IN THE SUPREME COURT OF FLORIDA

EDDIE LEE SEXTON,

Appellant,

v. Case No. 86,132

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/or clarify the statement of the case and facts recited by the appellant:

The appellant's statement of the facts asserts that "numerous" motions in limine were filed by Sexton to exclude collateral bad acts, citing R. **85-87, 215-223, 258-259, 262-263, 302-303** (Appellant's Initial Brief, **p.** 3). In fact, the appellant's attorney only filed one motion challenging the admission of this evidence. The motions found at R. **85-87** and **302-303** requested exclusion of possible prosecutorial arguments in penalty phase. The **R. 215-217** motion related to allegedly inflammatory photographs. The motions found at R. 258-259 and **262-263** were filed by counsel for codefendant Willie Sexton and, although all of Willie's motions were generically adopted by the appellant, these motions were never once argued to the court below. The one motion in limine and accompanying memorandum filed by the appellant relating to collateral crimes and bad acts is found at R. **218-223,** and the argument contained therein is limited solely to the claim that the evidence was inadmissible under Section **90.403,** Florida Statutes, because any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues,

misleading the jury, or needless presentation of cumulative evidence (R. 218-223). The appellant's motion was ultimately granted in part, as the court excluded any evidence relating to the conspiracy to kill Raymond Hesser, a disabled camper at Little Manatee, and to assume Hesser's identity and continue the family's flight from justice (T. 1297-99).

At the pretrial in camera hearing on this issue, defense counsel stated that "the basis of my motion is Section 90.403; and, that's about the extent of my argument, is 90.403." (T. 2199).

The appellant's brief also states that the court below found four aggravating circumstances: prior violent felony conviction; avoid arrest; cold, calculated and premeditated; and heinous, atrocious or cruel (Appellant's Initial Brief, p. 4). However, a review of the sentencing order filed reflects that the court only enumerated three aggravating factors, and did not specifically find heinous, atrocious or cruel to apply (R. 465-466). The court did characterize the murder as atrocious and cruel in its recitation of facts to support the cold, calculated and premeditated factor. During the penalty phase charge conference, the prosecutor advised the court that heinous, atrocious or cruel did not apply under the case law, and this factor was never argued to the judge or the jury

(T. 1828). The jury was not instructed on HAC as a potential aggravating circumstance,

The appellant's brief indicates that Yale Hubbard, ranger at Little Manatee River State Recreation Area, testified that the Sexton family camped at site number 16 (Appellant's Initial Brief, p. 8). Hubbard actually indicated the family lived at site number 18 (T. 966).

The appellant's brief states that a discovery violation was alleged by the defense based on Pixie's testimony that she had heard her father say that Joel had to be gotten rid of during a trip to Ohio with Willie (Appellant's Initial Brief, p. 12). The alleged discovery violation actually pertained to Pixie's testimony that she heard her father tell her mother the night that Joel was killed that he "had Willie do it" (see, T. 1018-1025).

Pixie did not testify that she had given Tylenol and adult NyQuil to her baby Skipper on the night he died (Appellant's Initial Brief, p. 15); she stated that the appellant had given the baby the Tylenol and NyQuil (T. 1055). Pixie also testified that the appellant gave the baby NyQuil regularly, anytime he cried, and that other children in the family were routinely given NyQuil as well (T. 1238). Pixie stated that she believed Skipper was still alive when she laid him on the bed (T. 1055-56). In the morning,

she noticed the baby was not breathing and took him to the appellant, who told her the baby was dead (T. 1056). Pixie denied that she had suffocated or killed him (T. 1239).

Pixie believed that the appellant's comments that Joel "knew too much" referred to the fact that Joel knew the appellant to be the father of Pixie's two girls (T. 1069). Pixie also testified that, at one point, the appellant had Willie go back and redo Joel's burial, because Joel's foot was coming out (T. 1071).

The appellant's description of his videotape leaves out some of his most ominous statements. On the tape, the appellant claims that all of the Ohio charges of child abuse were due to lies told by Michelle and officials with the Department of Human Services (DHS) (T. 1166-69, 1197-98, 1202). He stated that he did not want to hurt anyone but that he was a father, and would do anything for his children (T. 1191-92). He acknowledged that he had violated the law and that he would continue to do so as necessary to preserve and protect his family (T. 1198-99). His desperation is demonstrated in the following excerpts from the tape:

> I cannot in any way go back to Stark County with these children or my wife. They have got some kind of pickup order on my children and my wife. Me, myself, I guess right now I'm really free until they find out that I'm with my wife and children. But I'm willing to give up my freedom and my life, if

necessary, to regain and retain the custody for these children (T. 1188-89).

...

My children are suffering from this. We have done nothing. But I will not in no circumstances surrender my children without a fight. I would rather do it legally, but I want to state at this time if it does come down to it, I want the world to know that we are loved as parents and we love our children and that we're willing to die for our children (T. 1190-91).

...

I would do this for any child upon the face of this earth or any individual if they needed it. I would not do them no harm and I don't want no one hurt from this situation because I have to stop and think of the individuals that are only doing their job. I understand that. But I'm a father too and I would die for my country, but I would also die for my children (T. 1191-92).

...

Now, I think I have brought forth enough tonight to enlighten you upon this situation. It is entirely up to you now. I took my children and placed them before you. I placed my wife before you. I've placed myself and I have jeopardized myself. I know that once you do this, you will know that I have violated the law and I admitted it. But I will continue to violate the law in the protection of my family and the preservation of my family (T. 1198-99).

...

We understand that we're breaking the law, but we understand that we're a family too (T. 1201).

Christopher Sexton's testimony that the appellant had told the children that he had brought them into the world and could take

them out of it was not admitted over a 'renewed" objection, as suggested in the appellant's brief (Appellant's Initial Brief, p. 20). Rather, the defense objected to this testimony as irrelevant[1] because it was too remote in time (T. 1263-65, 1272-79). In a proffer, Christopher indicated that these statements had been made before the appellant's standoff incident with Ohio authorities (T. 1274). The court rejected remoteness as a basis for exclusion of this testimony, recognizing the state's theory that the appellant's domination and control began as soon as his children could walk, talk, or understand, and did not begin with the standoff incident (T. 1278-79).

