IN THE SUPREME COURT OF FLORIDA

RYAN J. URBIN,

Appellant,

v. CASE NO. 89,433

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

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STATEMENT OF THE CASE AND FACTS

On October 5, 1995 a Duval County Grand Jury indicted Urbin for first-degree murder, either premeditated or during a felony, and armed robbery based on the murder and robbery of Jason Hicks on September 1, 1995. (I 1).[1] Urbin's trial began in late July 1996 (IV 172), and the evidence produced at trial disclosed the following facts.

Raymond Graham was watching friends shoot pool at Harley's Rack and Cue in Jacksonville around 2:45 a.m. on September 1, 1995 when he heard three gunshots from the parking lot. (VI 523). He saw a white male running across the parking lot (VI 523-24) and identified Urbin in court as that person. (VI 526). Graham also stated that he identified Urbin when shown a photographic array of six people by the police. (VI 531).

The medical examiner performed an autopsy on the victim's body on September 1, 1995. (VI 560). Using autopsy photographs, he identified three gunshot wounds suffered by the victim. One bullet went through the victim's left hand and into his chest. (VI 560-65). A second bullet was also found in the victim's chest. (VI 566-69). The third gunshot wound was to the victim's right shoulder. (VI 569). The bullet that went through the hand and into the chest was large caliber. (VI 564). Because of its path,

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[1] References to the record consist of the volume followed by the page. Thus, "I 1" refers to page 1 of the first volume of record.

the medical examiner testified that the victim would have been lower than the shooter and kneeling or lying on the ground. (VI 564). The other two wounds were consistent with the victim being on his back in the parking lot. (VI 568-69). The victim also had lacerations and bruises on his face that were consistent with being struck with a pistol. (VI 571). The cause of death was multiple gunshot wounds to the victim's chest. (VI 571).

Craig Flatebo testified that, on January 5, 1996, he pled guilty to charges arising from a home invasion and to second-degree murder for his part in Hicks' death. (VI 575-76). Through his plea agreement, he could receive no more than two sentences of life imprisonment, and his plea was conditioned on his truthful testimony at Urbin's trial. (VI 576-77). After identifying Urbin (VI 578), Flatebo testified that he, Urbin, and Jason Ambrose were at a party and discussed committing a robbery. (VI 581). Urbin had a gun and wanted to be the one to commit the robbery. (VI 582-83). Ambrose suggested the pool hall (VI 581), and the trio left the party in Ambrose's car, with Ambrose driving (VI 582) and Urbin in the front passenger seat. (VI 584).

At the pool hall they saw an Oriental-looking man leave. (VI 584). They followed his car until he pulled over to where a police car was parked and then went back to Harley's. (VI 585). Urbin went into Harley's to look around and then returned to the car. (VI 586-87). Ambrose got the guns from the trunk and gave them to

Urbin. (VI 588). When the victim came out, Urbin followed him while Ambrose drove away. (VI 590). About two minutes later, they heard three shots from Harley's. (VI 591). When they drove toward Merrill Road, they saw Urbin running through another parking lot. (VI 591).

Ambrose stopped for Urbin, who was "awful excited" and who told Ambrose to drive off. (VI 592). Urbin kept telling them that the victim should not have resisted (VI 592) and that he shot the victim because he saw Urbin's face. (VI 593-94). Urbin showed them a gold necklace with a charm and a diamond ring he took from the victim. (VI 594). Flatebo and Urbin spent the night at a friend's apartment (VI 597-98), and Flatebo was arrested on September 14, 1995. (VI 599).

Jason Ambrose testified that he also pled guilty to second-degree murder in January 1996 and that his plea agreement was conditioned on his truthful testimony against Urbin. (VI 619-20). He corroborated Flatebo's testimony (VI 622-32) and also testified that Urbin had the victim's wallet. (VI 632). When Ambrose saw the victim's driver's license, he realized that he knew the victim. (VI 632).

Steve Mann, who called himself Urbin's best friend (VI 676), said that he heard Urbin, Flatebo and Ambrose talking about robbing someone at the party. (VI 669-71). Urbin said they were going to Harley's. (VI 672). Later that weekend Urbin, Mann, Steve DeVore,

and Larry Mottley drove to Ft. Myers to see DeVore's father. (VI 673). While in Ft. Myers, Urbin confessed to Mann that he killed the victim. (VI 674-75).

After the state rested (VII 694), Urbin testified on his own behalf. According to Urbin, he accompanied Ambrose and Flatebo to Harley's. (VII 724-25). After parking the car, Ambrose and Flatebo took the guns and walked back to the pool hall. (VII 738). After Urbin heard three shots, the others returned to the car; Flatebo said he shot the victim and had the victim's jewelry and wallet. (VII 739-42). Urbin denied shooting the victim (VII 747) and confessing to Mann. (VII 748).

On cross-examination Urbin denied that he was blaming Flatebo to get back at him for testifying against Urbin at Urbin's trial on the home invasion. (VII 759). He also denied confessing to fellow inmates Joey Koller, Steve Roberts, and Darren Adams. (VII 763-64). In the state's case in rebuttal Roberts (VII 784-86), Adams (VII 805), and Koller (VII 815) all testified that Urbin asked them to lie and testify that Flatebo confessed that he killed the victim.

The jury convicted Urbin of first-degree murder and armed robbery as charged on August 1, 1996. (VIII 961; I 276-77). The trial court scheduled the sentencing phase for August 30 and discharged the jury until that date. (VIII 964).

When proceedings recommenced, the state presented testimony from the assistant state attorney who prosecuted Urbin on the home invasion. She testified that Urbin was convicted of armed robbery, armed burglary, and armed kidnapping (X 986) in February 1996 (X 991) and that the home invasion occurred on September 13, 1995 (X 988), less than two weeks after Urbin killed Jason Hicks. Urbin presented testimony from Ernest Miller (a psychiatrist), Urbin's mother, and several friends, as well as his own testimony. The jury recommended that Urbin be sentenced to death by an eleven to one vote. (X 1169; I 279).

