IN THE SUPREME COURT OF FLORIDA

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PRESSLEY ALSTON,

Appellant,

v. Case No. 87,275

STATE OF FLORIDA,

Appellee.

______________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA J. YATES
Assistant Attorney General
Florida Bar #293237

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

James Coon, a twenty-year-old college student, visited his grandmother, a patient at University Hospital in Jacksonville, in the late afternoon of January 22, 1995. (XIV 811).[1] The police found his abandoned car the following day (XIV 830-31), and his family never saw him alive again. After consulting with her preacher, Gwenetta McIntyre, Pressley Alston's girlfriend, went to the Jacksonville Sheriff's Office on May 24, 1995. (XV 882). McIntyre spoke with Detective Quinn Baxter on May 25. (XV 882). Based on McIntyre's information, sixteen-year-old Dilanjan Ellison, Alston's half-brother, and then Alston were arrested. (XV 931). Alston confessed to abducting and robbing Coon and then killing him. (XV 942-43). Alston offered to take the detectives to the body, but it could not be located. (XV 950-56). On the way back to the Police Memorial Building Alston asked to be taken to his mother's so that he could talk with her. (XV 956). He admitted to his mother that he killed the victim. (XV 957; XVI 1062). While being walked to the jail, Alston was interviewed by reporters. (XV

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[1] In Amendments to the Florida Rules of Appellate Procedure, 21 Fla. L. Weekly S507 (Fla. November 22, 1996), this Court amended Fla. R. App. P. 9.210(b)(3) to require reference to volume as well as page numbers of the record and transcript. The record and transcript of this case are contained in 19 volumes. Thus, the reference "XIV 811" is to page 811, located in volume XIV.

958-59). Alston asked to be taken back to the scene in the daylight, and Baxter checked him out of the jail around 8:40 a.m. on May 26. (XV 965). Once at the scene, it took approximately ten minutes to locate the victim's body. (XV 966). Later that day Alston asked to see Baxter and Detective Abel Roberts again. (XV 967). He admitted shooting the victim twice. (XV 969). Between his arrest and August 23, 1995, Alston asked to speak with the detectives numerous times. (XI 141-45). In a statement made on June 1, 1995 Alston admitted that he decided the victim had to be killed because he could identify them and that, when Ellison shot the victim but failed to kill him, Alston shot him in the head twice. (XV 926; XVI 1158-60). All of Alston's statements were introduced into evidence.

The state indicted Alston for first-degree premeditated murder, armed robbery, and armed kidnapping. (I 14). The trial took place from November 27 through December 1, 1995. Baxter testified that the route Alston said they took from the hospital to the scene of the murder was approximately twenty miles and would take twenty-five to thirty minutes to drive. (XIV 1174). McIntyre testified that she saw Alston in possession of the victim's car (XV 861) and jewelry. (XV 888-89, 892). The medical examiner found the victim's death to be a homicide, with the cause of death being

multiple gunshot wounds to the head. (XVI 1145). He identified two gunshot wounds to the skull (XVI 1138); either would have been fatal. (XVI 1141-42). The jury convicted Alston as charged. (II 340).

After hearing evidence at the penalty phase on December 13 and 14, 1995, the jury recommended that he be sentenced to death by a vote of nine to three. (III 484). The court sentenced Alston to death at a sentencing hearing on January 12, 1996. (XIX 1802-14). The trial court found that six aggravators had been established: 1) prior convictions of violent felonies; 2) felony murder/robbery and kidnapping; 3) committed to avoid or prevent arrest; 4) committed for pecuniary gain; 5) heinous, atrocious, or cruel (HAC); and 6) cold, calculated, and premeditated (CCP). (III 512-15). The court merged the felony murder and pecuniary gain aggravators and considered "that five (5) statutory aggravating circumstances have been proven beyond any reasonable doubt." (III 515). The court found several nonstatutory mitigators (III 515-18) and weighed them against the aggravators. The court then stated:

> As required by law the court has found and weighed the statutory aggravating circumstances and finds that six (6) circumstances, five (5) after merger, have been established beyond a reasonable doubt. The aggravating circumstances are compelling and persuasive evidence which must be weighed

> in conjunction with any statutory or non-statutory mitigating circumstances found to exist. No statutory mitigating circumstances exist, but some few non-statutory mitigating circumstances exist which individually and collectively are wholly insufficient to militate against the strong aggravating circumstances which cry out for the imposition of the death penalty. This defendant has demonstrated his lack of respect for the integrity of other people's person and property. He refuses to conform his conduct to the requirements of law. Death is the only appropriate punishment under the facts and circumstances of this case. Indeed any one aggravating factor in this case, standing alone, would outweigh any mitigating factor or factors.

(III 518-19).

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court did not err in refusing to suppress Alston's statements made on May 25 and 26, 1995.

ISSUE II: The videotape of Alston made while being walked to the jail was properly admitted into evidence.

ISSUE III: The trial court did not err in refusing to inform the jury that Alston was taking psychotropic medications.

ISSUE IV: The trial court properly allowed the medical examiner to identify the victim from dental records.

ISSUE V: There was sufficient evidence to withstand the motion for judgment of acquittal of the armed robbery charge.

ISSUE VI: The trial court did not err in refusing to instruct the jury on independent acts.

ISSUE VII: The trial court did not err in refusing to delay the penalty phase until Alston's codefendant was tried and sentenced.

ISSUE VIII: The trial court properly instructed the jury.

ISSUE IX: The trial court properly allowed the state to present victim impact evidence.

ISSUE X: The trial court instructed the jury correctly as to victim impact evidence.

ISSUE XI: No error occurred in allowing the state to display a photograph of the victim.

ISSUE XII: The record supports the trial court's finding avoid arrest in aggravation.

ISSUE XIII: The trial court properly found this murder to have been heinous, atrocious, or cruel.

ISSUE XIV: The trial court did not abuse its discretion in weighing the mitigation.

ISSUE XV: The record supports finding this murder to have been committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification.

ISSUE XVI: The trial court did not err in refusing to prohibit imposition of the death penalty.

ISSUE XVII: Alston's death sentence is proportionate.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED ALSTON'S MOTION TO SUPPRESS HIS CONFESSION.

Alston argues that the trial court erred in refusing to suppress his confession. There is no merit to this claim, however, and it should be denied.

On October 13, 1995, Alston moved to suppress his statements made on May 25 and 26, 1995 to Detectives Quinn Baxter, Abel Roberts, and Robert Hinson. (I 51). The trial court held a hearing on that motion, among others, on November 17.

At that hearing Baxter, a twenty-one-year veteran with the sheriff's office, described the search for James Coon and how Alston became a suspect in the case. (XI 95-102). After Baxter arranged to have Alston picked up (XI 102-04), Baxter and Roberts questioned Alston at the Police Memorial Building. (XI 104). After a few preliminary questions, Baxter informed Alston of his Miranda[2] rights. (XI 107-09). Alston professed that he understood his rights. (XI 109-10). Baxter testified that he never promised Alston anything, that he never threatened Alston (XI 110), that

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

Roberts never promised anything to Alston or threatened him, and that Alston confessed freely and voluntarily and offered to take them to the victim's body. (XI 111). As stated by Baxter:

> Well, basically after he confessed to being part of the kidnapping and robbery and the murder, saying that the gun had gone off three times, he, in fact - and I talked about having closure for Ms. Coon and the body, and he, in fact, asked me if I take him to where the body was, or something to that effect, would I not get the death penalty, or something to that effect. And I told him I couldn't talk to him about the death penalty, that was against the law, obviously, and he basically stated that he wanted to help us find the body.

(XI 111-12). As far as Baxter knew, Alston did all of this voluntarily. (XI 112). The interrogation began around 9:25 p.m., and they left to search for the body at 11:20 p.m. (XI 113). Alston refused all offers of food or drink during the interview. (XI 113).

Alston gave the detectives specific directions to where he left the victim's body. (XI 114). Searching the area at Alston's direction, however, they could not locate the body. (XI 117-18). On the way back to the Police Memorial Building, Alston asked if they could stop at his mother's so that he could talk with her. (XI 118). Baxter denied expecting anything from Alston in return for allowing him to visit his mother. (XI 119).

When they returned to the jail, Alston asked the detectives to come back in the morning so that he could assist in finding the body. (XI 129). They took Alston from the jail at 8:40 a.m. on May 26 (XI 129) and readvised him of his constitutional rights. (XI 130). At the scene, it took about ten minutes to locate the body following Alston's directions. (XI 130-31). Before being sent back to the jail Alston asked Baxter to come back and see him. (XI 131).

About 1:30 p.m. on May 26 Baxter received a message that Alston wanted to talk with him, and Baxter went to the jail. (XI 132). Alston made another statement at that time. (XI 134). Baxter received messages on May 28 and 29 that Alston wanted to speak with him, and he visited Alston again on June 1. (XI 134-35).

Defense counsel objected that, because the motion to suppress dealt only with statements from May 25 and 26, testimony about any other statements was irrelevant. (XI 136). The prosecutor responded that subsequent statements were relevant:

> I think that one of the things that our appellate courts look at are the defendants' continued willingness or lack of willingness to talk to law enforcement officers in a custodial interrogation setting, and I believe I'm allowed to establish how many separate times this defendant requested to talk to the

> police, to show that at no time during his incarceration did he ever have the least bit of trouble wanting to talk to the police. It all goes to his voluntariness.

