IN THE SUPREME COURT OF FLORIDA

MARTIN PUCCIO,

Appellant,

vs.

Case No. 86,242

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SARA D, BAGGETT
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0857238
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(407) 688-7759

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

CONSTITUTIONS AND STATUTES PAGES

IN THE SUPREME COURT OF FLORIDA

MARTIN PUCCIO,

Appellant,

vs. Case No. 86,242

STATE OF FLORIDA,

Appellee.
_____/

PRELIMINARY STATEMENT

Appellant, MARTIN PUCCIO, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Given its page limitations in responding to Appellant's twenty-issue brief, the State will rely on Appellant's statement of the case and facts and its facts as related in each argument.

SUMMARY OF ARGUMENT

Issue I - Since the codefendants were not sentenced to death at the trial level, their cases should not be compared to Appellant's case when performing a proportionality analysis. Disparate sentences are analyzed as mitigation and weighed against aggravation. See Issue IV.

Issue II - The record supports the trial court's finding that this murder was committed in a "cold" manner and without any "pretense of moral or legal justification." Even did it not, there is no reasonable possibility that the sentence would have been different absent this aggravating factor.

Issue III - The record supports the trial court's finding that this murder was committed in a "heinous, atrocious, or cruel" manner. Even did it not, there is no reasonable possibility that the sentence would have been different absent this aggravating fact

Issue IV - Appellant's sentence of death is not disproportionate to sentences in other cases under similar facts.

Issue V - The trial court did not abuse its discretion in refusing to admit and consider the probation officer's recommendation in Appellant's presentence investigation report of a life sentence. Even if it did, such error was harmless beyond a reasonable doubt.

Issue VI - The trial court gave the newly amended Jackson instruction, which adequately informed the jury that each element of the CCP factor must be found beyond a reasonable doubt. Even if it did not, this murder was committed in a cold, calculated, and

premeditated manner under any definition of the terms. Thus, any error in the instruction would have been harmless beyond a reasonable doubt.

Issue VII – There was no evidence to support an instruction on the "extreme duress or substantial domination" mitigating factor. Defense counsel agreed that the instruction would not apply to any domination by Derek Kaufman, and this instruction does not apply to actions by the victim, Should the instruction have been given, however, there is no reasonable possibility that the recommendation or the ultimate sentence would have been different.

Issue VIII – By asking Dr. Day on direct examination whether he relied on Appellant's discussion of the murder to form his opinions, defense counsel opened the door for the State to question the doctor on cross-examination about the substance of Appellant's comments. If the comments were elicited in error, however, such error was harmless beyond a reasonable doubt.

Issue IX – Any application of the amended statute providing for a sentence of death or life imprisonment without parole, absent a request or consent by Appellant, would have constituted an ex *post facto* violation. Thus, Appellant cannot claim that the trial court should have considered life imprisonment without parole as a sentencing option where he made no request for such consideration.

Issue X – Appellant did not make an unequivocal request to represent himself during the penalty phase. Rather, he wanted defense counsel to present the testimony of a witness against counsel's advice. After Appellant indicated to the trial court

upon questioning that he wanted to present this witness' testimony, the trial court in no way forced counsel to present the witness' testimony, Rather, defense counsel made a tactical decision to present such testimony against his own advice. Under these circumstances, no Faretta inquiry was required. Regardless, while the witness was severely impeached on cross-examination, his testimony was cumulative to that presented by other witnesses. Thus, any harm in presenting his testimony was harmless beyond a reasonable doubt.

Issue XI - When read in its entirety, the trial court's written sentencing order makes clear that the trial court did not presume application of the death penalty upon finding a single aggravating factor. Rather, the trial court performed its function of finding aggravation and mitigation and weighing them accordingly.

Issue XII - The trial court gave the newly amended HAC instruction, which this Court has repeatedly upheld against Appellant's constitutional challenge. Even were it erroneous, this murder was committed in a "heinous, atrocious, or cruel" manner under any definition of the terms.

Issue XIII - This Court has previously held that the penalty phase instructions adequately inform the jury that it can consider mental mitigation even though it does not rise to the level of statutory mitigation. Thus, the trial court was not required to strike the "extreme" and "substantial" modifiers from the statutory mental mitigating factors.

Issue XIV - This Court has previously held that the trial court need not instruct on each individual nonstatutory mitigating factor.

Issue XV - Appellant did not preserve a hearsay objection to Detective Murray's testimony which related statements by Derek Kaufman. Regardless, Kaufman's statements were not admitted for their truth, but rather to show that they were made, in order to corroborate Kenneth Calamusa's testimony. Second, Appellant opened the door to such testimony during his cross-examination of Calamusa by alleging that no one could corroborate Calamusa's testimony when, in fact, Derek Kaufman's statements did. Were Kaufman's statements to Detective Murray admitted in error, however, such error was harmless beyond a reasonable doubt.

Issue XVI - Derek Kaufman's statements to Michael Colletti, implicating Appellant in the plan to obtain a gun to shoot the victim, were admissible under the co-conspirator hearsay exception, Sufficient evidence established the "predicate evidence" that this plot existed and that Kaufman's attempt to obtain a gun from Colletti related to this plot. Even if Kaufman's statements to Colletti were admitted in error, however, such error was harmless beyond a reasonable doubt.

Issue XVII - By failing to seek a curative instruction, defense counsel failed to preserve an objection to a comment by the prosecutor during guilt-phase closing arguments. Regardless, the State's comment was in fair reply to defense counsel's preceding argument and did not constitute a comment on Appellant's post-

arrest silence. The State's immediate explanation to the jury after defense counsel prematurely objected cured any error that may have occurred by the state's incomplete sentence. Even if it did not, any error was harmless beyond a reasonable doubt.

Issue XVIII – Circumstantial evidence sufficiently established the identity of the person as Appellant who called Thomas Lemke. Even if the State did not sufficiently identify the caller, any error in the admission of Mr. Lemke's testimony was harmless beyond a reasonable doubt.

Issue XIX – Defense counsel was given numerous opportunities to object to the trial court's instructions during voir dire on reasonable doubt, but made none. In any event, this Court has evaluated similar comments and found them not improper, much less fundamental error.

Issue XX – Defense counsel either had or could have obtained with due diligence the substance of the information found in a mental health report relating to Heather Swallers that counsel obtained subsequent to Appellant's penalty phase. Regardless, there is no reasonable probability that the information would produce an acquittal on retrial.

ARGUMENT

ISSUE I

WHETHER APPELLANT'S SENTENCE IS DISPROPORTIONATE TO THOSE OF HIS CODEFENDANTS (Restated).

Appellant claims that this murder was "a group effort" and that out of all his codefendants he should not have been "singled Out" for a death sentence. Alternatively, he contends that, "[i]f the culpability of the group is legitimately divisible among the individual members, Derek Kaufman and Donald Semenec are equally, if not more, culpable than Appellant. Yet neither Kaufman nor Semenec received the death penalty." **Brief of Appellant** at 33-34.

Appellant's argument is based solely on the concept of proportionality. He misperceives, however, the function of proportionality review. In Garcia v. State, 492 So. 2d 360, 368 (Fla. 1986), the defendant claimed that his death sentences denied him equal justice where none of his three codefendants were likewise sentenced to death. Two pled guilty and received life sentences, and one was tried and received life sentences. In rejecting Garcia's proportionality claim, this Court stated that Garcia's argument "misapprehend[ed] the nature of proportionality review":

> Such review compares the sentence of death to the cases in which we have approved or disapproved a sentence of death. It not thus far been extended to cases where the death wenaltv was not imwosed at the trial level. Prosecutorial discretion in plea bargaining with accomplices is not unconstitutionally impermissible and does not violate the principle of proportionality. In

> the case of the third accomplice who went to trial and received consecutive life sentences, "an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case."

Id. at 368 (citations omitted; emphasis added) (quoting Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), cert. denied, 428 U.S. 923 (1976)), sentence rev'd on other mounds, 622 So. 2d 1325 (Fla. 1993).

Here, none of Appellant's codefendants were sentenced to death at the trial level. Heather Swallers and Derek Dzvirko had pled guilty to second-degree murder and conspiracy to commit first-degree murder, and had been sentenced to seven years in prison, followed by three years of probation, and to eleven years in prison, followed by five years of probation, respectively. (R 3784-85). Thus, their sentences, which were the result of the State's decision to engage in a plea bargain, are irrelevant to Appellant's proportionality claim. See Garcia, 492 So. 2d at 368 ("Prosecutorial discretion in plea bargaining with accomplices is not unconstitutionally impermissible and does not violate the principle of proportionality."); Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987) (same).

Alice Willis, Donald Semenec, and Lisa Connelly had been convicted by a jury of second-degree murder and conspiracy to commit second-degree murder, and had been sentenced to forty years in prison, followed by forty years of probation, to life in prison, followed by fifteen years of probation, and to life in prison with

a concurrent five years in prison, respectively. (R 3785-86). As to these three codefendants, their sentences are irrelevant to a claim of disproportionate sentencing since they were only convicted of second-degree murder. See Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994) ("Although Steinhorst's death sentence was affirmed before Hughes was convicted, Hughes was only convicted of second-degree murder . . . . Therefore, Hughes' sentence is not relevant to a claim of disparate sentencing."); Garcia, 492 So. 2d at 368 (stating that proportionality review does not apply to cases where death penalty not imposed at trial level); see also Larzelere v. State, 676 So. 2d 394, 407 (Fla. 1996) (finding acquittal of codefendant "irrelevant to this proportionality review because, as a matter of law, he was exonerated of any culpability"), cert. denied, 117 S. Ct. 615 (1997).

Finally, Derek Kaufman had been convicted by a jury of first-degree murder and conspiracy to commit first-degree murder, but the jury had recommended a life sentence. After performing its independent analysis, the trial court sentenced Kaufman to life in prison without the possibility of parole for twenty-five years on the murder charge, and to a consecutive thirty years in prison on the conspiracy charge. (T 3786). As this Court held in Garcia, mercy by the jury in recommending life does not prevent a death sentence for a codefendant. 492 so. 2d at 368. Moreover, proportionality review does not apply to cases where the death penalty was not imposed at the trial level. Id. Thus, Appellant cannot claim that his sentence is disproportionate to that of his

codefendants where some pled to second-degree murder, some were convicted of second-degree murder, and one was sentenced to life in accordance with the jury's recommendation of mercy.[1]

On the other hand, this Court has consistently considered the disparate treatment of codefendants in terms of mitigation when analyzing the proportionality of death sentences. In other words, in performing proportionality analyses in previous cases, this Court has weighed the disparate treatment of codefendants as mitigation against any aggravation. E.g., Colina v. State, 634 So. 2d 1077, 1082 (Fla. 1994) (affirming trial court's rejection of disparate treatment as mitigation where defendant responsible for barrage of lethal blows after codefendant hit victim once and knocked him to ground), cert. denied, 115 S. Ct. 330, 130 L. Ed. 2d 289 (1995); Haves v. State, 581 So. 2d 121, 127 (Fla. 1991) (finding sentence proportionate where codefendant proposed robbing a cabdriver and obtained gun from friend, but Hayes concocted plan, shot driver, and rifled victim's pockets while codefendants wiped fingerprints from cab), cert. denied, 502 U.S. 972 (1992).

---

[1] Appellant cites to Slater v. State, 316 So. 2d 539 (Fla. 1975), and Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), to support his claim that proportionality analysis applies to his codefendants' sentences. In Slater, however, this Court overturned a jury override, finding that the disparate sentences of Slater's codefendants as mitigation constituted a reasonable basis for the jury's life recommendation. 316 So. 2d at 540-42. In Scott, both Scott and his codefendant had originally been sentenced to death, but the codefendant's sentence was later reduced to a life sentence. This Court's later consideration of that reduced sentence is in keeping with Garcia since the codefendant was originally sentenced to death.

However, the trial court in this case rejected as mitigation both the statutory mitigating circumstance that Appellant was an accomplice whose participation was relatively minor, and the nonstatutory mitigating circumstance of the disparate sentences of the codefendants. (R 3778-79, 3783-87). Nowhere in his brief does Appellant challenge the rejection of this mitigation! In his separate proportionality claim raised in Issue IV, he discusses the mitigation found by the trial court and then makes the following conclusory and inconsistent statement: "There is also other mitigation existing in this case which the trial court improperly rejected. As explained in Point I, there was strong evidence that Kaufman and Semenec were equally culpable." **Brief of Appellant** at 56. However, Point I is a challenge to the proportionality of Appellant's sentence; it is not a challenge to the propriety or legality of the trial court's rejection of such evidence as mitigation. And although Appellant challenges the rejection of other nonstatutory mitigation during his proportionality argument in Issue IV, he does not present legal argument or analysis regarding the rejection of the "minor participation" or disparate treatment mitigating factors. To the extent, however, that this Court chooses to overlook this pleading deficiency and, in performing its proportionality analysis, consider the trial court's rejection of the codefendants' sentences as mitigation, the State will rely on its response to Issue IV, infra,

ISSUE II

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "COLD, CALCULATED, AND PREMEDITATED" MURDER AGGRAVATING FACTOR (Restated).

Appellant claims that the record does not support the CCP aggravating factor in this case. **Brief of Appellant** at 36-47. In its written sentencing order, the trial court acknowledged and defined the four elements inherent in this aggravating factor and then made the following findings as they related to those elements:

> The murder of Bobby Kent was planned for at least two days. The evidence at trial revealed that on July 13, 1993, the defendant's girlfriend, Lisa Connelly, telephoned and later met with Eileen Traynor. Connelly told Traynor that Martin Puccio wanted Bobby Kent dead, as Kent had beaten him up. Lisa Connelly further telephoned Alice Willis, the victim's former girlfriend, who was at her home in Palm Bay, Florida. Connelly told Willis that Willis was in danger, as Kent was planning on going to Palm Bay to murder Willis and to smother her baby, unless Willis came back to Broward County to again date Kent.
>
> Shortly after the phone call, Eileen Traynor arrived at Connelly's house. Alice Willis, along with Heather Swallers and Donald Semenec, soon arrived from Palm Bay. Together, they traveled to Derek Kaufman's house attempting to obtain an untraceable firearm with which to shoot Bobby Kent. Later that night, Lisa Connelly and Alice Willis took Bobby Kent to Weston intending to shoot him. However, after shooting the gun, the girls became scared and returned with Bobby Kent to the block where his and Martin Puccio's houses were located. In the presence of Martin Puccio, Lisa Connelly, Heather Swallers and Donald Semenec, Bobby Kent walked away hand in hand to his house with Alice Willis. After Kent and Willis left, Martin

> Puccio told the remaining defendants that Bobby Kent needed to be killed.
>
> On July 14, 1993, the evening of Bobby Kent's murder, the defendants gathered in front of Martin Puccio's house. There, they discussed who would stab Bobby Kent first. They further discussed where the murder would occur, how the murder would occur and what would be done with Bobby Kent's body afterwards. The group also decided to meet at Hollywood Beach afterwards. Martin Puccio, despite the heat of a South Florida night in July, wore a bandanna and trench coat. Underneath the coat, Puccio had strapped a diving knife to his leg. Puccio also brought a metal pipe with him, which he offered to Derek Dzvirko to use. After midnight, on July 15, 1993, the plan to murder Bobby Kent was carried out. It occurred at the place planned and in the manner discussed by the defendants. Bobby Kent's body was disposed of as planned and the group departed and met as arranged at the Hollywood Beach area. There was no evidence presented which showed any pretense of moral or legal justification for this murder.
>
> The events and facts of Bobby Kent's murder proves the four elements which constitute that the homicide was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification, beyond and to the exclusion of any reasonable doubt.