It was the appellant that told Christopher to use an alias while they were staying at Little Manatee campground (T. 1290). Christopher heard the appellant say that he was going to bury Joel's clothes (T. 1292). Christopher testified that the appellant and Joel did not get along; he acknowledged that 'sometimes" the appellant tried to iron things out between Joel and Pixie (T. 1306, 1307). He indicated that the only gun in the camper had been pawned or left in New Port Richey (T. 1311).

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[1]This was the first of only a few relevancy objections to the evidence of collateral bad acts by the appellant.

Mathew Sexton testified that he never heard Pixie say anything about getting rid of Joel (T. 1335). He described Pixie and Joel's relationship as "sometimes good, but mostly no good" (T. 1345). He stated that Joel never fought back when the other kids abused him because he was afraid of the appellant (T. 1350). Mathew also testified that Charles (Skipper) was responsible for all of the beatings on Joel, and that Skipper was always the one that escalated Joel's abuse to the next level (T. 1351, 1357). All of the kids were usually high on something when Joel was being abused (T. 1330, 1353-55).

Charles Sexton testified that the appellant often spoke of killing Joel (T. 1604). The appellant's brief suggests that Pixie and the appellant wanted it done because Joel knew too much about the baby (Appellant's Initial Brief, p. 37), but Charles only said it was the appellant that wanted it done because of what Joel knew about the baby (T. 1605). Charles stated that the appellant spoke of getting rid of Joel too many times to count (T. 1609). The appellant's brief fails to mention that Charles testified that two or three days before Joel was killed, the appellant asked Charles to kill Joel, but Charles declined, saying he was a passivist (T. 1610).

The appellant notes that Sherry testified that Willie said he killed Joel because he was afraid Joel would talk about the baby's death, but neglects to mention that this testimony was only a proffer, and was excluded by the court as hearsay (T. 1666-68). According to Sherry, the appellant told Willie that if anyone else got killed, the appellant would call the police (T. 1662). Sherry acknowledged that the appellant repeatedly expressed concern about Joel going back to Ohio (T. 1686). Sherry testified that she never saw Pixie with a knife or blood on her the day Joel died, and although she initially believed Pixie's alleged claim to have stabbed Joel, she ultimately learned that this wasn't true (T. 1680-81).

Sherry admitted that she was drinking, smoking, and sniffing with the other kids while they lived in New Port Richey, but claimed that she never participated in the abuse of Joel; she was entirely disgusted by the acts committed upon him (T. 1675-76). When Sherry testified in guilt phase, she acknowledged that she was not allowed to talk outside of the family while growing up, and that after Michelle's complaint, they were told not to talk about the abuse in the house (T. 1685, 1687). Sherry stated that she knew she would get beat if she did talk, as Pixie had been beaten when she told that the appellant messed with her (T. 1687). During

the penalty phase, however, Sherry testified that her family was perfectly normal, just like other families she knew growing up (T. 1879-80). She stated they had a good life in Ohio, and everyone got along except Pixie (T. 1879). She loved her father and he never abused her; he had sex with her when she was 17, but this was her idea (T. 1873-74, 1876).

The appellant's sister, Nellie Hanft, asked the jury to recommend a life sentence during her penalty phase testimony (T. 1890).

SUMMARY OF THE ARGUMENT

I. The trial court did not err in admitting evidence of collateral crimes and other bad acts previously committed by the appellant. This evidence was relevant to explain the appellant's domination and control over his son, Willie Sexton, and to establish the appellant's motive for having Joel Good killed. Because the testimony was highly probative, it was not subject to exclusion under Section 90.403, Florida Statutes. It was not made a feature of the trial.

II. The trial court did not err in finding the aggravating factor of heinous, atrocious or cruel. In fact, the trial court did not find this factor to apply. Even if the sentencing order is read to suggest that the court below may have considered the factor, no harmful error has been shown since the murder was committed in a heinous, atrocious and cruel manner and there were three other strong aggravating factors and scant mitigation found.

III. The appellant's death sentence is not disproportionate, but was imposed for one of the most aggravated and least mitigated of murders. The speculation that Pixie may have been involved in the murder or that Willie may never even face trial for his pending charge does not require that this Court reduce the sentence imposed

herein. Since the appellant was clearly the dominant force behind this killing, the appellant's argument on this issue must fail.

IV. This Court has consistently rejected the appellant's constitutional attack on the death penalty statute challenging the statute's authorization of a jury recommendation based on a bare majority vote.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY ADMITTING COLLATERAL CRIME EVIDENCE.

The appellant's first issue challenges the admission of evidence relating to collateral crimes he committed prior to the murder of the victim in this case, Joel Good. Specifically, the appellant attacks testimony that he subjected his children to emotional, physical, and sexual abuse and was engaged in a standoff with Ohio authorities that wanted to take his children into custody, as well as the testimony relating to the death of Pixie's baby Skipper Good. However, no error has been demonstrated in the admission of this evidence.

It must be noted initially that the appellant repeatedly mischaracterizes this evidence throughout his brief as "Williams Rule" evidence (Appellant's Initial Brief, pp. 53, 54, 59, 66, 67, 68), and notes that "the collateral crime evidence was in no way similar to the homicide" (p. 60). Not once in this case was it ever suggested that this was similar crime evidence admissible under Section 90.404(2) and Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959). To the contrary, the evidence was only ever offered and admitted under Section 90.402 as

dissimilar fact, relevant testimony. See, Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994), cert.. denied, ___ U.S. , 115 s. ct. 1317, 131 L. Ed. 2d 198 (1995); Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988), cert. denied, 490 U.S. 1028 (1989). It is hard to understand why this Court should have to keep making this distinction, only to be faced with appellate briefs that fail to recognize the distinction.

In addition, the appellant mischaracterizes the nature of the objections to this evidence below. The appellant's argument extensively disputes the relevancy of the testimony, yet the defense below only challenged the relevancy of a few specific facts. These were: an objection to the videotape made by the appellant while in Ohio (T. 1122) ; an objection to Christopher's testimony that the appellant claimed to be a warlock, and told his children that he brought them into this world, so he could take them out (challenged as remote) (T. 1263-65, 1271, 1277); an objection to Michelle's testimony that the appellant took all the boys into the bathroom in Ohio to see who had the biggest penis (T. 1379); an objection to Steven Zurbey's testimony about negotiations during the standoff in Ohio in November, 1992 (T. 1418); and an objection to Sherry's testimony on cross examination that the appellant had her come to Florida in order to avoid a blood test on

her son (T. 1670-71), which Pixie had already testified to earlier (T. 1051).

