct. 2089, 104 L. Ed. 2d 652 (1989); Lamb v. State, 532 So. 2d 1051 (Fla. 1988) (beating victim to death with hammer was HAC). Monlyn does not challenge the trial court's findings with respect to the HAC aggravator. Those findings (R 3034-35), however, are supported by the record and should be affirmed.

## ISSUE XII

WHETHER THE COURT ERRED IN NOT GIVING A REQUESTED INSTRUCTION DEFINING MITIGATING CIRCUMSTANCES.

Monlyn complains that the trial court refused to give his requested instruction defining mitigating circumstances. This issue, however, has not been preserved for review. Even if it were cognizable on appeal, however, this claim has no merit.

The written instructions submitted the day before the penalty phase contained a paragraph defining mitigating circumstances. (R 2979). Monlyn, however, never brought this proposed instruction to the court's attention, even though two penalty-phase charge conferences were held, and never secured a ruling on the proposed

instruction. The courts of this state have long held that "it is the movant's burden to secure rulings on his or her motions, and that failure to obtain a ruling on a motion effectively waives that motion." State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991); State v. Barber, 301 So. 2d 7 (Fla. 1974); Flanagan v. State, 586 So. 2d 1085 (Fla. 1st DCA 1991); Leretilley v. Harris, 354 So. 2d 1213 (Fla. 4th DCA), cert. denied, 359 So. 2d 1216 (Fla. 1978); see also Parker v. Dugger, 660 So. 2d 1386 (Fla. 1995). Because Monlyn did not secure a ruling on the proposed instruction, this claim has been waived.

There is also no merit to this claim. The only instruction given on mitigators was the catch-all instruction on nonstatutory mitigation: "Among the mitigating instructions you may consider, if established by the evidence, is any aspect of the defendant's character or record, and any circumstances of the offense." (R 2365). The standard jury instructions are presumptively valid. See Archer v. State, 673 So. 2d 17 (Fla. 1996); Finney v. State, 660 So. 2d 674 (Fla. 1995); Gamble v. State, 659 So. 2d 242 (Fla. 1995). As Monlyn states (initial brief at 82), the scope of mitigation is potentially large. The catch-all instruction needs no further defining because, as stated in Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), "any aspect of

a defendant's character or record and any of the circumstances of the offense" should be considered. Monlyn speculates that without his proposed instruction the jurors might have narrowed their consideration of mitigation (initial brief at 32), but presents nothing to support that speculation. In fact, it is just as likely that further defining what can be considered in mitigation might cause the jurors to constrain their consideration of the evidence. There is no merit to this issue, and it should be denied.

## ISSUE XIII

WHETHER THE COURT PROPERLY REFUSED TO GIVE THE REQUESTED INSTRUCTION ON DOUBLING AGGRAVATORS.

Monlyn argues that the court erred by refusing to give the jury his requested instruction on the doubling of aggravators. There is no merit to this issue.

Besides first-degree murder, the state charged Monlyn with armed robbery and armed kidnapping. The jury convicted him of all three counts as charged. Prior to the penalty phase, Monlyn filed a written proposed instruction on the doubling of aggravators. (R 2985). At the first penalty-phase charge conference, Monlyn argued that the facts did not support instructing the jury on the felony-murder aggravator. (SR 9-10). When the state asked that the jury be instructed on pecuniary gain as an aggravator, Monlyn objected

that the facts did not support that aggravator (SR 12-13) and that finding both felony murder and pecuniary gain in aggravation would be improper doubling. (SR 13-14). He asked that the jury be told only one aggravator could be found. (SR 18-19). The trial court held that instructing on both aggravators would not be an improper doubling. (SR 20).

The trial court made the following findings with respect to the felony-murder and pecuniary-gain aggravators:

> B. The capital felony was committed while the Defendant was engaged in the commission of, or an attempt to commit, a robbery or kidnapping.
>
> FINDING:
>
> The evidence presented during the guilt phase and the jury's verdict finding the Defendant guilty of the offenses of Robbery While Armed and Kidnapping While Armed (Counts II and III) establish this aggravating circumstance beyond a reasonable doubt. The evidence established beyond a reasonable doubt that the Defendant went onto the victim's property and waited in his barn until the victim drove up in his truck. The Defendant has a preconceived intent to murder the victim and to steal his truck. After the victim got out of his truck, the Defendant beat the victim with the butt-stock and barrel of a shotgun that the Defendant had taken to the scene. During the course of the attack the Defendant inflicted multiple wounds to the victim's head which resulted in his death. During the course of the murder the Defendant kidnapped the victim by binding and gagging

him. He also drug the victim's body into the barn. After completing the kidnapping and murder the Defendant stole the victim's wallet, money, and truck, and drove it to Lake City, Florida. The Court finds that this aggravating circumstance, standing alone, would support imposition of the death penalty based upon the facts and circumstances of this case and the background of the Defendant.