(R 3770-72).

Appellant claims that, while the killing may have been calculated, it was not cold "due to the rape of Willis by Kent and his further threats to kill Willis and the distress of beating Appellant. The group was acting on the emotion caused by these events." **Brief of Appellant** at 39. Appellant also claims there was a pretense of justification for killing Bobby Kent based on Kent's alleged threats to kill Alice Willis if she did not resume

their relationship, and Kent's previous physical abuse of Appellant. In other words, Appellant claims that he killed out of self-defense and defense of another. **Brief of Appellant** at 36-38.

The record does not reveal, however, that Appellant was aware of Kent's attempted rape of Willis or his threat to kill Willis. In the citations to the record provided by Appellant (T 1655, 1705, 1714, 1775), none reflect that Appellant was present during these conversations or otherwise aware of Kent's threat to kill, or attempted rape of, Willis. Although others in the group may have been motivated to kill Kent for these reasons, the record does not reveal that Appellant was so motivated. Unless Appellant can show by evidence in the record that he was aware of the threat and acted because of it, which he has failed to do, he cannot claim a pretense of justification or an emotional basis for the murder.[2]

What the evidence does reflect, and what Appellant alternatively relies upon for a pretense of justification and lack of "coldness," is that he wanted Kent killed because he was tired of Kent physically abusing him. When everyone met at Appellant's house on July 13th, Appellant kept saying that "Bobby needed to be

---

[2] Nor by citation to Geralds v. State, 601 So. 2d 1157 (Fla. 1992), cert. denied, 117 S. Ct. 230, 136 L. Ed. 2d 161 (1993), can he support his claim. In Geralds, the circumstances surrounding the murder were, according to this court, "entirely circumstantial." Id. at 1163. Thus, Geralds' reasonable hypotheses relating to his motivation for killing the victim, which the State could not rebut, established a colorable claim of pretense. Here, the facts surrounding the murder, and Appellant's motivation, as will soon be discussed, are well-detailed in the record. Thus, Appellant's unreasonable and unsupported hypothesis can be rebutted and rejected.

killed" because "[i]t would stop [Kent] from beating him up." (T 1651-52). Lisa Connelly agreed, saying that Kent would not let Appellant have a relationship with his parents. (T 1653). The following night, the group returned to Appellant's house and resumed their discussion about killing Kent. (T 1671-72). Appellant was the first person to broach the subject. (T 1675). Appellant said that 'he wanted Bob Kent dead" because "he was tired of him wrecking his life and he was beating him up all the time." (T 1675).[3]

Even this motivation, however, does not rebut the "cold" nature of this murder, or constitute a pretense of moral or legal justification for it. Here, the record reveals that there was no imminent threat of attack by Kent. No one testified that Kent had threatened to beat or kill Appellant. Although Kent had allegedly beaten Appellant in the past, Appellant remained friends with him and continued to associate with him on a regular basis. Kent was conversing idly with friends when Semenec attacked him from behind without warning or provocation. He presented absolutely no threat to any of the defendants. Thus, absent an immediate or imminent threat of death or great bodily harm, Appellant's decision to kill Kent for past abuses or potential future ones does not constitute a pretense of justification. Cf. Wuornos v. State, 676 So. 2d 972, 974 (Fla. 1996) (finding itself obligated to accept state's theory

[3] Appellant also told Kenneth Calamusa that he killed Kent because "Bobby used to pick on him or something in that manner," (T 2111-12). Appellant told Tommy Strong that he killed Kent because Kent was "an asshole." (T 2149).

as to CCP factor where defendant armed herself in advance and confessed to killing in order to silence witness, and facts rebutted pretense of self-defense), cert. denied, 117 S. Ct. 491, 136 L. Ed. 2d 384 (1997); Wuornos v. State, 644 So. 2d 1000, 1008 (Fla. 1994) (finding no pretense where facts rebutted claim of self-defense), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995); Walls v. State, 641 So, 2d 381, 388-89 (Fla. 1994) (finding no pretense where victim was prostrate and helpless when defendant returned to kill her), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995); Williamson v. State, 511 So. 2d 289, 293 (Fla. 1987) (finding no pretense where no evidence of any threatening acts by victim or plan by victim to attack defendant or codefendant for failing to repay loan), cert. denied, 485 U.S. 929 (1988).

Appellant cites to Banda v. State, 536 So. 2d 221 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989), to support his contrary assertion, but such case is inapplicable. In Banda, the victim, who was known as "Rambo" to his friends, had a reputation for violence and had threatened, in front of several witnesses, to beat Banda up the next time he saw him for failing to repay a $10 loan. Banda told several witnesses that he believed the victim was going to kill him, so he killed the victim in a preemptive strike. 536 so. 2d at 222-223. In striking the CCP aggravating factor, this Court found a colorable claim 'that this murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime." Id. at 225.

Clearly, Banda was faced with an imminent threat of violence from the victim. As noted previously, Appellant was not. Rather, Appellant and his friends simply decided that they no longer wanted Kent in their lives. But instead of distancing themselves from Kent, they decided to kill him. So, without warning or provocation they lured him into a remote location, engaged him in conversation, then attacked him from behind. Before he could register what was happening, several members of the group, including Appellant, descended on him, stabbing and beating him to death. Under such facts, the trial court properly found no pretense of moral or legal justification for this murder.

Similarly, the evidence reveals that Appellant and his codefendants carefully planned this murder for at least two days. After periods of calm and cool reflection, they decided, for whatever reason, that they needed to kill Kent. As this Court has previously stated, "[t]he 'cold' element generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts though perhaps also supported by expert opinion." Walls, 641 So. 2d at 388. Clearly, the facts here do not support Appellant's claim that he committed this murder in a heat of passion. Rather, as in Walls, Appellant's actions against Bobby Kent "fall within the category of a protracted execution-style slaying, which by its very nature is a 'cold' crime." Id. at 388. Thus, the trial court properly found that this murder was "cold" within the meaning of the "cold, calculated, and premeditated" aggravating factor.

Even were the evidence somehow insufficient to support the CCP aggravating factor, Appellant's death sentence should nevertheless be affirmed. There would remain one valid and extremely weighty aggravating factor: HAC. In comparison, the trial court gave little weight to Appellant's lack of a significant criminal history, his age, his history of alcohol and drug abuse, the victim's domination of Appellant, and the unlikelihood that Appellant would endanger others if given a life sentence. It gave very little weight to Appellant's potential for rehabilitation. (R 3772-73, 3779-82, 3787-90). When such unavailing mitigating circumstances are weighed against the extremely weighty HAC factor, and the facts of the case, there is no reasonable possibility that the jury's recommendation or the trial court's ultimate sentence would have been different absent the CCP aggravating factor. Ferrell v. State, 680 So. 2d 390, 391-92 (Fla. 1996) (upholding death sentence where prior second-degree murder weighed against several nonstatutory mitigators given little weight by trial court); Duncan v. State, 619 So. 2d 279, 284 (Fla. 1993) (same), cert. denied, 114 S. Ct. 453, 126 L. Ed. 2d 385 (1994); Slawson v. State, 619 So. 2d 255, 259-60 (Fla. 1993) (upholding death sentence where contemporaneous murders weighed against three statutory mitigators (two relating to mental health) and several nonstatutory mitigators given little weight by trial court), cert. denied, 114 S. Ct. 2765, 129 L. Ed. 2d 879 (1994). Therefore, this Court should affirm Appellant's sentence for the murder of Bobby Kent.

ISSUE III

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR (Restated).

Appellant claims that the record does not support the HAC aggravating factor in this case, **Brief of Appellant** at 47-51. In its written sentencing order, the trial court devoted five pages to its findings regarding this factor. Included in those findings were the following:

> After being lured to the remote area in the Weston subdivision under a ruse, Bobby Kent was distracted from the majority of the group by his former girlfriend, Alice Willis. She walked with him along the canal bank, feigning to rekindle their relationship. As planned, she stopped by the water's edge. Heather Swallers then approached the couple, and began to engage them in conversation. This afforded the attackers the opportunity to stealthily approach the victim. Donald Semenec delivered the first of the many stab wounds inflicted on Bobby Kent. The testimony and evidence proved that Semenec stabbed Bobby Kent in the back of his neck. Bobby Kent, in pain and conscious disbelief, turned to his childhood best friend, the defendant, Martin Puccio, and asked for his help. Puccio answered his friend's pleas by sticking his knife into the victim's abdomen and slicing it open, in a motion similar to that used to gut a fish.
>
> Even after he received these wounds, Bobby Kent attempted to distance himself from his attackers. The defendant, Martin Puccio, and accomplices Donald Semenec and Derek Kaufman pursued him, tackled him to the ground and then inflicted several additional stab wounds. After a period of time, several of the young adults who, during the attack had entered Alice Willis' car, turned on the car and its headlights. The testimony revealed that from the car, they could see the victim lying on his back, surrounded by his three attackers. He was still alive, and they could

hear his breathing. Derek Kaufman then swung the baseball bat into Bobby Kent's head and no further sound was heard by those in the car. Bobby Kent was carried to the water's edge by Derek Kaufman and Derek Dzvirko. Kent was making a wheezing sound and was covered in his blood. The defendant, Martin Puccio, then assisted Derek Kaufman in putting Bobby Kent into the water.

Dr. Selove observed the following injuries to Bobby Kent:

The initial stab wound to the back of the neck.

A stab wound to the chest, that pierced three of the four heart chambers.

Two knife wounds that slit Bobby Kent's throat and windpipe.

A superficial wound to the shoulder.

The slicing wound which opened Bobby Kent's abdomen.

Some defensive wounds on Bobby Kent's arm, finger and shoulder.

Blunt trauma to his head.

Dr. Selove also made the observation that the attack took place within approximately a ten yard area. This was consistent with the blood evidence and testimony of the crime scene detectives.

* * * *

The pain and suffering the victim endured during the duration of the attack has been established not only by the defensive wounds he received, indicating that he was well aware of what was happening, but by the victim's screams and gestures, as well as the blood stains which evidenced his struggle. All of this evidence proves that he did not die instantly. Bobby Kent fought for his life as he contemplated his own death. This murder was the product of multiple stabbings and a

> beating, during which the victim was conscious throughout and aware of what was happening. The murder was extremely wicked and vile and inflicted a high degree of pain and suffering to the victim. The defendant, Martin Puccio, acted with utter indifference to the suffering of the victim. This murder was clearly accompanied by such additional acts so as to set it apart from the norm of Capital felonies. It was indeed a conscienceless, pitiless crime which was unnecessarily torturous to Bobby Kent. Davis v. State, 620 So. 2d 152 (Fla. 1993); Campbell v. State, 571 so. 2d 415 (Fla. 1990); Hansborough v. State, 509 so. 2d 1081 (Fla. 1987); Nibert v. State, **508** So. 2d 1 (Fla. 1987).

(R 3766-69).

Appellant claims that "[t]he group never intended to cause any unnecessary or prolonged suffering," which is evidenced by three rapidly fatal wounds and the "quick and frenzied" nature of the attack. Moreover, he asserts that "there was insufficient evidence of prolonged suffering." **Brief of Appellant** at 48-50. The record reveals, however, that after the stab wound to the neck, which Dr. Selove testified was not fatal (T 1935), Bobby Kent grabbed his neck and sought help from Appellant (1808-09). Appellant then stabbed Kent in the stomach, which was not immediately fatal either, because Kent ran from the group, only to be pursued and tackled to the ground. (T 1808-09, 2109-10, 2148-49). At this point, no one could relate the sequence of injuries. However, Kent's neck was broken, his throat was cut, he was bludgeoned with a baseball bat, and he was stabbed repeatedly in the front and on his back with at least one knife, possibly two. (T 1924-56). Although the medical examiner estimated the time it would take for

certain wounds to render a person unconscious or dead, he could not relate the order of the wounds, so he could not estimate how long Kent remained conscious. However, Kent had at least one defensive wound, and several of the wounds were superficial in nature. (T 1932-38, 1951-52). The broken neck likely paralyzed him so he could not move (T 1955), and he was "gurgling his blood" when Kaufman hit him with the baseball bat (T 1693). Such evidence clearly supports the trial court's finding that Appellant "acted with utter indifference to the suffering of the victim" and that "[t]he murder was extremely wicked and vile and inflicted a high degree of pain and suffering to the victim." (R 3769). Davis v. State, 620 So. 2d 152 (Fla. 1993), cert. denied, 114 S. Ct. 1205, 127 L. Ed. 2d 552 (1994); Campbell v. State, 571 So. 2d 415 (Fla. 1990); Hansborough v. State, 509 So. 2d 1081 (Fla. 1987); Nibert v. State, 508 So. 2d 1 (Fla. 1987).