Thus, although the appellant's brief challenges the general relevancy of all of the collateral evidence, that argument was only preserved for appeal with regard to a few specific instances. Therefore, the general relevancy argument is not subject to review in this appeal. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Clearly, the relevancy objections that were made below were properly overruled, as will be shown.

The record shows that the basis of the objection to this evidence below was that exclusion was required under Section 90.403, Florida Statutes, an argument that is not asserted in the appellant's brief until ten pages into this issue. The first objection during trial came when Pixie was testifying about growing up in the Sexton household. After Pixie stated and that the appellant would beat the children that questioned his decisions or did not do as he said, defense counsel approached the bench and said 'This is where I would suggest the inflammatory nature outweighs any probative value it may have" (T. 1034-35) The jury was excused and counsel continued "I'm suggesting at this point that all of the cases cited within my memo of law previously provided to the court are applicable and that the bottom line is

the inflammatory nature and the prejudice to my client is far far outweighed by [sic] any probative value this type of evidence may have" (T. 1036). Penalty phase defense counsel added that, even if it had probative value in guilt phase, the prejudicial impact would be great in any penalty phase as the evidence would constitute nonstatutory aggravation (T. 1036-37). No relevancy objection was offered.

Thus, the proper argument before this Court is the appellant's contention that the collateral evidence in this case was subject to exclusion under Section 90.403, Florida Statutes, because its probative value was allegedly outweighed by the danger of unfair prejudice. Even this argument is not preserved as to much of the evidence now challenged. The standing objection granted during Pixie's testimony related only to 'any evidence of sexual abuse between Mr. Sexton and any of his children" (T. 1042). There was never any objection to any of the testimony relating to the death of Pixie's baby, Skipper (T. 1053-56). The only objection to Christopher's testimony was the remoteness objection noted above relating to the appellant's statements, as well as the objection to the Hesser conspiracy, which was sustained (T. 1267-1314). There was no objection at all to Mathew's testimony (T. 1321-59). Nearly all of Judy Genetin's testimony was admitted without objection (T.

1363-72). There was no objection as Michelle testified about discipline in the home and being put in a closet with roach spray (T. 1373-78). Defense counsel was clearly on notice that he needed to made objections under Section 90.403 as he believed necessary (T. 1379, 1441, 2207-08). To the extent that objections were made, the court below carefully examined the testimony at issue, considered the probative value as well as the prejudicial effect, entertained extensive argument by the parties, and ultimately ruled that, for the most part, the collateral evidence was admissible.[2] This ruling was within the sound discretion of the trial judge, and no abuse of that discretion has been demonstrated.

The victim in this case was killed in order to protect the appellant, a fugitive, and to preserve the secrecy of his life on the run. According to the appellant, Joel had to be killed because he knew too much (T. 1030, 1031, 1069, 1605). The appellant was hiding from Ohio authorities, and the jury was entitled to know the steps the appellant had taken to flee with his family and why he was on the run in the first place. The victim's 'knowledge" that

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[2]The court did exclude evidence relating to the appellant's involvement in a conspiracy to kill a disabled camper, Raymond Hesser, with the intent of assuming Hesser's identity in order to continue the family's flight from the law (T. 1294-99).

ultimately led to his demise was highly probative, even if it reflected poorly on the appellant.

In Heiney v. State, 447 So. 2d 210 (Fla.), cert. denied, 469 U.S. 920 (1984), this Court was faced with a similar situation. Heiney had fled to Florida after killing his roommate in an argument in Texas. He later robbed and killed an individual who had given him a ride. In rejecting Heiney's contention that evidence of the shooting in Texas should not have been admitted, this Court held that the evidence was properly admitted to show Heiney's motive for the subsequent crime and to provide the entire context of the crimes charged. 447 so. 2d at 214.

The appellant's motive in this case was clearly a material fact in issue, particularly given the defense theory that Pixie was the one to convince Willie to kill Joel, and the strong defense argument, in support of that theory, that Pixie shared a motive at least as compelling as the appellant's to have Joel dead. The appellant's motive was to silence Joel, and to insure that Joel's knowledge remained unknown to the rest of the world. Joel knew that the appellant was running from authorities in Ohio; he knew that his baby son, Skipper, had been killed; he knew that the appellant had fathered Pixie's other two children. All of these events were critical to explain why the appellant wanted Willie to

kill Joel. All of them were not only relevant, but sufficiently probative to outweigh any danger of unfair prejudice.

In Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 508 U.S. 924 (1993), this Court sorted through a complex web of players and events, concluding that two counts of murder, solicitation to commit murder, conspiracy, and attempted murder were properly joined in a single trial. Fotopoulos had convinced his girlfriend to kill a man that had been blackmailing Fotopoulos about illegal counterfeiting activities. Fotopoulos videotaped the murder and later used the tape as leverage to insure the girlfriend would kill Fotopoulos' wife in order to collect insurance proceeds. The girlfriend hired someone at Fotopoulos' direction, and when the hired killer came to Fotopoulos' home and shot the wife, Fotopoulos shot the killer to make it appear that both shootings were part of a burglary. In upholding the denial of severance for these offenses, this Court noted that at separate trials, 'evidence of each offense would have been admissible at the trial of the other to show common scheme and motive, as well as the entire context out of which the criminal action occurred." 608 so. 2d at 790.

As in Fotopoulos, the murder herein involved a defendant manipulating a loved one to kill in order to solely benefit the defendant. The murder of Joel Good was an act of violence

perpetrated by one family member upon another. To be properly understood, the act must be viewed in the context within which it occurred. The death of Skipper Good and the extraordinary family dynamics involved were integral parts of this murder, and were properly admitted in the appellant's trial.

A description of the relationships between the appellant and his children explains how the appellant could convince and direct Willie to kill Joel. Evidence of the domination and control of the family by the appellant explains and sheds light on Willie's involvement in the murder. The appellant controlled and directed every facet of each child's life, from the mundane to the profound. To present an orderly, intelligent case, the state needed to accurately depict the true nature of the family relationships. Absent such evidence, the jury would be left wondering why Willie would kill for his father, why other adult offspring would acquiesce in their father's plan and why they shared in their father's desire to avoid arrest and the dissolution of the family.