(XI 137). The court overruled the objection: "The State is entitled to establish the totality of the circumstances, to include voluntary acts of the defendant." (XI 138). Thereafter, the prosecutor took Baxter through twelve requests, dated from June 5, 1995 through August 23, 1995, from Alston that Baxter visit him. (XI 141-44). Baxter testified that Alston never indicated any unwillingness to speak with him and that he never promised Alston anything. (XI 145).

On cross-examination Baxter testified that he did not inform Alston that he was under arrest because, when Baxter entered the interrogation room, Alston said: "'One of the officers said homicide.'" (XI 155). Baxter also stated that he thought Alston "was trying to watch his words and be very careful what he said." (XI 157). Baxter testified that he told Alston that, if Alston told him the truth, he would tell the state attorney and public defender's office, his lawyer, and any judge that Alston had done so. (XI 159). He also "related to Pressley Alston that Ms. Coon obviously needed closure in this case." (XI 159). Baxter acknowledged that Roberts stopped taking notes of the interview

when Alston asked him to do so. (XI 163). When Baxter introduced himself he mentioned the Sweet case, in which Alston had been accused of being the shooter, but denied telling Alston that he could be like Sweet or he could cooperate. (XI 164). Baxter said he did not know what Alston was thinking when he asked that notes not be taken. (XI 166).

Detective Robert Hinson testified that he was involved with Alston only during the initial search for the victim's body when Alston was handcuffed to him during the search. (XI 181-82). He denied making any promises or threats to Alston. (XI 182). Alston was cooperative and wanted to find the body and never expressed any fear of Baxter and Roberts. (XI 183).

Detective Roberts testified that he had been a homicide detective for almost three years. (XI 185). Roberts denied that either he or Baxter threatened Alston or made him any promises. (XI 186). Roberts saw Alston twelve or thirteen times between May 26 and August 23, 1995, and Alston never said he was afraid to talk with Roberts or any other officer. (XI 186). After being advised of his rights on May 25, Alston never expressed any unwillingness to talk to the police and was never coerced. (XI 187).

On cross-examination Roberts said he had no idea what Alston was thinking when he asked Roberts to stop taking notes. (XI 188-

89). He did not think that Alston did not understand that oral statements could be used against him. (XI 189). Alston never broke down, cried, or became hysterical. (XI 191).

Alston testified in his own behalf. He claimed that he watched his words carefully and remained silent during the May 25 interview. (XI 195). Alston stated that Baxter promised that the victim's mother would testify on his behalf and that he would not get the death penalty. (XI 196-97). He stated that he talked to the detectives only after Baxter said "I promise." (XI 197-99). On cross-examination Alston denied having been interrogated before even though he had been arrested twenty-one times. (XI 199). He claimed that Baxter said he would be on death row like Sweet. (XI 201-02). He admitted that he made numerous requests to talk with the detectives. (XI 202).

Defense counsel argued that Alston's statements should be suppressed because 1) the detectives did not tell him that he was under arrest and on what charge (XII 271-75); 2) Alston did not understand his rights (XII 275-77); 3) Baxter improperly used the Christian burial technique (XII 277-78); 4) Baxter said that he would tell the judge that Alston cooperated (XII 278-79); and 5) Baxter took background information before reading Alston his rights. (XII 279). The prosecutor argued that the state had

proved that Alston's statements were made freely and voluntarily. (XII 280-86). The court made the following statement in denying the motion to suppress:

> The Court finds that the statements of Pressley Bernard Alston were freely and voluntarily made, that he waived his rights knowingly and intelligently and, furthermore, that he understood his rights. There was no deceit, trickery and chicanery practiced by the Jacksonville Sheriff's Office in connection with his interrogation, there were no promises, unlawful promises, threats, intimidation or coercion. The defendant repeatedly sought to talk to the police officers, and knew full well the consequences of his doing so.

(XII 286-87).

Convictions based on involuntary statements will not be allowed to stand. E.g., Traylor v. State, 596 So. 2d 957 (Fla. 1992); Thomas v. State, 456 So. 2d 454 (Fla. 1984); Reddish v. State, 167 So. 2d 858 (Fla. 1964). However, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" Colorado v. Connolly, 479 U.S. 157, 167 (1986). Coercion can be psychological as well as physical and, as recognized by this Court: "If for any reason a suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be used against him." Reddish,

167 So. 2d at 863; DeConingh v. State, 433 So. 2d 501 (Fla. 1983), cert. denied, 465 U.S. 1005 (1984).

Even though coercion can be psychological, the psychological impact of voluntary disclosure of a guilty secret does not qualify as state compulsion. Oregon v. Elstad, 470 U.S. 298 (1985). Thus, the "[p]olice are not required to protect [people] from their own unwarranted assumptions," nor is it "forbidden to appeal to the consciences of individuals." Johnson v. State, 660 So. 2d 637, 643-43 (Fla. 1995), cert. denied, 116 S. Ct. 1550 (1996); cf. Bruno v. State, 574 So. 2d 76, 80 (Fla.) ("fact that Bruno's confession was motivated in part by concern over the welfare of his son does not provide a basis for suppressing the confession"), cert. denied, 502 U.S. 834 (1991); Cannady v. State, 427 So. 2d 723, 728 (Fla. 1983) ("mere fact that appellant regarded Officer McKeithen as his friend is insufficient to show that his confession was improperly induced"); Black v. State, 630 So. 2d 609, 617 (Fla. 1st DCA 1993) ("At worst, the police merely acquiesced in appellant's attempt to obtain leniency for his girlfriend, when in fact, the police had no intention of charging her. . . . That appellant thought differently does not furnish a basis for invalidating his otherwise voluntary confession"); Barnason v. State, 371 So. 2d 680, 681 (Fla. 3d DCA 1979) (psychologically effective interrogation does not render a

confession involuntary), cert. denied, 381 So. 2d 764 (Fla. 1980). Furthermore, "that a police officer agrees to make one's cooperation known to prosecuting authorities and to the court does not render a confession involuntary." Maqueira v. State, 588 So. 2d 221, 223 (Fla. 1991), cert. denied, 112 S. Ct. 1961 (1992).

The trial court applied the proper standards, and the record supports the court's refusal to suppress Alston's statements. The detectives were veteran police officers, and Alston has more than a passing familiarity with the criminal justice system. The trial court saw and heard the witnesses and obviously found the detectives to be the more credible witnesses when they stated that they made no promises or threats to Alston. Telling Alston that the victim's mother needed closure is not a blatantly coercive and deceptive ploy, as this Court has described the Christian burial technique. Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989).

Alston's reliance on Williams v. State, 441 So. 2d 653 (Fla. 3d DCA 1983), and State v. Charon, 482 So. 2d 392 (Fla. 3d DCA 1985), is misplaced because these cases are factually distinguishable. The state failed to show that Charon's confession was made freely and voluntarily when the police questioned the seventeen-year-old defendant "in his father's absence because the

detective had misinformed the juvenile officer concerning the father's availability." Id. at 393. Alston, on the other hand, was twenty-four years old and had considerable experience with being arrested. In Williams the appellate court commented that the detectives' "testimony, with crucial contradictions in some areas and so manifestly equivocal in other areas, confirms so many details that the conclusion is persuasive indeed that the appellant's version is the correct one." 441 So. 2d at 657. The same cannot be said about the instant case.

A trial court's denial of a motion to suppress is presumed correct. Terry v. State, 668 So. 2d 954 (Fla. 1996); Trepal v. State, 621 So. 2d 1361 (Fla. 1993), cert. denied, 114 S. Ct. 892 (1994); Henry v. State, 613 So. 2d 429 (Fla. 1992), cert. denied, 114 S. Ct. 699 (1994); Jones v. State, 612 So. 2d 1370 (Fla. 1992), cert. denied, 114 S. Ct. 112 (1994); Johnson v. State, 608 So. 2d 4 (Fla. 1992), cert. denied, 113 S. Ct. 2366 (1993). An appellate court must interpret the evidence, reasonable inferences, and deductions in a manner most favorable to sustaining the trial court's ruling, Terry, Orme v. State, 677 So. 2d 258 (Fla. 1996), Trepal, Johnson, and should defer to the fact-finding authority of the trial court rather than substituting its judgment for the trial court's. Gilbert v. State, 629 So. 2d 957 (Fla. 3d DCA 1993); see

Wasko v. State, 505 So. 2d 1314 (Fla. 1987). Finally, appellate review is limited to determining if the trial court's ruling is supported by competent substantial evidence. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982).

The trial court's ruling is supported by competent, substantial evidence, and Alston has failed to show an abuse of discretion. There is no merit to this issue, and it should be denied.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY ADMITTED A VIDEOTAPE INTO EVIDENCE.

Alston argues that the trial court erred in admitting into evidence a videotape made while he was walked between the Police Memorial Building and the jail. There is no merit to this issue.

It is routine practice for the police to walk prisoners from the Police Memorial Building to the jail, i.e., a "walkover" of approximately one hundred yards. (XI 120). Television news crews videotaped Alston's walkover, and reporters questioned him during that trip. On November 15, 1995, Alston filed a motion to prohibit the state from introducing the videotape into evidence. (II 306). The court considered this motion at the November 17 motion hearing.