Even were the evidence somehow insufficient to support the HAC aggravating factor, Appellant's death sentence should nevertheless be affirmed. There would remain one valid and extremely weighty aggravating factor: CCP. In comparison, the trial court gave little weight to Appellant's lack of a significant criminal history, his age, his history of alcohol and drug abuse, the victim's domination of Appellant, and the unlikelihood that Appellant would endanger others if given a life sentence. It gave very little weight to Appellant's potential for rehabilitation. (R 3772-73, 3779-82, 3787-90). When such unavailing mitigating circumstances are weighed against the extremely weighty CCP factor,

and the facts of the case, there is no reasonable possibility that the jury's recommendation or the trial court's ultimate sentence would have been different absent the HAC aggravating factor. Ferrell v. State, 680 So. 2d 390, 391-92 (Fla. 1996) (upholding death sentence where prior second-degree murder weighed against several nonstatutory mitigators given little weight by trial court); Duncan v. State, 619 So. 2d 279, 284 (Fla. 1993) (same); Slawson v. State, 619 So. 2d 255, 259-60 (Fla. 1993) (upholding death sentence where contemporaneous murders weighed against three statutory mitigators (two relating to mental health) and several nonstatutory mitigators given little weight by trial court). Therefore, this Court should affirm Appellant's sentence for the murder of Bobby Kent.

ISSUE IV

WHETHER APPELLANT'S SENTENCE IS DISPROPORTIONATE TO THAT OF OTHER DEFENDANTS UNDER SIMILAR CIRCUMSTANCES (Restated).

Regarding the murder of Bobby Kent, the trial court found the existence of two aggravating factors: CCP and HAC. Although it also found the existence of two statutory mitigators, as well as several nonstatutory mitigating factors, it gave them all "little weight" or "very little weight." Ultimately, it determined that "the mitigating circumstances do not outweigh the aggravating circumstances." (R 3796).

As this Court has repeatedly held, the weighing process is not a numbers game. Rather, when determining whether a death sentence

is appropriate, careful consideration should be given to the totality of the circumstances and the weight of the aggravating and mitigating circumstances. Floyd v. State, 569 So. 2d 1225, 1233 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991). Here, the evidence established that Eileen Traynor was at Lisa Connelly's house on July 13, 1993, (T 1642). Connelly told Traynor that Appellant wanted her to kill Bobby Kent. (T 2296, 2302). Connelly said she needed a gun to shoot Kent, but did not want to use her mother's gun because it could be traced, so Traynor called Derek Kaufman. (T 2276-78, 2297). When Alice Willis, Donald Semenec, and Heather Swallers later arrived at Connelly's house from Palm Bay, they all drove to Kaufman's house to obtain a gun. (T 1641-42, 2283-87). While there, Willis also said that "something needed to be done about Bobby." (T 2299-2300). They discussed killing Kent in a drive-by shooting or taking him out to Weston. (T 2288). Ultimately, Kaufman was not able to supply them with a gun. (T 2287).

When the five returned to Connelly's house, Connelly and Willis took a gun from Connelly's mother's bedroom. (T 1643-46, 1712-13). Willis and Connelly then dropped Swallers, Semenec, and Traynor off at Catherine Della Vedova's house, where they stayed for an hour or so. (T 1647, 1650). Connelly and Willis drove Bobby Kent to the Weston area to shoot him, but could not do it, so they returned to Della Vedova's with Kent, and all but Traynor and Della Vedova left to take Kent home. (T 1650, 1654, 1655, 1714).

When they pulled up in front of Appellant's house. Kent and

Willis walked down the street, and Swallers, Semenec, and Connelly stood out in the street talking to Appellant. Appellant kept saying that "Bobby needed to be killed." (T 1651-52). Appellant and Connelly discussed the need to kill Appellant for five or six minutes. (T 1653).[4] When Willis returned to the group without Kent a few minutes later, Willis and Connelly spoke privately then left with Swallers and Semenec. (T 1654-55). On the way to Connelly's house, Connelly and Willis told Swallers and Semenec that Kent had just raped Willis. (T 1655-56). When they got to Connelly's house, Connelly made a phone call. (T 1656-57). Then they went to sleep. (T 1657).

The next day, Derek Dzvirko came over, and Connelly and Willis were on the phone off and on all day. (T 1658, 1661). Willis told Dzvirko that Kent had tried to rape her, so they had to kill him. (T 1775, 1838). Willis also told Dzvirko that Kent had threatened to kill her and her baby if she did not resume their relationship. (T 1775). That evening, they had a three-way telephone call with Appellant and Kaufman. (T 1779). Later, Connelly, Willis, Swallers, Semenec, and Dzvirko obtained a bat from one of Dzvirko's friends. (T 1662-64, 1785-86). After Connelly and Willis stopped at a pay phone and made a call, they picked up Derek Kaufman and drove to Appellant's house. (T 1664, 1668-69, 1787, 1790).

When they got to Appellant's house, Appellant was dressed in a trench coat, black jeans, a T-shirt, and a bandanna, and carried

[4] Derek Kaufman was not present for this discussion.

a diving knife. (T 1673, 1793). Appellant was the first one to mention killing Kent. (T 1675). "He said that he wanted Kent dead" because he was tired of Kent "wrecking his life" and "beating him up all the time." (T 1675). Kaufman said he would "help him do it." (T 1676). Willis volunteered to stab Kent first, then Connelly volunteered to do it because she did not want Willis to do it, then Semenec volunteered to do it. (T 1676). So the plan became for them to take Kent to Weston under the pretext of racing cars. Semenec would walk behind Swallers and stab Kent, and then they would throw the body in the water. (T 1676, 1681, 1682). Appellant showed them a metal pipe before he put it in the car and said that "he could use it to hit Bob with." (T 1670).

At that point, Kent walked up. (T 1681). Appellant, Connelly, Kaufman and Dzvirko got in Appellant's car. Willis, Kent, Swallers, and Semenec got in Willis' car. Appellant led the way to Weston. (T 1794-95, 1801-02). When they got to Weston, Kent and Willis went for a walk, and the others stood around talking. (T 1684, 1802). Kaufman took the baseball bat out of the car, Semenec took out a knife, and Appellant took out the pipe. (T 1685, 1804). Dzvirko saw Appellant with a knife when Kaufman tried to hand the pipe to him. (T 1883). Kent and Willis returned and walked down to the canal. Swallers walked down there to talk to them. Then Semenec walked up behind Kent as planned and stabbed him in the back of the neck. (T 1686-88, 1806-07). Kent grabbed his neck and said, "Oh, fuck" and called Appellant's name. (T 1689, 1808-09). Appellant then stabbed him in the stomach, and

Kent said, "No, please, I'm sorry" and "Marty, I'm sorry." (T 1690, 1808-09). Kent ran and Kaufman yelled, "Get him; somebody's got to get him." (T 1809). Appellant, Semenec, and Kaufman ran after Kent. (T 1809). When Willis turned the lights on to the car, Dzvirko saw Kent lying on his back. Kaufman was standing over him and Semenec was crouching over Kent. (T 1810). He saw Semenec pull something out of Kent's chest.' (T 1860). Kaufman yelled, "Turn the car off; turn the lights off; we're not done." (T 1810) . Kaufman then swung the bat over his head and Dzvirko heard a crack. (T 1810).

After Kaufman, Dzvirko, and Appellant put Kent's body in the canal, they drove to the beach, where Appellant told them what there alibi was going to be. (T 1702-04). Appellant also told Swallers at the beach that he stabbed Kent in the upper chest or heart. (T 1704). That night, Appellant called Kent's house and when Kent's father answered the phone he pretended to tell Kent to call him in the morning. (T 2007). The next day when Kent's father came over to talk to him, Appellant claimed that Kent went out with a girl from Publix the night before and suggested that "the gang took him away, and they did something to him." (T 2008).

---

[5] According to the medical examiner, there were only two stab wounds to the front torso of Kent's body: one to the abdomen and one to the heart. (T 1933-34). Dzvirko saw Appellant stab Kent, or hit Kent in a stabbing motion, in the abdomen. (T 1808-09, 1858, 1877-79, 1881). Appellant told Kenneth Calamusa and Tommy Strong that he stabbed Kent in the stomach. (T 2109, 2148-49). Appellant also told Swallers the night of the murder that he stabbed Kent in the chest or heart. (T 1704). Thus, if Semenec was pulling something out of Kent's chest, it must have been the knife Appellant had used to stab Kent with.

When Kent's father suggested that they call the police, Appellant suggested that they wait a few days. (T 2009). When Kent's father did call the police, Appellant relied on the alibi he had concocted at the beach and disclaimed any knowledge of Kent's whereabouts. (T 2017-26, 2032-57).

After his arrest, Appellant told Kenneth Calamusa that they lured Kent to a remote area, someone stabbed Kent in the neck, and then he stabbed Kent in the stomach. When Kent ran, they chased him. He was cutting Kent's throat when someone told him not to do it that way, so he plunged the knife into Kent's neck. (T 2107-11). Appellant also bragged to Tommy Strong that he stabbed Kent in the stomach and ripped the knife down. When Kent ran, they "beat him with a bat." (T 2148-51).

To mitigate this senseless murder, Appellant presented evidence to establish that he had no significant history of previous criminal activity. However, the trial court believed that previous arrests for misdemeanor juvenile and adult crimes, evidence of drug use, and the contemporaneous conviction for conspiracy to commit first-degree murder, which preceded the murder, reduced the weight of this mitigating factor. Thus, the trial court gave this factor "little weight." (R 3772-73).

Appellant also sought to mitigate this murder with the fact that he was only 20 years old at the time of the offense. However, the trial court noted that, according to Appellant's mental health expert, Appellant "'show[ed] an average to high average intellectual potential'" and "manipulated others by using his 'All

American Boy Charm.'" It also described the evidence as showing a 'highly planned and coordinated conspiracy," and a "great deal of cunning and leadership" by Appellant. Thus, it gave this mitigator "little weight." (R 3779-82).

Appellant also claimed as mitigation that he had been adversely affected, physically and emotionally, by the use of drugs and/or alcohol during his youth. However, the trial court noted that, according to Appellant's own mental health expert, Appellant had a behavioral problem rather than a drug problem. Appellant was advised upon his release from an in-patient drug treatment facility several years before the murder not to associate with his former friends, but Appellant persisted in associating with Kent and taking drugs. In addition, the trial court noted that there was no evidence that Appellant was an alcoholic, or that Appellant was under the influence of drugs or alcohol at the time of the murder. Thus, given the premeditated and brutal nature of the crime, the trial court gave this mitigating factor "little weight." (R 3787-88).

In addition, Appellant claimed as mitigation that he had a potential for rehabilitation. However, the trial court noted that Appellant's own mental health expert was uncertain in this regard. When asked if Appellant could be subject to rehabilitation, Dr. Day answered, "I would hope so" and "I think it's a possibility, yes." (T 2902). In light of this equivocal testimony and other evidence, the trial court gave this factor "very little weight." (R 3788-89) .

Next, Appellant claimed as mitigation that he suffered from situational stress because the victim dominated his life and he was too embarrassed to seek assistance from anyone, and that the murder was a reaction to the abuse by the victim and his embarrassment at being abused. Without response, the trial court found this mitigator to exist, but gave it "little weight." (R 3789-90).

Finally, Appellant alleged as mitigation that he was unlikely to endanger others while serving a life sentence. However, the trial court noted that Appellant's brother related an incident where Appellant struck another person. In addition, the trial court stated that it did not "have a crystal ball to determine whether this defendant could pose a threat to others in prison." However, "in an abundance of caution," it found this mitigating circumstance to apply, but gave it "little weight." (R 3790).

To bolster his disproportionality argument, Appellant also recounts additional mitigating circumstances that he presented, but that the trial court rejected. To the extent he challenges the trial court's rejection of these circumstances, the State responds as follows. "When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and &ether, in the case of nonstatutory factors, it is truly of a mitigating nature." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) (emphasis added). Moreover, "[t]he decision as to whether a particular mitigating circumstance is established lies with the judge.

Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991), cert. denied, 112 S. Ct. 1500, 117 L. Ed. 2d 639 (1992). See also Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990) ("We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion."), cert. denied, 114 S. Ct. 136 (1991).

The trial court rejected as mitigation that Appellant "is young and is able to work" and had a job delivering pizzas for a year and a half, because even if sentenced to life in prison his opportunities for work would be limited if nonexistent. (R 3791).[6] The trial court did consider and weigh, contrary to Appellant's assertion, Appellant's ability to help others in jail in assessing his potential for rehabilitation. (R 3788-89). It rejected Appellant's claim that his prior treatment and counseling for drug abuse was "inappropriate" because Appellant 'had several opportunities for treatment, and his parents "participated in numerous activities and programs in attempts to alter [Appellant's] behavior." (R 3790-91). It found irrelevant Appellant's claim

[6] The trial court also heard testimony at the allocution hearing that Appellant's uncle helped him obtain a job at Pizza 28, but the owner had to let him go because he was "incorrigible" around his friends. (T 5144-46). Appellant's father also testified that Appellant was fired from numerous jobs because Kent worked with him and they would get in trouble. (T 3162).

that he would never have committed this crime on his own, because the fact was that he carried out his intent to kill Bobby Kent. (R 3791). That this was an isolated incident and out of character for Appellant was argued and assessed in relation to Appellant's future dangerousness. (R 3731, 3790).

To the extent some of this evidence was rejected, the record supports its rejection. To the extent it should have been found in mitigation, there is no reasonable possibility that the outcome would have been different. Given its assessment of Appellant's other evidence in mitigation, there is no reason to believe that the trial court would have given these factors more than little or very little weight. And in connection with the other unavailing mitigation, its rejection was harmless beyond a reasonable doubt. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992).

As noted in Issue I, suara, Appellant stated in a single sentence that the trial court improperly rejected evidence that Derek Kaufman and Donald Semenec were at least equally culpable but received lesser sentences. To the extent this comment, unaccompanied by argument or legal authority, suffices to challenge the trial court's rejection of such mitigating evidence, the State responds as follows. In its written sentencing order, the trial court stated that it purposefully waited to sentence Appellant until all of the other defendants had been tried and sentenced. As a result, it had the benefit of hearing and evaluating the State's

evidence against each defendant, and each defendant's defense. (R 3792).[7] Although its findings of fact were drawn solely from the evidence presented in this trial, it noted that it had had the opportunity, prior to Appellant's sentencing "to reflect upon the relative culpability of each defendant, the various verdicts rendered and, where appropriate, the recommendation of sentence." (R 3792).