The fact that the collateral crimes occurred in a different state and prior to the killing of Joel Good does not make this evidence inadmissible. "Res gestae" refers to facts which are necessary to put the principle crime in context, and to adequately describe the nature of the deed. Evidence admitted as res gestae

is not limited to that which occurs in the same general time and place as the charged crime. See, Heiney; Bryan.

Because all of this testimony was highly probative, its admission was not precluded by the danger of unfair prejudice. This Court has repeatedly approved the admission of highly prejudicial evidence, such as the defendant's commission of other murders, when sufficient probative value has been shown. See, Fotopoulos; Heiney; Henry v. State, 649 So. 2d 1361, 1365 (Fla. 1994), cert. denied, ___ U.S. , 116 S. Ct. 101, 133 L. Ed. 2d 55 (1995); Henry v. State, 649 So. 2d 1366, 1368 (Fla. 1994), cert. denied, ___ U.S. ___, 115 s. ct. 2591, 132 L. Ed. 2d 839 (1995); Wuornos v. State, 644 So. 2d 1000, 1007 (Fla. 1994) (finding relevance of six similar murders that were committed by Wuornos "clearly outweighs prejudice" of their admission), cert. denied, U.S. , 115 s. ct. 1705, 131 L. Ed. 2d 566 (1995); Buenoano v. State, 527 So. 194 (Fla. 1988); Smith v. State, 365 So. 2d 704 (Fla. 1978), cert. denied, 444 U.S. 885 (1979).

The appellant's reliance on Henry v. State, 574 So. 2d 73 (Fla. 1991), is misplaced. In Henry, this Court reversed Henry's conviction for murder of his common law wife, due to evidence admitted in his trial relating to the fact that after killing his wife, Henry kidnaped her five year old son and murdered him as

well. The reason that the evidence of the son's murder was *unfairly* prejudicial is that the state admitted many unnecessary details about the son's death, including photographs taken at the son's autopsy. In the instant case, no such unnecessary details were admitted. For example, although Pixie testified that she had told Joel that the appellant was the father of her daughters, she does not otherwise describe the sexual abuse - either the nature or the frequency of the acts committed upon her. The collateral evidence included only those facts necessary to explain the family relationships and to place Joel's death in the context in which it occurred.

Furthermore, the record does not support the appellant's assertion that this evidence became a feature of the trial. The state strongly takes issue with the appellant's description as to both the quality and quantity of this evidence. Some of the appellant's facts are inaccurate. For example, the appellant's brief indicates that the appellant fathered two children by Sherry; and fathered four of his own grandchildren altogether (Appellant's Initial Brief, pp. 54, 64). In fact, the record seems clear that Sherry only had one child; there is no indication that the appellant had more than three grandchildren altogether (T. 1001, 1051, 1671). The appellant's unfortunately sparing use of record

cites makes verification of his facts difficult. Another discrepancy is the appellant's reference to "Lawyers and police officers" that testified about law violations in Ohio (Appellant's Initial Brief, p. 65). In fact, only one lawyer and one officer so testified[3] (T. 1363, 1416). The testimony of these two witnesses takes up about 17 total pages of transcript; this is less than the state's first witness, Yale Hubbard, a "strictly chain of custody" witness according to the appellant (T. 961-985, 1363-72, 1416-24).

The appellant's brief characterizes Hubbard and three other witnesses as called for 'chain of custody" purposes, and notes a fifth did nothing more than perform the autopsy on Joel (Appellant's Initial Brief, p. 68). These witnesses were not as incidental as suggested. Yale Hubbard described the camping area where the family was staying, and noted the unusual manner in which the camper was parked so that the license tag could not be seen (T.

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[3]Although two police officers from Ohio were called as witnesses by the state, one of these witnesses, Det. Stephen Raady, did not become involved with the Sexton family until December, 1992, after they had already fled from Ohio. Raady did not testify about any particular law violations in Ohio other than noting that warrants had been issued for the appellant's arrest in October, 1993, based on his removing children from the state that had been in the temporary custody of DHS (T. 1427-28). Raady's testimony primarily concerned how law enforcement became aware of the homicides after the appellant and Mrs. Sexton has been arrested (T. 1429-32).

968-69). Baker testified about the difficulties in finding Joel's gravesite, and played a videotape depicting the camper and the area where the body was finally discovered (T. 1436-37, 1444-45). Dr. Herrman's description of the body and the cause and manner of death included the admission of photographs of the deceased, who still had a rope with sections of tree branches attached fully encircling his neck (T. 1460, 1461, 1463). The appellant suggests that none of testimony relating strictly to Joel's death was particularly gruesome, yet defense counsel objected to the crime scene videotape and to some of the photographs as inflammatory (T. 1441, 1460, 1463). The appellant fails to discuss Gail Novack as a witness, the librarian that overheard the appellant tell Willie prophetically that the only way Joel would make it back to Ohio was in a body locker (T. 1516).

The appellant ascribes specific numbers of transcript pages for witnesses as direct or collateral, and concludes that testimony relating to collateral matters "consumed over one half of the trial" (Appellant's Initial Brief, p. 69). The state disputes the accuracy of this conclusion and challenges the appellant to support it with specific record cites. Although the appellant asserts that the testimony of Charles Sexton "was roughly equal in terms of evidence of the murder and of the collateral crimes," a review of

Charles' testimony reveals less than one page relating to collateral crimes - that being the testimony that the appellant made all of the decisions in the family, and if anyone stepped out of line, they would get their ass beat, as Charles had seen happen to Willie (T. 1610). The appellant claims that 47 pages of Pixie's testimony was collateral in nature, but the state finds less than 30 such pages (T. 1043-60, 1067-74, plus some of 1208-11 and 1254-56); the appellant characterizes 31 pages of Christopher's testimony as collateral, but only about 15 pages referred to prior bad acts by the appellant (T. 1267-72, 1280-90). Apparently, the appellant has included as pages of collateral matters all of the testimony that was elicited by the defense about prior bad acts committed by *Pixie.* Such can hardly be considered to support his argument that evidence relating to *his* prior bad acts became a feature of the trial.

The state would offer the following summaries of the evidence presented: 282 pages of transcript relating to Joel's death; 108 pages relating to collateral crimes committed by the appellant; 85 pages relating to the nature of the relationship between Pixie and Joel, and prior bad acts committed by Pixie and other siblings; and 48 pages transcribing the videotape created by the appellant, in

which he denies having committed any prior bad acts with regard to his family.