At that hearing Detective Baxter testified that he did not

call the press to say that Alston was being moved to the jail. (XI 121). In fact, Alston wanted the news media to be present during the walkover. (XI 122). The only thing he was concerned about was that his employer's company name on his shirt be covered or obscured. (XI 122-23). The detectives did not question Alston during the walkover and did not direct the reporters to do so. (XI 123-24). On cross-examination Baxter reiterated that Alston wanted the news media there - "he said something about he might want to be on the news early in the interview." (XI 168-69).

The state argued that the motion should be denied because no due process violation occurred. Alston argued that the videotape misrepresented him because it distorted his appearance and attitude (XI 209-10) and that any probative value of the videotape was outweighed by the prejudice it would cause. (XI 211-12). The court denied the motion to exclude the videotape stating:

> The Court has balanced the interests under 403, because that really is the gravamen of the motion. The court finds that the evidence is compelling and highly probative of the issues in this case. Indeed, the conduct of the defendant at the time that he talked to the reporters indicates consciousness of guilt, and the prejudicial effect does not outweigh the probative value under the balancing test under 403.

(XI 212-13).

A trial court's ruling on the admissibility of evidence is presumed correct and "will not be disturbed on appeal unless there is a clear showing of abuse" of discretion. Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995); Kearse v. State, 662 So. 2d 677 (Fla. 1995). The cases that Alston relies on, however, are clearly distinguishable and do not control this case. In Cave v. State, 660 So. 2d 705, 709 (Fla. 1995), this Court held that the videotape of a staged reenactment of the crime, that ended with a gunshot "and a view of the car driving down the highway with its rear lights slowly fading from view," should not have been admitted. In Scott v. State, 559 So. 2d 169 (Fla. 4th DCA 1990), the court held that the jury should not have heard the audio portion of a videotape where deputies talked about Scott's dealing cocaine from his home. The court in Pausch v. State, 594 So. 2d 1216, 1218 (Fla. 2d DCA 1992), found an abuse of discretion in allowing the jury to hear portions of a taped interview where a detective "accused [the defendant] of lying and abusing her son" and "persistently condemned Pausch as an unfit mother." Finally, the court held that a videotape showing "in great detail the decaying, animal-ravaged remains of a body" should not have been admitted in Pottgen v. State, 589 So. 2d 390, 392 (Fla. 1st DCA 1991). No egregious conduct, such as occurred in these cases, took place in

the instant case.

Instead, the trial court correctly noted that the videotape indicated Alston's consciousness of his guilt. Alston demonstrated no improprieties by the state or the deputies concerning the walkover. That he may have made silly faces, laughed, and smiled was solely Alston's doing. He, and he alone, was responsible for any prejudice his conduct might have caused.

The trial court properly admitted the videotape of the walkover. Alston has not shown an abuse of discretion, and this issue should be denied.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY THAT ALSTON WAS TAKING PSYCHOTROPIC MEDICATION.

Alston claims that the trial court erred by refusing to give his requested instruction informing the jury that he was taking psychotropic medications during his trial. There is no merit to this issue. Even if error occurred, however, it was harmless.

Prior to trial, Alston filed a suggestion of mental incompetence alleging that he exhibited inappropriate behavior, was extremely depressed, and refused to follow counsel's advice. (I 29). The trial court ordered that Alston undergo a competency

evaluation (I 32), and the experts reported to the court on October 13, 1995 that Alston was competent to proceed. (II 292). On November 16, 1995 Alston filed a written motion asking that the jury be told he was receiving psychotropic medication. (II 324). This motion came up at a pretrial motion hearing, and the prosecutor objected to informing the jury that Alston was on medication (XI 223) because that

> would imply to the jury that this defendant has mental problems. This is not a case where a notice of intent to rely on an insanity defense has been raised, and I believe that that is done merely to put that seed in the jury's mind. There is no other reason to do it.

(XI 224). The court denied the request and held that Florida Rule of Criminal Procedure 3.215(c) "is not triggered because there is not an adjudication of incompetency or restoration." (XI 224-25). Counsel argued that the request should be granted even though Alston had not been declared incompetent because Alston might engage in bizarre behavior. (XI 225-26). The trial court disagreed with counsel's interpretation of the rule and stated:

> I think the rule is triggered, now, you may be correct that if your client exhibits inappropriate behavior and there is a showing that that inappropriate behavior is a result of the psychotropic medication, that I would then so inform the jury, but in a vacuum I'm not inclined to do so, and I would have to be

> convinced that it would be the result of medication and not just because he wanted to do it, because then I would be giving him a license to act inappropriately, and that's what I fear. And I'm -- I'm not saying he would do it, but it gives the defendant a license to act silly or act inappropriately.

(XI 227). Thereafter, the judge stated: "I'm taking your motion under advisement, and I will see what type of behavior the defendant exhibits during the trial and I'll act accordingly." (XI 227).

Counsel renewed the motion after Gwenetta McIntyre, Alston's girlfriend, testified and argued that, after court adjourned following McIntyre's testimony, Alston "swore and showed a lot of emotion." (XV 913). The prosecutor responded: "It's because I made him mad, because he wanted to talk to Gwenetta and I told her to go on out the door. He's acting very normal, Judge, that's just him, it has nothing to do with medication." (XV 913). The court denied the request and stated:

> I have kept an eye on Mr. Alston throughout the proceedings, I have not seen any bizarre or inappropriate behavior. I'm looking for it, as I indicated earlier, and he's just showing the normal range of reactions of a person accused of a crime.

(XV 914).

Alston now argues that he should be retried because of the

court's refusal to inform the jury that he was on psychotropic medication, relying on Rosales v. State, 547 So. 2d 221 (Fla. 3d DCA 1989).[3] Rosales, however, is factually distinguishable and does not support Alston's argument. According to the district court, "Rosales spent seventeen years in and out of mental hospitals" and had been "adjudicated mentally ill under the Baker Act" at least twice. Id. at 223. Moreover, a psychiatrist testified that Rosales was competent to stand trial only because he had received an injection of psychotropic medication prior to trial. Id. Additionally, Rosales' only defense was insanity. On those facts the district court found reversible error in not giving the rule 3.215(c) instruction.

Here, on the other hand, Alston had never been declared incompetent, and, in fact, the trial court specifically found him competent to stand trial. (II 331). The only incident during trial where counsel renewed the request for instruction occurred, as the prosecutor noted, because Alston was mad at her, not because he was affected by the medications. Moreover, this apparently singular episode of misbehavior occurred outside the jury's presence. Alston has not demonstrated that the refusal to tell the

[3] This appears to be the only case ever reported concerned with the instruction provided in Fla. R. Crim. P. 3.215(c).

jury he was on medications prejudiced him or prevented him from presenting a defense.

Even if error occurred, it was harmless. During the penalty phase, Eric Waugh, a psychiatrist, testified that Alston had a biological disorder that was treatable with medication (XVIII 1631) and that, during trial, Alston was on three medications that controlled his mood swings. (XVIII 1632-33). Counsel suggested that Alston might exhibit bizarre or inappropriate behavior because of the medications, but it is obvious that those medications prevented rather than caused such behavior. Any error on this issue, therefore, is harmless, and no relief is warranted.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE MEDICAL EXAMINER TO IDENTIFY THE VICTIM FROM DENTAL RECORDS.

Because the trial court refused to declare the medical examiner to be an expert in forensic odontology, Alston argues that the court erred in allowing the examiner to identify the victim through his dental records. There is no merit to this claim. Moreover, even if error occurred, it was harmless.

Dr. Bonifacio Floro, the medical examiner, testified on behalf of the state. The prosecutor tendered Dr. Floro as an expert in

forensic odontology. (XVI 1121). The court, however, only permitted the doctor "to give an opinion or opinions in the area of forensic pathology but not in the area of forensic odontology." (XVI 1122). During his testimony, Floro stated that he obtained the victim's dental x-ray records from Dr. Chester Aikens. (XVII 1128). The court overruled the defense objections that the x-rays were hearsay and that identifying the victim was outside Floro's expertise. (XVI 1128). Floro then testified that his investigator, Carol Deane, assisted Dr. Aikens in preparing a dental chart. (XVI 1129). Defense objections were again overruled. (XVI 1129). Floro then stated that Dr. Aikens' records matched perfectly the dental records prepared in the medical examiner's office. (XVI 1130). The court granted the defense a continuing objection (XVI 1131), and Floro testified that he and Dr. Arthur Burns, an odontologist (XVI 1121), made the identification together. (XVI 1131).

As Alston acknowledges, "[t]he determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge whose decision will not be reversed absent a clear showing of error." Terry v. State, 668 So. 2d 954, 960 (Fla. 1996); Geralds v. State, 674 So. 2d 96 (Fla. 1996); Finney v. State, 660 So. 2d 674 (Fla. 1995). Furthermore,

an expert may "express an opinion on matters in which the witness has expertise when the opinion is in response to facts disclosed to the expert at or before the trial." Geralds, 674 So. 2d at 100. Applying these standards to the instant case, it is obvious that no error occurred. Dr. Floro testified that, besides taking courses in forensic odontology, he attended workshops in that discipline and also received on-the-job training from Dr. Burns (XVI 1121) and that his training had prepared him to identify remains from dental records. (XVI 1127). Even if Floro was not declared a forensic odontologist, he has considerable experience and expertise in forensic odontology. Alston has demonstrated no abuse of discretion in the trial court's allowing Dr. Floro's testimony.