The trial court directed the parties to file sentencing memoranda by September 12. (X 1172). Each side filed a memorandum. (II 308, 313). On September 27, 1996 the court heard argument from the parties (III 472 et seq.), asked for a transcript of Dr. Miller's testimony (III 457), and set sentencing for October 11. (II 457).

The trial court sentenced Urbin to death on October 11, 1996. (III 503). The court found that the state had established three aggravators: 1) prior conviction of violent felony; 2) felony murder/robbery;[2] and 3) committed to avoid or prevent arrest. (II 323-26). The court considered all of the mitigators proposed by Urbin (age; substantially impaired capacity to appreciate the

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[2] The court also found the pecuniary gain aggravator, but merged it with the felony murder aggravator. (III 325).

criminality of his conduct; father's absence; drug/alcohol abuse, mother in prison; dyslexia; employment). Although the judge found that all of the proposed mitigators had been established, he also found them entitled to little weight. (III 326-29). Thereafter, the court held that the aggravators outweighed the mitigators and sentenced Urbin to death. (III 330).

SUMMARY OF ARGUMENT

Issue I. Urbin's complaints about the prosecutor's comments during closing argument at the penalty phase are procedurally barred because he did not object to those comments at trial and has failed to demonstrate on appeal that the comments constituted fundamental error.

Issue II. The trial court correctly found in aggravation that the murder was committed to avoid or prevent arrest.

Issue III. Urbin's death sentence is proportionate.

ARGUMENT

Issue I

WHETHER UNOBJECTED-TO PROSECUTORIAL COMMENTS WARRANT RESENTENCING.

Urbin claims that he should be given a new sentencing proceeding because "the prosecutor's penalty-phase argument was filled with improper and prejudicial remarks." (Initial brief at 25). This issue should be denied, however, because it is procedurally barred and because Urbin has failed to show reversible error.

In this issue Urbin sets out thirteen types of allegedly improper prosecutorial comments. As he concedes, however, he objected to none of these comments. (Initial brief at 26). This issue is, therefore, procedurally barred. Gudinas v. State, 693 So.2d 953, 959 (Fla. 1997); Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996); Allen v. State, 662 So.2d 323, 331 (Fla. 1995), cert. denied, 116 S.Ct. 1326 (1996); Rose v. State, 461 So.2d 84, 86 (Fla. 1984), cert. denied, 471 U.S. 1143 (1985).

To overcome this procedural bar, Urbin argues that the complained-about comments "rendered the sentencing proceeding fundamentally unfair." (Initial brief at 27). As this Court stated in Crump v. State, 622 So.2d 963, 972 (Fla. 1993): "Fundamental error goes to the foundation of the case or the merits of the cause of action and can be considered on appeal without

objection." Urbin ignores, however, other pronouncements of this Court on how prosecutorial comments are to be considered.

> Wide latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. A new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks.

Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982) (quoting Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704 (1977)) (citations omitted). Moreover, reversal is inappropriate if any error that occurred was harmless. State v. Murray, 443 So.2d 955 (Fla. 1984). Instead, "it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations." Id. at 956. This is so because fundamental error occurs only if the "error committed was so prejudicial as to vitiate the entire trial." Id. Applying those principles to this case, it is obvious that no reversible error occurred.

1. Inflammatory Rhetoric

Urbin first complains that the prosecutor's using words such as "execution," "brutal," "vicious," "ruthless," and "cold-blooded"

to describe this murder was inappropriate because "the shooting occurred during a scuffle in response to the victim's resistance to the robbery." (Initial brief at 29). This thinly veiled attempt to blame the victim for his own death does not make the prosecutor's statements any less than fair comment on the evidence. This was an unprovoked armed robbery. Urbin could have run away when the victim resisted. Instead, he shot the victim - not just once, but three times. Urbin fired the last two shots while the victim was on his back on the ground. (VI 567-69). The victim also had lacerations and bruises on his face that were consistent with being struck in the face with a pistol. (VI 571). This murder was, in truth, a brutal, vicious, cold-blooded execution, and the prosecutor committed no error in calling it what it was. If this Court decides that the prosecutor erred, however, any error would be harmless. Cf. Davis v. State, 22 Fla.L.Weekly S331, S333 (Fla. June 5, 1997) (characterizing murder as "brutal" and "vicious" not error in light of the evidence); Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996) (harmless error for prosecutor to use word "exterminate"); Jones v. State, 652 So.2d 346, 352 (Fla. 1995) ("assassination" was a reasonable characterization of the murder), cert. denied, 116 S.Ct. 202 (1996); Burr v. State, 566 So.2d 1051, 1054 (Fla.) (saying that Burr "executes" people was fair comment on the evidence), cert. denied, 474 U.S. 879 (1985); see also Tison v. Arizona, 481 U.S. 137, 151 (1987) ("the

possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves.").

2. Mischaracterization of Evidence

Urbin claims that the evidence does not support the prosecutor's statements regarding the victim's pleading for his life. The medical examiner testified that the first shot went through the victim's left hand, while that hand was raised palm up, and into the victim's chest while the victim was lower than Urbin, *i.e.*, either kneeling or lying on the ground. (VI 560-65). The prosecutor's comment that the victim pled with Urbin not to shoot was a logical inference from the evidence. The prosecutor did not ask the jurors to put themselves in the victim's shoes or to imagine his suffering. See Walker v. State, 22 Fla.L.Weekly S537 (Fla. Sept. 4, 1997); Garron v. State, 528 So.2d 353 (Fla. 1988). Instead, the prosecutor merely submitted his view of the evidence to the jurors for their consideration.

3. Trivializing Jurors' Responsibility

Urbin claims that the prosecutor trivialized the jurors' job at sentencing by telling them it was "not a difficult process." This statement came during the following argument.