In terms of witnesses, it is true that three of the state's fourteen witnesses only testified about collateral matters (Judy Genetin, attorney for DHS in Ohio, T. 1363-1372; Michelle Sexton Croto, the appellant's daughter, T. 1373-1404; and Steven Zurbey, Jackson Township [Ohio] Police Captain, T. 1416-1424). None of these witnesses were cumulative; they all had independent, relevant information to present. Michelle discussed her initial report to her school guidance counselor, stating that she thought she was pregnant and the appellant was the father (T. 1385). It **was** this report that led to DHS becoming involved with the family, and ultimately led to the appellant's flight from Ohio authorities (T. 1386). Judy Genetin discussed DHS' involvement with the family, and the judicial action taken as a result of Michelle's report, culminating in the appellant's standoff with Ohio authorities (T. 1366-72). Captain Zurbey discussed his involvement with negotiations with the appellant during the standoff, including the appellant's statements that he would kill anyone that tried to take his kids, and described the fortification of the appellant's home as found after the standoff (T. 1418-23). While some of this testimony may have overlapped on some details, all of these

witnesses were necessary to describe the events in Ohio leading up to the appellant's run from the law and ultimately the murder of Joel Good.

The appellant also claims that this testimony should not have been admitted because it may have unfairly prejudiced him in the penalty phase of his trial. This Court has recognized that the potential for penalty phase prejudice is not a ground for exclusion of otherwise admissible guilt phase evidence. Randolph v. State, 463 So. 2d 186, 189 (Fla. 1984), cert. denied, 473 U.S. 907 (1985). No error has been shown in this regard.

A careful review of this evidence demonstrates that the collateral testimony which was most prejudicial - the appellant's having fathered Pixie's two daughters, and his direction to Pixie to "quiet" her baby Skipper - was also the most probative. Joel Good had been very distraught over the death of his child, and this was a primary factor in Good's desire to return to Ohio (T. 1059). It was at this time that Pixie told him that the appellant was the father of her girls (T. 1059, 1067). Good confronted the appellant about the girls, and told the appellant that Good and Pixie were going to return to Ohio (T. 1067-69). The appellant told Good that he was to raise Pixie's daughters as if they were his own, and that they would never make it to Ohio; he would have them killed (T.

1068-70). According to Pixie, it **was** this knowledge in particular that got Good killed (T. 1069).

Due to the clear admissibility of the most prejudicial testimony, to the extent that any of the remaining evidence complained of could be found to have been improper, any possible error must be deemed harmless. The appellant's emotional abuse of his children in claiming to be a warlock, comparing the size of his son's penises, and taking the children to a cemetery to stand in an open grave was not simply admitted for shock value; it was all relevant to show the nature and extent of the appellant's control over his children. Should this Court determine, however, that at some point the probative value was outweighed by the danger of unfair prejudice, it cannot be said that this evidence of emotional abuse improperly affected the jury's verdict in light of the more prejudicial evidence that the appellant was the father of Pixie's two daughters. In terms of assessing the potential harmfulness of any possible error, the evidence must be considered in the context of the other collateral evidence properly presented. With such consideration, the harmlessness of any possible error is demonstrated. See, Bryan, 553 so. 2d at 748 (relevancy of photograph of defendant committing bank robbery with sawed-off shotgun was substantially outweighed by danger of unfair prejudice,

but error was harmless because had no effect on jury verdict); State v. [illegible], 491 So. 2d 1129 (Fla. 1986).

Furthermore, the appellant's argument as to the potential harmfulness of any error focuses solely on Pixie's credibility. The facts offered in support of this argument are again misleading and inaccurate. For example, the appellant asserts that "All of the witnesses, save Pixie" testified that Pixie lured Joel into the woods to be killed and that she abused Joel, that they had a bad marriage (Appellant's Initial Brief, p. 70). In fact, the only state witness that testified that about Pixie luring Joel into the woods was Mathew, who stated that Pixie told him the night of the murder that she had egged Joel into the woods (T. 1344). Of course, Pixie also allegedly told Sherry that she had stabbed Joel, which Sherry testified she later learned was not true (T. 1680). Mathew, Christopher, and Charles were the only state witnesses to testify about Pixie's abuse of Joel, and Mathew stated that Charles was the one that would instigate the abuse and take it to the next level (T. 1351, 1357). Despite some disagreement on the subjective question of the quality of Pixie's marriage[4] and the extent of

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'Pixie herself acknowledged that she and Joel had discussed divorce at one point, after Joel had had a fight with the appellant (T. 1226).

Pixie's participation in Joel's abuse, none of these witnesses created the 'credibility problem" with Pixie that the appellant is so eager to have this Court determine. Pixie's credibility is only seriously in jeopardy if you totally believe Sherry, a defense witness that stated she has always hated Pixie and who was so brainwashed by the appellant that she thought his sexual exploits with her were part of a normal family life.

On these facts, the appellant has failed to establish any abuse of discretion in the trial court's admission of evidence about prior collateral crimes and other bad acts by the appellant. The trial court's conclusion that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice was correct. The evidence was clearly relevant, highly probative, limited in scope,[5] and was not made a feature of the

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[5]A review of the state's response to the motion in limine on this evidence reveals a number of other collateral crimes which were never attempted to be admitted below, such as the appellant's use of fraud to receive disability payments; his nocturnal visits to his daughters' bedrooms where the appellant would comment on the beauty of their bodies and describe precisely the acts he would like to perform on them; visits to the graveyard as a frequent occurrence (testimony at trial only related one such visit); that babysitting cousins had observed two of the boys tied to a bed in a darkened, feces infested room; the appellant's common practice of pointing knives and firearms at his wife and children; the appellant's describing to his family the many men he allegedly killed in Vietnam; his repeated warnings to his wife and children that his friend "Iceman" would

trial. Any possible error in the admission of some of the less prejudicial, less probative testimony would be harmless beyond any reasonable doubt. Therefore, the appellant is not entitled to a new trial.

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kill anyone or anything that the appellant directed him to kill; reports of abuse in the house to DHS going back to 1989; and discussions the appellant had with his older sons to murder Sherry and Pixie, as the appellant was afraid they could not be trusted to be quiet (R. 352-359).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, OR CRUEL.