Even if error had occurred, it would have been harmless because the victim's identity was adequately established. Alston led the police to the skeletonized remains of the man he killed and admitted to his mother that he killed James Coon. (XV 957). The parties stipulated that a Guess watch, a gold pendant, and the red Honda, all items that had been in Alston's possession, belonged to James Coon. (XIV 843-45). Additionally, two of Coon's uncles identified photographs of the clothes on the remains as being the clothes worn by their nephew when they last saw him at University Hospital on January 25, 1995. (XIV 813; 817). The state proved

that Alston killed James Coon. If any error occurred in Floro's identification of the victim's remains, that error was harmless.

ISSUE V

WHETHER THE TRIAL COURT CORRECTLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL OF THE CHARGE OF ARMED ROBBERY.

Alston argues that the evidence was insufficient to convict him of armed robbery and that the trial court erred in denying his motion for judgment of acquittal of that charge. There is no merit to this claim.

The second count of Alston's indictment charged that he "did unlawfully by force, violence, assault, or putting in fear, take money or other property, to wit: a vehicle and contents, United States currency, wallet and contents, clothing, and jewelry, the property of James Coon." (I 14). After the state rested its case, Alston moved for judgment of acquittal on all counts. (XVII 1259). Regarding the armed robbery count, he argued that the proof was insufficient "that there was a robbery as opposed to a killing and then a theft as an afterthought." (XVII 1260). The trial court denied the motion. (XVII 1260). He makes the same argument to this Court, and, as before, it should be rejected.

Subsection 812.13(1), Florida Statutes (1995), defines robbery

as "the taking of money or other property which may be the subject of larceny from the person or custody of another. . . when in the course of the taking there is the use of force, violence, assault or putting in fear." Furthermore, an act is considered to be 'in the course of the taking' if it occurs either prior to, contemporaneously with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events." § 812.13(3)(b), Fla. Stat. (1995). As this Court has interpreted subsection 812.13, "the violence or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of violence or intimidation and the taking constitute a continuous series of acts or events." Jones v. State, 652 So. 2d 346, 349 (Fla. 1995). Using a firearm in the commission of a robbery is per se violent. Johnson v. State, 366 So. 2d 418, 419 (Fla. 1978) (display of a firearm constitutes "the element of force, assault, violence, or putting in fear by which the robbery was accomplished").

The state proved that the taking of the victim's property was much more than an "afterthought." Alston told the police that he and Ellison could not find anyone to rob on Saturday, but that they flagged down the victim and robbed him on Sunday. (XV 942). The defense stipulated that jewelry and the red Honda that had been in

Alston's possession belonged to the victim. (XIV 843-45). Alston had access to his girlfriend's handgun (XV 855-56) and admitted that he had possession of the handgun. (XV 942; XVI 1158).

Moving for a judgment of acquittal "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974); Orme v. State, 677 So. 2d 258 (Fla. 1996); Taylor v. State, 583 So. 2d 323 (Fla. 1991). a judgment of conviction comes to a reviewing court with a presumption of correctness. Terry v. State, 668 So. 2d 954 (Fla. 1996). The state "is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict." Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Holton v. State, 573 So. 2d 283 (Fla. 1990), cert. denied, 500 U.S. 960 (1991). Furthermore, the jury need not believe the defendant's version of the facts when the state produces conflicting evidence. Finney v. State, 660 So. 2d 674 (Fla. 1995); Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 115 S. Ct. 2588 (1995); Taylor; Cochran.

If the state introduces competent, substantial evidence that is inconsistent with a defendant's theory of events, "the question of whether the evidence is sufficient to exclude all reasonable

hypotheses of innocence is for the jury to decide," Atwater v. State, 626 So. 2d 1325, 1328 (Fla. 1993), cert. denied, 114 S. Ct. 1578 (1994). The state's evidence was more than sufficient to submit the armed robbery charge to the jury. Alston has shown no error in the trial court's denial of his motion for judgment of acquittal, and that denial should be affirmed.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY REFUSED TO GIVE AN INSTRUCTION ON INDEPENDENT ACTS.

Alston argues that the trial court should have given his requested instruction on independent acts. There is no merit to this claim.

Alston asked that the trial court give the following instruction during the guilt phase:

> If you find that the killing was committed by a person other than the defendant and that it was an independent act of the other person, not part of the scheme or design of a joint felony, and not done in furtherance of a joint felony, but falling outside of, and foreign to, the common design or the original collaboration, then you should find the defendant not guilty of felony murder.

(II 339). At the guilt-phase charge conference, the court denied the request, stating that the proposed instruction is "argumentative and it's covered by the standard jury instructions."

(XVII 1285). Alston has shown no error in the trial court's ruling.

As this Court has stated many times, a "Defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions." Hooper v. State, 476 So. 2d 1253, 1256 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986); Sawyer v. State, 558 So. 2d 975 (Fla. 1991); Robinson v. State, 574 So. 2d 108 (Fla. 1991); Smith v. State, 424 So. 2d 726 (Fla. 1982). However, a "court should not give instructions which are confusing, contradictory, or misleading." Butler v. State, 493 So. 2d 451, 452 (Fla. 1986). Alston's current claim that his statements presented conflicting evidence "as to whether co-defendant Dilanjan Ellison was actually the primary mover behind this crime" (initial brief at 68) is insufficient. See Smith, 424 So. 2d at 732 (defendant's statement not sufficient to warrant instruction on defense of withdrawal in light of the facts).

Felons are generally responsible for the acts of their co-felons. Lovette v. State, 636 So. 2d 1304 (Fla. 1994). The evidence showed that Ellison was a willing participant in these crimes, but not an independent actor. Instead, Alston, not Ellison, had access to the murder weapon (XV 855-56, 857), and he,

not Ellison, decided that the victim had to be killed. (XVI 1158). Alston, not Ellison, coldly executed the victim by shooting him in the head after Ellison's shot failed to kill him. (XVI 1159).

The facts of this case did not warrant instructing the jury on the independent acts of a cofelon. Alston has demonstrated no error, and this issue should be denied. See Allen v. State, 636 So. 2d 494, 497 n.3 (Fla. 1994).

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN REFUSING TO CONTINUE THE PENALTY PHASE.

Alston claims that the trial court erred in denying his motion to continue his penalty proceeding until after his codefendant had been tried and sentenced. There is no merit to this claim.

Alston and his sixteen-year-old half brother, Dilanjan Ellison, robbed and kidnapped the victim; both shot the victim, but it was Alston who executed him by shooting him in the head. The jury convicted Alston as charged on December 1, 1995 (XVII 1396), and the trial court scheduled the penalty phase for December 13, 1996. (XVII 1398). On December 11 Alston filed a motion for continuance seeking to delay his penalty phase until Ellison was tried and sentenced. (III 468). The trial court heard the parties argue the motion at a motion hearing on December 11 and denied the

requested continuance. (XVII 1414). Alston now argues that the court abused its discretion in doing so.

"The denial of a motion for continuance should not be reversed unless there has been a palpable abuse of discretion; this abuse must clearly and affirmatively appear in the record." Gerалds v. State, 674 So. 2d 96, 99 (Fla. 1996). A defendant must demonstrate "(1) prior due diligence to obtain the witness's presence; (2) that substantially favorable testimony would have been forthcoming; (3) that the witness was available and willing to testify; and (4) that the denial of the continuance caused material prejudice." Id. Alston did not meet these requirements. Although Alston deposed Ellison, Ellison refused to answer questions on the advice of his attorney. (III 589 et seq.). Given Ellison's statement portraying Alston as the major actor in these crimes and as the victim's killer (III 472-74), it is mere speculation that Ellison would have testified favorably for Alston.

Alston has demonstrated no abuse of discretion in the trial court's denial of his motion for continuance. Cf. Gamble v. State, 659 So. 2d 242, 245 (Fla. 1995) (trial court not required to postpone sentencing and await codefendant's plea and sentence). Therefore, this Court should affirm the trial court's ruling.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO ITS ROLE.

Alston argues that the trial court incorrectly instructed the jury as to the relative roles of the judge and the jury. There is no merit to this claim.

This issue jumbles together Alston's guilt- and penalty-phase-instruction complaints. Addressing the guilt phase first, the transcript of the guilt-phase charge conference discloses the following: The trial court proposed using all of the standard instructions on "rules for deliberation." (XVII 1284). Alston objected to the sentence: "It is the judge's job to determine what a proper sentence would be if the defendant is guilty." (XVII 1284). Alston did not propose an alternative instruction; he only asked that the quoted sentence be omitted. The trial court decided to give the standard instruction (XVII 1284) and instructed the jury, in part, as follows: "Your duty is to determine if the defendant is guilty or not guilty in accordance with the law. It is the Judge's job to determine what a proper sentence would be if the defendant is guilty." (XVII 1369).

This standard guilt-phase instruction is a correct statement of the law. Alston has demonstrated no error, and the trial

court's overruling of his objection should be affirmed.