> Our purpose here today is to consider - for you to consider what punishment to recommend to Judge Wilkes that the defendant should get for executing Jason Hicks. The

> final decision is not made by you, it's made by Judge Wilkes. It's not a difficult process. The jury makes a recommendation. That recommendation must be given great weight by the judge. But the judge, after he receives your recommendation, will decide what the final sentence will be.

(X 1122-23). As the prosecutor stated, the jury's recommendation is advisory, and the trial judge will consider that recommendation in imposing sentence. The trial court instructed the jury, properly and without objection, on its duty and responsibility in arriving at a recommended sentence. (X 1163-68). The prosecutor's choice of words may have been inartful, but it did not constitute fundamental error.

4. "Higher Authority" Argument

Urbin states that it was improper for the prosecutor to imply "that he, or another higher authority, has already made the careful decision" to seek the death penalty in this case. (Initial brief at 31). Seeking the death penalty in any particular case is a matter of prosecutorial discretion. Telling the jury that and that the instant case warranted the death penalty was a proper comment. That the prosecutor may have offered Urbin a plea agreement at some point in time is irrelevant.

5. Misstatement of Law Regarding Mercy

Urbin next complains that the prosecutor erred by telling the jury that "if sufficient aggravating factors are proved beyond a

reasonable doubt, you must recommend a sentence of death, unless the mitigating circumstances outweigh the aggravating circumstances." (X 1125, emphasis supplied). Given the conditional "if" and "unless," the state does not concede that this statement was erroneous. Even if it were error, however, the statement was made only one time, and the court properly instructed the jury on weighing aggravators and mitigators. (X 1165-67). Any error, therefore, was harmless. Cf. Henyard v. State, 689 So.2d 239, 250 (Fla. 1996) (harmless error where prosecutor told prospective jurors three times that jurors must recommend death if aggravators outweigh mitigators); see also Wuornos v. State, 644 So.2d 1000 (Fla. 1994), cert. denied, 514 U.S. 1069 (1995).

6. Misleading Jury Regarding Merged Aggravators

Urbin complains that the prosecutor should not have told the jury that the felony murder/pecuniary gain aggravator was especially weighty. The prosecutor did tell the jury that these two aggravators merged into one, and the trial court gave a merger instruction specifically about the felony murder and pecuniary gain aggravators. (X 1165). In weighing aggravators and mitigators, each factor must be assigned a qualitative weight. Slawson v. State, 619 So.2d 255 (Fla. 1993), cert. denied, 512 U.S. 1246 (1994). Telling the jury that killing someone during an armed robbery committed for pecuniary gain is a weighty aggravator is fair comment, not error.

7. Denigration of Mitigators

Urbin claims that the state improperly denigrated his proposed mitigators as excuses. Mitigators are "factors that in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Consalvo v. State, 697 So.2d 805 (Fla. 1996). "Extenuate" is defined as "to lessen or to try to lessen the real or apparent seriousness (as of a crime, offense, or fault) or extent of (guilt) by making partial excuses . . . or by affording a basis for excuses . . . MITIGATE (2): to make partial excuses for: to try to justify (as by making partial excuses)." Webster's 3d New International Dictionary (1981) at 805 (emphasis added). By introducing his proposed mitigators, Urbin sought to give reasons for his killing the victim and to excuse his actions so that the jury would not recommend and the judge would not impose a death sentence. The proposed mitigators were "excuses," and the prosecutor did not err by giving them their proper name.

Urbin objected neither to these comments nor to the court's instructions on how mitigating evidence was to be considered. Even if this Court were to hold that prosecutors should not use the word "excuse," any error would be harmless, not fundamental. See James v. State, 695 So.2d 1229, 1234 (Fla. 1997); Jones, 652 So.2d at

352; Mann v. State, 603 So.2d 1141, 1143 (Fla. 1992); Valle v. State, 581 So.2d 40, 46-47 (Fla. 1991); Lucas v. State, 568 So.2d 18, 21 (Fla. 1990); Pardo v. State, 563 So.2d 77, 79 (Fla. 1990). The cases that Urbin relies on, Garron; Riley v. State, 560 So.2d 279 (Fla. 3d DCA 1990); and Russo v. State, 505 So.2d 611 (Fla. 3d DCA 1987), are not apposite. In Garron and Russo the appellate courts found reversible error in the state's questioning the validity of an insanity defense as a defense to murder during the guilt phase. In Riley the appellate court reversed because the state ridiculed Riley's defense of self-defense, also at the guilt phase. Here, the prosecutor did not attack the principles of mitigating circumstances, he merely argued that Urbin's evidence did not ameliorate the enormity of his guilt. The instant case, thus, is not comparable to Garron, Riley, and Russo. See James; Wuornos; Pardo. Urbin's claim that the state did not contradict the evidence he presented (initial brief at 36 n.8) ignores the testimony elicited on cross-examination.

8. Attack on Defense Witness

Urbin next complains that the prosecutor denigrated his mother's testimony. Although Urbin's mother tried to take some of the blame for Urbin turning out like he did (X 1074), she also blamed Urbin's father (*i.e.*, X 1066), her boyfriend and Urbin's brother (*i.e.*, X 1065-66), Urbin's friends (*i.e.*, X 1067-70), and her mother. (*I.e.*, X 1074). She also admitted that she was a

twice-convicted felon, the more recent conviction being for her tampering with a witness in her son's home-invasion case. (X 1083). Although Ms. Urbin stated that she was "devastated" by the victim's death (X 1096), she admitted that she never expressed her concern to the victim's family. (X 1097). The complained-about comments were supported by the evidence. They reflected the prosecutor's view of the testimony and were made in the context of assisting the jury in determining Ms. Urbin's credibility. As such, the comments were not error, let alone fundamental error that could provide relief, given Urbin's lack of objection. Cf. Shellito v. State, 22 Fla.L.Weekly S554, S556 (Fla. Sept. 11, 1997) (referring to defendant's mother as "either an extremely distraught concerned mother or . . . a blatant liar" was not error); Craig v. State, 510 So.2d 857, 865 (Fla. 1987) (calling the defendant a liar was not improper).