The appellant next challenges the trial court's finding that the murder of Joel Good was heinous, atrocious or cruel. Curiously enough, a review of the record does not support the suggestion that the court actually found or applied this aggravating factor. In his sentencing order, the judge specifically enumerated three aggravating factors - prior violent felony conviction, committed to avoid arrest, and cold, calculated and premeditated. The finding of CCP states that the murder 'was especially atrocious and cruel," but this language appears to be surplusage, and there is no reason to believe that the judge found or applied HAC as a fourth aggravating factor. In fact, at the penalty phase jury instruction conference, defense counsel withdrew a proposed instruction due to his understanding that the state was not seeking HAC as an aggravator. The prosecutor agreed that HAC was not applicable under the case law (T. 1828). The prosecutor never argued the existence of that factor to the jury or the judge, and the jury was never instructed on HAC as a potential aggravator.

Even if the sentencing order could be read to suggest that the trial judge may have considered this factor, the appellant has failed to demonstrate reversible error. The manner in which Good was killed was identical to the method that the appellant taught his sons to kill law enforcement officers that might attempt to apprehend the appellant. Although the appellant suggests that it may have been Willie that decided to strangle Joel "as opposed to shooting him with the gun in the camper" (Appellant's Brief, p. 75), there was no evidence admitted below that there even was a gun in the camper, and in fact the only suggestion about the existence of any firearm was defense counsel's questioning of Christopher inferring that the only gun had been pawned while the family was living in New Port Richey (T. 1311-12).

This case is clearly distinguishable from Omelus v. State, 584 so. 2d 563 (Fla. 1991), and Williams v. State, 622 So. 2d 456 (Fla.), cert. denied, 510 U.S. 1000 (1993), due to the appellant's domination over his son. There was an abundance of testimony that the appellant was the one in the family that made all the decisions (T. 1034, 1045, 1269, 1322, 1374, 1610) . The appellant not only convinced Willie to kill Joel, he had trained his son to kill in the heinous manner actually employed in Joel's death.

Furthermore, given the existence of three other strong, unchallenged aggravating factors, and the scant mitigation offered below, any possible error in the case must be found harmless. Peterka v. State, 640 So. 2d 59, 71-72 (Fla. 1994) (doubling of avoid arrest/hindering law enforcement and improper finding of pecuniary gain harmless, since three valid aggravators remained), cert. denied, U.S. , 115 S. Ct. 940, 130 L. Ed. 2d 884 (1995). The appellant is clearly not entitled to relief on this issue.

ISSUE III

WHETHER THE APPELLANT'S SENTENCE OF DEATH IS PROPORTIONAL.

The appellant next challenges his death sentence as disproportionate. The appellant claims that Joel Good's murder was not one of the most aggravated and least mitigated murders, and asks this Court to reduce his sentence to life imprisonment. A review of the evidence in this case, however, clearly refutes this argument. Therefore, the appellant is not entitled to relief on this issue.

The appellant's proportionality argument is no more than an expression of his difference of opinion with regard to the trial judge's conclusion that the aggravating factors proven outweighed the mitigation offered below. He does not dispute the existence of any of the aggravating factors except HAC, which it is not at all clear that the court below even found, and he does not identify the existence of any mitigating factors which he believes the court mistakenly overlooked. This Court has noted that it is not proper to reweigh the aggravating and mitigating circumstances under the guise of a proportionality analysis. Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989). Yet that is clearly what the appellant seeks to do in this case, since he merely argues

the weight of the respective factors, and does not attempt to compare this case with factually similarly cases that this Court has previously considered.

The only case cited by the appellant to support his argument that this was not one of the most aggravated and least mitigated murders is DeAngelo v. State, 616 So. 2d 440 (Fla. 1993). DeAngelo is not factually similar either as to the crime or as to the existence of aggravating or mitigating factors. Although DeAngelo involved a killing planned well in advance, the motivation for the murder was not itself an independent aggravating factor. More importantly, there was significant mitigation in DeAngelo beyond that presented in the instant case. The appellant claims that the trial court in this case found 'severe" emotional strain (Appellant's Brief, p. 77). Although the sentencing order acknowledges that the appellant was under emotional strain due to the efforts of Ohio officials to take his children from him, the court below never characterized this mental stress as 'severe." In DeAngelo, expert testimony established the existence of significant mental health mitigation, including treatable psychotic disorders and mental illnesses causing hallucinations, delusional paranoia, and mood disturbances. Other nonstatutory mitigation was also found.

A review of comparable cases supports the imposition of the death sentence herein. Hodges v. State, 595 So. 2d 929 (Fla.), vacated on other grounds, 506 U.S. 803 (1992), involved a murder committed in order to keep the victim from pursuing criminal charges against Hodges for indecent exposure. The aggravating factors of hindering law enforcement and cold, calculated and premeditated are like those found in the instant case, although the appellant herein also had a prior violent felony conviction. In mitigation, the Hodges trial judge found no significant criminal history and that Hodges contributed to society, and was a good employee, husband and father. The instant case was similar, although the court below also noted that the appellant was under some emotional strain and at times acted in a peculiar fashion. This Court specifically rejected a proportionality argument in Hodges; it must do the same herein.

Similarly, in Fotopoulos, 608 So. 2d at 784, a witness elimination murder led to imposition of a death sentence that was affirmed by this Court. In Fotopoulos, victim Kevin Ramsey was murdered by Fotopoulos' girlfriend. The girlfriend was directed by Fotopoulos to commit the murder because the victim planned to blackmail Fotopoulos. The same three aggravating factors found in the instant case applied to Ramsey's murder, and nonstatutory

mitigation included Fotopoulos being a good, hard-working son from a good family and having a master's degree.

Larzelere v. State, 676 So. 2d 394 (Fla. 1996), similarly supports a finding that the instant death sentence is proportional. Larzelere was convicted of hiring a gunman to shoot her husband in order to collect his life insurance benefits. The trial court found two aggravating factors, cold, calculated and premeditated and murder for pecuniary gain, and found in mitigation that Larzelere had the ability to adjust and conform to imprisonment and that Larzelere was not the shooter. Although the motivations for the murders in Larzelere and the instant case were different, both cases involved enticing another individual to carry out a calculated plan for executing someone that stood in the way of something the defendants wanted - in Larzelere's case, money, and in the instant case, the appellant's freedom. See also, Peterka, 640 So. 2d at 59 (murder committed to conceal Peterka's identity because he was wanted in another state).

