IN THE SUPREME COURT OF FLORIDA

NATHAN JOE RAMIREZ,

Appellant,

vs. CASE NO. 89,377

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

Appellant contends that the trial court committed reversible error in determining that he freely and voluntarily waived his Miranda rights. Ramirez contends the statements should have been suppressed based on the following facts: 1) he was not read his constitutional rights immediately when he was brought in for questioning, 2) when they were read it was done in a perfunctory manner which suggested lack of importance, 3) his age (17) and immaturity, 4) the failure of police to contact his parents, and 5) "inappropriate" physical contact during the questioning. It is the state's contention that after conducting an evidentiary hearing on the motion and after reviewing the videotaped confession, the trial court properly denied the motion to suppress.

Appellant next contends that the prosecutor improperly introduced evidence of the codefendant's statements. This evidence was properly introduced after defense opened the door to the line of questioning. Further, the claim is procedurally barred and harmless.

The trial court properly found the aggravating factors of cold, calculated and premeditated and avoid arrest where both factors were established by the evidence. Further, error, if any is harmless.

Appellant's sentence was proportionate to other similar cases.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING THAT UNDER THE TOTALITY OF CIRCUMSTANCES STATEMENTS APPELLANT MADE TO LAW ENFORCEMENT WERE MADE FREELY AND VOLUNTARILY AND WERE OBTAINED IN COMPLIANCE WITH MIRANDA V. ARIZONA.

Appellant contends that the trial court committed reversible error in determining that he freely and voluntarily waived his Miranda rights. Ramirez contends the statements should have been suppressed based on the following facts: 1) he was not read his constitutional rights immediately when he was brought in for questioning, 2) when they were read it was done in a perfunctory manner which suggested lack of importance, 3) his age (17) and immaturity, 4) the failure of police to contact his parents, and 5) "inappropriate" physical contact during the questioning.[1] It is the state's contention that after conducting an evidentiary hearing on the motion and after reviewing the videotaped confession, the trial court properly denied the motion to suppress.

At the evidentiary hearing conducted on the motion to suppress in the instant case, the state presented Detectives Clifford Blum

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1 The motion to suppress alleged the interrogation was illegal because it was conducted without prior Miranda warnings. (Attached as Exhibit A) During the motion to suppress hearing the trial court noted that the coercion argument was not raised in the motion but he allowed counsel to cross-examine the witnesses concerning the allegation. (VOL X, R 1433)

and Jeffrey Bousquet of the Pasco County Sheriff's Office who testified about the interview and confession. Appellant did not testify.

Detective Blum testified that he initially contacted appellant because co-defendant Jonathan Grimshaw said he had given Ramirez certain articles from the victim's house. Blum said that initially Ramirez denied having the articles. Once Blum told him that he knew Grimshaw had called him about the articles, Ramirez told him he only had one of the rings--he had lost the other one. He then took Blum to his girlfriend's to retrieve the handcuffs and to another friend's (Rodney) to get the gun. (VOL X, R 1421-22) He then asked Ramirez if he'd be willing to go to the Sheriff's Office and speak to Detective Bousquet. Ramirez agreed to do so. Blum took Ramirez to the station and turned him over to Detective Bousquet. Blum testified that he had no intentions of arresting Ramirez at that time; that Ramirez was not a suspect. (VOL X, R 1422). On cross Blum testified that he asked Ramirez his age and when he said he was 17, Blum tried to ascertain the whereabouts of his parents.[2]

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2 On the videotape the officers repeatedly ask Ramirez how to contact his parents. Ramirez repeatedly said there is no way because they work and he doesn't know where. The officers were finally able to get the phone number for his grandparents to contact them. Mr. Ramirez was contacted and came to the station. (VOL X, R 1497, 1499, 1502-05, 1521)

Detective Bousquet testified that prior to interviewing Ramirez the only information he had connecting Ramirez to the murder was from Grimshaw and he did not believe Grimshaw because Grimshaw had given them a number of different stories. Accordingly, Blum was only directed to go to Ramirez' house to see if Ramirez had any of the stolen property. (VOL X, R 1428-29) They had no intention of arresting Ramirez, only to see what, if any, information he had. When Bousquet first came into contact with Ramirez he was in a room where a videotape camera was already set up and they immediately began videotaping. Bousquet testified that there was no period of time where he had prior contact with Ramirez that's not on the videotape. (VOL X, R 1430)[3]

The videotape shows that shortly after questioning began, Ramirez admitted that he was involved in the homicide. At that point Bousquet was directed by Detective Jones to read appellant his Miranda rights. The following colloquy ensued:

> BY DETECTIVE BOUSQUET:
> Q "I'll go through all that with Nathan. Nate, I'm going to read you your rights and go through the case.
> A "I have a question. Am I like being placed under arrest?
> Q "No. I'm reading you your rights. Nate, you have the right to remain silent.

---

3 Relevant portions of the videotape were played for the court and are transcribed for the record. (VOL X, R 1431) Due to audio problems at the hearing, a previously prepared transcript of the tape was also introduced as State's Exhibit C and is included in the record on appeal. (VOL I, R 35-125; VOL X, R 1443)

> Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him be present while you're bing questioned. If you can't afford to hire a lawyer, one will be appointed to represent you during questioning, if you wish, if you decide, at any time to exercise your rights and not answer any questions or make any statements.
>
> "Nate, do you understand these rights as I've explained them to you?
>
> A (Indicating affirmatively).
>
> Q "Having these rights in mind, do you wish to speak to me now about the case?
>
> A "I guess. That's what I'm here for.
>
> (VOL I, R 40; VOL X, R 1439-40, 1443-44)

During the course of the interview, Ramirez was once again read his rights from a waiver of rights form which he signed. He also signed a consent to search form. (VOL X, R 1505-07)

After hearing the foregoing the trial court made the following finding:

> THE COURT: All right. I agree the totality of the circumstances. It appears to the Court that at first, this defendant was a potential witness to the Grimshaw case, and as soon as it appears that he might have some involvement, they quickly gave him Miranda. At all times during his questioning, he spoke clearly and logically and did not appear to be under any stress.
>
> The striking is characterized by the defense attorney. I'll agree it could be called slapping. I don't think it was that prevalent. I think you can analogize it to a coach encouraging one of the kids on a baseball team by whacking him on the butt or whatever, as a kind of a form of encouragement. Obviously, the methodology used here by Detective Bousquet was to appear as a friend, and I think he carried that part of his role out very well.

> They got water for this young man, they offered to get him some food at one point. He even put his arms around him after the young man had made his confession, so to speak. I think there may have been some genuine sympathy shown by the detective. I'd -- no one likes to see a young boy get into trouble, but this is a very serious charge.
>
> I saw no sign of what I would call abuse. This young man at no time appeared to be in fear or suffering in any way.
>
> As far as Miranda, I agree the original Miranda could have been done more thoroughly, but I think at that point, it was done just to protect themselves because it appeared it might -- could be that man could be implicated. And his physical affirmation and his verbal affirmation is as good as you'll find in most cases. The written affirmation is, and the consent to the search later on, might even be superfluous. They certainly had enough information to get a search warrant if they wanted it without getting the consent signed by the young man.
>
> The Court's impressed that this young man seems pretty clear-headed and seems to know pretty well what was going on during this. And then after he realized that he was in hot water, then he first kind of got sad, you might say. But I'll deny the motion to suppress.

(VOL X, R 1548-49)

The principle is well settled that a trial court's order denying a defendant's motion to suppress comes to the appellate court clothed with a presumption of correctness. Henry v. State, 586 So. 2d 1033 (Fla. 1991), Wasko v. State, 505 So. 2d 1314 (Fla. 1987); DeConingh v. State, 433 So. 2d 501, 504 (Fla.), cert. denied, 465 U.S. 1005 (1984), Stone v. State, 378 So. 2d 765, 769 (Fla.), cert. denied, 449 U.S. 986 (1980), McNamara v. State, 357

So. 2d 410 (Fla. 1978). While the burden is upon the state to prove by a preponderance of evidence that the confession was freely and voluntarily given, a reviewing court must interpret the evidence in the light most favorable to sustaining the trial court's ruling. State v. Riehl, 504 So. 2d 798 (Fla. 2nd DCA), review denied, 513 So. 2d 1063 (1987); Williams v. State, 441 So. 2d 653 (Fla. 3d DCA 1983). A reviewing court should not substitute its judgment for that of a trial court, but, rather, should defer to the trial court's authority as a fact-finder. Wasko v. State, 505 So. 2d at 1316. The trial court's ruling on this issue cannot be reversed unless it is clearly erroneous. The clearly erroneous standard applies with "full force" where the trial court's determination turns upon live testimony as opposed to transcripts, depositions or other documents. Thompson v. State, 548 So. 2d 198, 204, n. 5 (Fla. 1989).

In order to find that a confession is involuntary within the meaning of the Fourteenth Amendment, there must first be a finding that there was coercive police action. Colorado v. Connelly, 479 U.S. 157 (1986). The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained. When reviewed in context of the facts of this case and the relevant case law, it is clear that the trial court properly denied the motion.