Turning to the penalty-phase instructions, Alston proposed that the jury be given the following instruction:

> The punishment for this crime is either death or life imprisonment without the possibility of parole. Final decision as to what punishment shall be imposed rests [solely] with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon PRESSLEY ALSTON, <u>and the law requires the court to give great weight to your recommendation. I may reject your recommendation only if the facts are so clear and convincing that virtually no reasonable person could differ.</u>

(III 417). At a charge conference immediately prior to the penalty phase the court agreed to add the language about giving the jury's recommendation great weight (XVII 1431), agreed to delete the parenthetical "solely" (XVII 1432-33), and refused to give the last sentence of the proposed instruction. (XVII 1433). Thereafter, the court gave the jury the following preliminary instruction, among others, at the beginning of the penalty phase:

> The final decision as to what punishment shall be imposed for the crime of murder in the first degree rests with the judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant in this case, and the law requires the Court to give great

weight to your recommendation.

(XVII 1449).

Now, Alston argues that this instruction violates Caldwell v. Mississippi 472 U.S. 320 (1985). As this Court has held many times, however, "Florida's standard jury instructions fully advise the jury of the importance of its role." Archer v. State, 673 So. 2d 17, 21 (Fla. 1996); Johnson v. State, 660 So. 2d 637 (Fla. 1995), cert. denied, 116 S. Ct. 1550 (1996); Larkins v. State, 655 So. 2d 95 (Fla. 1995). Any change from the standard instruction in this case was at Alston's request. This claim has no merit and should be denied.

ISSUE IX

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE JURY TO HEAR VICTIM IMPACT EVIDENCE.

Alston argues that the trial court erred in allowing the presentation of victim impact evidence through a statement of the victim's mother. There is no merit to this issue.

Prior to trial, Alston filed a motion seeking to "exclude evidence or argument designed to create sympathy for the deceased." (II 249). At the December 11, 1995 motion hearing Alston argued that victim impact evidence is not appropriate. (XVII 1422). The

state responded that it intended to abide strictly by the language in Payne v. Tennessee, 501 U.S. 808 (1991), and Florida cases interpreting Payne. (XVII 1423). At the beginning of the penalty phase on December 13 defense counsel announced that he had reviewed the proposed victim impact statement that would be read by the victim's mother. (XVII 1444). Counsel stated that he specifically objected to the fourth paragraph of the proposed statement. (XVII 1444). The prosecutor argued that the paragraph was appropriate under Payne (XVII 1444-45), but the court agreed with the defense and directed that paragraph 4 be excluded. (XVII 1445). The court held that the rest of the statement could be read to the jury. (XVII 1445). Thereafter, the victim's mother read her three-and-one-half-page statement to the jury. (XVIII 1457-60).

Subsection 921.141(7), Florida Statutes (1993), provides as follows:

> (7) Victim impact evidence.--Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate

> sentence shall not be permitted as a part of victim impact evidence.

This Court upheld the constitutionality of this statute in Windom v. State, 656 So. 2d 432 (Fla.), cert. denied, 116 S. Ct. 571 (1995). In doing so it commented that "this Court has held victim impact testimony to be admissible as long as it comes within the parameters of the Payne decision." Id. at 438. Since Windom, this Court has acknowledged and upheld the state's right to present victim impact evidence numerous times. Bonifay v. State, 680 So. 2d 413 (Fla. 1996); Farina v. State, 680 So. 2d 392 (Fla. 1996); Hitchcock v. State, 673 So. 2d 859 (Fla. 1996); Allen v. State, 662 So. 2d 323 (Fla. 1995).

In Bonifay this Court stated:

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family.

680 So. 2d at 419-20. As required by the statute, the testimony of the victim's mother demonstrated his "uniqueness as an individual human being" and did not constitute "[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence." § 921.141(7). Because the testimony met the

requirements of Payne and the statute, it was both relevant and admissible. Alston has demonstrated no error, and this Court should affirm the trial court's allowing the state to present victim impact evidence.

ISSUE X

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING VICTIM IMPACT EVIDENCE.

Alston claims that the trial court improperly instructed the jury on victim impact evidence. There is no merit to this argument.

Prior to trial, Alston filed a proposed instruction on victim impact evidence. (II 323). At the December 11, 1995 motion hearing Alston asked that the proposed instruction be given (XVII 1425-26), but the state objected to any formal instruction on victim impact evidence. (XVII 1426). The judge, however, stated "I think some type of instruction just has to be given to the jury by the court." (XVII 1427). It was then decided that the issue would be revisited at sentencing. (XVII 1428-29).

On December 13 the trial court asked defense counsel if he still wanted a cautionary instruction on victim impact evidence and counsel responded affirmatively. (XVII 1445-46). The prosecutor then read such an instruction given by the court in the penalty

phase of another case. (XVII 1446-47). The court decided to give the instruction produced by the state (XVII 1447-48), and, prior to the victim's mother's statement, gave the jury the following instruction:

> Ladies and gentlemen of the jury, you are going to hear evidence known as victim impact evidence which will be offered by Sharon Coon during the penalty phase of this trial.
>
> I remind you, or tell you, instruct you that you shall not consider the victim impact evidence as an aggravating circumstance, but the victim impact evidence may be considered by you in making your decision in this matter.

(XVII 1451-52). The court included the second sentence of the above-quoted instruction in the instruction given to the jury just prior to beginning deliberations. (XIX 1752).

A standard jury instruction on victim impact evidence has not been promulgated or adopted by this Court. The instruction given in this case, however, fully comports with Payne v. Tennessee, 501 U.S. 808 (1989), and Windom v. State, 656 So. 2d 432 (Fla.), cert. denied, 116 S. Ct. 571 (1995). In Windom this Court stated that victim impact "evidence is not admitted as an aggravator but, instead, . . . allows the jury to consider 'the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.'" Id. at 438 (quoting

§ 921.141(7), Fla. Stat. (1993)). The instruction told the jury precisely what Windom requires, i.e., that victim impact evidence is not an aggravator, but that it could be considered by the jury. Alston has demonstrated no error, and this claim should be denied.

ISSUE XI

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR TO DISPLAY A PHOTOGRAPH OF THE VICTIM DURING CLOSING ARGUMENT.

Alston argues that the trial court erred in allowing the prosecutor to display a photograph of the victim during closing argument. There is no merit to this issue. Even if error occurred, however, it was harmless.

At the December 11, 1995 motion hearing the prosecutor announced that he would introduce a photograph of the victim during the mother's testimony. (XVII 1441). Alston objected, arguing that the photograph was irrelevant and that its "prejudicial value would outweigh any probative effect." (XVII 1442). The court overruled the objection. (XVII 1443). Thereafter, the state did not introduce the photograph during testimony, but, rather, the prosecutor displayed it to the jury during closing argument.

As Alston points out, the "test of admissibility of photographic evidence is relevance." Cave v. State, 660 So. 2d

705, 708 (Fla. 1995). The legislature, as acknowledged by this Court, has decided that victim impact evidence is relevant. E.g., Bonifay v. State, 680 So. 2d 413 (Fla. 1996). This Court has consistently recognized that photographs of victims when dead are relevant and admissible: "Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Henderson v. State, 463 So. 2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1985). A photograph of the victim when alive is no less relevant or admissible than one of the same victim when dead. If the object of victim impact evidence is to demonstrate the victim's uniqueness, what better way to do so than through a photograph of the victim while alive. Such truly shows the jury who the victim was, instead of leaving him or her a faceless shadow.

The admissibility of photographs is within the trial court's discretion, and that court's decision will not be overturned absent a showing of clear error. Lockhart v. State, 655 So. 2d 69 (Fla. 1995). Alston has demonstrated no clear error and, thus, no abuse of discretion. Even if the trial court erred in allowing the state to display the photograph, however, any such error would be harmless because Alston has not shown that the photo became a

feature of the trial or improperly affected the jury's recommendation. This issue, therefore, should be denied.

ISSUE XII

WHETHER THE TRIAL COURT CORRECTLY FOUND IN AGGRAVATION THAT THE MURDER WAS COMMITTED TO AVOID ARREST.

Alston argues that the trial court erred in finding in aggravation that he killed the victim to avoid or prevent a lawful arrest. There is no merit to this claim.

The trial court made the following findings regarding this aggravator:

> The aggravating circumstance specified in Florida Statute Section 921.141(5)(e) was established beyond a reasonable doubt in that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. The defendant and his accomplice took James Coon from a hospital where he had been visiting an ill relative, drove him to a remote part of town after taking personal property from him, and thereafter executed him because the defendant realized that James Coon could identify him and his accomplice. The purpose of the killing was to eliminate a witness to the kidnapping and robbery. This statutory aggravating circumstance was established beyond any reasonable doubt.

(III 512-13). The record fully supports these findings.