In three separate places in its 43-page sentencing order, the trial court discussed the relative culpabilities of the participants and their disparate sentences. (R 3778-79, 3783-87, 3792-96). In one of those discussions, the trial court rejected Appellant's claim in mitigation that he was an accomplice whose participation was relatively minor. (R 3778-79). In another, it rejected Appellant's claim in mitigation that his accomplices were given lesser sentences.* (R 3784-87). Finally, the trial court devoted four and a half pages in a section entitled "Proportionality" to Appellant's culpability and greater sentence. (R 3792-96). Ultimately, it made the following determination:

> The culpability of the defendants charged in the death of Bobby Kent are not equal. Bobby Kent's death was primarily the result of Martin Puccio's actions. Martin Puccio's level of culpability, respective to the other

---

[7] The trial court also made the following comment at the allocution hearing: "Each defendant must be sentenced proportionately to their individual level of culpability and with due consideration to each mitigating circumstance that an individual brings with them to the courtroom." (T 3250).

[8] Again, Appellant has not directly challenged the rejection of this mitigation.

> defendants charged, was substantial. The State has proven beyond and to the exclusion of every reasonable doubt, the actual acts of Martin Puccio in the murder of Bobby Kent. Contrasting the relative culpability of each defendant indicted for the murder of Bobby Kent, Martin Puccio is significantly more culpable. The Court considers that the defendant, Martin Puccio, stabbed Bobby Kent several times, assisted in tackling Bobby Kent when the victim attempted to flee from his execution, and then placed his body into the water of the nearby canal. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

(R 3796).

Contrary to Appellant's assertion, the evidence supports the trial court's conclusion. Appellant conceived the idea to kill Kent and initially convinced Connelly and Willis to shoot him. When that plan failed, the group (minus Kaufman) reconvened over at Appellant's house to discuss alternative plans. When Kent walked up, their conversations ceased that night, but resumed the following day. Over the course of the day, Connelly and Willis enlisted Kaufman and obtained a baseball bat through a friend of Semenec. Once again, they convened at Appellant's house. Appellant was the first to mention killing Kent. Kaufman merely volunteered to "help." Semenec volunteered to stab Kent first. During the next fifteen or twenty minutes, Appellant and Kaufman finalized the plans.

Having lured Kent to a remote area, Semenec began the sequence as planned by stabbing Kent in the neck. When Kent realized what had happened, he turned to Appellant for help, but Appellant stabbed him in the stomach. When Kent ran, Appellant, Kaufman, and

Semenec chased him down. As he had confessed later to Swallers, Appellant stabbed Kent in the heart. As he had confessed to Kenneth Calamusa, he cut Kent's throat. Then he and Kaufman threw his body in the canal. At the beach, Appellant concocted the alibi, which he recited to Kent's father and the police. Appellant also made a phony call to Kent's father that night to make it seem as if Kent had not been with him.

Moreover, of the three who actually attacked Kent, Appellant dealt the fatal blows: the stab wound to the abdomen, the stab wound to the heart, and the horizontal cuts to the throat. (T 1938-40, 1941-51). Kaufman struck only a nonfatal blow to Kent's head with a bat that did not even crack the scull. (T 1952-53). Semenec caused only a superficial cut to the back of the neck. (T 1932, 1935). All of the other wounds were superficial and/or defensive in nature. (T 1932-38). Even if Semenec stabbed Kent more than the one time in the back of the neck, his blows were nonfatal.

This Court has previously stated that "a death sentence is not disproportionate when a less culpable codefendant receives a less severe punishment." Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994), cert. denied, 115 S. Ct. 1118 (1995). Based on the facts in this case, the trial court properly determined that Appellant's culpability for this murder was far greater than that of any other codefendant. Thus, his death sentence is not disproportionate. Cf. Hannon, 638 So. 2d at 44 (finding sentence proportionate where defendant delivered fatal blow to throat after codefendant had

repeatedly stabbed victim); Colina v. State, 634 So. 2d 1077, 1082 (Fla. 1994) (affirming trial court's rejection of disparate treatment as mitigation where defendant responsible for barrage of lethal blows after codefendant hit victim once and knocked him to ground); Haves v. State, 581 So. 2d 121, 127 (Fla. 1991) (finding sentence proportionate where codefendant proposed robbing a cabdriver and obtained gun from friend, but Hayes concocted plan, shot driver, and rifled pockets, while other codefendants wiped fingerprints from cab).

It is also well-established that this Court's function is not to reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991), sentence rev'd on other grounds, 670 So, 2d 920 (Fla. 1996); Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989), sentence rev'd on other urounds, 614 So. 2d 482 (Fla. 1993). Rather, as the basis for proportionality review, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court, and the relative weight accorded them. See State v. Henry, 456 So. 2d 466 (Fla. 1984). It is upon that basis that this Court determines whether the defendant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. state, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 9.23 (1976) .

The two aggravating factors found in this case are supported by competent, substantial evidence and, according to the trial court, are not outweighed by the mitigating evidence presented.

Ultimately, the trial court conscientiously concluded that death was warranted, Contrary to Appellant's assertion, his sentence is not disproportionate to other defendants' sentences for similar murders under similar circumstances, Cf. Bonifay v. State, 680 So. 2d 413 (Fla. 1996) (upholding sentence where defendant was enlisted by cousin to kill former coworker; "felony murder," "pecuniary gain," and CCP found in aggravation, and "no significant history," age (17), and numerous nonstatutory mitigators found in mitigation); Johnson v. State, 660 so. 2d 648 (Fla. 1995) (upholding sentence where defendant choked and stabbed neighbor for $20 when she opened door; finding "prior violent felony," "pecuniary gain," and HAC in aggravation, and fifteen mitigators, including age and 'no significant history"), cert. denied, 116 S. Ct. 1550, 134 L. Ed. 2d 653 (1996); Heath v. State, 648 So. 2d 660 (Fla. 1994) (upholding sentence where defendant and brother left bar with victim to smoke marijuana, but robbed and shot him in remote location; "prior violent felony" and "commission during an armed robbery" found in aggravation, and "extreme mental/emotional disturbance," good character in prison, and disparate treatment found in mitigation), cert. denied, 115 s. ct. 2618 (1995). Therefore, this Court should affirm Appellant's sentence for the murder of Bobby Kent.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ADMIT AND CONSIDER IN MITIGATION THE PROBATION OFFICER'S RECOMMENDATION IN THE PRESENTENCE INVESTIGATION REPORT THAT APPELLANT RECEIVE A LIFE SENTENCE (Restated).

Prior to trial, defense counsel moved to dismiss the indictment because it failed to allege the aggravating factors upon which the State would rely in seeking the death penalty. (R 3382; T 216-17). Defense counsel also sought to have the trial court declare that death was not an appropriate penalty because the probation officer who prepared a pretrial presentence investigation report concluded that life without parole was the appropriate sentence in this case. (T 217-18). Given the statutory scheme for imposing the death penalty, the trial court denied the motions. (T 218-20).

At the beginning of the penalty phase, the trial court cautioned defense counsel not to mention the probation officer's report or recommendation in his opening statement because the officer's opinion regarding the sentence "usurps the jury's function" and is not appropriate. (T 2039-40). During the defense case, however, defense counsel indicated that he wanted to call the probation officer as a witness to relate her investigation of Appellant's criminal history and her opinion as to the appropriate sentence. (T 2934-35). The trial court prohibited any testimony relating to her opinion:

> It is the province of the jury solely to recommend to this Court what sentence to impose. An opinion of anyone else regardless of what analysis is used is not relevant.

> Particularly when that opinion is based on something other than having sat as a trier of fact, listening to the evidence that was presented, as well as being instructed on the law by the Court.
>
> What Ms. White used to make her finding is not relevant. As a matter of fact, the Department of Corrections prohibits probation officers from making a recommendation as to sentence in capital cases for those precise reasons. And Ms. White from my understanding was not authorized to do so and has been reprimanded by the Department of Corrections for making a recommendation. It's not appropriate.
>
> * * * *
>
> So clearly, any analysis, if she did one is irrelevant. It usurps the province of the jury. Furthermore, the sentence that she recommended in making her analysis is a sentence which is nonexistent. She has recommended that Mr. Puccio be imprisoned for life with no chance of parole. That is not one of the possible sentences available to Mr. Puccio in this case.
>
> * * * *
>
> The proffer having been made, if that is the purpose of Ms. White's testimony, she will not be allowed to testify before the jury to this.

(T 2935-36).

In this appeal, Appellant claims that the trial court's preclusion of the probation officer's recommendation as to sentence is a violation of Lockett v. Ohio, 438 U.S. 586 (1978). **Brief of Appellant** at 59-60. This Court rejected a similar claim, however, in Thompson v. State, 619 So. 2d 261, 266 (Fla.), cert. denied, 114 S. Ct. 445, 126 L. Ed. 2d 378 (1993), wherein the trial court refused to allow defense witnesses to express their personal

opinions concerning the appropriateness of the death penalty in Thompson's case. As in Thompson, the probation officer's opinion was irrelevant and properly excluded. Therefore, this claim should be denied.

ISSUE VI

WHETHER THE INSTRUCTION ON THE CCP FACTOR WAS UNCONSTITUTIONAL (Restated).

Prior to trial, Appellant challenged the constitutionality of the CCP aggravating factor, but not its attendant instruction. (R 3388-89). At the hearing on the motion, defense counsel presented the recently-issued opinion in Jackson v. State, 648 So. 2d 85, 89 & n.8 (Fla. 1994), to challenge the instruction as well. The trial court denied the motion as it related to the aggravating factor, but indicated that it would give the instruction provided in Jackson, as opposed to the then-standard instruction. (T 234-38). Prior to the penalty phase, defense counsel proposed an alternative instruction, which was denied. (R 3619; T 2823-25). The trial court gave the Jackson instruction. (T 3072-73).

In this appeal, Appellant renews his challenge to the constitutionality of the CCP instruction. Specifically, he claims that the instruction did not specifically indicate that the State had to prove each element of the instruction beyond a reasonable doubt. **Brief of Appellant** at 61-63. The instruction as given, however, indicated that the jury could consider whether the offense was committed in a cold, calculated and premeditated manner without

any pretense of moral or legal justification. It then defined each of those terms, i.e., "cold," "calculated," 'premeditated," and "pretense." (T 3072-73). Finally, the trial court instructed the jury that "[e]ach aggravating circumstance must be established beyond a reasonable doubt before it can be considered . . . ." (T 3074). By its plain language, the factor has four elements, all of which must be proven before the jury may apply the factor. Contrary to Appellant's assertion, the instruction was not unconstitutionally vague.

Even were it deficient, however, Appellant's sentence should nevertheless be affirmed. Appellant conspired with several other people, at least a day if not days before the murder, to kill Bobby Kent. In furtherance of their plan, they lured their unsuspecting victim to a remote location, they secreted knives, a bat, and a metal pipe in their cars to use on the victim, and they viciously attacked him without provocation or justification. Under these facts, this aggravating factor would apply based on any definition of this factor. Cf. Foster v. State, 654 So. 2d 112, 115 (Fla. 1995), cert. denied, 116 S. Ct. 314, 133 L. Ed. 2d 217 (1996); Hall v. State, 614 So. 2d 473, 478 (Fla. 1993), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1994); Parker v. State, 476 So. 2d 134, 140 (Fla. 1985), cert. denied, 115 S. Ct. 944, 130 L. Ed. 2d 888 (1995). Therefore, any error in the CCP jury instruction was harmless beyond a reasonable doubt.

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON THE "EXTREME DURESS OR SUBSTANTIAL DOMINATION" MITIGATING FACTOR (Restated).

In this appeal, Appellant claims that the trial court abused its discretion in refusing to instruct the jury on the "extreme duress or substantial domination" mitigator. Appellant contends he committed this murder while under the substantial domination of Derek Kaufman.[9] **Brief of Appellant** at 63-65. At the penalty phase charge conference, defense counsel requested this instruction and initially named Derek Kaufman as the dominator. (T 3017). When the trial court commented that Mr. Kaufman's alleged domination began after the murder, defense counsel suggested that Bobby Kent, the victim, was the dominator. (T 3018-19). At that point, the following colloquy occurred:

> THE COURT: Well, Mr. Puccio's testimony at trial was that prior to getting into the vehicles on the evening of Mr. Kent's death that he did not speak to Mr. Kaufman, nor did he speak to Ms. Swallers.
>
> [DEFENSE COUNSEL]: I understand that.
>
> THE COURT: He said he did notice tattoos on Mr. Kaufman's shoulders, knew that it was a gang.
>
> [DEFENSE COUNSEL]: I understand that, too. But I'm giving you the other possible domination.

---

[9] He does not renew his argument made below that he was also under the substantial domination of Bobby Kent, the victim. Thus, he has waived this argument for appeal.

THE COURT: On the trip out to the Weston area he had no conversation with Mr. Kaufman. It is only after Mr. Kent's murder that Mr. Kaufman according to Mr. Puccio says, I'm a gang leader; I am a hit man. If my name is mentioned, you are dead. And that according to Mr. Puccio, Mr. Kaufman made up the alibi that was then presented and placed Mr. Puccio in fear. So that did not occur as to Mr. Kaufman by your own client's testimony prior to Mr. Kent's death.

[DEFENSE COUNSEL]: I would agree with that now that Your Honor's refreshed my memory.

THE COURT: So, therefore, the instruction is not applicable as to Mr. Puccio acting under the substantial domination of Mr. Kaufman.

[DEFENSE COUNSEL]: That would be true.

(T 3019-20) (emphasis added). Given defense counsel's concession during the charge conference that the evidence did not support Derek Kaufman as the dominator, Appellant cannot now claim that Derek Kaufman was, in fact, the dominator. See Tillman v. State, 471 so. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Even if he had not conceded as much, however, there was no evidence to support the instruction. Heather Swallers testified that on the night before the murder, Appellant expressed to her, Donald Semenec, and Lisa Connelly his desire that Bobby Kent be killed. (T 1651-52). According to Swallers' testimony, Kaufman was not there. The following day, Connelly, Willis, Semenec, and Dzvirko obtained a bat because "Derek [Dzvirko] was going to beat up Bobby Kent." (T 1664). It was not until then that they picked

up Derek Kaufman and went to Appellant's. (T 1669). At Appellant's, they started talking about killing Kent. (T 1672). Appellant said he wanted Kent dead because "he was tired of him wrecking his life and he was beating him up all the time." (T 1675). According to Appellant's own testimony, he had no conversations with Kaufman at this time. (T 2399-2400). Once they agreed on a plan, Appellant put a metal rod in his mother's car and they left with Kent. (T 1679-83). Appellant testified that Kaufman said nothing during the drive out to Weston. (T 2408). At the scene, although Appellant denied stabbing Kent, or otherwise participating in the murder, by his own testimony Kaufman did not begin to order him around until after the murder. (T 2410-31). Thus, based on the facts presented, there was insufficient evidence to support an instruction on the "extreme duress or substantial domination" mitigator. See Valdes v. State, 626 So. 2d 1316, 1324 (Fla. 1993), cert. denied, 114 S. Ct. 2724, 129 L. Ed. 2d 849 (1994); Maqueira v. State, 588 So. 2d 221, 224 (Fla. 1991), cert. denied, 112 S. Ct. 1961, 118 L. Ed. 2d 563 (1992); Hill v. State I 515 So. 2d 176, 178 (Fla. 1987), cert. denied, 485 U.S. 993 (1988).