First, appellant's assertion that Miranda was violated because he was not instructed before any questioning began is without merit. Both detectives testified that Ramirez was not a suspect and that he voluntarily came in for questioning. Bousquet also testified that as soon as it became apparent that Ramirez was involved, he was read his rights and he agreed to speak to the detectives.

As appellant concedes warnings are only required when there is a custodial interrogation. Where, as here, an individual voluntarily agrees to speak to law enforcement, is not under arrest and, therefore free to leave at any time, there is no custodial interrogation mandating the giving of warnings. As this Court recently stated in Davis v. State, 698 So. 2d 1182 (Fla. 1997):

> . . . Miranda warnings are required whenever the State seeks to introduce against a defendant statements made by the defendant while in custody and under interrogation. Absent one or the other, Miranda warnings are not required. Alston v. Redman, 34 F.3d 1237, 1243 (3d Cir.1994) (citing Miranda, 384 U.S. at 477-78, 86 S.Ct. at 1629-30); Sapp v. State, 690 So.2d 581 (Fla.1997); see also Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980) ("It is clear that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."). Although custody encompasses more than simply formal arrest, the sole fact that police had a warrant for Davis's arrest at the time he went to the station does not conclusively establish that he was in custody. Rather, there must

> exist a "*restraint on freedom of movement of the degree associated with a formal arrest.*" Roman v. State, 475 So.2d 1228, 1231 (Fla.1985). The proper inquiry is not the unarticulated plan of the police, but rather how a reasonable person in the suspect's position would have perceived the situation.
>
> Id. at 1188

In Roman v. State, 475 So. 2d 1228, 1231 (Fla. 1985), this Court addressed a similar claim and stated:

> Appellant's arguments on this issue presuppose that he was in custody during the time he was interrogated. In determining whether a suspect is in custody, "the ultimate inquiry is simply 'whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct 711, 714, 50 L.Ed.2d 714 (1977)). This inquiry is approached from the perspective of how a reasonable person would have perceived the situation. Drake v. State, 441 So.2d 1079 (Fla.1983), cert. denied, --- U.S. ----, 104 S.Ct. 2361, 80 L.Ed.2d 832 (1984). "A policeman's unarticulated plan has no bearing on the question of whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, --- U.S. ----, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)(footnote omitted). Appellant's situation was that he was being questioned in an investigation room at the sheriff's department, having voluntarily complied with a deputy's request to go there. That an interrogation takes place at a station house does not by itself transform an otherwise noncustodial interrogation into a custodial one. Mathiason. The defendant in Drake was aware that he had furnished the police with probable cause for his arrest.

> This knowledge, coupled with the fact that his request to discontinue further interrogation without counsel went unheeded, afforded a reasonable basis for Drake to believe he was not free to leave. Appellant here has shown no similar basis for a reasonable belief that there was a restraint on his freedom of movement of the degree associated with a formal arrest.

Thus, the determination of whether the defendant was in custody is viewed from the perspective of the defendant, not the perspective of the investigating officers. See, also, Traylor v. State, 596 So. 2d 957, 966 (Fla. 1990)(A person is in custody if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest).

Ramirez voluntarily came to the station to be interviewed. He clearly knew he was not under arrest because Detective Bousquet told him he was not under arrest. (VOL X, R 1440) Additionally, as defense counsel noted during cross-examination of Detective Bousquet, Ramirez was seated in an unlocked room and was free to leave at any time. (VOL XIII, T 550-51) Further, the questioning only lasted two hours. (VOL XIII, T 569) Under these circumstances, there was no custodial interrogation and no need to advise Ramirez of his Miranda rights prior to the interview. Nevertheless, *Ramirez was read his rights as soon as it became clear that he was involved in the crime and before he admitted*

anything more than he entered the house. As such there is no violation of Miranda.

Furthermore, while petitioner suggests that the voluntariness of his statement is suspect because he was not immediately given Miranda warnings, appellant has failed to present any facts or law that supports his claim that his statement was involuntary and required suppression. To the contrary, this court, as well as the United States Supreme Court has repeatedly held that when a suspect waives his right to counsel after receiving warnings equivalent to those prescribed by Miranda v. Arizona, 384 U.S. 436 (1966) that will generally suffice to establish a knowing and intelligent waiver of the right to counsel. Michigan v. Harvey, 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990); Patterson v. Illinois, 487 U.S. 285, 292 n. 4, 108 S.Ct. 2389, 2394-2395, 101 L.Ed.2d 261 (1988); Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). It is undisputed that Ramirez received his Miranda warnings and that he agreed to talk to the detectives.

While the state maintains that under these circumstances, there was no requirement that warnings be given during the initial questioning where Ramirez was not a suspect and there was no custodial interrogation, the fact that the warnings were not given until shortly after questioning began, does not preclude him from subsequently waiving his rights and voluntarily confessing. As

this Court noted in the in Davis v. State, 698 So.2d 1182 (Fla. 1997), the Court in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), held that even where a defendant has previously given a voluntary, but unwarned statement that was inadmissible because of a Miranda violation, subsequent statements, made after careful Miranda warnings were given and waiver was obtained, are admissible. This Court in Elstad further explained that even "if errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." Oregon v. Elstad, 105 S.Ct. at 1293.

The Elstad Court also rejected the argument urged by appellant that the unwarned but voluntary statement enters into the equation as to whether the subsequent warned statement was voluntary. The admissibility of any subsequent statement in these circumstances turns *solely* on whether it is knowingly and voluntarily made. Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222

(1985) (emphasis added). See, also, Perry v. State, 522 So. 2d 817, 819 (Fla. 1988).

Ramirez contends, however, that the confession also was the result of coercion. He bases this claim on the perfunctory manner in which he was given his Miranda warnings suggesting a lack of importance, his age (17), immaturity, the failure of police to contact his parents and "inappropriate" physical contact by Detective Bousquet. Miranda does not impose a burden on law enforcement to use a certain tone or manner of delivery. Miranda requires notice. Ramirez was given notice. Further, the trial court reviewed the tape and found no improper conduct, whether it be in the manner of delivery of the warnings or to the detective's tapping appellant on the leg during the course of the interview.

As for his age, this Court in Thomas v. State, 456 So. 2d 454 (Fla. 1984), reviewed a similar claim and held:

> Appellant also says that because of his youth and his state of intoxication when questioned, he was incapable of validly waiving his rights and knowingly making voluntary incriminating statements. *However, this Court has recognized that youthful age, although a factor to be considered in determining voluntariness of a statement, will not render inadmissible a confession which is shown to have been made voluntarily.* State v. Francois, 197 So. 2d 492 (Fla. 1967). Ross v. State, 386 So. 2d 1191, 1195 (Fla. 1980). . .
>
> The trial judge found that the state had carried its burden of showing that appellant's confessions were freely and voluntarily given.

> Appellant has failed to show that the trial judge's determination was erroneous.

Thomas v. State, 456 So. 2d at 458. (emphasis added) There was no evidence in the instant case that supports a conclusion that Ramirez's age kept him from freely and voluntarily waiving his rights.

Further, the evidence shows that the officers repeatedly questioned Ramirez as to how to contact his parents. Ramirez' reluctance to involve his parents was not the result of any improper conduct by law enforcement and does render his confession and waiver involuntary.

In the instant case, the evidence shows that Ramirez voluntarily came to the sheriff's station, that he was not a suspect, that the detectives repeatedly attempted to contact his parents, that he was repeatedly offered food and beverages, that he was assured he was not under arrest, that he was not told until the very end of the tape that he was not going to be released, that he was read his rights twice and that he voluntarily waived those rights. In light of the foregoing, this Court should affirm the order of the Court denying the motion to suppress. Gardner v. State, 480 So. 2d 91, 93 (Fla. 1985); DeConingh v. State, 433 So. 2d 501, 504 (Fla. 1983).

ISSUE II

WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST HIM AND TO DUE PROCESS OF LAW WERE VIOLATED WHEN THE PROSECUTOR BELOW WAS PERMITTED TO QUESTION DETECTIVE BOUSQUET EXTENSIVELY REGARDING STATEMENTS JONATHAN GRIMSHAW MADE TO HIM WHICH INCULPATED APPELLANT.

Relying on Bruton v. United States, 391 U.S. 123, 137 (1968) and Cruz v. New York, 481 U.S. 186, 189 (1987), Ramirez contends that the prosecutor's being allowed to question Detective Bousquet regarding co-defendant Jonathan Grimshaw's statements incriminating Ramirez during both the guilt and penalty phases of the trial violated his rights to confront and cross-examine the witnesses against him and to due process of law. For the following reasons, the state maintains that Ramirez is not entitled to relief on this claim.