9. Lack of Remorse

As Urbin sets out in a quote from the record, the prosecutor used the word "remorse" twice in referring to Urbin. (Initial brief at 37, quoting X 1146-47). In Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983), this Court stated that

> henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor

> nor as an enhancement of an aggravating factor.

Later, however, this Court also stated that the prohibition on the state's presenting evidence of lack of remorse to aggravate a defendant's sentence "does not mean that the state is unable to present this evidence to rebut nonstatutory mitigating evidence of remorse presented by a defendant." Walton v. State, 547 So.2d 622, 625 (Fla. 1989), cert. denied, 493 U.S. 1036 (1990).

Just as Walton did, Urbin opened the door on remorse when he testified on direct that he was

> very sorry that this happened. I don't even - I can't even imagine what the family, the victim's family is going through right now, the loss of Jason Hicks. And I am very sorry that I had anything to do with this. And if I could have done anything to change what happened, I would do it.

(X 1110). Immediately prior to this statement, however, Urbin denied killing the victim (X 1109-10) and, on cross-examination, admitted he never tried to express his alleged remorse. (X 1111-12). In fact, he denied having done anything. (X 1117).

As quoted by Urbin, the prosecutor told the jurors that lack of remorse was not an aggravator. Instead, he stated that the jury's responsibility was to analyze Urbin's character. These are correct statements of the law. Walton; Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977) ("the purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called

for"); Stewart v. State, 558 So.2d 416, 419 (Fla. 1990) (same); Hildwin v. State, 531 So.2d 124, 129 (Fla. 1988) (same), aff'd, 490 U.S. 638 (1989). When placed in context, it is obvious that the prosecutor's mention of remorse was a fair comment on the evidence. Even if this Court were to find the prosecutor's brief reference to Urbin's lack of remorse in his thirty-some-page closing argument to be error, that error was harmless. Shellito; Wuornos.

10. Implying Urbin Could be Released

Urbin also complains about the prosecutor's pointing out that, although a life sentence would be without parole, "[w]e all know in the past laws have been changed. And we all know that in the future laws can change." (X 1147). This is little more than a common sense comment on the state of the law and could not have impermissibly influenced the jury. See Reese v. State, 694 So.2d 678 (Fla. 1997); Allen v. State, 662 So.2d 323 (Fla. 1995), cert. denied, 116 S.Ct. 1326 (1996); Parker v. State, 456 So.2d 436 (Fla. 1984); Harris v. State, 438 So.2d 787 (Fla. 1983), cert. denied, 466 U.S. 963 (1984). Urbin's reliance on Singer v. State, 109 So.2d 7 (Fla. 1959), and Newlon v. Armontrout, 693 F.Supp. 799 (W.D. Wyo. 1988), aff'd, 885 F.2d 1328 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990), is misplaced. In Singer the court reversed because of numerous prosecutorial comments that were not based on the evidence and that interjected personal concerns into the case. In Newlon the court reversed because "the jury was

subjected to a relentless, focused, uncorrected argument based on fear, premised on facts not in evidence, and calculated to remove reason and responsibility from the sentencing process." 693 F.Supp. at 808. The same cannot be said about this case. Urbin has failed to demonstrate fundamental error that would excuse his failure to object to the complained-about comment.

11. Reminding the Jury to Carry Out its Responsibility

The prosecutor told the jurors to weigh the aggravators and mitigators instead of just taking the easy way out and voting for life without considering the evidence presented at the penalty phase. (X 1151). This is merely a rephrasing of the weighing instructions given by the trial court (X 1163 et seq.) and in no way told those jurors that they had to vote a certain way. Even if this Court finds error in the prosecutor's choice of words, any error would be harmless.

12. Victim Impact Argument

Urbin complains that the prosecutor "eulogiz[ed]" the victim and that he "held out the victim's good character for comparison with the defense request for a life sentence." (Initial brief at 40). Victim impact evidence is admissible in Florida, e.g., Moore v. State, 22 Fla.L.Weekly S619 (Fla. October 2, 1997), and the purpose of a sentencing proceeding "is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty

is called for." Stewart v. State, 558 So.2d 416, 419 (Fla. 1990) (quoting Elledge v. State, 346 So.2d 998, 1001 (Fla. 1997)); Hildwin v. State, 531 So.2d 124 (Fla. 1988), aff'd, 490 U.S. 638 (1989). The prosecutor's argument was fair comment. No fundamental error has been demonstrated. See Davis v. State, 22 Fla.L.Weekly S563 (Fla. Sept. 11, 1997); Consalvo v. State, 697 So.2d 805 (Fla. 1996); Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993).

13. Showing Mercy to the Defendant

Finally, Urbin complains that the prosecutor asked the jury to show Urbin "the same amount of mercy, the same amount of pity that he showed Jason Hicks." (X 1152). Even if this were error, it was harmless. Richardson v. State, 604 So.2d 1107 (Fla. 1992).

Contrary to Urbin's contentions, the complained-about comments did not constitute fundamental error, either individually or collectively. Urbin objected to none of these comments and, by failing to demonstrate fundamental error, has failed to overcome the procedural bar caused by that lack of objection. This issue, therefore, should be summarily denied.

Issue II

WHETHER THE EVIDENCE SUPPORTS FINDING THE AVOID ARREST AGGRAVATOR.

Urbin argues that the trial court erred in finding that the avoid arrest aggravator applied in this case. There is no merit to this claim.