Were this Court to find, however, that the trial court should have instructed the jury on this mitigating factor, this Court should nevertheless affirm Appellant's sentence of death. The facts established two extremely weighty aggravating factors: that Appellant committed the murder in a heinous, atrocious, or cruel manner, and that Appellant committed the murder in a cold, calculated, and premeditated manner without any pretense of moral

or legal justification. Even when coupled with the mitigation the trial court found, there is no reasonable possibility that the recommendation or the trial court's sentence would have been different had the "extreme duress" instruction been given. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Caaehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992). Therefore, this Court should affirm Appellant's sentence of death for the murder of Bobby Kent.

ISSUE VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO CROSS-EXAMINE DR. DAY DURING THE PENALTY PHASE REGARDING STATEMENTS MADE BY APPELLANT TO THE WITNESS (Restated).

During defense counsel's direct examination of Dr. Day, a clinical and forensic psychologist, the doctor testified that he evaluated Appellant in 1990 prior to the murder, and again three days prior to his testimony. (T 2889-92, 2896). In relation to his most recent interview, the doctor testified that he found Appellant sane and competent. (T 2899). At this point, the following colloquy occurred:

> Q. [BY DEFENSE COUNSEL] Now I'm not going to ask you to get into --did you have an opportunity to discuss what occurred in July of '93 with him?
>
> A. [BY DR. DAY] I did.
>
> Q. Okay. Without discussing and getting into the facts because really at this juncture they're not relevant, but could you tell us if,

you were able to make an evaluation from a psychological point of view as to what thought processes were occurring at that time?

(T 2899-2900) (emphasis added).

As a result of this questioning, the State elicited the following on cross-examination:

> Q. [BY THE STATE] What facts did you know about this case when you met with him?
>
> A. [BY DR. DAY] When I met with him Sunday?
>
> Q. Yes.
>
> A. I had a summary statement of about 15 pages or something like that.
>
> Q. From where?
>
> A. That came from his attorney.
>
> [State reviews documents without objection].
>
> * * * *
>
> Q. So I have a report from Dr. Trudi Garfield Block, is that correct?
>
> A. (Nods head.) Right.
>
> Q. And then a five page statement of Mr. Puccio, is that correct?
>
> A. Correct,
>
> Q. Those were the only two documents you used when [--] you used to familiarize yourself with this case,
>
> A. Right. That's all I had.
>
> Q. I noticed that Mr. Puccio's -- in Mr. Puccio's statement there's no mention of the facts of this case, only the background abuse that he describes. Is that correct?

A. Correct.

Q. So you don't know anything about the incident itself, the actual killing from that statement.

A. I spoke to him Sunday.

Q. Okay. So what he related to you on Sunday --

A. That's all I know.

Q. What did he relate to you on Sunday about the incident itself?

[DEFENSE COUNSEL]: Your Honor, I'll object. That was not the subject of direct.

THE COURT: Overruled.

(T 2906-08). Thereafter, the witness related statements Appellant made about the murder. (T 2908-09).

In this appeal, Appellant claims that the trial court abused its discretion in allowing Dr. Day to relate Appellant's comments about the murder because defense counsel did not open the door to such testimony. **Brief of Appellant** at 66-68. Appellant cites to Lovette v. State, 636 **So.** 2d 1304, 1308 (Fla. 1994), and Parkin v. State, 238 So. 2d 817 (Fla. 1970), cert. denied, 401 U.S. 817 (1971), to support his contention, but neither are availing. In Lovette, the State called the defendant's confidential expert as a witness during the guilt phase to introduce inculpatory statements made by the defendant to the expert. This Court found the State's actions to be fundamental error, because even though Lovette submitted to a voluntary examination by the expert he neither called the expert as a witness, nor opened the door for the State

to elicit such testimony. Thus, Lovette's statements were admitted in violation of his Fifth Amendment rights. Here, however, not only did Appellant submit to a voluntary examination by Dr. Day, he called Dr. Day as a witness during the penalty phase, and elicited testimony and opinions based upon the doctor's interview with Appellant.

Parkin, though factually dissimilar, actually supports the trial court's ruling in Appellant's case. In Parkin, the defendant was subjected to a compulsory examination when she gave notice of an intent to rely on an insanity defense. Under these facts, this Court held that the trial court should not allow the expert to relate any facts surrounding the crime which were obtained directly from the defendant. However, "if the defendant's counsel opens the inquiry to collateral issues, admissions or guilt, the State's redirect examination properly could inquire within the scope opened by the defense." 238 So. 2d at 820. Thus, even if the defendant is forced to submit to an examination and to provide inculpatory information, that information may be admitted during the guilt phase if the defense opens the door. Here, although there was no compulsory examination and no use of compelled information in the guilt phase, the defense opened the door to inquiry about Appellant's admission. Thus, the trial court did not abuse its discretion in allowing the State to elicit such testimony from Dr. Day. Cf. Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1992) (finding evidence of collateral crimes admissible where doctor relied on material containing evidence of crimes in formulating

opinion), cert. denied, 114 S. Ct. 112, 126 L. Ed. 2d 78 (1993); Johnson v. State, 608 so. 2d 4, 10-11 (Fla. 1992) (finding evidence of prior criminal history admissible where doctor relied on same), cert. denied, 113 S. Ct. 2366, 124 L. Ed. 2d 273 (1993); Muehleman v. State, 503 So. 2d 310, 315 (Fla.) (finding juvenile criminal record admissible because doctor relied on same in formulating his opinion), cert. denied, 484 U.S. 882 (1987); Parker v. State, 476 so. 2d 134, 139 (Fla. 1985) ("[I]t is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis.").

Even if it were error, however, Appellant's sentence should nevertheless be affirmed. Appellant's guilt had already been determined. And Appellant's admissions provided no additional information from that which was admitted during the guilty phase. Thus, any error in allowing Dr. Day to relate Appellant's admissions about the murder was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 SO. 2d 1129 (Fla. 1986).

ISSUE IX

WHETHER THE TRIAL COURT FAILED TO CONSIDER A LIFE SENTENCE WITHOUT PAROLE AS A SENTENCING OPTION (Restated).

Appellant committed this murder on July 15, 1993. (R 3334-35). At that time, the possible penalties for first-degree murder were death or life imprisonment without the possibility of parole for 25 years. § 775.082(1), Fla. Stat. (1993). On May 25, 1994, an amendment to this statute became effective making the possible penalties for a first-degree murder death or life imprisonment without the possibility of parole. Ch. 94-228, § 1, at 1577, Laws of Fla. Appellant's penalty phase proceedings occurred in late September 1994.

In this appeal, Appellant claims that the trial court committed fundamental error by failing to instruct the jury on the sentencing option of life without parole, and by failing to consider this sentencing option in determining the proper sentence. Brief of Appellant at 68-73, He raises this claim as one of fundamental error because admittedly he made no request for such an instruction or consideration of this option. The State submits that had the trial court instructed the jury on this option or considered this option in its independent analysis without consent of Appellant it would have committed an ex post *facto* violation.

Article I, section 10, of the Florida Constitution, and Article I, section 10, clause 1, of the United States Constitution, prohibit the Florida legislature from passing any "ex post facto Law." In order to constitute an *ex post facto* law, it must be

retroactive, i.e., apply to events occurring before its enactment, and it must disadvantage the defendant by its application. Weaver v, Graham, 450 U.S. 24, 29 (1981). "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." Id. at 30. See also Miller v. Florida, 482 U.S. 423 (1987); Dobbert v. Florida, 432 U.S. 282 (1977).

Here, the legislature increased the severity of the minimum sentence available, so that if defendants are sentenced to life imprisonment under the amendment they are no longer eligible for parole. Since Appellant was not given fair notice of this increased penalty at the time he committed his offense, the State could not apply this amended provision to him at the time of sentencing, Appellant could have, however, waived any ex post *facto* challenge and requested instruction and consideration under the amended statute, but he did not do so. See, e.g., Larzelere v. State, 676 So. 2d 394, 403 (Fla. 1996) (holding that defendant can waive fundamental right to conflict-free counsel); State v. Upton, 658 So. 2d 86, 87 (Fla. 1995) (holding that defendant can waived constitutional right to trial by jury); Armstrong v. State, 579 So. 2d 734, 735 (Fla. 1991) (holding that defendant can waive challenge to fundamentally erroneous jury instruction by requesting instruction). Therefore, he cannot complain that the trial court did not apply the amendment to his case.

To support his argument to the contrary, Appellant cites to numerous cases from Oklahoma, the principal case being Allen v. State, 821 P.2d 371 (Okla. Crim. App. 1991). In Allen, the court explained that the possible penalties for first-degree murder at the time Allen committed his crimes were life imprisonment (with a possibility of parole) and death. Subsequent to the offense, but prior to Allen's sentencing, the state legislature amended the statute to include an intermediate option--life imprisonment without parole. So the sentencing options became life imprisonment (with parole), life imprisonment without parole, and death. Allen waived any ex post *facto* challenge and sought an instruction on and consideration of life imprisonment without parole, but the trial court denied the request. On appeal, the Court of Criminal Appeals held that the amendment did not disadvantage the defendant because he was not subjected to a harsher penalty than was available at the time he committed his crime. Id. at *375-76.* In other words, the minimum (life with parole) and the maximum (death) did not change; the legislature merely added an intermediate option (life without parole). Thus, given the defendant's waiver, the appellate court held that the trial court fundamentally erred in refusing to instruct on and consider this sentencing option. Id. at 376-77. See also Wade v. State, 825 P.2d 1357, 1363 (Okla. Crim. App. 1992) (reaffirming Allen, but noting there would be no error if defendant did not request or objected to instruction on and consideration of life without parole option); but see Salazar v. State, 852 P.2d 729, 736-41 (Okla. Crim. App. 1993) (reaffirming Allen and Wade,

but finding failure to instruct on range of penalty options fundamental error not subject to waiver),

Critical to the Oklahoma court's analysis was the fact that the amendment did not affect the minimum and maximum penalties to which a defendant would be subjected. In Florida, on the other hand, the legislature replaced the minimum penalty (life with the possibility of parole after 25 years) with one more harsh (life without parole). This amendment, if applied retroactively to Appellant without his consent, would have resulted in an ex *post facto* violation." Given that Appellant did not request application of the amendment and waive any ex *post facto* challenge, the trial court cannot be said to have fundamentally erred in failing to instruct on and consider the amended sentencing option. Therefore, this claim must fail.

---

[10] After the legislature amended the statute, this Court amended the jury instructions to reflect these changes. In re Standard Jury Instructions in Criminal Cases 678 So. 2d 1224 (Fla. 1996). After quoting the statutory change;, this Court noted the following in a footnote: "Section 775.082(1), as amended in 1994, became effective on May 25, 1994. Ch. 94-228, Laws of Fla. Therefore, it applies to offenses committed on or after that date." Id. at 1224 n.1. In addition, in the amended instructions, this Court added the following 'Note to Judge": "For murders committed prior to May 25, 1994, the penalties were somewhat different; therefore, for crimes committed before that date, this instruction should be modified to comply with the statute in effect at the time the crime was committed." Id. at 1225. Thus, this Court has implicitly assessed the *ex post facto* implications of the amendments and has cautioned the trial courts accordingly.

ISSUE X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING APPELLANT TO CALL A WITNESS DURING THE PENALTY PHASE OVER DEFENSE COUNSEL'S OBJECTION WITHOUT CONDUCTING A FARETTA INQUIRY (Restated).

During Appellant's penalty-phase case, defense counsel informed the trial court at sidebar that Appellant insisted on calling a cellmate against counsels' advice, and asked the trial court to advise Appellant of his options. Pursuant to counsel's request, the following colloquy occurred:

> THE COURT: Mr. Puccio, your attorneys as you've just heard as Mr. Cazel's worded is less than enthusiastic to call this witness on your behalf. They indicate it's your desire to call this witness.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Is this what you want to do?
>
> THE DEFENDANT: Yes,
>
> THE COURT: Do you understand all the attorneys can do is advise you. They counsel you. The ultimate decision, of course, is yours. This is your trial. And in this situation you are rejecting their advice that they give you, Have you had enough time to make this decision?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are you sure this is what you want to do?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You understand that by putting this witness on the stand, questions may be asked that may give Mr. Donnelly the opportunity to dwell into other issue that would not otherwise come before the jury? I don't know what this witness is going to say.

MR. CAZEL: Me neither.

THE COURT: I don't know what it is, but you understand this may bring other issues up or give Mr, Donnelly the opportunity to cross-examine him or present witnesses in rebuttal that otherwise would not have come out.

THE DEFENDANT: No, it's all right.

THE COURT: You sure this is what you want to do now?

THE DEFENDANT: Yes.

THE COURT: Have you had sufficient time to make this decision or think about doing this?

THE DEFENDANT: Yes.

THE COURT: Have you spoken to counsel, spoken to your parents, whoever else it might be regarding the issue of putting this witness on the stand?

THE DEFENDANT: Yes.

THE COURT: Are there any questions you have whatsoever?

THE DEFENDANT: No.

THE COURT: This is what you want to do.

THE DEFENDANT: Yes.

THE COURT: Anyone forced you, threatened you or promised you anything in order to have you make this decision?

THE DEFENDANT: No.

THE COURT: To put this witness on the stand? Okay. Very well.

MR. CAZEL: Yes, sir.

(Thereupon, the following proceedings were resumed within the hearing of the jury:)

THE COURT: Next witness, please.

MR. CAZEL: Your Honor, we would call Mark Lopez at this time.

(T 2945-48).

Thereafter, Mark Lopez testified that he was in jail for a violation of probation and shared a cell with Appellant for four months. He also testified that Appellant was "a good guy," and that Appellant had obtained his GED and was taking art classes, (T 2949-50). On cross-examination, Mr. Lopez testified further that the underlying offense for his VOP was resisting arrest with violence. In addition to violating the provisions of his house arrest, Mr. Lopez had been arrested for sexual battery on a 16-year-old victim and was facing 25 years to life in prison. (T 2950-52).