Guilt phase

During cross-examination Detective Bousquet, *defense counsel* introduced the subject of Grimshaw's confession. He noted that Detective Bousquet didn't have to lie to Ramirez as he did to Grimshaw and that before Grimshaw telephoned Ramirez at the behest of the detectives, there was no evidence Ramirez was involved. (VOL XIII, T 547-48) He continued by asking, "[I]sn't it true, sir, that Mr. Grimshaw told you so many things you didn't know who to suspect?" The detective responded, "That's correct." Counsel for Ramirez continued, "Including Mr. Grimshaw?" To which the

detective responded, "Mr. Grimshaw went through it and told us the only thing he would know, that's how we knew that he was involved in the case." (VOL XIII, T 550) Defense counsel then asked Detective Bousquet about the fact that Ramirez had told the detectives that Grimshaw had cut two of the wires and told him to cut the third, that Grimshaw had told him to get the Vaseline, that Grimshaw had sexually battered the victim, that Grimshaw had ordered him to kill the dog, that Grimshaw handed him the gun, that Grimshaw had told him to shoot Mrs. Boroski, that Grimshaw had tied the victim up and that Grimshaw had told her to shut-up. (VOL XIII, T 556, 559, 560, 563, 564, 565, 566) Subsequently, he asked about Grimshaw being allowed at the crime scene, being taken to the site of the vehicle and leading the police on a "merry chase across the county to find" Mrs. Boroski's body that was ultimately found in the other direction. (VOL XIII, T 567-8) He then noted that Ramirez never did that, that he cooperated fully with Detective Blum and that Grimshaw's interview was over five hours, whereas Ramirez's was only two. (VOL XIII, T 569)

On redirect the state attempted to clarify the issues raised by Ramirez's counsel. Detective Bousquet confirmed that although Ramirez ultimately admitted shooting Mrs. Boroski twice in the head, he had initially blamed Grimshaw. (VOL XIII, T 574) Further, he noted that Ramirez initially denied even seeing the sexual assault, but later claimed he peeked around the corner and

saw Grimshaw with his pants down sexually assaulting Mrs. Boroski. Detective Bousquet also testified on redirect that Ramirez admitted helping Grimshaw tie Mrs. Boroski. Ramirez said he and Grimshaw tied Mrs. Boroski up with her face down on the bed. Ramirez also told Detective Bousquet that he (Ramirez) got the knife and the Vaseline. (VOL XIII, T 576) The State further inquired:

> Q And you spoke to Jonathan Grimshaw?
> A Yes, I did.
> Q And Mr. Kiley asked you about that, that he said many things to you?
> A Yes, sir.
> Q What did Jonathan Grimshaw tell you about whether or not Jonathan Grimshaw sexually abused --
> MR. KILEY: Objection. Hearsay.
> MR. ATTRIDGE: Judge, he opened the door.
> THE COURT: I'm going to sustain the objection.
> Q (By Mr. Attridge) Without going into what was said, did you get a different version from Jonathan Grimshaw?
> A Yes, I did.
> Q Now, Mr. Kiley also asked you that you have no other evidence to say that the following scenario did happen, that once he shot Mrs. Boroski, it was only after being ordered to do so by Mr. Grimshaw. You said you had no other evidence to contradict that.
> A Correct.
> Q As a matter of fact, you do have evidence to contradict that, don't you?
> MR. KILEY: Objection. Counsel's testifying.
> MR. ATTRIDGE: I can lead him. I'm allowed to impeach him.
> Q (By Mr. Attridge) You do have evidence to contradict that, don't you?
> A Yes, I do.
> Q And you had evidence at that time to contradict that, correct?
> A Yes, sir.

Q As a matter of fact, the statement of Jonathan Grimshaw contradicts what Nathan Ramirez told you took place, correct?

MR. KILEY: Objection. Hearsay.

MR. ATTRIDGE: Judge, it goes into a matter he brought up.

THE COURT: All right. I'll overrule the objection.

Q (By Mr. Attridge) So Mr. Kiley said you had no other evidence to contradict that Jonathan Grimshaw said that he, Jonathan Grimshaw, was in the car at the time Mrs. Boroski was shot?

A That is correct.

Q And he also told you that it was Nathan that wanted to kill her?

A That's correct.

Q Mr. Kiley also talked about the wild goose chase that Mr. Grimshaw took you throughout the county. Did Mr. Grimshaw give you a reason as to why he was taking you all out on a wild goose chase prior to the body being found?

A Yes, sir, he did.

Q What did he tell you?

A That that was -- his codefendant had told him basically that they had -- by taking us out there, they could lead us away from the body so the body would decompose and we'd have no evidence.

Q So Grimshaw told you Ramirez told him to lead you all away from the body?

A Yes, sir, that's correct.

(VOL XIII, TR 577-579)

On recross, ***defense counsel*** *again* inquired as to Grimshaw's statements:

Q Okay. Well, let's get back to Mr. Grimshaw. You just told Mr. Attridge a couple minutes ago on redirect that you got a different version from John Grimshaw, correct?

A I got a couple different versions, yes, sir.

Q You got four different versions from John Grimshaw, didn't you?

A No, sir.
Q How many?
A Three.
Q Three. All right. The first one being he heard some glass and peeked in, correct?
A That's correct.
Q The second one being he answered an ad over the computer to commit a burglary for $250, correct?
A That's correct.
Q And the third one being he went up to the residence, Nathan Ramirez jumped out of the bushes and forced him to commit this crime, correct?
A He stated Nathan Ramirez was involved, that is correct.
Q So you had three different versions from John Grimshaw, right?
A That's what John said, yes, sir.
Q And you didn't believe any of them, right?
A I take the whole overall case and look at it as a whole.
Q Right. Three different versions?
A Correct.
Q Mr. Grimshaw told you that he had been in that house before, correct?
A That's correct.
Q That the lady had made him dinner, correct?
A That's what Grimshaw said, yes, sir.
Q Said he helped unload groceries in the car, in her car; isn't that correct?
A That's correct. That's what he stated.
Q And you confirmed that that wasn't true, sir; isn't that correct?
A I didn't confirm anything. I don't know, I wasn't there.

(VOL XIII, TR 599-600)

Q (By Mr. Kiley) Did you ever check to see if this -- if Mildred Boroski wrote a check for $150 for dog food?
A Absolutely. I check all evidence that comes in, all statements.

Q Did Mrs. Boroski write a check to Kash N' Karry for a hundred and fifty-five -- fifty dollars for dog food?
A No, she didn't.
Q Then Mr. Grimshaw changed his story, did he not, sir?
A He maintained that he was always with her at the grocery, never changes that, but he changed different scenarios.
Q Several scenarios in the same story, correct, sir?
A That's correct. That's what Grimshaw states.

(VOL XIV, TR 604)

Q So you don't know where the surgical gloves were found?
A Where the surgical gloves were found?
Q Yes.
A Yeah. One was found inside the residence.
Q Do you know where they came from?
A Per John Grimshaw, they came from his house.
Q From John Grimshaw's house, correct, sir?
A That is correct.
Q Were you aware that a box of surgical gloves was found in Mr. Grimshaw's residence?
A Yes, I was.
Q Not only did he tell you, someone from your agency found some, didn't they?
A That's correct, they did find them.

(VOL XIV, TR 608)

Consistent with this line of inquiry the state, on redirect asked about Grimshaw's final version of events:

BY MR. ATTRIDGE:
Q What was Jonathan Grimshaw's final version?
A Final version was that him and Nathan Ramirez did the actual break-in, that

ultimately Nathan Ramirez was the one that shot and killed the victim, Mildred Boroski.

Q Who, according to Jonathan Grimshaw, according to his final version, sexually assaulted Mrs. Boroski?

A Yes, sir. He stated that Nathan Ramirez only assisted in it, but that he was the one involved in sexual intercourse as well.

Q And who, according to Grimshaw, shot and killed Mrs. Boroski?

A Jonathan Grimshaw stated Nathan Ramirez shot and killed Mildred Boroski.

Q Okay. And pointing the fingers at each other as to who sexually assaulted her?

A Yes, sir. Both pointing at each other as to sexual assault.

Q But the two living people that emerged from that house both agree on one thing --

A Yes, sir. That Nathan Ramirez --

Q -- that Nathan Ramirez was the one that fired the two rounds that killed Mrs. Boroski?

A Correct.

MR. ATTRIDGE: I have no further questions.

(VOL XIV, TR 610-611)

Although the state maintains that the foregoing clearly establishes that the defense opened the door to this line of questioning and that it was proper rebuttal and/or clarification of defense counsel's questioning, it should be noted at the outset that this claim has not been adequately preserved for appeal. As review of the foregoing shows the only objection made to the state's inquiry of Detective Bousquet concerning Grimshaw's statements was one hearsay objection which was sustained and one hearsay objection which was overruled based on the state's argument

that it "goes to the matter brought up." (VOL XIII, T 578) Defense counsel acquiesced in that ruling and did not argue, as he does here, that it was a Bruton Cruz violation.

In Lucas v. State, 376 So. 2d 1149, 1151-52 (Fla. 1979), this Court made it clear that "this court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law." Thus, defense counsel's bare bones objection based on hearsay without any supporting authority or reference to the issue now raised is not sufficient to preserve this claim based on a confrontation/interlocking confession basis. Lucas v. State, 376 So. 2d 1149, 1151-52 (Fla. 1979). Furthermore, even if the initial objection was sufficient, counsel waived the claim by not renewing the objection when the state subsequently inquired as to Grimshaw's statements. Gonzalez v. State, 624 So. 2d 300 (Fla. 4th DCA 1993)(failure to object at the numerous times during trial that this evidence was received waives claim for review.) See, also, Hazen v. State, 700 So. 2d 1207 (Fla. 1997) (challenge to admission of reverse identification barred because not renewed when witness testified); Feller v. State, 637 So. 2d 911 (Fla. 1994) (failure to renew his confrontation clause objection when testimony was offered at trial bars review.)