The trial court made the following findings as to this aggravator:

> 4. The Murder for which the Defendant is to be sentenced was committed for the purposes of avoiding or preventing a lawful arrest.
>
> After the Defendant completed the robbery and killing of Jason Hicks he returned to the car driven by Jason Ambrose and occupied by Craig Flatebo. During the trial Craig Flatebo testified that the Defendant said to him immediately upon returning to the car after the robbery, that he had slipped up behind the victim, Jason Hicks, and removed the jewelry and forced him to the ground on his stomach so he could not identify him. After the Defendant attempted to remove the wallet or money from the victim's pocket, the victim turned around and saw the Defendant's face, and that was the reason he shot the victim. The Court finds that this aggravating circumstance was proven beyond a reasonable doubt.

(II 325-26). The record 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, 513 U.S. 834 (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, 507 U.S. 999 (1993); Sliney v. State, 22 Fla.L.Weekly S476 (Fla. July 17, 1997); Gore v. State, 22 Fla.L.Weekly S471 (Fla. July 17, 1997); Thompson v. State, 648 So.2d 692 (Fla. 1994), cert. denied, 515 U.S. 1125 (1995). 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. Sliney; Consalvo v. State, 697 So.2d 805 (Fla. 1996); 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, 514 U.S. 1070 (1995); Walls v. State, 641 So.2d 381, 390 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995); Bottoson v. State, 443 So.2d 962, 963 (Fla. 1983), cert. denied, 469 U.S. 873 (1984).

Urbin told Flatebo that the victim saw "his face so he had to shoot him." (VI 593-94). This confession that he killed the victim to eliminate him as a witness is direct evidence of Urbin's motive. Walls. It is also sufficient to support the trial court's finding the avoid arrest aggravator, and this Court should affirm that finding.

Issue III

WHETHER URBIN'S DEATH SENTENCE IS PROPORTIONATE.

In this issue Urbin argues that his death sentence is disproportionate.[3] There is no merit to this claim.

Urbin first claims that "the facts of the murder itself do not call for the most severe punishment available" and that "[t]he circumstances of this crime do not set it apart from other felony murders which this Court has determined did not warrant the death penalty." (Initial brief at 51). He then cites several cases where this Court reduced the death sentence. These cases, however, are distinguishable from the instant case.[4]

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[3] Urbin does not challenge his convictions of first-degree murder and armed robbery. As set out in the Statement of the Case and Facts, *supra*, it is obvious that those convictions are supported by competent, substantial evidence. They should, therefore, by affirmed.

[4] A bare majority of this Court reduced the death sentence in Terry v. State, 668 So.2d 954, 965-66 (Fla. 1996), because it could not determine the facts underlying the felony murder aggravator and because it decided the prior violent felony aggravator was worth little weight. In Sinclair v. State, 657 So.2d 1138, 1142-43 (Fla. 1995), this Court found the death sentence disproportionate where there was only a single aggravator to weigh against several nonstatutory mitigators. Likewise, Thompson v. State, 647 So.2d 824, 827-28 (Fla. 1994), had a single aggravator and "significant" mitigation. In Jackson v. State, 575 So.2d 181, 193 (Fla. 1991), this Court held: "Upon this record, we find insufficient evidence to establish that Jackson's state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder." Although there were two aggravators in Livingston v. State, 565 So.2d 1288 (Fla. 1988), this Court stated: "The record discloses several mitigating factors which effectively outweigh the remaining valid aggravating circumstances." Id. at 1292.

The state established three aggravators, and the trial court found Urbin's mitigating evidence entitled to little weight. Rather than the cases cited by Urbin (note 4, *supra*), other cases affirming the death sentence imposed for murder during the commission of a felony are more comparable to this case in terms of aggravators and mitigation. Mendoza v. State, 22 Fla.L.Weekly S655 (Fla. 1997); Moore v. State, 22 Fla.L.Weekly S619 (Fla. October 2, 1997); Blanco v. State, 22 Fla.L.Weekly S575 (Fla. Sept. 18, 1997); Shellito v. State, 22 Fla.L.Weekly S554 (Fla. Sept. 11, 1997); Sliney v. State, 22 Fla.L.Weekly S476 (Fla. July 17, 1997); Consalvo v. State, 697 So.2d 805 (Fla. 1996); Bonifay v. State, 680 So.2d 413 (Fla. 1996); Pope v. State, 679 So.2d 710 (Fla. 1996), cert. denied, 117 S.Ct. 975 (1997); Hunter v. State, 660 So.2d 244 (Fla. 1995), cert. denied, 116 S.Ct. 946 (1996); Lowe v. State, 650 So.2d 969 (Fla. 1994), cert. denied, 116 S.Ct. 230 (1995); Brown v. State, 644 So.2d 52 (Fla.1994), cert. denied, 115 S.Ct. 1978 (1995); Smith v. State, 641 So.2d 1319 (Fla. 1994), cert. denied, 115 S.Ct. 1125 (1995); Melton v. State, 638 So.2d 927 (Fla.), cert. denied, 513 U.S. 971 (1994); Hayes v. State, 581 So.2d 121 (Fla.), cert. denied, 502 U.S. 972 (1991); Freeman v. State, 563 So.2d 73 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Johnson v. State, 442 So.2d 185 (Fla. 1983), cert. denied, 466 U.S. 963 (1984). The death penalty is warranted by the facts of this murder.

Urbin next argues that "the aggravating circumstances are not especially compelling." (Initial brief at 52). The trial court found that the state had established three aggravators: 1) felony murder/robbery; 2) prior violent felony; and 3) committed to avoid or prevent arrest. Urbin challenges the propriety of finding only the third of these, but as explained is issue II, *supra*, the trial court properly found the avoid arrest aggravator.