In this appeal, Appellant claims that, by allowing him to dictate which witnesses to call, the trial court permitted Appellant to act as co-counsel without conducting a Faretta hearing. **Brief of Appellant** at 73-74. In order to trigger a Faretta inquiry, however, a defendant must make an unequivocal request to represent himself. State v. Roberts, 677 So. 2d 264, 265 (Fla. 1996) (finding request for co-counsel did not amount to unequivocal request to represent self). Appellant made no such request. While his decision to call a witness against counsels' advice created a conflict in strategy, it did not equate to an unequivocal request to represent himself. Absent such a request, the trial court had no duty to make a Faretta inquiry.

After consulting with counsel, Appellant decided that he wanted to call a witness in his behalf during the penalty phase. The trial court cautioned Appellant as to the State's ability to cross-examine the witness and noted counsel's displeasure, but Appellant remained unmoved. At that point, defense counsel was faced with a strategic decision: appease Appellant and call the witness, or risk alienating Appellant and refuse to call the witness. They made the decision to call the witness. Appellant should not now be able to fault the trial court (or counsel) for doing what he insisted on doing. If any error occurred by Appellant's decision to call Mark Lopez, it was invited by Appellant and should not be charged against the court (or counsel). See Rose v. State, 617 So. 2d 291, 294 (Fla. 1993) (finding defendant's decision to pursue defense of innocence precluded claim that counsel was ineffective for failing to pursue defense of insanity or intoxication), cert. denied, 114 S. Ct. 279, 126 L. Ed. 2d 230 (1994); Thompson v. State, 648 So. 2d 692, 694-95 (Fla. 1994), cert. denied, 115 S. Ct. 2283, 132 L. Ed. 2d 286 (1995).

In Blanco v. State, 452 So. 2d 520 (Fla. 1984), a similar situation occurred wherein Blanco insisted on calling two witnesses during the guilt phase against his counsel's advice. The trial court, after questioning Blanco extensively, ultimately ruled that Blanco could present the witnesses over counsel's objection. Blanco then challenged the trial court's ruling on appeal. In rejecting Blanco's claim, this Court held that "the trial court did

not err in allowing [Blanco] to present witnesses. The ultimate decision is the defendant's." Id. at 524.[11]

Even if the trial court did err in allowing Appellant to call a witness over defense counsel's objection, this Court should nevertheless affirm Appellant's sentence of death. While Mr. Lopez' credibility was seriously impeached with his criminal history, such information had no relation to Appellant. More importantly, Mr. Lopez' favorable testimony was cumulative to that of other defense witnesses. For example, Appellant's brother testified that Appellant was generous and kind (T 2963), and Deputy Greetham testified that Appellant had adjusted well to incarceration and was involved in a self-help program of some sort (T 2974-75). Thus, there is no reasonable probability that the outcome would have been different absent Mr. Lopez' testimony. See State v, DiGuilio, 491 So. 2d 1129 (Fla. 1986).

---

[11] Blanco challenged in federal court defense counsels' effectiveness for allowing Blanco to dictate their strategy, but the Eleventh Circuit declined to analyze "the precise errors that might have been made by counsel," and instead analyzed any actual prejudice caused by the alleged error. It found none since the witnesses' testimony was cumulative and any effect of their impeachment was harmless in light of the overwhelming evidence of guilt. Blanco v. Sinaletary, 943 So. 2d 1477, 1494-98 (11th Cir. 1991).

ISSUE XI

WHETHER THE TRIAL COURT IMPROPERLY APPLIED A PRESUMPTION FOR DEATH AFTER FINDING THE EXISTENCE OF ONE AGGRAVATING FACTOR (Restated).

In the concluding paragraphs of its 43-page sentencing order, the trial court made the following comments:

> In summary, this Court finds that there are two (2) aggravating circumstances applicable to this case which have been proven beyond and to the exclusion of every reasonable doubt. The Court finds two (2) statutory and four (4) non-statutory mitigating circumstances of little weight were proven by a preponderance of the evidence. After independently evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating circumstances.
>
> On September 28, 1994, the jury recommended that this Court impose the death penalty upon MARTIN PUCCIO by a majority vote of (eight) 8 to four (4). This Court must give great weight to the jury's sentencing recommendation. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Death is presumed to be the proper wenaltv when one (1) or more aggravating circumstances are found unless thev are outweiuhed by one or more mitigating circumstances. *White v. State, 403 So.* 2d 331 (Fla. 1981).
>
> The ultimate decision as to whether the death penalty should be imposed rests with the trial judge. Hoy v. State, 353 So. 2d 826 (Fla. 1977). Additionally, the sentencing scheme requires more than a mere counting of the aggravating and mitigating circumstances. It requires the Court to make a reasoned judgment as to what factual situations require the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances. Flovd v. State 569 So. 2d 1225 (Fla. 1990); Jackson v. State, 498 So. 2d 406 (Fla. 1986).

> Based upon the above analysis it is the sentence of this court that you, MARTIN PUCCIO, be sentenced to DEATH for the Murder of Bobby Kent.

(R 3796-97) (emphasis added).

Appellant seizes on the underscored sentence to claim that the trial court improperly presumed that death was the appropriate sentence where the State had proven at least one aggravating factor. **Brief of Appellant** at 75-77. It is clear from the order in its entirety, however, that the trial court properly performed its function of independently weighing the aggravating and mitigating factors. Not only did the trial court analyze each and every aggravating and mitigating factor, but it performed its own proportionality analysis before deciding that death was the appropriate sentence in this case. Given the depth of its analysis, it cannot be said that the trial court failed to perform its duty under the statute. Therefore, this Court should affirm Appellant's sentence of death for the premeditated murder of Bobby Kent.

ISSUE XII

WHETHER THE INSTRUCTION ON THE HAC AGGRAVATING FACTOR WAS UNCONSTITUTIONAL (Restated).

Prior to trial, Appellant challenged the constitutionality of the HAC aggravating factor and its attendant instruction and proposed an alternative instruction. (R 3381-85, 3616, 3618). At a hearing on the motion, the trial court denied the motion without prejudice to resubmit the proposed instruction during the penalty phase charge conference. (T 226-28; R 3477). Defense counsel renewed his request at the charge conference, but it was denied. (T 2815-16). The trial court gave the newly amended instruction. (T 3071-72).

In this appeal, Appellant renews his challenge to the constitutionality of the HAC instruction given in this case. **Brief of Appellant** at 78-80. Nowhere in his brief, however, does he even acknowledge that this Court has repeatedly rejected his argument. E.g., Rolling v. State, 22 Fla. L. Weekly S141, 147-48 (Fla. Mar. 20, 1997), and cases cited therein. Regardless, this factor would survive under any definition of the terms, given that the victim's friends lured him into the woods, repeatedly stabbed him, broke his neck, and slit his throat. Cf. Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994) (finding invalid HAC instruction harmless in bludgeoning murder of elderly couple where "this aggravator clearly existed and, under any instruction, would have been found"). Thus, this claim should be denied.

ISSUE XIII

WHETHER THE STATUTORY MENTAL MITIGATING FACTORS ARE UNCONSTITUTIONAL BECAUSE THEY CONTAIN THE MODIFIERS "EXTREME," "SUBSTANTIAL," AND "SUBSTANTIALLY" (Restated).

Prior to trial, Appellant moved to strike the adjectives "extreme," "substantial," and "substantially" from the "extreme mental or emotional disturbance," "extreme duress or substantial domination," and "capacity to appreciate" mitigating factor instructions. He argued that the jury would reject any evidence relating to those factors if the evidence did not rise to those levels. (R 3578-79). At a pre-penalty-phase hearing, the trial court denied the motion, (T **2782**).

In this appeal, Appellant renews his claim made below, but again fails to acknowledge that this Court has previously rejected this identical claim. **Brief of Appellant** at 81-82. For example, in Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995), cert. denied, **116 S**. Ct. 1550, 134 L. Ed. 2d 653 (1996), this Court found that this argument "rests on a fundamental misconception of Florida law," because "[s]tatutory mental mitigators are distinct from those of a nonstatutory nature." Similarly, in Foster v. State, 614 So. 2d 455, 461 (Fla. 1992), cert. denied, 114 S. Ct. 398, 126 L. Ed. 2d 346 (1993), this Court found that the instructions as a whole adequately informed the jury that it could consider mental mitigating evidence even if it did not rise to the level of "extreme" or "substantial." Here, the jury was given the standard instructions for both mental mitigators, and the catch-all

provision. Thus, as in Foster, there is "no reasonable likelihood that the jurors understood the instruction to preclude them from considering any relevant evidence." 614 So. 2d at 462. See also Lemon v. State, 456 So. 2d 885, 887 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985).

Regardless, Appellant did not seek an instruction on, or argue to the jury the applicability of, the "capacity to appreciate" statutory mitigating factor, nor any lesser standard of it as nonstatutory mitigation. (R 3725-33, 3772-92; T 2825-29, 3014-23, 3058-70). And although the trial court refused to instruct the jury on the "extreme duress or substantial domination" mitigator, it considered the victim's domination over Appellant as a nonstatutory mitigating factor. (R 3789-90). Appellant argued the "extreme mental or emotional disturbance" mitigator both as a statutory and as a nonstatutory mitigating factor. (R 3725-33, 3773-78, 3789-90; T 3058-70). The trial court rejected it as a statutory mitigator, but found it as a nonstatutory mitigator. (R 3773-78, 3788-90). There is no reason to believe that the jury did not also consider such evidence as a nonstatutory mitigating factor. Therefore, this claim should be denied.

ISSUE XIV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON INDIVIDUAL NONSTATUTORY MITIGATING CIRCUMSTANCES (Restated).

Prior to the penalty phase, defense counsel sought instructions on several nonstatutory mitigating factors. (R 3614-15; T 2802-10). The trial court denied his request. (T 2814-15). Appellant claims that the trial court erred, but once again fails to acknowledge that this Court has repeatedly rejected such claims. E.g., Finney v. State, 660 So. 2d 674, 684 (Fla. 1995), cert. denied, 116 S. Ct. 823, 133 L. Ed. 2d 766 (1996); Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992) ("[T]he standard jury instruction on nonstatutory mitigators is sufficient, and there is no need to give separate instructions on individual items of nonstatutory mitigation."), cert. denied, 114 S. Ct. 112, 126 L. Ed. 2d 78 (1993); Robinson v. State, 574 So. 2d 108 (Fla. 1991), cert. denied, 502 U.S. 841 (1992). Since Appellant has failed to present any new argument which would warrant reconsideration of this issue, this Court should deny his claim and affirm his sentence of death.

ISSUE XV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY STATEMENTS OF DEREK KAUFMAN DURING THE GUILT PHASE (Restated).

During the State's case-in-chief, Kenneth Calamusa testified that Appellant confessed his involvement in Bobby Kent's murder to him while they were in jail together. Among other things, Calamusa testified that Appellant told him that after he stabbed Kent in the stomach, Kent ran and he and Kaufman chased him. Appellant also told him that while Appellant was cutting Kent's throat, "someone else came up and told him not to do it like that, in that manner. So he plunged the knife in the neck." (T 2108-11). Then, according to Appellant, he and two other guys carried Kent to the canal where one of the guys dropped him, so he and Kaufman put Kent into the water. (T 2111).

On cross-examination, Calamusa could not remember if he had told anyone that Appellant told him that he stabbed Kent in the neck 30 or 40 times. (T 2133). So defense counsel showed Calamusa his deposition testimony, and Calamusa agreed that he told Detective Murray that Appellant told him that "he plunged [the knife] in his neck and it was going up and down (indicating)." At that point, defense counsel asked Calamusa if he knew whether the medical examiner's examination would substantiate that statement, and Calamusa said he did not know. (T 2134). Defense counsel then asked, "Do you know if anyone has testified that they actually saw Mr. Puccio do what you say he told you he did do?" Calamusa said he did not know. (T 2134). Several questions later, defense

counsel asked Calamusa, "Do you know of anyone has testified that Mr. Puccio, in fact, is the one that helped carry the body?" Calamusa responded, 'I have no idea. I have no way of knowing that." Counsel then asked, "So you don't know if there is anyone that would substantiate what he said he told you?" Calamusa responded, "All I know is what he told me. I'm here to tell you what he told me." (T 2137-38).

Following another witness' testimony, the State indicated that it wanted to call Detective Murray to relate sworn statements of Derek Kaufman regarding Appellant stabbing Kent in the neck and putting his body in the water. Citing to Walsh v. State, 596 So. 2d 756 (Fla. 4th DCA 1992), rev. denied, 605 So. 2d 1268 (Fla. 1992), the State argued that defense counsel had opened the door to such testimony by its questions to Calamusa on cross-examination. The State emphasized that it was offering the testimony to rebut the inference that there was nothing to corroborate Calamusa's testimony when, in fact, Kaufman's statements to Detective Murray would. The trial court took the issue under advisement. (T 2163-70).

Following another witness' testimony, the parties again discussed the propriety of Detective Murray's testimony, which was proffered to the court. (T 2184-95). As proffered, Detective Murray would testify that he took a statement from Derek Kaufman on July 19, 1993. In his statement, Kaufman said he and Derek Dzvirko carried Kent to the water's edge, but Dzvirko dropped Kent and walked off, saying he could not do it. So Appellant helped Kaufman

put Kent's body in the water. (T 2200-02, 2207). Kaufman also stated that Appellant stabbed Kent in the throat in lateral and jabbing motions. (T 2202). According to Detective Murray, when he took Calamusa's statement on August 26, 1993, Calamusa's description of who put Kent's body in the water and how Kent's neck was cut was consistent with Kaufman's version. (T 2203-04). No one else had provided that information, nor was it released to the public. (T 2204-05).

After further discussion, the trial court found that defense counsel had opened the door to such testimony and rejected, based on Walton v. State, 481 So. 2d 1197 (Fla. 1985), cert. denied, 493 U.S. 1036 (1986), counsel's claim that such testimony would constitute a Bruton violation. (T 2208-18). Given the trial court's ruling, defense counsel agreed to the cautionary instruction proposed by the court which was given to the jury both before and after Detective Murray's testimony: "There is now going to be testimony placed before you that is being offered not for the truth of the statement, but merely as the statement pertains to the testimony of Mr. Calamusa." (T 2218-24, 2225, 2242, 2265).