Assuming, arguendo, that this claim was properly preserved for appeal, it is, nevertheless without merit. After Ramirez's

cross-examination of Detective Bousquet, the state as the party who called the witness may properly conduct a redirect examination in order to rebut or explain matters elicited during the cross-examination. The redirect examination includes all matters discussed during the cross-examination. Where, as here, the cross-examination "opens the door" to the admission of certain testimony, it is admissible during the redirect examination if it tends to qualify, limit or explain testimony elicited on cross-examination. Johnson v. State, 660 So. 2d 637 (Fla. 1995). It is also generally held that the scope of redirect examination rests largely in the discretion of the trial court. Tompkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). Although Detective Bousquet's testimony standing alone and taken out of context could be considered error, a review of the record shows that the statements elicited by the state were to explain and clarify the testimony elicited by the defense during cross-examination. This is a proper purpose for redirect examination. Jones v. State, 440 So. 2d 570, 576 (Fla. 1983); Huff v. State, 495 So. 2d 145 (Fla. 1986); Dragovich v. State, 492 So. 2d 350 (Fla. 1986); Larzelere v. State, 676 So. 2d 394 (Fla. 1996).

The rule of completeness is codified as section 90.108, Florida Statutes (1987), and applies to writings and recorded statements. "Although the language of section 90.108 does not

cover testimony regarding part of a conversation, a similar consideration of the potential for unfairness may require the admission of the remainder of a conversation to the extent necessary to remove any potential for prejudice that may result from the original evidence being taken out of context." Charles W. Ehrhardt, Florida Evidence Sec. 108.1 at 32 (1992); Johnson v. State, 608 So. 2d 4, 9-10 (Fla. 1992). The trial court's determination that the defense had opened the door to this line of questioning was within his discretion and appellant has failed to show an abuse of that discretion.

Furthermore, in the instant case, any possible error regarding the admission of Grimshaw's statements is harmless.[4] Norton v. State, 1997 WL 792794 (Fla. 1997) This Court recently did an exhaustive analysis of the introduction of confessions of codefendants in a joint trial in Franqui v. State, 699 So. 2d 1312 (Fla. 1997). The codefendant's confessions in Franqui were not redacted, were admitted as substantive evidence against the defendant and no limiting instruction was given. In Franqui the admission was predicated on the theory that no Confrontation Clause violation existed because the confessions of the defendant and codefendant sufficiently interlocked to render the codefendant's

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4 Pursuant to Section 924.051, Florida Statutes (1996), the appellant has the burden of proving that any error was prejudicial. Given the strength of the state's evidence, including appellant's confession to law enforcement that he shot Mrs. Boroski, he cannot meet this burden.

confession reliable. Id. Based upon Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), and Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), this Court determined that reliance on interlocking facts in determining the confessions' admissibility was error. Nevertheless, this Court concluded that Cruz and Wright authorized the application of the harmless error doctrine. See, also, Smith v. State, 699 So. 2d 629 (Fla. 1997). This Court's harmless error analysis included the following:

> Thus, while that portion of San Martin's confession which implicated Franqui should not have been introduced into evidence, the fact that it mirrors Franqui's confession in so many respects strongly indicates that the error was harmless. Of course, Franqui's confession is powerful evidence of his guilt. Further, Franqui's confession is corroborated by other evidence in the case, including the manner in which the crime was committed. Further, as noted previously, the evidence relating to the police having recovered the guns at San Martin's direction was properly admitted. The State's forensic expert testified that the bullet that killed Lopez was fired from a revolver. One of the guns the police recovered was a revolver, and Franqui confessed that he was the only one of the codefendants armed with that kind of gun. The other two guns recovered by the police and all of the guns carried by the victims were inconsistent with the fatal bullet. Because the revolver was rusty, the expert could not say with certainty that the fatal bullet came from that revolver. However, he did say that the bullet which killed Lopez came from the same gun as another bullet which was lodged in the passenger mirror of the grey Suburban, and the trajectory of a hole in the passenger window lined up with that bullet, thereby

> indicating that it was fired from within the vehicle. Franqui was the only occupant of the grey Suburban, and he admitted firing a .357 revolver toward Lopez's vehicle.
>
> The jury specifically found Franqui guilty of first-degree murder either by premeditated design or in the course of a felony, and evidence supporting both theories is extensive. At the very least, we are convinced beyond a reasonable doubt that the Confrontation Clause violation was harmless beyond a reasonable doubt as it relates to Franqui's conviction of first-degree felony murder. State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

Franqui v. State, 699 So. 2d 1312, 1321 (Fla. 1997)

In the instant case, Ramirez admitted entering the fenced backyard, cutting the telephone wires, burglarizing the house, arming himself with a gun, a knife and handcuffs, killing the barking dog, tying the victim up, getting the Vaseline (presumably used in the sexual assault) and driving the victim to an overgrown field where he killed her by shooting her twice in the head. (VOL XIII, T 446-556) The physical evidence was consistent with Ramirez's confession. The only real difference between the two confessions was in who thought of the idea and who committed the sexual assault. Both agreed, however, that Ramirez shot and killed the victim. Based on the foregoing the state maintains that error in allowing this line of questioning in the guilt phase was harmless.

In the penalty phase, Detective Bousquet was asked by the state about Grimshaw's statement. Defense counsel again objected

based on hearsay. (VOL VII, T 955). The court then called for a ten minute recess to allow both sides to present him with case law on the issue. (VOL VII, T 958) When the court reconvened, the prosecutor argued the rule of completeness. Defense counsel responded that the state's cases concerned introducing the complete statement of the defendant, whereas in the instant case they were seeking to introduce the statements of a codefendant. He maintained that they would not have the ability to cross-examine. The court found it was admissible to rebut the defense claim of substantial domination of another person. (VOL VII, T 960) Although, the defense had never asserted a Bruton claim, the state brought the issue to the court's attention:

> MR. HALKITIS: We would also argue, and I think this needs to be argued for record purposes, the hearsay would not be a viable objection as the Court indicated, but a Bruton problem might be. They have turned it into a Bruton problem by asking this officer what Grimshaw said in the cross-examination of this officer.
>
> I think it's obvious that what they're trying to do with this Officer is bring out a portion that is portraying Mr. Grimshaw as being the leader and Mr. Ramirez as being the follower, which they did in the guilt phase. We feel that any objection as to being a Bruton problem would not be a valid objection, because they went into it in their case.

(VOL VII, TR 960-961)

Despite the court's recessing to allow time for research, defense counsel did not present any argument or case law to the contrary. He did, however, ask for a standing objection to the

line of questioning. (VOL VII, T 961) The state then was allowed to inquire of Detective Bousquet concerning Grimshaw's statements. (VOL VII, T 962-67) Defense counsel cross-examined the detective concerning the inconsistencies in Grimshaw's and Ramirez's statements. (VOL VII, T 967-79)

Again, the state maintains that this claim has not been adequately preserved. Although defense counsel objected based on hearsay and his ability to cross-examine, he did not present the argument now being made to this Court. The trial judge took a recess to allow counsel to find and present contrary case law to him. As this Court stated in Lucas v. State, 376 So. 2d 1149, 1151-52 (Fla. 1979), "this court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law." Thus, defense counsel's bare bones objection based on hearsay without any supporting authority or reference to the issue now raised is not sufficient to preserve this claim based on a confrontation/interlocking confession basis. Lucas v. State, 376 So. 2d 1149, 1151-52 (Fla. 1979).

Moreover, while the state recognizes that this type of statement is normally not admissible in the penalty phase, this Court has allowed such statements when they are admitted under an exception to the hearsay rule. In Damren v. State, 696 So. 2d 709, 713-14 (Fla. 1997), this Court held that a deceased accomplice's

statements were admissible because they fell within the excited utterance exception to the hearsay rule and because the witnesses to the statement were available for cross-examination. Specifically, this Court stated:

> Damren claims that the court erred in allowing Wendy Hedley, Tessa Mosley, and Joanne Waldrup to testify in the penalty phase as to what Chittam said about the murder when he returned to Hedley's trailer immediately following the killing. We disagree.
>
> The State argued the following in its proffer of Chittam's statements to the trial court: 1) Hearsay is admissible in the penalty phase; 2) Damren was accorded a fair opportunity to rebut Chittam's statements because Hedley, Mosley, and Waldrup were available for cross-examination; 3) Chittam's statements were corroborated by other witnesses who also were available for cross-examination; and 4) Chittam himself was unavailable for cross-examination only because Damren, in order to silence him, had beaten him to death with a hatchet shortly after he made the statements. The State also argued that the statements were admissible in any event as excited utterances.
>
> Our review of the record shows no abuse of discretion in admitting Chittam's statements. See Blanco v. State, 452 So.2d 520, 523 (Fla.1984). We addressed a similar deceased-declarant scenario in Spencer v. State, 645 So.2d 377 (Fla.1994), wherein the out-of-court statements of the murder victim (describing a prior attack and threat by the defendant) were admitted in the penalty phase via the in-court testimony of a police officer. We found it sufficient under section 921.141(1), Florida Statutes (Supp.1992), that "Spencer was ... given an opportunity to cross-examine the officer." Id. at 383-84. Damren was accorded the same

> opportunity. See also Waterhouse v. State, 596 So.2d 1008 (Fla.1992).
>
> Further, Chittam's statements fall within the excited utterance exception to the hearsay rule. The statements were made shortly after the murder of Miller; Chittam was in a highly agitated state over the burglary gone awry when he made the statements; and he was in dire fear for his own life because of the killing he had just witnessed. As noted above, Chittam was killed within hours of making the statements. We find no error.
>
> We find the remainder of Damren's claims to be without merit or any error to be harmless. We affirm the convictions and sentences, including the death sentence.
>
> Damren v. State, 696 So. 2d 709, 713-14 (Fla. 1997)

The statements in the instant case, are admissible under the rule of completeness, they were relevant to rebut Ramirez's claim of substantial domination and Detective Bousquet was available for cross-examination.