The trial court made the following findings as to the two other aggravators:

> 1. The Defendant was previously convicted of a felony involving the use or threat of violence to another person.
>
> On September 13, 1995, the Defendant and 2 co-defendants, Jody Damren and Craig Flatebo, went to the home of the victim, Bonnie Sue Hilton, of 1843 Woodenrail Lane, Jacksonville, Florida, and rang the door bell. When the victim responded to the front door and opened it, the Defendant, Urbin and a co-defendant, Jody Damren, forced their way into the home. The defendant, Urbin, was armed with a pistol and pushed the victim to the floor and covered her face with a pillow to prevent her from identifying him. The victim complained that she could not breath, and the victim was then tied with the cord from the telephone and was left lying on the floor while the defendants, Urbin and Damren, ramsacked [sic] the house. Jewelry, food and guns were removed from the victim's home. The Defendants, Urbin and Damren, were charged and convicted of Armed Robbery with a Firearm, Burglary With Assault and Armed Kidnapping on April 24, 1996. This crime that this Court is relying on as an aggravator, not only meets the statutory requirement of a crime of violence, but is particularly disturbing in that it occurred some 13 days after the

Defendant had killed the victim in this homicide, for which the defendant is being sentenced today. This conviction was proven beyond a reasonable doubt.

2. The defendant, in committing the crime for which he is to be sentenced, was engaged in the commission of or an attempt to commit the crime of robbery.

The Defendant was convicted of Armed Robbery in addition to 1st Degree Murder. The evidence clearly shows that the Defendant, along with 2 co-defendants in this case, mainly [sic] Craig Flatebo and Jason Ambrose, were seeking to find a victim for the purpose of robbing them. The Defendant, Urbin, and his 2 accomplices had agreed to rob the first person who exited the Harley's Rac and Cue parlor. According to the evidence at the trial, this was a place of business where there was gambling that took place at night, and that all the participants were known to carry large sums of cash. The Defendant was to wait outside the business until the first person exited Harley's Rac and Cue. The first person who exited the business was an unknown male who left the premises before the Defendant could commit the robbery. The victim, Jason Hicks, was the second person to exit the premises, and the Defendant approached the victim with a .357 Magnum for the purposes of robbing him. After the Defendant has removed the jewelry from around the victim's neck, there was some scuffle between the victim and the Defendant, and the Defendant shot the victim, Jason Hicks, 3 times with the .357 Magnum. The Defendant, Urbin, then returned to the car, which was parked approximately a block or more from the scene of the crime, where his co-defendants, Jason Ambrose and Craig Flatebo were waiting. The Defendant, Urbin, related to the co-defendants that he has to shoot the victim, Jason Hicks, 3 times because he (meaning the victim) would recognize him. This aggravating circumstance was proved beyond a reasonable doubt.

> 3. The Murder for which the Defendant is to be sentenced was committed for financial gain.
>
> This aggravating factor was proven beyond a reasonable doubt as the Defendant removed the jewelry and other personal items of the victim during the commission of the robbery. However, this aggravating factor merges with aggravating factor number "2", and has been treated as one by this Court.

(II 323-25). The record supports these findings. Urbin, however, argues that they are not entitled to much weight.

First, Urbin states that the felony murder aggravator "has been treated as a relatively weak aggravator." (Initial brief at 52). Armed robbery, however, is a serious crime. Murdering someone during an armed robbery compounds, rather than dilutes, the seriousness of the criminal episode. Such murders are also extremely cold-blooded. As stated by the United States Supreme Court, "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves." Tison v. Arizona, 481 U.S. 137, 151 (1987). In Tison the Court went on to explain why "unintentional" murders can be deserving of the death penalty:

> A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all -- those who act in self-defense or with other justification or excuse. Other

> intentional homicides, though criminal, are often felt undeserving of the death penalty -- those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all -- the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."

Id. at 157 (emphasis supplied). Urbin was recklessly indifferent to the value of the victim's life. Contrary to Urbin's contention, felony murder/robbery, involving as it does two extremely serious felonies, is an especially weighty aggravator.

Urbin also argues that the prior violent felony aggravator is diluted because it was based on his commission of a home invasion two weeks after the instant murder. The home invasion resulted in Urbin's being convicted of armed robbery, armed burglary, and armed kidnapping (X 986) at trial in February 1996. (X 991). The home invasion, therefore, qualified as a prior conviction. King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989 (1991); Elledge v. State, 346 So.2d 998 (Fla. 1977).

Urbin argues that his previous convictions (throwing rocks at a car and burglarizing a home by kicking in the door, initial brief at 53, note 11; see also pages 4-5 of the PSI) demonstrated no violent criminal propensities. (Initial brief at 53). The purpose

of sentencing, however, "is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Elledge, 346 So.2d at 1001. Therefore, "[p]ropensity to commit violent crimes is a valid consideration." Id. As the trial court found, the home invasion was "particularly disturbing." It occurred not quite two weeks after he murdered the victim in this case and involved the victim being threatened with a gun, held down with a pillow over her face almost suffocating her, and bound. (X 988-89). Obviously, the murder did nothing to curb Urbin's propensity to commit violent crimes as shown by his committing other violent crimes shortly thereafter. The prior violent felony is an important consideration in analyzing Urbin's character.

Urbin has demonstrated no error in the trial court's consideration of the aggravators, and the court's finding three aggravators applicable should be affirmed.

Last, Urbin claims that his death sentence is disproportionate because "the mitigating circumstances in this case are substantial." (Initial brief at 53). The trial court fully considered the mitigating evidence, however, and disagreed with Urbin's assessment of that evidence. The court made the following findings of fact:

B. Statutory Mitigating Factors

1. The age of the Defendant at the time of the crime.

The Defendant was 17 years of age at the time of the killing of the victim on September 1, 1995. According to the Pre-Sentence Investigation Report, the Defendant was 18 years of age on October 24, 1995. The Court finds that although the Defendant had not reached his age of majority at the time of the homicide, he was a mature person for his age. He had worked and lived on his own for some period of time prior to this crime. The Court has considered the Defendant's age at the time of the crime, and has given it some weight.