The appellant also argues, as part of this issue, that "intra-case proportionality" - regarding the respective punishments received by the parties - requires a reduction of his sentence to one of life. However, although the appellant focuses much of his argument on trying to make Pixie sound culpable for Joel's murder,

speculation as to Pixie's alleged role in the homicide was never argued to the court below for consideration as mitigation or for proportionality purposes. Thus, his assertion that the trial court "failed to consider" Pixie's role (Appellant's Initial Brief, p. 78) is unwarranted. Since he did not request the trial judge to evaluate his sentence in light of Pixie's plea agreement, this argument has not been developed with sufficient facts and findings to permit appellate review. Cf., Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990) (defense must identify mitigation for trial court's consideration), cert. denied, 510 U.S. 845 (1993).

Furthermore, the fact that Pixie was never charged in Joel's death precludes a reduction of the appellant's sentence on proportionality grounds with respect to Pixie. In Melendez v. State, 612 So. 2d 1366 (Fla. 1992), cert. denied, 510 U.S. 934 (1993), this Court declined to compare Melendez's sentence with that of an alleged accomplice who had never been charged in the crime:

> Proportionality is used to compare a death sentence to other cases approving or disapproving a sentence of death. Arguments relating to proportionality and disparate treatment are not appropriate here where the prosecutor has not charged the alleged accomplice with a capital offense.

612 So. 2d at 1368-69. This is consistent with the recognition that "[p]rosecutorial discretion in plea bargaining with accomplices is not unconstitutionally impermissible and does not violate the principle of proportionality." Garcia v. State, 492 so. 2d 360, 368 (Fla.), cert. denied, 479 U.S. 1022 (1986); see, Diaz v. State, 513 So. 2d 1045, 1049 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988); Palmes v. Wainwrisht, 460 So. 2d 362 (Fla. 1984).

Every case cited in the appellant's brief to support his statement that this Court has "reversed death sentences where an equally culpable codefendant received lesser punishment," involves a jury override. See, Slater v. State, 316 So. 2d 539 (Fla. 1975); Pentecost v. State, 545 So. 2d 861 (Fla. 1989); Spivey v. State, 529 so. 2d 1088 (Fla. 1988); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Caillier v. State, 523 So. 2d 158 (Fla. 1988); DuBoise v. State, 520 So. 2d 260 (Fla. 1988); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Malloy v. State, 382 So. 2d 1190 (Fla. 1979). This is an important distinction since the focus in those cases was on whether evidence implicating a codefendent with a lesser sentence could have provided a reasonable basis for the life recommendations. Similar arguments to those made in the above cases have been rejected where the jury has recommended death.

Compare, Hoffman, 474 so. 2d 1178 (Fla. 1985), and Brookings.

Even when the jury has recommended a life sentence, this Court has upheld death sentences where codefendants received lesser sentences. Thompson v. State, 553 So. 2d 153 (Fla. 1989), cert. denied, 495 U.S. 940 (1990); Eutzy v. State, 458 So. 2d 755 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). In Thompson, this Court reaffirmed the comment in Eutzy that every time this Court has upheld the reasonableness of a jury life recommendation possibly based, to some degree, on the treatment of a codefendant or accomplice, the jury "had before it, in either the guilt or the sentencing phase, direct evidence of the accomplice's equal culpability for the murder itself." 553 So. 2d at 158; 458 So. 2d at 759. Clearly, no such evidence is present in the instant case.

The appellant's argument as to this claim is not one of evidence, but one of speculation. The fact that the actual killer, Willie, "may" never even face trial due to his incompetency does not establish error in the sentence herein. If a triggerman/codefendant were killed during the course of a robbery, would a non-triggerman otherwise eligible for the death penalty escape the ultimate penalty simply because his dead codefendant would never be brought to trial? What if other codefendants are

simply never captured? Willie's incompetence at the time of the appellant's sentencing was argued to and considered by the judge and jury, but it is not mitigating in nature, and certainly not in the same sense as having a codefendant upon whom a jury has recommended or a judge has imposed a life sentence.

Even if you assume that Willie is never subjected to the death penalty, reduction of the appellant's sentence is not warranted. Recognition of Willie as the "actual killer" is not dispositive on the question of assessing relative culpability. This Court has repeatedly upheld death sentences on defendants that did not actually kill, even when the actual killer was not sentenced to death. Ferrell v. State, 653 So. 2d 367 (Fla. 1995); Heath v. denied 648 So. 2d 660 (Fla. 1994), cert. , ___ U.S. , 115 S. Ct. 2618, 132 L. Ed. 2d 860 (1995); Craig v. State, 510 So. 2d 857 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Smith, 365 So. 2d at 704. The instant record is replete with evidence that Willie killed Joel because he was under the appellant's extreme domination, and the appellant directed him to kill Good. See, T. 1002 (the appellant and Willie went for a walk alone shortly before Willie killed Joel); T. 1010-13, 1603-04, 1623 (the appellant came back into the woods and found Willie strangling Joel, and told Willie to "finish him off" after seeing Joel's leg move); T. 1017

(the appellant told his wife that he had Willie kill Joel); T. 1018, 1029-31 (the appellant discussed needing to kill Joel in front of Willie); T. 1044, 1270 (Willie was beaten any time he failed to do as the appellant directed); T. 1046, 1049, 1285-86 (the appellant taught Willie how to kill by using rope with wood handles to strangle someone); T. 1209, 1270 (Willie never refused to do anything the appellant asked); T. 1334 (the appellant told Mathew not to tell anyone about Joel's death, or the appellant and Willie could get the electric chair) T. 1610 (the appellant had asked Charles to kill Joel a few days before Willie killed Joel).