Furthermore, the admission of the statement was harmless. Ramirez' own statement established that he entered the fenced backyard, cut the telephone wires, burglarized the house, armed himself with a gun, a knife and handcuffs, killed the barking dog, tied the victim up, got the Vaseline (presumably used in the sexual assault) and drove the victim to an overgrown field where ***he killed her by shooting her twice in the head.*** (VOL XIII, T 446-556) The physical evidence was consistent with Ramirez' confession. The only real difference between the two confessions was in who thought

of the idea and who committed the sexual assault. Both agreed, however, that Ramirez shot and killed the victim.

Additionally, the trial court found five aggravating circumstances: 1)during the course of a kidnapping and/or sexual battery, 2) during the course of a robbery and/or burglary for financial gain, 3) cold, calculated and premeditated, 4) heinous, atrocious, or cruel, and 5) avoid arrest. (VOL VI, R 732-738) Whereas, the trial court gave little weight to the statutory and non-statutory mitigation evidence proffered. (VOL VI, R 732-738) Further, to the extent that the evidence was offered to rebut Ramirez' claim of substantial domination, the trial court found the existence of the statutory mitigating factor. (VOL VI, R 732-738)

Based on the foregoing the state maintains that error in allowing this line of questioning in the penalty phase was harmless. Franqui v. State, 699 So. 2d 1312, 1321 (Fla. 1997).

ISSUE III

WHETHER THE LOWER COURT ERRED IN SUBMITTING TO THE JURY AND FINDING THE CCP AGGRAVATOR AND WHETHER THERE IS AN INCONSISTENCY IN FINDING BOTH CCP AND THE AVOID ARREST AGGRAVATOR.

The trial court's sentencing order provides, in pertinent part (VOL VI, R 733-735):

> c. The murder for which the Defendant was convicted was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The Defendant had a heightened level of premeditation as indicated by numerous factors including, but not limited to, the phone wires being cut prior to the Defendant entering the victim's home, the Defendant wearing gloves, but no masks, prior to entering the home; and, having made careful plans as evidenced by the thought process demonstrated in choosing an elderly victim who lived alone, in a quiet neighborhood with which the defendant was familiar; i.e. the victim was not chosen by accident or coincidence but through a careful prearranged plan to effectuate her death.
>
> * * *
>
> e. The capital felony was a homicide committed for the dominant purpose of avoiding or preventing a lawful arrest. It is apparent from the overall testimony and evidence that the defendant wanted to commit a murder and he did not want to get caught; this was not an impulsive killing. The facts show that the defendant remarked "she (victim) saw my face - we got to kill her." Specifically, the killing occurred after the victim had been blindfolded and kidnapped then led to a vacant field in the middle of the night where she was

> executed for no other apparent motive. Pillows were used over and under the victim's head to muffle the gun shot sounds from others who may be in ear shot (the victim was not shot in her house where nearby residents could hear). Also, a plan to set the victim's house on fire was aborted because the co-defendant thought it might spread to his house nearby.

In Wickham v. State, 593 So. 2d 191, 193-194 (Fla.), cert. denied, 505 U.S. 1209, 120 L.Ed.2d 878 (1992), this Honorable Court pronounced:

> [4] Fourth, Wickham contends that the trial court erred in finding that the murder was cold, calculated, and premeditated. While the murder of Fleming may have begun as a caprice, it clearly escalated into a highly planned, calculated, and prearranged effort to commit the crime. It therefore met the standard for cold, calculated premeditation established in *Rogers v. State*, 511 So.2d 526 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), even though the victim was picked at random. We also find no evidence sufficient to establish that Wickham had a valid pretense of justification that would have negated this aggravating factor. See *Banda v. State*, 536 So.2d 221 (Fla.1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).
>
> (emphasis supplied)

See also Hannon v. State, 638 So. 2d 39, 43-44 (Fla. 1994)(avoid arrest aggravator properly found where the murder of victim Carter was ancillary to the primary purpose of obtaining revenge against Snider); Ferrell v. State, 686 So. 2d 1324, 1330 (Fla. 1996)(CCP properly found where defendants took victim to a remote area where

there would be no witnesses and that they shot the victim execution-style to prevent identification of codefendants Hartley and Johnson as participants in an earlier robbery); Foster v. State, 679 So. 2d 747 (Fla. 1996)(CCP upheld where robbery complete before the murders occurred, victims had complied with all of defendant's orders and posed no physical threat to defendant and victims were laying face down when defendant methodically executed each one).

Appellant cites cases like Barwick v. State, 660 So. 2d 685 (Fla. 1995); Perry v. State, 522 So. 2d 817 (Fla. 1988); Hardwick v. State, 461 So. 2d 79 (Fla. 1984); and Gorham v. State, 454 So. 2d 556 (Fla. 1984), for the proposition that rudimentary planning for a robbery and a burglary cannot be transferred to the murder where there is no evidence of a planned murder in advance. But each of those cases simply presented the situation that a homicide ensued when the intended burglary or robbery went awry; in the instant case we have more. Even if the defense contention were true that Ramirez and his companion initially entered the premises without a premeditated intent to kill, things changed dramatically afterwards to satisfy the heightened premeditation-calculated factors. Not only was the elderly Ms. Boroski subdued by being tied to the bed and sexually assaulted but afterwards Ramirez and his companion decided to remove her from her home -- bound and helpless -- took her to a secluded area and executed her with two

gunshots to the head. And this after appellant and companion Grimshaw had spent an hour and a half in the victim's house (VOL XIII, TR 515). Even the execution showed great preparation with pillows under and on top of her head. (VOL XII, TR 377, 386, 392-393; VOL XIII, TR 457) Thus, the killers accomplished the killing without exposure to neighbors who might have heard the gunshots had the killers acted within the house.

In Thompson v. State, 648 So. 2d 692 (Fla. 1994), this Court approved a finding of the presence of the CCP aggravator where the defendant, armed with a knife and a gun, went to the cemetery office, obtained a check from victim Swack, then drove Swack and his assistant Nancy Walker to an isolated area and forced them to lie on the ground. There was no evidence of a struggle with victim Walker. The Court emphasized the factors of advanced procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out on a matter of course. Id. at 696.

Similarly, in the instant case, appellant's pre-entry preparations included cutting the telephone lines and entering the premises with a crowbar (used to kill the victim's dog). Upon entering, Ramirez further armed himself with a knife from the kitchen. The victim was tied to a bed and sexually assaulted and appellant stole items from the house. Following a ninety-minute interval, the victim while bound was removed from her home, driven

to an isolated area and executed with two gunshots to the head. The CCP finding *sub judice* is as appropriate as in Thompson.

Similarly, another case that involved an escalation from a simple burglary to a CCP finding approval was a double homicide committed in Walls v. State, 641 So. 2d 381 (Fla. 1994). There the defendant deliberately woke up the two victims by knocking over a fan after entering the house to commit a burglary. Id. at 384. Walls forced victim Peterson to tie up her boyfriend, then she was taken to another room and bound and gagged. The boyfriend was shot, appellant "wrestled" with Peterson, ripping off her clothes, shot her non-fatally, listened to her screams and then shot her in the head. This Court determined that all four prongs of the CCP factor were present: (1) the killing was the product of cool and calm reflection, not prompted by emotional frenzy, panic or a fit of rage; (2) there was a careful plan or prearranged design to commit murder before the fatal incident since, as this Court explained "At the point where Walls left Alger's body he obviously had formed a 'prearranged decision' to kill Peterson" - Id. at 388; (3) heightened premeditation was present in light of the drawn out affair; and (4) there was no pretense of moral or legal justification.

Ramirez' murder of Mrs. Boroski also qualifies in light of the decision to sexually assault the victim, steal her property and

after ninety minutes take her to an isolated spot for execution where a pillow could muffle the shot.

Appellant next contends that the trial court's findings reflect a tension between the CCP and avoid arrest aggravators as described in the dicta of Derrick v. State, 581 So. 2d 31, 37 (Fla. 1991), i.e. if Derrick did not decide to kill Sharma until recognized it would seem the facts would not support a finding of heightened premeditation.