The avoid arrest aggravator "focuses on a defendant's motivation for a crime." Stein v. State, 632 So. 2d 1361, 1366

(Fla.), cert. denied, 115 S. Ct. 111 (1994). Therefore, as this Court has stated, "in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was witness elimination." Preston v. State, 607 So. 2d 404, 409 (Fla. 1992), cert. denied, 113 S. Ct. 1619 (1993); Thompson v. State, 648 So. 2d 692 (Fla. 1994), cert. denied, 115 S. Ct. 2283 (1995); Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 510 U.S. 834 (1993); Correll v. State, 523 So. 2d 562 (Fla.), cert. denied, 488 U.S. 871 (1988). This Court has uniformly upheld a trial court's finding the avoid arrest aggravator when the defendant admitted killing the victim to eliminate a witness. Whitton v. State, 649 So. 2d 861, 867 (Fla. 1994), cert. denied, 116 S. Ct. 106 (1995); Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994), cert. denied, 115 S. Ct. 1708 (1995); Walls v. State, 641 So. 2d 381, 390 (Fla. 1994), cert. denied, 115 S. Ct. 943 (1995); Bottoson v. State, 443 So. 2d 962, 963 (Fla. 1983), cert. denied, 469 U.S. 873 (1984).

In the instant case Alston admitted that he killed the victim because the victim could identify him and Ellison as the people who robbed him. (XVI 1158). Alston's confession that the victim was killed to eliminate him as a witness is direct evidence of his motive. Walls. Alston's reliance on Thompson v. State, 647 So. 2d

824 (Fla. 1994), Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987), and Bates v. State, 465 So. 2d 490 (Fla. 1985), is misplaced because none of those defendants admitting killing to eliminate a witness. The trial court's finding the avoid arrest aggravator should be affirmed because Alston has demonstrated no error as to that finding.

ISSUE XIII

WHETHER THE TRIAL COURT PROPERLY FOUND THIS MURDER TO HAVE BEEN COMMITTED IN A HEINOUS, ATROCIOUS, OR CRUEL MANNER.

Alston argues that the trial court erred in finding in aggravation that he committed this murder in a heinous, atrocious, or cruel (HAC) manner. The record, however, supports this finding. If this aggravator should not have been found, any error was harmless.

The trial court made the following findings regarding this aggravator:

> The aggravating circumstance specified by Florida Statute Section 921.141(5)(h) was established beyond a reasonable doubt in that the capital felony was especially heinous, atrocious, or cruel. This was not a "routine" robbery wherein the decedent was killed simultaneously with the robbery. James Coon was forced into his own vehicle with his two (2) assailants, repeatedly begged for his life, was taken out of the vehicle in a remote

> location in Jacksonville, and vividly contemplated his death for a minimum of thirty (30) minutes. The words of James Coon are haunting, "Jesus, Jesus, please let me live so I can finish college." The defendant's accomplice shot the decedent once, and it appears that this shot was not fatal. After the accomplice came back to the defendant who did not go out into the woods initially with the accomplice and the decedent, the defendant inquired as to whether James Coon was dead. The accomplice responded that he assumed that he was as he had shot him once.
>
> Not content with this assurance from the accomplice, the defendant took the firearm from the accomplice and went to the victim who was alive, moaning, and James Coon held up his hand as if to fend off further attacks. The defendant then shot James Coon at least two (2) times, and there is no question that James Coon was then rendered dead. It is difficult for the court to imagine a more heinous, atrocious, or cruel manner of inflicting death upon an innocent citizen who just happened to be in the path of this defendant who was then a predator looking for money or other things of value.

(III 513-14).

Relying on Hartley v. State, 21 Fla. L. Weekly S391 (Fla. Sept. 19, 1996), Ferrell v. State, 21 Fla. L. Weekly S388 (Fla. Sept. 19, 1995), Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), and Stein v. State, 632 So. 2d 1361 (Fla.), cert. denied, 115 S. Ct. 111 (1994), Alston argues that this murder was not HAC because there was no evidence of torture or extreme and outrageous

depravity (initial brief at 84) and that multiple swift gunshot wounds, even if the victim is begging for his life, do not establish HAC. (Initial brief at 85). As the state will demonstrate, the cited cases are distinguishable, and there is no merit to this argument.

The HAC aggravator applies to the nature of the killing and the surrounding circumstances. Gorby v. State, 630 So. 2d 544 (Fla. 1993), cert. denied, 115 S. Ct. 99 (1994); Stano v. State, 460 So. 2d 890 (Fla. 1984), cert. denied, 472 U.S. 1111 (1985); Mason v. State, 438 So. 2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). As this Court recently stated, "[e]xecution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim." Hartley, 21 Fla. L. Weekly at S394; Ferrell; Robertson v. State, 611 So. 2d 1228 (Fla. 1993). The state produced no such other evidence in Hartley, Ferrell, Bonifay, and Stein, and, thus, this Court held those murders not to be HAC.

In the instant case, however, the state did produce such evidence. As noted by the trial court, the rural area where the victim was killed was a thirty-minute drive from where he was abducted. Relying only on the fact that the victim died from either one of two gunshots to the head ignores the length of time

the victim had to contemplate and worry about his fate at the hands of armed kidnappers. It also ignores the fact that Ellison marched the victim into the woods and shot him. That shot did not kill him, however, and, if the victim had thoughts that he might still survive, Alston had a different plan. On hearing from Ellison that the victim was alive, Alston took the gun and marched into the woods. He ignored the victim's pleas for mercy and shot him dead.

"In determining whether the circumstance of heinous, atrocious or cruel applies, the mind set or mental anguish of the victim is an important factor." Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988), cert. denied, 489 U.S. 1040 (1989); Wyatt v. State, 641 So. 2d 1336 (Fla. 1994), cert. denied, 115 S. Ct. 1983 (1995); Phillips v. State, 476 So. 2d 194 (Fla. 1985). As this Court has held many times, fear and emotional strain preceding a victim's death contribute to the heinous nature of that death. Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 114 S. Ct. 538 (1993); Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 113 S. Ct. 1619 (1993); Adams v. State, 412 So. 2d 850 (Fla.), cert. denied, 459 U.S. 882 (1982). Furthermore, as this Court has recognized, the HAC aggravator can "be supported by evidence of actions of the offender preceding the actual killing, including forcible abduction, transportation away from possible sources of

assistance and detection, and sexual abuse." Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988); see Fennie v. State, 648 So. 2d 95 (Fla. 1994), cert. denied, 115 S. Ct. 1120 (1995); Routly v. State, 440 So. 2d 1257 (Fla. 1983), cert. denied, 468 U.S. 1220 (1984). When coupled with the forcible abduction and transportation, the time the victim had to contemplate his fate, both before and after being shot the first time, distinguishes this case from those relied on by Alston. The fact of this case set this murder apart from the norm of capital felonies and show it truly to have been heinous, atrocious, or cruel.

Even if this Court decides that the trial court erred in finding this aggravator, no relief is warranted. As stated by this Court previously: "If there is no likelihood of a different sentence, the trial court's reliance on an invalid aggravator must be deemed harmless." Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Striking HAC would leave four aggravators (felony murder/pecuniary gain, avoid or prevent arrest, prior conviction, and CCP) to be weighed against inconsequential nonstatutory mitigation. Given the presence of four strong aggravators and the lack of significant mitigators, there is no reasonable likelihood that Alston would have received a sentence of life imprisonment if the HAC aggravator had not been

considered. Cf. Hartley (striking HAC was harmless); Ferrell (same); Gerald v. State, 674 So. 2d 96, 104-05 (Fla. 1996) (no reasonable likelihood of different sentence where striking an aggravator left two aggravators to be weighed against a statutory mitigator and three nonstatutory mitigators); Barwick v. State, 660 So. 2d 685, 697 (Fla. 1995) (no likelihood of different sentence when eliminating CCP left five aggravators to be weighed against "minimal mitigating evidence"); Fennie, 648 So. 2d at 99 (eliminating CCP would be harmless because "[t]he totality of the aggravating factors and the lack of significant mitigating circumstances conclusively demonstrate that death is the appropriate penalty in this case"); Pietri v. State, 644 So. 2d 1347, 1354 (Fla. 1994) (striking CCP left three aggravators and, even if the trial court had found mitigators, there was no reasonable likelihood of a different sentence), cert. denied, 115 S. Ct. 2588 (1995); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994) (striking two aggravators was harmless where the three remaining aggravators "far outweigh the minimal mitigating evidence"), cert. denied, 115 S. Ct. 1372, (1995); Peterka v. State, 640 So. 2d 59, 71-72 (Fla. 1994) (striking two aggravators was harmless where three aggravators remained to be weighed against lack of a significant criminal history), cert. denied, 115 S. Ct. 940 (1995);

Stein, 632 So. 2d at 1367 (harmless error where four aggravators remained to be weighed against statutory mitigator); Watts v. State, 593 So. 2d 198, 204 (Fla.) (eliminating HAC was harmless where three aggravators remained to be weighed against one statutory mitigator and one nonstatutory mitigator), cert. denied, 505 U.S. 1210 (1992).

The state established five, or at the least four, aggravators. Alston, on the other hand, established only inconsequential nonstatutory mitigation. His death sentence, therefore, should be affirmed.

ISSUE XIV

WHETHER THE TRIAL COURT GAVE SUFFICIENT WEIGHT TO ALSTON'S MITIGATING EVIDENCE.

Alston argues that the trial court erred by assigning insufficient weight to the nonstatutory mitigators that he established. There is no merit to this claim.

In Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), this Court set out the manner in which trial courts should address proposed mitigating evidence. Under the Rogers procedure a trial court must "consider whether the facts alleged in mitigation are supported by the evidence[,] . . . must determine whether the established facts are of a kind capable of

mitigating the defendant's punishment[, and] . . . must determine whether they are of sufficient weight to counterbalance the aggravating factors." Id. at 534. Whether the greater weight of the evidence establishes a proposed mitigator "is a question of fact." Campbell v. State, 571 So. 2d 415, 419 n.5 (Fla. 1990); Lucas v. State, 613 So. 2d 408 (Fla. 1992), cert. denied, 114 S. Ct. 136 (1993). Moreover, a trial court has broad discretion in determining whether mitigators apply, and the decision on whether the facts establish a particular mitigator lies with the trial court and will not be reversed because this Court or an appellant reaches a contrary conclusion, "absent a palpable abuse of discretion." Foster (Jermaine) v. State, 21 Fla. L. Weekly S324, S327 (Fla. July 18, 1996); Foster (Charles) v. State, 654 So. 2d 112 (Fla.), cert. denied, 116 S. Ct. 314 (1995); Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 115 S. Ct. 2588 (1995); Wyatt v. State, 641 So. 2d 355 (Fla. 1994), cert. denied, 115 S. Ct. 1372 (1995); Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), cert. denied, 114 S. Ct. 2123 (1994); Preston v. State, 607 So. 2d 604 (Fla. 1992), cert. denied, 113 S. Ct. 1619 (1993); Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, 112 S. Ct. 1500 (1992). A trial court's finding that the facts do not establish a mitigator "will be presumed correct and upheld on review if

supported by 'sufficient competent evidence in the record.'" Campbell, 571 So. 2d at 419 n.5 (quoting Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1991)); Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 114 S. Ct. 453 (1993); Lucas; Johnson v. State, 608 So. 2d 4 (Fla. 1992), cert. denied, 113 S. Ct. 2366 (1993); Ponticelli v. State, 593 So. 2d 483 (Fla. 1991), aff'd on remand, 618 So. 2d 154 (Fla.), cert. denied, 114 S. Ct. 352 (1993). Resolving conflicts in the evidence is the trial court's duty, and its decision is final if supported by competent substantial evidence. Parker v. State, 641 So. 2d 369 (Fla. 1994), cert. denied, 115 S. Ct. 944 (1995); Lucas; Johnson; Sireci; Gunsby v. State, 574 So. 2d 1085 (Fla.), cert. denied, 112 S. Ct. 136 (1991).

It is obvious that the trial court applied the above-stated precepts when it made the following findings of fact:

> Mitigating Circumstances
>
> No statutory mitigating circumstances were urged by the defendant. The defendant did, however, produce evidence of non-statutory mitigating circumstances which were urged as circumstances sufficient to outweigh the statutory aggravating circumstances.
>
> PRESSLEY ALSTON suggests that he suffered through a "horribly deprived and violent childhood" as outlined in his memorandum of law in favor of a life sentence filed December 19, 1995. The court would not characterize the defendant's childhood as "horribly"

deprived and violent but would concede that the defendant did not enjoy the companionship of a mother who was affectionate toward him, and he did observe violence in his household as a child. The violence was ordinarily directed toward his mother who was an alcoholic and who went through turbulent relationships with many men by whom she had children and to whom she was never married. Certainly emotional deprivation is present, and it appears that economic deprivation was a fact of life with the defendant. It should be noted, however, that PRESSLEY ALSTON had an opportunity to remove himself from the unwholesome environment with his mother and did in fact do so, he having relocated to St. Augustine, Florida, where he lived with responsible, loving, and caring people who provided him with economic and emotional support. Unfortunately PRESSLEY ALSTON failed or refused to take advantage of an opportunity to remove himself forever from his Jacksonville environment.

In his memorandum of law in favor of a life sentence, the defendant sets out facts and circumstances numbered A through L, inclusive, under the main heading that the defendant suffered through a deprived and violent childhood. These circumstances are that the defendant's mother was an alcoholic; his mother was violent with the defendant; the defendant was treated more harshly than his siblings; his natural father was rarely around and when present, was violent with the defendant's mother; his mother was abused by male friends in front of the defendant; the defendant was raised in a poor, high-crime area; his mother was on welfare throughout his childhood; his mother did not encourage good performance in scholastic activities; his mother was not affectionate; his parents "trashed" each other in conversations with the

defendant; the defendant had no male role model; and the defendant was "handed from household to household" during his childhood. These sub-allegations are not properly treated as discrete mitigating circumstances. All of these facts and circumstances merge into one (1) non-statutory mitigating circumstance that the defendant suffered through a deprived childhood. This was established and is recognized as mitigation. It individually and collectively with other factors is not sufficient to outweigh the aggravating factors.

The defendant next urges that he took law enforcement to the scene of the crime so that the body of James Coon could be found and also admitted his involvement in the crime. It is true that the defendant ultimately took the police to the remote location where James Coon was murdered, but only after a lengthy period of time and only after he had been arrested and formally accused of being involved in the murder. It is also true that he admitted his involvement, but it is remarkable that he gave many different versions of his culpability in the kidnapping, robbery, and murder. He really never totally came through with his true involvement in this horrible crime.

The defendant also urges that he suffers from low intelligence and a mental age which is far below his chronological age. This is urged as one (1) non-statutory mitigating factor, and while this has been established, it is entitled to little weight. Although the defendant is not intelligent, he does know and has known at all appropriate times the difference between right and wrong and any intellectual or emotional handicaps are insignificant when weighed against the compelling aggravating circumstances.

The defendant urges that he suffers from a bipolar disorder, and this was established by competent evidence. Again, however, this mitigating circumstance is entitled to little weight in that it was never suggested that he was unable to conform his conduct to the requirements of law because of any emotional or psychiatric disability.

The defendant also urges that he has demonstrated the ability to work for a living. This mitigating circumstance has not been reasonably established by the evidence. It is true that there was some evidence of sporadic work by the defendant, but it is clear that he is not a person who has any sincere desire to support himself by traditional means. This mitigating circumstance, even if reasonably established, is of no significance whatsoever in view of the aggravating factors.

While in St. Augustine the defendant was required to attend church, and the efforts of the St. Augustine people in trying to rehabilitate the defendant certainly are commendable; however, the defendant never followed through on any religious commitment and has not, in fact, demonstrated sincere religious faith.

The last mitigating circumstance urged by PRESSLEY ALSTON is that he has demonstrated the ability to get along with people and treat people with respect. That he might have done so at some time in his life pales when contrasted with the utter disrespect and contempt with which he treated the dignity of James Coon. This purported mitigating circumstance is entitled to no weight whatsoever.

(III 515-18). After engaging in this assessment of the proposed nonstatutory mitigators, the trial court weighed the mitigators and the aggravators:

> As required by law the court has found and weighed the statutory aggravating circumstances and finds that six (6) circumstances, five (5) after merger, have been established beyond a reasonable doubt. The aggravating circumstances are compelling and persuasive evidence which must be weighed in conjunction with any statutory and non-statutory mitigating circumstances found to exist. No statutory mitigating circumstances exist, but some few non-statutory mitigating circumstances exist which individually and collectively are wholly insufficient to militate against the strong aggravating circumstances which cry out for the imposition of the death penalty. This defendant has demonstrated his lack of respect for the integrity of other people's person and property. He refuses to conform his conduct to the requirements of law. Death is the only appropriate punishment under the facts and circumstances of this case. Indeed any one aggravating factor in this case, standing alone, would outweigh any mitigating factor or factors.

(III 518-19).

The thoroughness and correctness of the trial court's findings are evidenced by the fact that Alston's only complaint on appeal is that the court did not assign enough weight to the mitigators. As this Court has long held, however, "the weight to be given a mitigator is left to the trial judge's discretion." Mann v. State,

603 So. 2d 1141, 1144 (Fla. 1992); Kilgore v. State, 21 Fla. L. Weekly S345 (Fla. August 29, 1996); Foster (Jermaine); Bonifay v. State, 680 So. 2d 413 (Fla. 1996); Windom v. State, 656 So. 2d 432 (Fla), cert. denied, 116 S. Ct. 571 (1995); Jones v. State, 648 So. 2d 669 (Fla. 1994), cert. denied, 115 S. Ct. 2588 (1995); Ellis v. State, 622 So. 2d 991 (Fla. 1993); Campbell; Swafford v. State, 533 So. 2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989). The trial court followed the dictates of Rogers and Campbell and considered all of the proposed nonstatutory mitigation. Cf. Barwick v. State, 660 So. 2d 685 (Fla. 1995); Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied, 115 S. Ct. 1799 (1995); Peterka v. State, 640 So. 2d 59 (Fla. 1994), cert. denied, 115 S. Ct. 940 (1995); Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S. Ct. 1578 (1994); Tompkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033 (1987). Alston has demonstrated no abuse of discretion, let alone a palpable abuse of discretion, in the weight the trial court assigned to the nonstatutory mitigation. Therefore, this claim should be denied.

ISSUE XV

WHETHER THE TRIAL COURT PROPERLY FOUND THIS MURDER TO HAVE BEEN COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

Alston claims that the trial court erred in finding that the cold, calculated, and premeditated (CCP) aggravator had been established. There is no merit to this issue.