2. The capacity of the Defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired.

The Defendant testified that at the time of the murder he had been consuming drugs and alcohol. The Defendant testified that he had been to a party with the co-defendant, and that he had consumed alcohol and drugs, and that during this party episode is where the 3 had agreed to commit the robbery. Dr. Ernest C. Miller, Jr., a renounced [sic] psychiatrist in Jacksonville, Florida, testified for the Defendant. He had examined the Defendant and consulted with the Defendant's mother, and concluded that the Defendant had suffered from some substance use disorder. He further found that the Defendant had a good grasp of reality, that he was not hallucinating or delusionary, and further found that the Defendant was not incompetent and not insane at the time of the murder and robbery. Dr. Miller further testified that the Defendant understood the wrongfulness of robbery and murder, and knew the difference between right and wrong. Dr. Miller further testified that the Defendant had the ability to conform his behavior to the requirements of the law, however, Dr. Miller stated that if, in fact, the Defendant was under the influence of drugs or alcohol, that would have impaired his judgment to some degree. The only evidence that we have that the Defendant was under the influence of alcohol and/or drugs was the

testimony of the Defendant himself. The Court has considered this mitigating factor, and has give it some weight.

3. Any other aspect of the Defendant's character or record, and any other circumstance of the offense which would include the non-statutory mitigators.

a. Absence of father. The Defendant's father is retired Navy and was married to the Defendant's mother for a short period of time following the birth of the Defendant. The mother testified that she and the Defendant's father had separated some 6 months following the Defendant's birth. The Defendant had limited contact with his father. On one occasions the Defendant went to live with his father in Wyoming, and that arrangement lasted a very short period of time. The Defendant and the Defendant's mother testified that his step-grandfather played some small part in his life up until his death when the Defendant was approximately 12 years of age. The Court has considered this mitigation and given it very little weight.

b. The Defendant's alcohol and drug abuse. The Defendant testified that he had a long history of abusing alcohol and drugs. However, there was no evidence or testimony that indicated to this Court that his use of drugs and alcohol impaired the Defendant's ability to know the difference between right and wrong. The Court has considered this mitigation and given it some weight.

c. The mother of the Defendant is presently in prison. She testified that she had not been an ideal mother for the Defendant, although she had provided a very nice home in a very nice neighborhood, and had made efforts to provide the Defendant with the necessities of life. She testified that she had failed miserably as a mother. The mother was sent to prison for approximately 2 years for trafficking in cocaine during the time the Defendant was 11 to 13 years of age. During

that period of time the Defendant was cared for by his older brother and grandmother. The Court has considered this mitigation and given it some weight.

d. Dyslexia: Both Dr. Miller and the Defendant's mother testified that the Defendant suffered from dyslexia, and did very poorly in school. The evidence shows that the Defendant completed 11 years of education, and Dr. Miller testified that he had average intelligence. The Pre-Sentence Investigation Report indicates that the Defendant spent a period of time at the Charter Hospital of Jacksonville beginning on April 20, 1992, and was discharged on July 16, 1992. The psychological evaluation indicated that the Defendant came from a dysfunctional family which started a birth and that his father had abandoned the family, and that the Defendant's mother was sent to prison during the Defendant's early teen years. As a result of all these activities he showed a schizophrenic like feature. However, according to Dr. Carl E. Begley who conducted the evaluation, he indicated that the Defendant did not show any signs of depression, he appeared to have a preoccupation with death, associated with a kind of thrill seeking, or heroic action. Additionally, the Defendant showed signs of being chemically dependent for alcohol and drugs. The Defendant was also admitted to inpatient treatment for 2 weeks due to his "out of control" behavior during a counseling session. He was finally discharged from Charter Hospital on July 17, 1992. A number of psychological and educational programs were recommended for the Defendant, but there was no indication from Charter Hospital that the recommendations were ever followed through with. The Court has given this mitigation some weight.

e. The Defendant stated in his Pre-Sentence Investigation Report that he had been employed with his mother at the Terror Shop located in the Market Square Mall from July, 1995 to September, 1995, at which time he was

> arrested. He indicated that he was very involved in the construction and welding projects to put this show together. The Defendant testified that prior to that he was employed at McDonald's Restaurant for approximately 6 months to 1 year, and that he had worked at numerous other jobs for brief periods of time. The Court has given this mitigation some weight.

(II 326-29). The record supports these findings.

Urbin, however, argues that this Court should consider (not that the trial court should have considered) his "potential for rehabilitation and his remorse" as mitigating (initial brief at 53), and that his "youth should be given overwhelming weight." (Initial brief at 57). There are several problems with these contentions.

First, this Court "is not a fact-finding body when it sits to hear appeals in death cases." Hamilton v. State, 678 So.2d 1228, 1232 (Fla. 1996). Doing as Urbin asks, *i.e.*, finding potential for rehabilitation and remorse as mitigators and that his age should be given overwhelming weight, however, would make this Court into a fact-finding body and "usurp the constitutional role of the trial court." Id. Additionally, the defense must "identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Lucas v. State, 568 So.2d 18, 24 (Fla. 1990). Urbin did not ask the trial court to consider potential for rehabilitation and remorse in mitigation, and the trial court cannot be faulted for not doing so.

Turning to the statutory mitigator of Urbin's age, the trial court found that mitigator, but gave it little weight because Urbin was mature for his age and had worked and lived on his own. The record supports these conclusions. This murder occurred on September 1, 1995, and Urbin turned eighteen less than two months later on October 24.[5] Urbin and his mother both testified that he worked some and that he lived away from home. (X 104, 1107, 1087, 1078). Urbin also testified that "basically I did my own thing for two years" (X 1104) and that his mother, brother, grandmother, and Patrick Grant, Urbin's best friend and father figure, tried to guide him in the right direction, but he ignored their efforts. (X 1112-14). Dr. Ernest Miller, Urbin's expert, testified that Urbin had a good grasp of reality, understood the wrongfulness of killing someone, was in at least the average intellectual range, and knew the difference between right and wrong when he killed the victim. (X 1012).