This Court has upheld the avoid arrest aggravator where the facts show the victim was abducted from the scene of one crime and taken to a remote area and killed for no other apparent motive. Hall v. State, 614 So. 2d 473, 477-478 (Fla. 1993)(evidence leaves no reasonable inference except that Hall and Ruffin killed the victim to eliminate the only witness to their having kidnapped and raped her and having stolen her car); Preston v. State, 607 So. 2d 404 (Fla. 1992); Cave v. State, 476 So. 2d 180, 188 (Fla. 1985); Routly v. State, 440 So. 2d 1257, 1264 (Fla. 1983); Swafford v. State, 533 So. 2d 270, 276 (Fla. 1988); Harmon v. State, 527 So. 2d 182, 188 (Fla. 1988); Thompson v. State, 648 So. 2d 692 (Fla. 1994). Obviously, the two aggravators are not mutually exclusive. Hall, *supra*; Swafford, *supra*. The removal of the victim from her home to a secluded site after the commission of the in-house crimes is satisfactory circumstantial evidence that the avoid arrest factor was a dominant purpose.

HARMLESS ERROR:

Even if the lower court erred, any error would be harmless. The trial court found five aggravating factors (homicide while engaged in the commission of a kidnapping/sexual battery, homicide during a robbery and/or burglary for financial gain, CCP, HAC, and homicide to avoid or prevent arrest) and gave little weight to the statutory and non-statutory mitigation evidence proffered (VOL VI, R 732-738). Removal of one -- or even two -- aggravator from the calculus would not change the result in light of the absence of significant mitigation. This Court has previously recognized that the presence of three or more remaining valid aggravators after excising an erroneously-found one where there is limited mitigation will result in harmless error. See Green v. State, 583 So. 2d 647, 653 (Fla. 1991) fn. 11; Holton v. State, 573 So. 2d 284 (Fla. 1990); Hill v. State, 515 So. 2d 176 (Fla. 1987); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Bassett v. State, 449 So. 2d 803 (Fla. 1984); Brown v. State, 381 So. 2d 690 (Fla. 1990); Barwick, *supra*.

ISSUE IV

WHETHER RAMIREZ'S SENTENCE WAS PROPORTIONATE.

The appellant next claims that his sentence of death was precluded by the fact that: 1) the trial court improperly found CCP, 2) the trial court failed to properly consider appellant's substance abuse history, age and capacity for rehabilitation, 3) codefendant, Jonathon Grimshaw, received life sentences for the same offenses.

On November 8, 1996 the trial court entered an order imposing a sentence of death in agreement with the 11 to 1 recommendation from the jury. (VOL VII, T 1328, VOL VI, T 732) The trial court found five aggravating factors including homicide while engaged in the commission of a kidnapping/sexual battery, homicide during a robbery and/or burglary for financial gain, CCP, HAC, and homicide to avoid or prevent arrest. In consideration of the statutory and nonstatutory mitigating evidence, the court found:

> The defense in its memoranda, jury instructions requested, and/or argument, asked the court and the jury to consider the following factors in mitigation of the indictment:
>
> a. At the time this murder was committed, the defendant was seventeen years old. Relevant expert testimony in this regard indicates that the defendant is more immature emotionally, intellectually and behavior-wise than his chronological age but, there was no evidence that he was, or is, in any way retarded or has a sub-normal I.Q.. The defendant's age at the time of the crime, while a mitigating factor is given little weight.

b. The defense claims the defendant has no significant history of prior criminal activity. However, the defendant does have a prior auto burglary for which he was prosecuted as a juvenile. Thus, while this factor is properly considered a mitigator, the foregoing circumstance militates against giving this factor significant weight.

c. The defense claimed that the defendant was under the influence of extreme mental or emotional distress. The expert testimony indicated that the defendant had a difficult childhood which included emotional abuse and "some" unnecessary physical punishment; that around the time of the murder the defendant was emotionally affected by several contemporaneous difficulties in his life including his girlfriend's decision to get an abortion, against his wishes, and their relationship falling apart thereafter, together with his natural mother's suffering from a chronic/terminal illness. In addition, there was some testimony that the defendant engaged in "huffing" (inhaling aerosol/hydrocarbon type products) which was not extensive. All of the above is alleged to have lowered the Defendant's ability to be independent of "bad influences". However, the court finds that the defendant was not under the influence of "huffing" type products or otherwise incompetent on the date of the crime and pursuant to the expert testimony, the defendant's overall condition did not otherwise preclude him from making a decision to premeditate the killing of the victim in this case. The court finds that the defendant was fully aware of his actions and has given this factor little weight.

d. The defense claimed that the Defendant was under extreme duress and substantial domination of another person, specifically his co-defendant, Johnathan Grimshaw. The defendant and co-defendant were both 17 years of age, although the co-defendant was several months older, they were both in the same grade and the defendant had less discipline problems

than the co-defendant while in school which would tend to indicate the greater maturity and independence from any bad influence from the co-defendant. There is otherwise no clear evidence or testimony to suggest that the co-defendant, Johnathan Grimshaw, substantially dominated or exercised extreme duress over Nathan Ramirez. The fact that the co-defendant was more brazen in appearing on local television expressing feigned concern and remorse for his neighborly victim's disappearance is suggestive of the co-defendant's braggadocio personality/reckless disregard for his potential for being caught and is not suggestive that he was "the leader". The evidence shows that the defendant was more astute and demonstrated leadership attributes by his reaction to the taped telephone conversation from the co-defendant wherein he adroitly avoided making incriminating statements and did not dwell on the subject matter in question. The subject phone conversation, at a minimum, demonstrates that the relation between the defendant and co-defendant was based more on a parity than any theory of domination; i.e. these individuals fit the classic mold of being "partners in crime". Furthermore, the defendant was admittedly the trigger man in each and every scenario presented. Accordingly, the Court gives this factor little weight.

e. The defense claimed the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The credible expert and lay testimony clearly established that the defendant could and did appreciate the criminality of his conduct on the night of these crimes. Specifically, testimony indicated that the defendant had, in early school years, a learning disability and was put into a remedial class and this hindered his ability to make "appropriate" decisions. However, testimony indicated that the defendant was not psychotic, knew right from

> wrong, was not disillusioned, suffered not drug abuse, nor inpatient psychiatric care. Therefore, the court finds that the defendant did appreciate the criminality of his conduct and could have conformed his conduct to the requirements of law; and there was no substantial impairment in this regard. Accordingly, the Court gives these factors little weight.

The Defense also argued nonstatutory mitigating factors, the defendant's character or record including, a) cooperation with law enforcement; b) conduct while incarcerated and during trial; c) demeanor and comments as they pertain to the crime; d) conduct prior to the crime; e) age, personality, character and talents; f) family background and family problems of the defendant; g) the defendant's prior record. The above factors have been considered by the Court and:

As to factors a, b, and c above, the evidence and court's account clearly show that the defendant has acted properly during his incarceration and during the trial; but, the defendant's conduct in this regard is not atypical for one caught "red handed" and hence, the Court gives these factors little weight.

As to factor d above, the defendant's cooperation can only arguably come from his voluntary confession. Because this followed extensive, pre-arranged, self-servingly instituted, "tracks" on two occasions before the co-defendant confessed and this Defendant was thereafter apprehended, the court although considering the foregoing a mitigating circumstance, gives it little weight in the weighing process.

As to factors e, f, and g above, the Court has considered those as previously noted in conjunction with the Statutory Mitigating factors herein above and the same analysis would also now apply.

The court has very carefully considered and weighted the aggravating and mitigating circumstances found to exist in this case, being ever mindful that a human life is at stake in the balance. The court finds, as did the

> jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.
>
> (VOL VI, R 735-738)

First, proportionality is not a recounting of aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). A review of similar cases compared to the facts of the instant case shows that the sentence in the instant case was proportionate. This Honorable Court has upheld the imposition of the death penalty in numerous cases where victims were killed during the course of a robbery/burglary. See, e.g., Moore v. State, 701 So. 2d 545 (Fla. 1997) (nineteen years old shot and killed victim during course of burgalry); Johnson v. State, 660 So. 2d 637 (Fla. 1995)(73-year-old victim beaten and stabbed during course of burglary); Atwater v. State, 626 So. 2d 1325 (Fla.), cert. denied, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994) (sentence upheld where defendant entered victim's apartment and repeatedly stabbed victim); Consalvo v. State, 697 So. 2d 805 (Fla. 1996)(victim stabbed during course of burglary); Melton v. State, 638 So. 2d 927 (Fla. 1994) (a sentence found proportionate where defendant convicted of a fatal shooting during a robbery where there were two aggravating factors and little mitigation); Hayes v. State, 581 So. 2d 121 (Fla. 1991) (death sentence proportionate for armed robbery); Jent v. State, 579 So. 2d 721 (Fla. 1991) (sentence proportionate for murder committed during the course of burglary

where court affirmed two aggravating factors balanced against little mitigation); Brown v. State, 565 So. 2d 304 (Fla. 1990) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators).

With regard to the specific arguments made by appellant, the state submits the following.