Four elements must be proved to establish the CCP aggravator: the murder must be "cold," it must be the product of a careful plan or prearranged design, there must be heightened premeditation, and there must be no pretense of moral or legal justification. Fennie v. State, 648 So. 2d 95 (Fla. 1994), cert. denied, 115 S. Ct. 1120 (1995); Jackson v. State, 648 So. 2d 85 (Fla. 1994); Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), cert. denied, 115 S. Ct. 1705 (1995); Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943 (1995). The trial court made the following findings as to this aggravator:

> The aggravating circumstance specified by Florida Statute Section 921.141(5)(i) has been established in that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The essential facts justifying the conclusion that this statutory factor has been established have been outlined in part. This was a crime of heightened calculation and premeditation. The defendant could have

> stopped at kidnapping and robbery. He could have taken the defendant's motor vehicle and other valuables and left James Coon to pursue his life as an exemplary citizen of this community. Instead the defendant confined James Coon in his motor vehicle and forced James Coon to contemplate his death while the defendant decided what to do with him. Certainly the defendant had more than ample time to reflect upon his actions, and there was absolutely no suggestion that he was under the influence of any intoxicants or the domination or pressure of another. Indeed, it appears that the defendant was with his brother, his accomplice, and they were celebrating the defendant's brother's sixteenth (16th) birthday. This was an outrageous crime without even a scintilla of evidence suggesting moral or legal justification. This statutory aggravating circumstance was established beyond a reasonable doubt.

(III 514-15). The facts support these findings and demonstrate the requisite heightened premeditation needed to establish CCP.

The CCP aggravator "focuses on the manner in which the crime was executed, i.e., the advance procurement of the murder weapon, lack of resistance or provocation, the appearance of a killing carried out as a matter of course." Stein v. State, 632 So. 2d 1361, 1366 (Fla.), cert. denied, 115 S. Ct. 111 (1994). Execution-style killings are often CCP. E.g., Jones v. State, no. 84,014 (Fla. December 26, 1996). This is especially true when the victim is kidnapped and then executed. Hartley v. State, 21 Fla. L.

Weekly S391 (Fla. Sept. 19, 1995); Ferrell v. State, 21 Fla. L. Weekly S388 (Fla. Sept. 19, 1996); Foster v. State, 21 Fla. L. Weekly S324 (Fla. July 18, 1996); Fennie.

Alston armed himself with McIntyre's handgun, and he and Ellison went looking for someone to rob. After flagging down the victim, they robbed him at gunpoint and, instead of just taking his car and other property and leaving, abducted him. According to Alston's statements, the victim did not provoke or resist them. See Arbalaez v. State, 626 So. 2d 169 (Fla. 1993) (defendant's statements can establish CCP), cert. denied, 114 S. Ct. 2123 (1994). Alston also stated that he decided that the victim had to be eliminated and that he sent Ellison off with the victim to do that. When Ellison failed to kill the victim, however, Alston shot him twice in the head. Alston did not act out of frenzy, panic, or rage, and he had no pretense of moral or legal justification for killing the victim. Instead, he coldly, calmly, and premeditatedly executed the victim. The trial court properly found CCP in aggravation, and that finding and Alston's death sentence should be affirmed. Hartley; Ferrell; Foster; Fennie.

ISSUE XVI

WHETHER THE TRIAL COURT CORRECTLY REFUSED TO PROHIBIT IMPOSITION OF THE DEATH PENALTY BASED ON ALSTON'S MENTAL AGE.

Alston claims that the trial court should have granted his motion to prohibit imposition of the death penalty based on his mental age. There is no merit to this issue.

On January 4, 1996 Alston filed a motion to bar imposing the death sentence on him because his mental age was between thirteen and fifteen years. (III 498). The trial court denied this motion at sentencing on January 12, 1996. (XIX 1799). As he did before the trial court, Alston relies on Thompson v. Oklahoma, 487 U.S. 815 (1988), and Allen v. State, 636 So. 2d 494 (Fla. 1994). This reliance is misplaced, however, because the chronological age of Thompson and Allen - the determining factor in those cases - was less than sixteen years. Alston, on the other hand, was twenty-four years old when he committed this murder.

As Alston points out, Sherry Risch, a clinical psychologist, opined that Alston's mental age was between thirteen and fifteen years. (XVIII 1620). Contrary to his contention (initial brief at 93), however, other evidence rebutted this opinion. Risch also

testified that Alston's memory was normal, that his word fluency was excellent, that he showed no evidence of impulse control deficit, and that he had good cognitive flexibility. (XVIII 1621-22). Furthermore, Alston's supervisors considered him to be a competent employee. (XIX 1655-56; 1659-60). Alston also had fathered four children, and he testified that he had been arrested twenty-one times. (XI 199). This evidence showed that Alston's level of functioning in society was more in line with his chronological age than with Risch's opinion of his mental age.

This Court has never held that a defendant's low mental age renders the death penalty per se inappropriate. Alston has presented nothing in this issue to demonstrate that his death penalty is inappropriate. The trial court did not err in denying Alston's motion, and this claim should be denied.

ISSUE XVII

WHETHER ALSTON'S DEATH SENTENCE IS PROPORTIONATE

Alston argues that his death sentence is disproportionate. There is no merit to this claim.

Contrary to his argument, the cases he relies on are factually distinguishable and do not support his death sentence being disproportionate. In Terry v. State, 668 So. 2d 954 (Fla. 1996),

the state established two aggravators in Terry's killing the clerk at a gas station/convenience store. This Court found one of the aggravators to be worth little consideration and held that the remaining aggravator, when weighed against the mitigators, did not warrant imposing the death penalty. In Thompson v. State, 657 So. 2d 824 (Fla. 1995), this Court struck three of the four aggravators found by the trial court and held that the remaining aggravator did not outweigh the significant mitigation. Similarly, Sinclair v. State, 657 So. 2d 1138 (Fla. 1995), involved only a single aggravator that, when balanced against the nonstatutory mitigators, did not support the death penalty.

The instant case, on the other hand, has five aggravators. Both CCP and HAC are "conspicuously" present. See Fitzpatrick v. State, 527 So. 2d 809, 812 (Fla. 1988). When the aggravators are weighed against the inconsequential nonstatutory mitigation established by Alston, it is readily apparent that this is one of the most aggravated and least mitigated of murders.

Other cases where the defendants robbed, kidnapped, and executed their victims are comparable to this case and demonstrate the error of Alston's argument. Kenneth Hartley and Ronnie Ferrell abducted their victim at gunpoint, robbed him, and then executed him. This Court found their death sentences proportionate where

four aggravators (CCP, felony murder/kidnapping, pecuniary gain, and avoid or prevent arrest) outweighed their minimal mitigation. Hartley v. State, 21 Fla. L. Weekly S391 (Fla. Sept. 19, 1996); Ferrell v. State, 21 Fla. L. Weekly S388 (Fla. Sept. 19, 1996). Similarly, Jermaine Foster and several friends abducted two men, robbed them, and then killed them. This Court agreed with the trial court that death was warranted when the four aggravators (CCP, previous conviction, felony murder/kidnapping, and pecuniary gain) outweighed the statutory mitigator of substantial impairment. Foster v. State, 21 Fla. L. Weekly S324 (Fla. July 18, 1996). In Fennie v. State, 648 So. 2d 95 (Fla. 1994), cert. denied, 115 S. Ct. 1120 (1995), this Court affirmed the death sentence for Fennie's kidnapping, robbery, and murder of the victim where there were five aggravators and several nonstatutory mitigators. See also Suggs v. State, 644 So. 2d 64 (Fla. 1994), cert. denied, 115 S. Ct. 1794 (1995); Green v. State, 641 So. 2d 391 (Fla. 1994), cert. denied, 115 S. Ct. 1120 (1995); Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 113 S. Ct. 1619 (1993); Happ v. State, 596 So. 2d 991 (Fla. 1992); Robinson v. State, 574 So. 2d 108 (Fla.), cert. denied, 502 U.S. 854 (1991); Nixon v. State, 572 So. 2d 1136 (Fla. 1990), cert. denied, 502 U.S. 854 (1991); Bryan v. State, 533 So. 2d 744 (Fla. 1988), cert. denied, 490 U.S. 1028

(1989); Card v. State, 453 So. 2d 17 (Fla.), cert. denied, 469 U.S. 989 (1984); Squires v. State, 450 So.2d 208 (Fla.), cert. denied, 469 U.S. 892 (1984); Routly v. State, 440 So.2d 1257 (Fla. 1983), cert. denied, 468 U.S. 1220 (1984); Justus v. State, 438 So. 2d 358 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984).

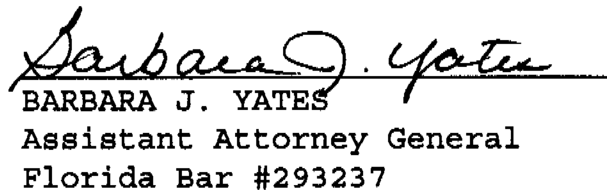
When placed beside truly comparable cases, it is obvious that Alston's death sentence is proportionate and that it should be affirmed.

CONCLUSION

For the foregoing reasons the State of Florida asks that Alston's convictions and death sentence be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



BARBARA J. YATES
Assistant Attorney General
Florida Bar #293237

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Teresa Sopp, Esq. 211 N. Liberty Street, Ste. Two, Jacksonville, Florida 32202-2800, this 13th day of January 1997.

BARBARA J. YATES
Assistant Attorney General