In this appeal, Appellant claims that Detective Murray's testimony was "inadmissible hearsay not within any recognizable exception," including the co-conspirator hearsay exception, and that defense counsel did not open the door to such testimony. **Brief of Appellant** at 86-89. First, defense counsel never objected on a hearsay basis; thus, this argument was not preserved for review. See Tillman v. State, 471 so. 2d 32 (Fla. 1985);

Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Regardless, given the discussions between the court and parties, and the cautionary instructions given, it is clear that Kaufman's statements through Detective Murray were not admitted for their truth. Rather, they were admitted to show that the fact that they were made corroborated Calamusa's testimony. Cf. Morgan v. State, 520 So. 2d 105, 106-07 (Fla. 2d DCA 1988) (finding codefendant's statement implicating defendant admissible to show why detective questioned defendant and not to prove truth of statement).

Second, contrary to Appellant's assertion, defense counsel did, in fact, open the door to this line of questioning. To cast doubt on Calamusa's veracity, defense counsel tried to attack the plausibility of the version of events told to him by Appellant. Initially, he asked whether the medical examiner's testimony would substantiate Appellant's statement that he stabbed Kent repeatedly in the neck. Then he asked whether any witness had testified to seeing Appellant either stab Kent in a jabbing manner or throw his body in the canal. Finally, defense counsel asked, "So you don't know if there is anyone that would substantiate what he said he told you?" This line of questioning clearly left the impression that Calamusa fabricated statements Appellant allegedly told him because (1) previous witnesses contradicted or failed to corroborate them, and (2) no other witness could corroborate them. Since this inference was untrue, given Kaufman's identical statements to Detective Murray, the trial court properly allowed the State to rebut the inference. See Walton v. State, 481 So. 2d

1197, 1199-1200 (Fla. 1985) (finding that defense opened door to admission of codefendant's confession), cert. denied, 493 U.S. 1036 (1986) ; Walsh v. State, 596 So. 2d 756, 756-57 (Fla. 4th DCA 1992) (finding codefendant's complete confession admissible to qualify, explain or limit cross-examination testimony), rev. denied, 605 So. 2d 1268 (Fla. 1992); Morgan, 520 So. 2d at 106-07 (finding that defense opened door to admission of codefendant's inculpatory statement).

Appellant cites to Tindall v. State, 645 So. 2d 129 (Fla. 4th DCA 1994), and Thompson v. State, 615 So. 2d 737 (Fla. 1st DCA 1993), to support his argument to the contrary, but neither are availing. In Tindall, the district court found that the investigating officer's testimony regarding the substance of anonymous witnesses' statements was not responsive to defense counsel's question, and was thus not invited. In Thompson, the defendant merely asked the lead detective whom he obtained information for the arrest warrant from, not what the information was. Thus, the State improperly elicited the substance of the information. In neither case, as here, did the defense leave an incorrect impression with the jury which the State should have been allowed to correct. Thus, neither case is analogous.

Were this Court to find, however, that Detective Murray's testimony relating Kaufman's statements was admitted in error, Appellant's conviction and sentence should nevertheless be affirmed. Heather Swallers and Derek Dzvirko were eyewitnesses to the murder and detailed Appellant's involvement in the

conspiracy/murder. In addition, Tommy Strong related inculpatory statements Appellant made to him while in jail. Coupled with the circumstantial evidence of Appellant's guilt, the testimony of these three witnesses would have, within a reasonable possibility, more than amply supported a verdict of guilt even without Kenneth Calamusa's testimony. Similarly, these three witnesses more than amply established Appellant's greater culpability for this murder. Thus, the admission of Kaufman's statements, which the jury was cautioned not to consider for their truth, was harmless beyond a reasonable doubt. See Morgan, 520 So. 2d at 107 (finding that, even if codefendant's hearsay testimony was not admitted, evidence of guilt was overwhelming); State v. DiGuilio, 491 so. 2d 1129 (Fla. 1996). As a result, this Court should affirm Appellant's conviction and sentence.

ISSUE XVI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY STATEMENTS OF DEREK KAUFMAN DURING THE GUILT PHASE UNDER THE CO-CONSPIRATOR HEARSAY EXCEPTION (Restated).

Prior to the testimony of Michael Colletti during the State's case-in-chief, defense counsel objected to any forthcoming testimony from Colletti which related any hearsay statements of Derek Kaufman. The State argued that the statements were admissible under the co-conspirator hearsay exception, and the trial court agreed. (T 2160-63). Thereafter, Colletti testified that he burglarized a house sometime in July 1993 and stole several

guns. Over defense counsel's hearsay objection, Colletti further testified that Derek Kaufman called him several times to obtain a gun because he wanted "to go out with some people and kill somebody." (T 2173-74). Kaufman called him initially "around the 9th of July," but he had thrown the guns he had stolen into a lake, so he tried to get a gun from someone else, but his source had already sold the ones he had. He spoke to Kaufman again four or five days later, and Kaufman asked him to go with them, but he thought about it and decided not to. (T 2179-81).

At trial, Colletti could not remember if Kaufman told him who the intended victim was, but he knew from another source that the victim was Bobby Kent, so he identified Kent as the victim in his pretrial deposition. (T 2178). In exchange for the gun, Kaufman told Colletti that the victim's best friend would "give" him a house to burglarize. (T 2174, 2179).

In this appeal, Appellant renews his claim that Kaufman's statements were inadmissible under the co-conspirator hearsay exception "because there was no independent evidence (i.e., evidence apart from these hearsay statements) that Appellant was involved in the conspiracy at this time." Rather, according to Appellant, the State's evidence showed that his involvement did not begin until July 13. **Brief of Appellant** at 90. In Slater v. State, however, the First District held the following:

> In establishing a conspiracy the state may adduce evidence of related transactions between or among other co-conspirators not withstanding that all alleged conspirators were not privy to that transaction if it is

> established that that transaction is part of the overall conspiracy. . . . As an example, two parties may agree to commit an illegal act: If, thereafter, a third party joins in the agreement, the original agreement may be proved in the trial of the third party notwithstanding that he was not a party to the initial agreement.

356 So. 2d 69, 70-71 (Fla. 1st DCA 1978).

Here, the State established through the testimony of Heather Swallers and Derek Dzvirko that Lisa Connelly and Alice Willis wanted to kill Bobby Kent. The initial plan was for Lisa and Alice to take Kent out to Weston and shoot him. When they were unable to carry out that plan, they then discussed other ways to kill Kent. At some point, the plan became for the group to take Kent out to Weston and bludgeon and/or stab him to death. Although Heather and Dzvirko could only relate Appellant's direct involvement beginning on July 13, Colletti's testimony established that Appellant became involved in the plan well before July 13. From Colletti's testimony it is obvious that Appellant was involved in the original plan to shoot Kent. Since the overall conspiracy included both the plan to shoot Kent, as well as the ultimate plan to bludgeon/stab him, Kaufman's hearsay statements to Colletti were admissible against Appellant to prove the conspiracy and, in turn, the murder. Slater, 356 So. 2d at 70; Echols v. State, 484 So. 2d 568, 573 (Fla. 1985) (finding admissible taped conversation between undercover officer and codefendant as evidence of premeditation where codefendant related reason for plan to kill victim), cert. denied, 479 U.S. 870 (1986); Timultv v. State, 489 So. 2d 150, 152-

53 (Fla. 4th DCA 1986) (finding independent evidence through testimony of two co-conspirators sufficient to admit hearsay statements of other co-conspirator against defendant in first-degree murder case), rev. denied, 496 So. 2d 144 (Fla. 1986).

Appellant cites to two cases to support his contrary position, neither of which are availing. In State v. Edwards, 536 So. 2d 288, 294 (Fla. 1st DCA 1988), the alleged conspiracy to traffic in cocaine involved only two people--Edwards and Hernandez. The undercover police officers dealt with only Edwards in setting up a transaction. Hernandez did not become involved until later. Since a conspiracy requires an express or implied agreement between two or more people, none of whom are police officers or informants, the "conspiracy" did not begin until Hernandez became involved. Thus, any initial conversations between Edwards and the police could not be used against Hernandez.

Here, however, as previously discussed, the conspiracy involved at least Lisa Connelly and Alice Willis prior to Appellant's confirmed involvement on July 13. Thus, under Slater, conversations between co-conspirators during the course, and in furtherance of, the conspiracy are admissible against all co-conspirators. As a result, the conversation between Colletti and Kaufman were admissible.

In Moore v. State, 503 So. 2d 923 (Fla. 5th DCA 1987), the second case relied upon by Appellant, two conversations occurred between a codefendant and a police informant prior to the trafficking transaction in question, and one conversation occurred

between the defendant, the police informant, and a co-conspirator after the defendant's arrest. As in Edwards, the conversations between the co-conspirator and the police informant were not made "during the course of" a conspiracy, since there were not two or more people conspiring to commit a crime. See also State v. Brea, *530* So. 2d 924, 926 (Fla. 1988) ("A statement made by an informant is not made by someone acting in concert with the defendant and does not fall within the class of statements which may be considered admissions."). And the conversation after their arrest are not considered "during the course and in furtherance of" the conspiracy. Moore, *503 so.* 2d at 924 ("[T]he statements made by conspirators *after* completion of the crime, and hence *after* the conspiracy, do not meet the statutory requirement that such statements, to be admissible, must be made 'during the course, and in furtherance, of the conspiracy."'). Thus, none were admissible against Moore. Moore is clearly distinguishable from the present case.

Next, Appellant claims that Colletti's testimony was inadmissible "because there was no predicate evidence that the hearsay conversation related to the plot to kill Bobby Kent." **Brief of Appellant** at 90-91. As noted, the original plot was to take Kent to Weston and shoot him. According to Swallers and Dzvirko, Lisa Connelly and Alice Willis actually attempted to carry out that plan, (T 1655, 1837). Such evidence established the "predicate evidence" that this plot existed and that Kaufman's attempt to obtain a gun from Colletti related to this plot. Just

because Swallers and Dzvirko did not learn of this plot until July 13 or later does not mean that the plot was not hatched earlier in time. Obviously it was since Kaufman was attempting to obtain a gun to kill Kent. Cf. Slater, 356 So, 2d at 70; Echols, 484 So. 2d at 573; Timultv, 489 So. 2d at 152-53.

However, even if Kaufman's hearsay statements were improperly admitted, Appellant's conviction should nevertheless be affirmed. Other permissible evidence clearly established that Appellant wanted to kill Kent, that he provided weapons for that purpose (a knife and a metal rod), that he participated in the ruse to lure Kent to the remote Weston area, that he stabbed Kent, that he helped throw Kent's body in the water, and that he provided the victim's father and the police false information to conceal the crime. Thus, even without Colletti's testimony, there is no reasonable possibility that the outcome would have been different. State v, DiGuilio, 491 So. 2d 1129 (Fla. 1986). Consequently, this Court should affirm Appellant's conviction for the first-degree murder and conspiracy to commit first-degree murder of Bobby Kent.

ISSUE XVII

WHETHER THE STATE COMMENTED DURING ITS GUILT-PHASE CLOSING ARGUMENT ON APPELLANT'S POST-ARREST SILENCE (Restated).

During his closing argument, defense counsel argued that Kenneth Calamusa and Tommy Strong, who related inculpatory statements Appellant made to them in jail, obtained the substance of their information from other sources prior to giving their sworn

statements. (T 2664-67). In rebuttal, the State made the following comments:

> Heather Swallers. Well she never told the officer, at the time that he took a statement from her. The answer to this question is, she never implicate[d] Marty at all.
>
> You have to ask the question, and what was interesting is they brought out the fact that Mr. Dzvirko never made a statement when he was arrested until six months later when he gave one to our office.
>
> Ms. Swallers gave a statement initially when she was arrested, but she never implicated Mr. Puccio until six months later after she pled guilty.
>
> Mr. Puccio never gave a statement --

(T 2681).

At that point, defense counsel objected, and the parties went sidebar. One of Appellant's attorneys said, "Comment on his right to remain silent. That's a mistrial." And his other attorney said, "I have to move for a mistrial." (T 2682). Thereafter, the prosecutor tried to explain that, had defense counsel let him complete his sentence, his comment would have been that no one, including Appellant, had made a statement prior to Calamusa's and Strong's statements that Appellant stabbed the victim in the stomach; thus, they had to have gotten that information from Appellant. The trial court took the motion under advisement until after the State's argument so it could review the statement in context. (T 2682-83). Thereafter, the State continued its argument before the jury:

> The statement Mr. Puccio gave to the Hollywood Police Department, he never mentioned, certainly, being at the scene of the crime or striking Bobby Kent in the abdomen.
>
> So we don't have any information at the time that Ken Calamusa and Tommy Strong come forward and gave this information about Marty Puccio striking Bobby Kent in the abdomen. Nothing in the transcript, any where.
>
> So where does that information come from?
>
> It comes from Marty Puccio, the statement that he gave them in the jail. And that was brought out several times in argument and examination.
>
> Ms. Swallers, you never mentioned Mr. Puccio in your original statement to the police.
>
> No, I did not.
>
> Mr. Dzvirko, you never provided a written statement to the police?
>
> No, I did not.
>
> So when we talk about the credibility of Tommy Strong and Ken Calamusa, where is that information coming from?
>
> From Mr. Puccio.

(T 2683-84).

Following the State's rebuttal argument, the trial court had the reporter read the State's original comments back. It then noted that defense counsel interrupted the prosecutor in mid-sentence, "which is a substantial factor that needs to be considered." (T 2729-30). The State again explained the context of its argument, but defense counsel insisted that the State

commented on Appellant's post-arrest silence. Thereafter, the trial court ruled as follows:

> See the problem is that the defense, by objecting as rapidly as they did, did not give the State the opportunity to finish their sentence. That's the problem we're dealing with here.
>
> The issues that Mr. Dzvirko's testimony, Ms. Swallers' testimony, as well as Mr. Calamusa's testimony and the attack that was made on the veracity of those individuals and their testimony, the statements, and as Mr. Donnelly after the objection at sidebar clearly indicated to the jury was that the statement that Mr. Donnelly was in the process of making when interrupted was that Mr. Puccio never gave a statement implicating himself.
>
> Clearly the evidence shows that Mr. Puccio made and gave a statement to the Hollywood Police Officers, so the objection taken in its entirety and in context is not a valid one. And the motion for mistrial is accordingly denied.

(T 2732-33).