First, appellant urges that an inapplicable aggravating circumstance was considered-CCP. For the reasons set forth in Issue 3, CCP was properly found and considered. Further, even if the lower court erred, any error would be harmless. The trial court found five aggravating factors (homicide while engaged in the commission of a kidnapping/sexual battery, homicide during a robbery and/or burglary for financial gain, CCP, HAC, and homicide to avoid or prevent arrest) and gave little weight to the statutory and non-statutory mitigation evidence proffered (VOL VI, R 732-738). Removal of one -- or even two -- aggravator from the calculus would not change the result in light of the absence of significant mitigation. This Court has previously recognized that the presence of three or more remaining valid aggravators after excising an erroneously-found one where there is limited mitigation will result in harmless error. See Green v. State, 583 So. 2d 647, 653 (Fla. 1991) fn. 11; Holton v. State, 573 So. 2d 284 (Fla. 1990); Hill v. State, 515 So. 2d 176 (Fla. 1987); Rogers v. State,

511 So. 2d 526 (Fla. 1987); Bassett v. State, 449 So. 2d 803 (Fla. 1984); Brown v. State, 381 So.2d 690 (Fla. 1990); Barwick, *supra*.

Next, appellant urges that the court failed to give sufficient weight to his substance abuse history, age and capacity for rehabilitation. This Court has held that the relative weight given to aggravating and mitigating factors is question entirely within discretion of fact finder, and is not governed by burdens of proof applicable when establishing factors. Johnson v. State, 660 So. 2d 637 (Fla. 1995) As evidenced by the order, the trial court thoroughly considered all of the evidence presented.

Further, the trial court, in the instant case, ordered memorandums, allowed argument and the presentation of new evidence at a sentencing hearing on November 4, 1996. After considering all of the foregoing, the judge entered a detail written analysis of the aggravating and mitigating circumstances. (attached) This order was read in its entirety at the sentencing hearing on November 8, 1996. (VOL VI, R 921-933) If the trial court failed to consider any evidence or factor that should have been considered it was incumbent on counsel to raise an objection at that time. §924.051, Fla. Stat. (1996) He did not. Thus, this claim is barred. cf. Kyles v. State, 22 Fla. Law Weekly 2760 (Fla. 4DCA, December 10, 1997); Cowan v. State, 22 Fla. Law Weekly D1577 (Fla. June 25, 1997).

Similarly, appellant's claim that the trial court failed to consider Grimshaw's life sentence should have been raised to the trial court. Appellant was sentenced after the effective date of section 924.051(3), Florida Statutes (1997) which states that "[a]n appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error." Peavy v. State, 23 Fla. Law Weekly D645 (Fla. 1DCA, March 6, 1998); Davis v. State, 23 Fla. Law Weekly D31, 32 (Fla. 1DCA, Dec. 18, 1997); see also Massey v. State, 698 So. 2d 607 (Fla. 5DCA 1997). The fact that counsel did not raise this claim to the trial court suggests that he considered that the thrust of his argument had been subsumed under the trial court's analysis of the substantial domination mitigating factor. In consideration of that factor the trial court stated:

> d. The defense claimed that the Defendant was under extreme duress and substantial domination of another person, specifically his co-defendant, Johnathan Grimshaw. The defendant and co-defendant were both 17 years of age, although the co-defendant was several months older, they were both in the same grade and the defendant had less discipline problems than the co-defendant while in school which would tend to indicate the greater maturity and independence from any bad influence from the co-defendant. There is otherwise no clear evidence or testimony to suggest that the co-defendant, Johnathan Grimshaw, substantially dominated or exercised extreme duress over Nathan Ramirez. The

> fact that the co-defendant was more brazen in appearing on local television expressing feigned concern and remorse for his neighborly victim's disappearance is suggestive of the co-defendant's braggadocio personality/reckless disregard for his potential for being caught and is not suggestive that he was "the leader". The evidence shows that the defendant was more astute and demonstrated leadership attributes by his reaction to the taped telephone conversation from the co-defendant wherein he adroitly avoided making incriminating statements and did not dwell on the subject matter in question. The subject phone conversation, at a minimum, demonstrates that the relation between the defendant and co-defendant was based more on a parity than any theory of domination; i.e. these individuals fit the classic mold of being "partners in crime". Furthermore, the defendant was admittedly the trigger man in each and every scenario presented. Accordingly, the Court gives this factor little weight.
>
> (VOL VI, R 736-737)

Regardless, the codefendant's life sentences does not preclude the imposition of the death penalty on the appellant in this case. To the extent that the appellant argues this Court must reduce his sentence on proportionality grounds due to his codefendant's sentence, his argument is without merit. This Court has repeatedly upheld death sentences when codefendants that participated in the crime but did not actually kill were sentenced to less than death. See, Raleigh v. State, Case No. 87,584 (Fla. Nov. 13, 1997); Johnson v. State, 696 So. 2d 317, 326 (Fla. 1997); Armstrong v.

State, 642 So. 2d 730, 738 (Fla.), cert. denied, 514 U.S. 1085 (1995); Hannon, 638 So. 2d at 44; Hall v. State, 614 So. 2d 473, 479 (Fla. 1993), cert. denied, 510 U.S. 834 (1993); Coleman v. State, 610 So. 2d 1283, 1287-88 (Fla.), cert. denied, 510 U.S. 921 (1993); Robinson v. State, 610 So. 2d 1288 (Fla.), cert. denied, 510 U.S. 1170 (1994); Downs v. State, 572 So. 2d 895, 901 (Fla.), cert. denied, 502 U.S. 829 (1991); Williamson v. State, 511 So. 2d 289, 292-293 (Fla.), cert. denied, 485 U.S. 929 (1988); Craig v. State, 510 So. 2d 857, 870 (Fla.), cert. denied, 484 U.S. 1020 (1988); Marek v. State, 492 So. 2d 1055, 1058 (Fla.), cert. denied, 511 U.S. 1100 (1994); Woods v. State, 490 So. 2d 24, 27 (Fla.), cert. denied, 479 U.S. 954 (1986); Deaton v. State, 480 So. 2d 1279, 1283 (Fla.), cert. denied, 513 U.S. 902 (1994); Brown v. State, 473 So. 2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985); Troedel v. State, 462 So. 2d 392, 397 (Fla. 1984); Bassett, 449 So.2d at 808-809. In all of the above cases, the codefendants were present during the crimes, participated at least to the extent that Grimshaw did in this case, and were convicted of first degree murder but sentenced to less than death. When, as here, codefendants are not equally culpable, the death sentence of the more culpable codefendant is not unequal justice when another codefendant receives a life sentence. Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994), citing Garcia v. State, 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986). See, also, Cardona

v. State, 641 So. 2d 361 (Fla.), cert. denied, 513 U.S. 1160 (1995); Colina v. State, 634 So. 2d 1077 (Fla.), cert. denied, ___ U.S. ___, 115 S.Ct. 330 (1994); Mordenti v. State, 630 So. 2d 1080 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 2726 (1994); Sims v. State, 602 So. 2d 1253, 1257 (Fla.), cert. denied, 506 U.S. 1065 (1993); Cook v. State, 581 So. 2d 141 (Fla.), cert. denied, 502 U.S. 890 (1991); Hayes v. State, 581 So. 2d 121, 127 (Fla.), cert. denied, 502 U.S. 972 (1991).

In general where this Court has reversed death sentences "where an equally culpable codefendant received lesser punishment," the sentence has been imposed despite a jury recommendation of life. See, Slater v. State, 316 So. 2d 539 (Fla. 1975); Pentecost v. State, 545 So. 2d 861 (Fla. 1989); Spivey v. State, 529 So. 2d 1088 (Fla. 1988); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Caillier v. State, 523 So. 2d 158 (Fla. 1988); DuBoise v. State, 520 So. 2d 260 (Fla. 1988); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Malloy v. State, 382 So. 2d 1190 (Fla. 1979). This is an important distinction since the focus in those cases was on whether evidence implicating a codefendant with a lesser sentence could have provided a reasonable basis for the life recommendations. Similar arguments to those made in the above cases have been rejected where the jury has recommended death. Compare, Hoffman v. State, 474 So. 2d 1178 (Fla. 1985), and

Brookings. Override cases are not applicable to a proportionality analysis, since different principles are involved.

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

A review of the facts established in the instant case clearly demonstrates the proportionality of the death sentence imposed. The circumstances of this murder compels the imposition of the death penalty.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, Post Office Box 9000 -- Drawer PD, Bartow, Florida 33831 this 3rd day of April, 1998.

Carol M. Dittmar
COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

NATHAN JOE RAMIREZ,

Appellant,

vs. CASE NO. 89,377

STATE OF FLORIDA,

Appellee.