And even if Pixie's alleged participation is considered, no inequity has been demonstrated. The facts recited in the appellant's brief on this point are misleading and argumentative. For example, the appellant asserts that "Each member of the family who testified stated unequivocally that Pixie hated Joel, that she tortured him, and that the marriage was awful" (Appellant's Initial Brief, p. 80). The words "hate," 'torture" and "awful" were never used by the witnesses; and none of the witnesses came across as "unequivocal." Michelle Sexton was a member of the family that was never asked about Pixie and Joel's relationship (T. 1373-1404). When Christopher was asked how Pixie and Joel got along, he stated "Not too good" (T. 1304). He stated that the appellant and Joel

did not get along too good, either (T. 1306). He did say that he had seen Pixie beat Joel, and burn him one time with a cigarette (T. 1305-06). This is consistent with Mathew's testimony that, while in New Port Richey, he witnessed instances of abuse to Joel (T. 1345-46). Mathew described the relationship between Pixie and Joel as 'good sometimes, but most of the time it wasn't no good" (T. 1345). Mathew indicated that the older Sexton children used a lot of drugs while in New Port Richey and were high when they abused Joel (T. 1330-31, 1354-55). He stated that all of the abuse on Joel was started by Charles, and that Charles was always the one that took Joel's beatings to the next level (T. 1351, 1357). He also described several times when Pixie was protective of Joel, and tried to stop the other kids from abusing him (T. 1352, 1357-58). Certainly the fact that Pixie sometimes joined in her siblings' abuse of Joel does not establish that she was equally culpable of this murder.

The appellant also suggests that Pixie's alleged statement to Sherry admitting she had sliced Joel's wrist was confirmed by the ax wound to Joel's hand, but even Sherry testified that Pixie's statement had ultimately been proven untrue (T. 1680). The appellant's brief states, without providing a cite to the record, that "Several witnesses testified that Willie and Pixie had a

sexual relationship which continued in Florida during their stay at the campground" (Appellant's Initial Brief, p. 81). In fact, the only testimony of this sort was Charles Sexton's statement that he had seen Pixie and Willie having sex once, and Pixie **was not** resisting (T. 1623). No time frame was offered with this testimony. Sherry also testified for the defense that she had seen Pixie **and** Willie have sex in the camper, in New Port Richey, and in Ohio, but Sherry's own testimony is highly contradictory with other witnesses and even with itself on many points (T. 1662). Sherry's allegation that Pixie and Willie had sex a lot cannot compel a conclusion that Pixie was equally culpable in Joel's death.

Even though Pixie was present at the scene of the murder and did not come to Joel's aid, this does not establish criminal liability for his death. Pixie was not the only eyewitness; Charles had followed the appellant into the woods and saw and heard the appellant direct Willie to "finish him off" after seeing Joel's leg move (T. 1603, 1623). The appellant asked Charles to kill Joel a few days before the murder, but Charles declined (T. 1610). The appellant told Mathew following the murder not to discuss it or the appellant and Willie would get the electric chair; Pixie **was** not implicated at all (T. 1334).

The defense theory at trial to blame Pixie focused on the suggestion that Pixie shared the same motive as the appellant, to avoid prosecution. However, the evidence below suggests only that Pixie believed her baby had died of crib death. Her testimony as to this is independently corroborated by Gail Novack's testimony about Pixie wanting information on crib death when she, Willie and Joel visited the library (T. 1508, 1531). Since Pixie did not believe she was responsible for baby Skipper's death, she would have no reason to believe she had to have Joel killed to protect herself. Pixie was not a fugitive running from the FBI; the fact that she may have, at times, expressed a desire not to be married to Joel does not show a motive comparable to the appellant's.

The appellant's motive to avoid prosecution, on the other hand, is firmly established by the evidence. The appellant acknowledged on his videotape that he had violated the law, and would continue to do so in order to protect his family (T. 1198-99, 1201). Mathew testified that while in Indiana for about a month, the appellant only permitted him to leave the trailer once, and Willie, Pixie and Joel did not leave the trailer at all (T. 1327). In Indiana and Oklahoma, he told his family that he was wanted by the FBI for fleeing Ohio, and they needed to prepare for a standoff (T. 1045, 1284). He trained his sons on how to kill law

enforcement officers, in case the FBI came in force, armed (T. 1046, 1284-87, 1328). Throughout the stay in Florida, he talked of the FBI and his standoff plans every week (T. 1052-53, 1289). While on the run, he would sit outside with a shotgun, waiting for the FBI (T. 1289, 1329-30). He discussed a plan with his family in case the FBI came and surrounded the trailer, where the appellant would drive straight through, and family members were assigned positions within the trailer from which to shoot the officers (T. 1287). When Joel told the appellant that he and Pixie wanted to return to Ohio, the appellant told Joel that they wouldn't make it, and if anyone tried to turn him in he would have them killed (T. 1068-69).

On these facts, the appellant's sentence is clearly proportional. The imposition of the death penalty is consistent with factually similar cases. Speculation about Pixie's involvement in Joel's murder, alleged as possible mitigation for the first time in this appeal, and speculation that Willie may never receive a death sentence for his participation, for reasons beyond the control of the state, do not establish that the appellant's sentence must be reduced. Since the evidence clearly demonstrates that the appellant was the dominant force behind this

homicide, his sentence is warranted even if it is the only sentence imposed on anyone as a result of Joel's murder.

ISSUE IV

WHETHER THE DEATH PENALTY STATUTE IS CONSTITUTIONAL.

The appellant's final challenge attacks the constitutionality of Florida's death penalty statute. Specifically, the appellant claims that the statute violates the Constitution by permitting a death recommendation to be returned by a bare majority vote. As the appellant recognizes, this Court has previously rejected this argument. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990), cert. denied, 510 U.S. 836 (1993); Brown v. State, 565 So. 2d 304, 308 (Fla.), cert. denied, 498 U.S. 992 (1990). Nevertheless, the appellant asserts that the issue must be reconsidered in light of case law which deems a sentencing jury to be a co-sentencer, with a role in the sentencing process which 'is not merely advisory."

There is nothing found in Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), or its progeny, which suggests that a valid jury recommendation can only be returned by more than a bare majority. In fact, this Court has consistently continued to reject this contention in cases decided after Espinosa. See, Larzelere, 676 So. 2d at 407, n. 7; Hunter v. State, 660 So. 2d 244, 252-253 (Fla. 1995); Thompson v. State, 648 so. 2d 692 (Fla. 1994), cert. denied, ___ U.S. ___, 115 s. ct.

2283, 132 L. Ed. 2d 286 (1995). Therefore, this Court must reject the appellant's constitutional challenge to the procedure allowing a bare majority of the jury to return a sentencing recommendation.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial 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. mail to Andrea Norgard, Assistant Public Defender, Polk County Courthouse, P. 0. Box 9000--Drawer PD, Bartow, Florida, 33831, this 11th day of December, 1996.

C Dittmar

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