C. The capital felony was committed for financial gain.

FINDING:

The evidence presented during the guilt phase, together with the jury's verdict finding the Defendant guilty of Robbery While Armed, established this aggravating circumstance beyond a reasonable doubt. The evidence established beyond a reasonable doubt that the Defendant went to the victim's property with the intent to steal his truck. The Defendant murdered the victim to accomplish this theft. Thus, the murder was committed, in part, to obtain some sought-after specific gain. Hardwick v. State, 521 So. 2d 1071 (Fla. 1988). Before committing the crimes, the Defendant told Darryl Adams that he was going to go to the victim's barn and steal his truck. He also told Johnny Craddock that he was going to break out of jail, kill someone, and steal that person's vehicle. There was sufficient credible evidence to establish that after murdering the victim, the Defendant stole his wallet and the money he found therein. He then stole the victim's truck and contents and drove the truck to Lake City, Florida. After his arrival in Lake City he told a witness that he possessed $200-300. When the witness asked him how he came to have that much money, given the fact that he had just escaped from jail,

the Defendant responded that in times like this "you have to improvise." When he was arrested in the early morning hours of the day following the murder the Defendant had in his possession over $20.00 cash. He had previously told a witness that he had purchased a bicycle after his arrival in Lake City for $35.00. There was no credible evidence to establish that the Defendant had any money in his possession when he escaped from the Madison County Jail two nights before the murder. Based on this and other evidence presented at trial, the Court finds that this aggravating circumstance has been established beyond a reasonable doubt. This aggravating circumstance, standing alone, supports the imposition of the death penalty based upon the facts and circumstances of this case and upon the Defendant's background.

RE: Doubling of Aggravating Circumstances "B" and "C"

FINDING:

When the only underlining felony of a murder is robbery, the aggravators of felony murder and for financial gain cannot be "doubled" and must be treated as one. White . State, 446 So. 2d 1031 (Fla. 1984); Oats v. State, 446 So. 2d 90 (Fla. 1984). However, when an additional felony has been committed that does not involve the same aspect of the case these aggravators may be "doubled." In this case, the Defendant was convicted of the additional felony of kidnapping which did not involve the same aspect of the case as did the robbery. Therefore, these aggravators may be "doubled" and separate weight given to each. Routly v. State, 440 So. 2d 1257, 1264 (Fla. 1983). Bolender v. State, 422 So. 2d 833 (Fla. 1982); Stevens v. State, 419 So. 2d 1058 (Fla. 1982). Even if these aggravators are

> treated as one, the Court finds that the aggravating circumstances outweigh the mitigating circumstances, and that the death penalty is justified.

(R 3031-33).

In Castro v. State, 597 So. 2d 259, 261 (Fla. 1992), this Court held that finding both pecuniary gain and committed during a robbery in aggravation "constitutes improper doubling." As the trial court noted, however, both felony murder and pecuniary gain can be found in aggravation "when an additional felony has been committed that does not involve the same aspect of the case." (R 3033). Because Monlyn had been convicted of kidnapping as well as robbery, the court correctly found that both aggravators had been established. Cf. Fennie v. State, 648 So. 2d 95 (Fla. 1994) (felony murder/kidnapping and pecuniary gain both applied), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 2083 (1995); Suggs v. State, 644 So. 2d 64 (Fla. 1994) (same), cert. denied, 115 S. Ct. 1794, 131 L. Ed. 2d 722 (1995); Green v. State, 641 So. 2d 391 (Fla. 1994) (same), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Walls v. State, 641 So. 2d 381 (Fla. 1994) (same), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995); Hall v. State, 614 So. 2d 473 (Fla.) (same), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993); Gore v. State, 599 So. 2d 978 (Fla.) (same),

cert. denied, 113 S. Ct. 610, 121 L. Ed. 2d 545 (1992); Nixon v. State, 572 So. 2d 1336 (Fla. 1990) (same), cert. denied, 502 U.S. 854, 112 S. Ct. 164, 116 L. Ed. 2d 128 (1991); Bryan v. State, 533 So. 2d 744 (Fla. 1988) (same), cert. denied, 490 U.S. 1028, 109 S. Ct. 1765, 104 L. Ed. 2d 200 (1989); Routly v. State, 440 So. 2d 1257 (Fla. 1983) (same), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 888 (1984).

Because no improper doubling occurred, the trial court correctly denied the requested instruction. There is no merit to this issue and it should be denied.

## CONCLUSION

THEREFORE, the State of Florida asks this Court to affirm Monlyn's convictions and sentence of death for the foregoing reasons.

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. Mail to Mr. David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of August, 1996.

Barbara J. Yates

BARBARA J. YATES
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