_____/

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CASE NO: 95-1073CFAWS-04

STATE OF FLORIDA

VS

NATHAN RAMIREZ

FILED IN OPEN COURT
THIS 8 DAY OF NOV 1996
Jed Pittman, Clerk
BY [illegible] D.C.
1:30 PM

SENTENCING ORDER

The Defendant was tried before this court on April 22, 1996 through April 26, 1996, and the court having heard the evidence presented in both the guilt and penalty phases, and the jury having found the Defendant guilty of Murder in the First Degree; and on April 29, 1996 and April 30, 1996, a penalty phase being held with the jury having returned an eleven to one recommendation that the Defendant be sentenced to death in the electric chair. On or about October 17, 1996, the court requested memoranda from counsel for the state and counsel for the Defendant. The memoranda were received from both sides on or before October 31, 1996. Pursuant to Supreme Court directive [Spencer v. State, 615 So.2d 688 (Fla. 1993)], the court set a sentencing hearing for November 4, 1996, at which time the Defendant, his counsel, and the state were all afforded opportunities to present additional evidence and the Defendant was afforded the opportunity to be heard in person, and the court having heard any evidence and argument presented, recessing the proceeding to consider the appropriate sentence, and reconvening on today's date for the purpose of final sentencing and contemporaneously filing this sentencing order, the court finds as follows:

1. There are sufficient aggravating circumstances established to support the jury's advisory sentence, which this court gives great weight to, and agrees with, to justify the imposition of the death penalty; and there are insufficient mitigating circumstances to outweigh the

aggravating circumstances of the indictment.

2. Specifically, the aggravating circumstances of the indictment established:

a. The capital felony was a homicide committed while the defendant was engaged in the commission of the crimes of kidnapping and/or sexual battery . Credible testimony from professional experts, together with the Defendant's own confession, made it obvious that the victim was sexually abused and kidnapped. Specifically, the victim was tied, face down, to her bed while she was sexually assaulted and later handcuffed and placed in her own motor vehicle and driven to a remote place of execution.

b. The capital felony was a homicide committed while the defendant was engaged in, or in an attempt to commit, a robbery and/or burglary for the purpose of financial gain. Testimony and evidence presented during the trial indicated that the Defendant knew the victim had just celebrated a birthday, guests were present earlier that day, and there was a strong likelihood that gifts would be available for taking and, in fact, the defendant stealthily broke into the victim's home to steal and did steal her property and cash after ransacking her home.

c. The murder for which the Defendant was convicted was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The Defendant had a heightened level of premeditation as indicated by numerous factors including, but not limited to, the phone wires being cut prior to the Defendant entering the victim's home; the Defendant wearing gloves, but no masks, prior to entering the home; and, having made careful plans as evidenced by the thought process demonstrated in choosing an elderly

victim who lived alone, in a quiet neighborhood with which the defendant was familiar; i.e. the victim was not chosen by accident or coincidence but through a careful prearranged plan to effectuate her death.

d. The capital felony was a homicide committed in an especially heinous, atrocious and cruel manner. This is evidenced by the high degree of pain and suffering, both physically and emotionally, that must have been felt by the victim who, which the facts showed, was moaning throughout the ordeal uttering phrases such as "please, stop". The victim was present as her dog was beaten to death; she was tied to the bed from which she was awakened and sexually abused thereon (as testified by the medical examiner, the sexual abuse in particular would have been very painful to this victim); the medical examiner further testified the victim sustained "defensive" wounds during her vain attempt to protect herself, her horror was real. The cords that bound the victim's wrists left gouge marks in her wrists and the bed posts that illustrate the intensity of her struggle. The torture of this victim persisted over a prolonged period of time while her house was being ransacked and then the victim was hooded and driven to an isolated area, then walked, handcuffed and barefooted, over 200 feet of heavy brush, which obviously would have taken longer to walk than a comparable distance on a paved road thereby elongating the victim's fear, to her place of execution.

e. The capital felony was a homicide committed for the dominant purpose of avoiding or preventing a lawful arrest. It is apparent from the overall testimony and evidence that the defendant wanted to commit a murder and he did not want to get caught; this was not an impulsive killing. The facts showed that the defendant remarked "she (victim) saw my face - we got to kill her." Specifically, the killing occurred after the victim had been blindfolded and kidnapped then led to a

vacant field in the middle of the night where she was executed for no other apparent motive. Pillows were used over and under the victim's head to muffle the gun shot sounds from others who may be in ear shot (the victim was not shot in her house where nearby residents could hear). Also, a plan to set the victim's house on fire was aborted because the co-defendant thought it might spread to his house nearby.

None of the other aggravating factors enumerated by statute is applicable to this case; and no others were considered by this court.

The court acknowledged its responsibility to consider all statutory mitigating factors pursuant to Florida Statute 921.141(6), as well as all nonstatutory mitigating factors.

The defense in its memoranda, jury instructions requested, and/or argument, asked the court and the jury to consider the following factors in mitigation of the indictment:

a. At the time this murder was committed, the defendant was seventeen years old. Relevant expert testimony in this regard indicates that the defendant is more immature emotionally, intellectually and behavior-wise than his chronological age but, there was no evidence that he was, or is, in any way retarded or has a sub-normal I.Q.. The defendant's age at the time of the crime, while a mitigating factor, is given little weight.

b. The defense claims the defendant has no significant history of prior criminal activity. However, the defendant does have a prior auto burglary for which he was prosecuted as a juvenile. Thus, while this factor is properly considered a mitigator, the foregoing circumstance militates against giving this factor significant weight.

c. The defense claimed that the defendant was under the influence of extreme mental or emotional distress. The expert testimony indicated that the defendant had a difficult childhood which included emotional abuse and "some" unnecessary physical punishment; that around the time of the murder the defendant was emotionally affected by several contemporaneous difficulties in his life including his girlfriend's decision to get an abortion, against his wishes, and their relationship falling apart thereafter, together with his natural mother's suffering from a chronic/terminal illness. In addition, there was some testimony that the defendant engaged in "huffing" (inhaling aerosol/hydrocarbon type products) which was not extensive. All of the above is alleged to have lowered the Defendant's ability to be independent of "bad influences". However, the court finds that the defendant was not under the influence of "huffing" type products or otherwise incompetent on the date of the crime and pursuant to the expert testimony, the defendant's overall condition did not otherwise preclude him from making a decision to premeditate the killing of the victim in this case. The court finds that the defendant was fully aware of his actions and has given this factor little weight.

d. The defense claimed that the Defendant was under extreme duress and substantial domination of another person, specifically his co-defendant, Johnathan Grimshaw. The defendant and co-defendant were both 17 years of age, although the co-defendant was several months older, they were both in the same grade and the defendant had less discipline problems than the co-defendant while in school which would tend to indicate the greater maturity and independence from any bad influence from the co-defendant. There is otherwise no clear evidence or testimony to suggest that the co-defendant, Johnathan Grimshaw, substantially dominated or exercised extreme duress over Nathan Ramirez.

The fact that the co-defendant was more brazen in appearing on local television expressing feigned concern and remorse for his neighborly victim's disappearance is suggestive of the co-defendant's braggadocio personality/reckless disregard for his potential for being caught and is not suggestive that he was "the leader". The evidence shows that the defendant was more astute and demonstrated leadership attributes by his reaction to the taped telephone conversation from the co-defendant wherein he adroitly avoided making incriminating statements and did not dwell on the subject matter in question. The subject phone conversation, at a minimum, demonstrates that the relation between the defendant and co-defendant was based more on a parity than any theory of domination; i.e. these individuals fit the classic mold of being "partners in crime". Furthermore, the defendant was admittedly the trigger man in each and every scenario presented. Accordingly, the Court gives this factor little weight.

e. The defense claimed the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The credible expert and lay testimony clearly established that the defendant could and did appreciate the criminality of his conduct on the night of these crimes. Specifically, testimony indicated that the defendant had, in early school years, a learning disability and was put into a remedial class and this hindered his ability to make "appropriate" decisions. However, testimony indicated that the defendant was not psychotic, knew right from wrong, was not disillusioned, suffered no drug abuse, nor inpatient psychiatric care. Therefore, the court finds that the defendant did appreciate the criminality of his conduct and could have conformed his conduct to the requirements of law; and there was no substantial impairment in this regard. Accordingly, the Court gives these factors little weight.

The Defense also argued nonstatutory mitigating factors, the defendant's character or record including, a) cooperation with law enforcement; b) conduct while incarcerated and during trial; c) demeanor and comments as they pertain to the crime; d) conduct prior to the crime: e) age, personality, character and talents; f) family background and family problems of the defendant; g) the defendant's prior record. The above factors have been considered by the Court and:

As to factors a, b, and c above, the evidence and court's account clearly show that the defendant has acted properly during his incarceration and during the trial; but, the defendant's conduct in this regard is not atypical for one caught "red handed" and hence, the Court gives these factors little weight.

As to factor d above, the defendant's cooperation can only arguably come from his voluntary confession. Because this followed extensive, pre-arranged, self-servingly instituted, "tracks" on two occasions before the co-defendant confessed and this Defendant was thereafter apprehended, the court although considering the foregoing a mitigating circumstance, gives it little weight in the weighing process.

As to factors e, f, and g above, the Court has considered those as previously noted in conjunction with the Statutory Mitigating factors herein above and the same analysis would also now apply.

The court has very carefully considered and weighted the aggravating and mitigating circumstances found to exist in this case, being ever mindful that a human life is at stake in the balance. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendant, Nathan Ramirez, is

hereby sentenced to death for the murder of Mildred Boroski. The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul

DONE AND ORDERED in New Port Richey, Pasco County, Florida this 8th day of November, 1996.

CRAIG C. VILLANTI
Circuit Court Judge
Sixth Judicial Circuit

CC: State Attorney
Public Defender