In this appeal, Appellant maintains that the State's partial comment was a comment on his post-arrest silence. **Brief of Appellant** at 91-93. Initially, the State submits that Appellant failed to preserve this issue for review. "The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury is to disregard the remarks." Duest v. State, 462 So. 2d 446, 448 (Fla. 1985). See also Parker v. State, 641 So. 2d 369, 376 & n.8 (Fla. 1994) (applying Duest) e o v e r , "both a motion to strike the allegedly improper [comments] as well as a request for the trial court to instruct the jury to disregard the [comments] are thought to be

necessary prerequisites to a motion for mistrial." Palmer v. State, 486 So.2d 22 (Fla. 1st DCA 1986). Here, Appellant failed to satisfy his burden.

Regardless, as the trial court found, the State's comments, in context, were in fair reply to defense counsel's preceding argument. Contrary to Appellant's contention, they were not fairly susceptible of being interpreted as a comment on Appellant's post-arrest silence. After all, as the court noted, Appellant gave a statement to the police. The State's point was that Appellant did not incriminate himself; thus, Strong and Calamusa did not obtain information about the murder from Appellant's post-arrest, pretrial statement. Moreover, any impropriety in the initial comment was immediately cured by the prosecutor's following remarks. See Morris, 456 So. 2d at 479-80. Thus, the trial court did not abuse its discretion. See Breedlove v. State, 413 So. 2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982).

Nor would the State's comment constitute harmful error given the quality and quantity of permissible evidence against Appellant. Both Heather Swallers and Derek Dzvirko gave eyewitness testimony implicating Appellant in the conspiracy/murder. Appellant also made inculpatory statements to two jail inmates. Thus, even had the State not made the comment, there is no reasonable possibility that the verdict would have been different. See State v. DiGuilio, 491 so. 2d 1129 (Fla. 1986).

ISSUE XVIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING DURING THE GUILT PHASE THOMAS LEMKE'S TESTIMONY REGARDING A CALL FROM SOMEONE NAMED 'MARTY" (Restated).

During the guilt phase, the State called Thomas Lemke as a witness. Mr. Lemke testified that he was a friend of Derek Kaufman. (T 2085). Mr. Lemke did not know Appellant. (T 2086). When the State asked Mr. Lemke if he had a conversation with Appellant, defense counsel objected because the State had failed to establish how Mr. Lemke knew whom he was talking to. The trial court sustained the objection until the State laid a proper predicate. (T 2086). Thereafter, Mr. Lemke testified that he received a phone call from someone who identified himself as "Marty," and who told him that Derek was in jail. Mr. Lemke asked "Marty" where Derek was, gave "Marty" his beeper number, and told "Marty" to call him back. Mr. Lemke called Derek, who told him to tell "Marty" to turn himself in, and Mr. Lemke relayed the message when he talked to "Marty" later. (T 2086-88).

When the State asked Mr. Lemke to relate the substance of the first conversation with "Marty," defense counsel objected again to the lack of predicate, which the trial court overruled. (T 2088). Mr. Lemke then testified that "Marty" informed him of Derek's arrest and told him that he wanted to leave the state because he was "wanted for questioning." (T 2088-89). After Mr. Lemke verified Derek's arrest, "Marty" paged him, and Mr. Lemke returned his call. During this second conversation, Mr. Lemke offered to

try to get money for "Marty" to leave town. (T 2089-91). They spoke three or four times that day, which was a Monday, and Mr. Lemke relayed Derek's message that "Marty" should turn himself in. (T 2095-98). Mr. Lemke stated in his deposition that "Marty" identified himself as "Marty Puccio," but he did not have a recollection at trial that "Marty" provided his last name. (T 2092-95).

In this appeal, Appellant maintains that the State failed to lay a proper predicate because "Lemke could not connect Appellant's voice to that of the phone caller because he had never heard Appellant's voice before." **Brief of Appellant** at 93-94. Circumstantial evidence, however, established the requisite nexus. First, Appellant's name is Martin "Marty" Puccio. The caller identified himself as "Marty" or "Marty Puccio." The caller told Mr. Lemke that Derek was in jail. Mr. Lemke called Derek, confirmed that Derek was in fact in jail, and obviously had a conversation about Marty because Derek told Mr. Lemke to tell Marty to turn himself in. Given the circumstantial nature of these facts, the trial court properly admitted Mr. Lemke's testimony. See Zeigler v. State, **402** So. 2d 365, 374 (Fla. 1981) ("[T]elephone conversations are competent evidence provided that the identity of the person with whom the conversation was had is established by direct evidence, facts or circumstances. . . . Although Smith did not positively testify that the person with whom he spoke was defendant, other facts and circumstances provided the basis for the conclusion that defendant was the person with whom Smith spoke."),

cert. denied, 455 U.S. 1035 (1982). The completeness of Mr. Lemke's identification of the caller goes to the weight rather than the admissibility of the evidence. Id.

Even if the State did not sufficiently identify the caller, any error in the admission of Mr. Lemke's testimony was harmless beyond a reasonable doubt. Mr. Lemke's testimony related only to statements made by Appellant well after the murder to show a consciousness of guilt. Given the other significant direct evidence of Appellant's guilt, there is no reasonable possibility that the verdict would have been different had Mr. Lemke never testified. See Manuel v. State, 524 So. 2d 734, 736 (Fla. 1st DCA 1988). Therefore, Appellant's conviction should be affirmed.

ISSUE XIX

WHETHER THE TRIAL COURT'S EXTRANEOUS COMMENTS DURING VOIR DIRE REGARDING THE REASONABLE DOUBT STANDARD VITIATED THE ENTIRE TRIAL (Restated).

At a pretrial hearing, the trial court informed the parties that it intended to explain trial procedure to the jury panel prior to jury selection. Included in this explanation would be a rather detailed explanation of the concept of reasonable doubt. Defense counsel asked for a copy of the written instructions, and the trial court told the parties to review them and make any objections prior to the trial. (T 290-311). The record reveals that defense counsel possessed a copy of the instructions two days later. (T 359). The day before jury selection, defense counsel indicated

that he had read the instructions and had no objection to them. The trial court discussed specifically the comments on reasonable doubt and, again, defense counsel indicated that he had no objection to them. (T 754-68). After the trial court made the comments to the jury panel, it called the parties sidebar for any objections, and defense counsel had none. (T 912).

Now, on appeal, Appellant claims that the trial court's comments on reasonable doubt minimized the standard and "diminished the reliability of both the guilt and penalty determination." **Brief of Appellant** at 94-97. Despite repeated opportunities, however, Appellant failed to object to the comments, and thus failed to preserve this issue for review. See State v. Wilson, 22 Fla. L. Weekly S2, 3 (Fla. Dec. 26, 1996) (citing Archer v. State, 673 So. 2d 17, 20 (Fla.), cert. denied, 117 S. Ct. 197 (1996)). In any event, this Court evaluated similar comments in Wilson and found such comments not improper, much less fundamental error. Therefore, this claim should be denied.

ISSUE XX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON ALLEGEDLY NEWLY DISCOVERED EVIDENCE (Restated).

In a supplemental motion for new trial, filed on October 26, 1994, almost a month after the conclusion of the penalty phase, defense counsel claimed that he obtained at a death penalty seminar, subsequent to the penalty phase, a confidential mental

health report relating to Heather Swallers. In this report, which was provided to Swallers' attorney on January 27, 1994, Dr. Vicary related the substance of Swallers' statements to the police, which did not include any reference to Appellant. In addition, the doctor indicated that Swallers suffers from Manic/Depressive Disorder, a major mental disorder, and that she has a history of family disturbance and substance abuse. Defense counsel contended that had he had the report at the time of trial "he would have been prepared to cross-examine the witness at greater length about her memory lapses and other matters associated with Dr. Vicary's diagnosis which included, a history of drug and alcohol abuse." In addition, defense counsel contended that he would have called Dr. Vicary to impeach Swallers' testimony "inasmuch as his evaluation cast serious doubts upon her credibility as a witness, including, but not limited to, her ability to recall events, especially statements she allegedly attributed to the defendant. Clearly, his evaluation strongly asserts her 'suggestibility,' and infers that she may be incapable of independent thought, let alone independent recollection." (R 3652-55, 3656-65).

At Appellant's allocution hearing prior to final sentencing, defense counsel presented the testimony of Dr. Day, Appellant's mental health expert, who testified that he reviewed Dr. Vicary's report. (T 3130). From the report, he opined that Swallers' ability to organize and interpret memories, and her ability to place a value on them, would have been ‘disrupted" by her history of drug and alcohol abuse, although he was not sure whether her

specific memory functions would have been disrupted. (T 3132). When questioned further on cross-examination, he testified that he was not talking about memory loss or memory lapse, but rather her reaction in stressful situations. (T 3136-37).

During argument on the motion for new trial, the trial court noted that Swallers provided a 188-page sworn statement to the prosecutor three weeks after the report, during which she related in detail her drug use, family problems, and memory of the events surrounding the murder. It also noted that Swallers gave a two-day deposition prior to trial, which was contained in 477 pages of transcript, during which she was questioned extensively about every subject imaginable. (T 3218-20). Defense counsel complained, however, that he was restricted at trial from questioning Swallers about her history of drug and alcohol abuse, and had the trial court been aware of the report, it might have been less restrictive. According to counsel, he would also have impeached Swallers with the fact that she did not implicate Appellant in her discussions with Dr. Vicary. (T 3220-27).

The State responded that Swallers did, in fact, implicate Appellant in her original statement to the police; that Swallers was asked at her deposition about memory lapses and what affect drugs and alcohol had on her; that only questions at trial relating to Swallers' use of drugs or alcohol at the time of the crime were relevant; and that Swallers implicated Semenec as the actual killer, rather than Appellant, and thus any further impeachment would not have affected the outcome of the trial. (T 3227-35).

At the hearing and in a later written order, the trial court denied the supplemental motion for new trial, finding (1) that Swallers, evaluation by Vicary and Vicary's subsequent report were confidential at the time of Swallers' deposition when she denied talking to anyone else about the crime, (2) that Swallers testified at her deposition to the effect of drugs upon her, (3) that Swallers consistently testified that she did not use drugs on the night of the murder, (4) that Swallers testified at trial that she never saw Appellant kill Kent or have a knife at the scene, although Swallers testified that Appellant told her at the beach that he stabbed Kent in the chest, (5) that Swallers was not, as the defense contended, "the main witness for the state,,, and (6) that the defense was put on notice of the substance of the information in Dr. Vicary's report through Swallers, statement to the prosecutor, deposition, and trial testimony. (R 3694-3701; T 3237-38). Relying on Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994), cert. denied, 116 S. Ct. 146 (1995), the trial court found that "the issues raised by Dr. Vicary's report are cumulative and impeachment evidentiary matters, which would not probably produce an acquittal on retrial.,, (R 3701).

In this appeal, Appellant renews his claims that he could not have discovered Dr. Vicary's report at the time of trial and that the information contained therein, if presented, would probably produce an acquittal on retrial. **Brief of Appellant** at 98-99, The State submits that the trial court's rulings were proper. Initially, a distinction must be made between the report itself and

the substance of the information contained therein. As the report indicated, Dr. Vicary evaluated Heather Swallers in a confidential manner. (R 3656). Until that confidentiality was waived, which apparently occurred for the first time at the seminar subsequent to Appellant's penalty phase, any conversations or report flowing from that evaluation would have been unavailable to Appellant's counsel. Even if he had obtained it somehow, absent a waiver, he would not have been able to use it at trial. Nor would he have been able to present the testimony of Dr. Vicary.

However, as the trial court found, the substance of the information contained in the report was either known by defense counsel or could have been discovered. Defense counsel had Swallers' lengthy statement to the prosecutor and her even more detailed deposition testimony, in both of which she described her family history, her drug and alcohol history, her recollection of the events surrounding the murder, and the effect of drugs on her memory. Thus, to the extent counsel did not have enough information relating to these areas, he could have obtained it by asking additional questions.

As for the effect of the report or the information in the report on Appellant's ability to impeach Heather Swallers, the record reveals that defense counsel impeached Swallers with the fact that she did not implicate Appellant until she had reached an agreement with the State. (T 1719-28). When he tried to question Swallers about her "experience with drugs," the trial court ruled that it would give counsel "a little latitude" and allow

questioning within a month preceding the murder, but cautioned counsel not to dwell on it. (T 1733-36). Thereafter, defense counsel questioned Swallers about her hospitalization and about Donny Semenec's use of drugs, and then moved on to something else. (T 1737-38). By his own choice, counsel did not question Swallers about her use of drugs during the month preceding the murder or, more importantly, during the evening of the murder or during her testimony at trial. As the trial court was aware, evidence of drug use is inadmissible unless it relates to use at the time of the event the witness is testifying about or use at the time the witness is testifying, or if it is shown by other relevant evidence that the prior drug use affects the witness' ability to observe, remember, or recount. Edwards v. State, 548 So. 2d 656, 658 (Fla. 1989). Here, defense counsel offered no other relevant evidence at the trial to justify impeaching her with drug use unrelated to the event or to her testimony. Given that she had recounted her drug use in detail in her pretrial statement and deposition, counsel had sufficient opportunity to do so, and had no need to rely on Vicary's report for such information.

Moreover, as the trial court related, the evidence against Appellant was "nothing short of overwhelming." (T 3238). And Heather Swallers was not the State's "key witness." In fact, as the trial court noted, Swallers did not see Appellant do anything to the victim. (R 3700-01). Rather, Derek Dzvirko testified that he saw Appellant stab Kent, and Kenneth Calamusa and Tommy Strong testified that Appellant told them he stabbed Kent. Thus, in light

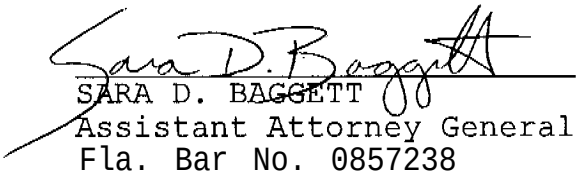
of this other credible testimony, the trial court properly denied Appellant's supplemental motion for new trial, since even if the report were not discoverable there is no reasonable probability that the information in the report would produce an acquittal on retrial. See William, 651 So. 2d at 88-89. Therefore, this Court should affirm Appellant's conviction and sentence for the murder of Bobby Kent.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death,

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



SARA D. BAGGETT
Assistant Attorney General
Fla. Bar No. 0857238
1655 Palm Beach Lakes' Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Paul E. Petillo, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 21st day of April, 1997.

SARA D. BAGGETT
Assistant Attorney General