As this Court has stated, "age is simply a fact, every murderer has one." Echols v. State, 484 So.2d 568, 575 (Fla. 1985), cert. denied, 479 U.S. 871 (1986). If age is to be accorded any significant weight, "it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility." Id.; LeCroy v. State, 533 So.2d 750 (Fla. 1988), cert. denied, 492 U.S. 925 (1989). This is so because "[m]itigating

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[5] Urbin's date of birth was October 24, 1977. (III 527).

circumstances must, in some way ameliorate the enormity of the defendant's guilt." Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). Therefore, age is a mitigator only "when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them." Id.; Gudinas v. State, 693 So.2d 953, 967 (Fla. 1997).

The evidence demonstrated that Urbin, despite being a minor by less than two months, was not impaired by a lack of age and that he was capable of taking responsibility for his actions. As this Court has long held, "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); Mendoza v. State, 22 Fla.L.Weekly S655 (Fla. October 16, 1997); Cole v. State, 22 Fla.L.Weekly S587 (Fla. Sept. 18, 1997); Elledge v. State, 22 Fla.L.Weekly S597 (Fla. Sept. 18, 1997); Kilgore v. State, 688 So.2d 895 (Fla. 1996); 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 v. State, 571 So.2d 415 (Fla. 1990); Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989). Urbin has demonstrated no error, let alone reversible error, in the trial court's

consideration of the proposed mitigating evidence, and the trial court's findings should be affirmed.

Urbin cites several cases where this Court reduced the death sentence and claims that, because his case is comparable to them, his sentence should also be reduced. (Initial brief at 56-57). The cases Urbin relies on, however, are distinguishable from this case. Terry v. State, 668 So.2d 954 (Fla. 1996), and Livingston v. State, 565 So.2d 1288 (Fla. 1988), have already been distinguished in note 4, *supra*. In Kramer v. State, 619 So.2d 274, 278 (Fla. 1993), the state established only two aggravators, but in view of the mitigation (including alcoholism, mental stress, and severe loss of emotional control), this Court found death a disproportionate sentence for "a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk." In Penn v. State, 574 So.2d 1079 (Fla. 1991), a single aggravator case, this Court found the death sentence disproportionate when compared to other single aggravator cases. Nibert v. State, 574 So.2d 1059 (Fla. 1990), is another single aggravator case where this Court found the death sentence disproportionate. Although the state established two aggravators in Farinas v. State, 569 So.2d 425 (Fla. 1990), this Court found the death sentence disproportionate because of Farinas' mental problems and obsession with the victim.

Here, the state established three aggravators, more than in any of the cases cited by Urbin. The record supports the trial court's finding that none of Urbin's mitigators were entitled to much weight.[6]

Instead of the cases that Urbin relies on, other cases are more relevant to a proportionality review. In Bonifay v. State, 680 So.2d 413 (Fla. 1996), this Court affirmed the death sentence given to a seventeen-year-old defendant where the trial court found that the three aggravators (felony murder/robbery; pecuniary gain; and cold, calculated, and premeditated) outweighed two statutory mitigators (no significant criminal history and age) and several nonstatutory mitigators. Similarly, this Court affirmed the death sentence for another seventeen-year-old defendant in LeCroy v. State, 533 So.2d 750 (Fla. 1988), cert. denied, 492 U.S. 925 (1989), where the trial court found that the same three aggravators present in the instant case (prior violent felony conviction, felony murder/robbery, and avoid or prevent arrest) outweighed the two statutory mitigators of no significant prior criminal history and age (to which great weight was given) and various nonstatutory mitigators. This Court affirmed an eighteen-year-old defendant's death sentence in Shellito v. State, 22 Fla.L.Weekly S554 (Fla.

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[6] Urbin has waived any other complaints about the trial court's consideration of the mitigating evidence by failing to raise, and brief, them on appeal. Coolen v. State, 696 So.2d 738 (Fla. 1997).

Sept. 11, 1997), where the trial court found two aggravators (prior violent felony conviction and pecuniary gain-felony murder/robbery) and gave only slight weight to Shellito's age and to the nonstatutory mitigating evidence. In Moore v. State, 22 Fla.L.Weekly S619 (Fla. October 2, 1997), this Court found the death sentence proportionate for a nineteen-year-old defendant based on three aggravators (prior violent felony conviction, avoid arrest, and pecuniary gain) that outweighed the mitigator of Moore's age. The death penalty has also been found proportionate for twenty-year-old defendants. E.g., Sliney v. State, 22 Fla.L.Weekly S476 (Fla. July 17, 1997) (two aggravators (felony murder/robbery; avoid or prevent arrest) outweigh two statutory mitigators (age; no significant criminal history) and several nonstatutory mitigators); Smith v. State, 641 So.2d 1319 (Fla. 1994) (two aggravators (felony murder/robbery; prior violent felony conviction), one statutory mitigator (no significant criminal history) and numerous nonstatutory mitigators), cert. denied, 513 U.S. 1163 (1995). This Court has also upheld many other death sentences where the victims died during the commission of a felony. E.g., Mendoza v. State, 22 Fla.L.Weekly S655 (Fla. October 16, 1997) (two aggravators (prior violent felony conviction; felony murder/robbery-pecuniary gain), nonstatutory mitigation given little weight); Pope v. State, 679 So.2d 710 (Fla. 1996) (two aggravators (pecuniary gain; prior violent felony conviction), both

statutory mental mitigators, three nonstatutory mitigators), cert. denied, 117 S.Ct. 975 (1997).

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

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm Urbin's convictions and his death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nada Carey, Office of the Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, FL 32301, this 27th day of October, 1997.

Barbara J. Yates

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