IN THE SUPREME COURT OF FLORIDA

ALPHONSO CAVE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

Case No. 90,165
L.T. Case No. 82-352 CF B
(Martin County)

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR MARTIN COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Appellant, ALPHONSO CAVE, was the defendant in the trial court below and will be referred to herein as "appellant" or "defendant." Appellee, the State of Florida, was the prosecution in the trial court below and will be referred to herein as "appellee" or "the State."

The following symbols will be used:

AB = Appellant's Initial Brief

R = The pleadings portion of the record on appeal

TV = Transcript portion of the record on appeal by volume, followed by the appropriate page number and at times by the line number on the page, i.e. TV 20, 155/20 refers to volume 20, page 155, line 20.

STATEMENT OF THE CASE AND FACTS

Lloyd Jones of the Martin County Sheriff's Office testified that, at first, appellant indicated that he had no knowledge of these crimes, and that he was with his girlfriend all night (TV 21, 1242/2, 12). Appellant also initially told him that he did not know John Earl Bush (TV 21, 1242/24). Subsequently, when Deputy Jones informed appellant that John Bush had already admitted involvement in the crimes, appellant expressed disbelief and a desire to hear the taped statement given by Bush (TV 21, 1243/9-17, 12441). After Deputy Jones played Bush's statement, appellant finally indicated that he too was involved in these crimes (TV 21, 1244/11, 18).[1] Appellant told Deputy Jones that (1) he had the gun when they robbed the Li'l General store (TV 21, 1244/21-1245/1, 1248/13-18); (2) he took Frances Slater out of the store at gunpoint and put her into their vehicle (TV 21, 1245/3-5, 1248/19-24); (3) while en route to the murder scene, Frances Slater begged for her life indicating that she would do anything, if they would let her go (TV 21, 1245/7-11);[2] and (4) when they arrived at the

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[1] When appellant took the stand, he admitted that he had initially lied about knowing John Earl Bush or anything about the robbery and murder, until he heard the statement given by Bush (TV 22 1444-45).

[2] Although appellant's mother initially testified that she did not remember appellant telling her that Frances Slater was crying and screaming and begging for them not to kill her (TV 22, 1587/11-18), after she was impeached with her deposition testimony (TV 22 1587/19-1588/21), she finally testified that she did recall that appellant told her that Frances was pleading and begging them not

murder scene, they got out of the vehicle and Frances Slater was first stabbed by John Earl Bush and then shot by J.B. Parker (TV 21, 1245/15, 1250/3-10). Deputy Jones also testified that appellant told him that it was Bush's idea to kill Frances Slater, and that he knew that she was going to be killed (TV 21, 1274/22 - 1275/3).

Lloyd Jones further testified that after appellant made the above statements to him, he took a taped statement from appellant (TV 21, 1250/11-17). In that statement, which was played to the jury (TV 21, 1256/16), appellant indicated that (1) when they went into the Li'l General store, the clerk was sweeping (TV 21, 1262/20); (2) the clerk was wearing a 7-11 type coat and a pair of blue pants, and there was a car parked in front of the store (TV 21, 1263/18-22); (3) he had on blue jeans and a white t-shirt (TV 21, 1270/2; TV 22, 1415/16); (4) when they went in the store, he had the gun and pulled it out (TV 21, 1259); (5) he and John Bush stood behind the counter (TV 21, 1270/6-10); (6) appellant demanded the money,[3] and when the clerk took the money out of the cash

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to kill her (TV 22, 1591/2-13)

[3] Although this transcript states, "We all went in the store. And I ran behind me" (TV 21, 1259/18-19), the original transcript of this statement prepared by Beverly Rogers of the Martin County Sheriff's Office, which was not admitted in this case but was in appellant's last appeal, indicates that what appellant said was, "We all went in the store, and I demanded the money." This Court can verify this statement by reviewing the actual taped statement, which was admitted in this matter as State's Exhibits 29 and 31.

register and gave it to Bush, appellant said, "Where's the rest of the money" (TV 21, 1259, 1270/13); (7) when the clerk indicated that it was down in the safe, Bush told her to get it, which she did and gave it to Bush (TV 21, 1270/14-16); (8) after they got the money and put the clerk in their car, they took the road to Indiantown because that was the quickest way out of the area[4] (TV 21, 1259/24-1260/1, 1266/3); (9) when they got back into the car, Pig (J.B. Parker) got the gun (TV 21, 1264/15); (10) when they arrived at the murder scene, Bush stabbed the victim with the knife, and Parker shot her in back of the head (TV 21, 1260/6-11); (11) that he and his gang "drunk" (alcoholic beverages) or (were) drunk, but that he knew what he was doing (V21, 1262/4-7); and (12) they had gone to the same store earlier in the night to check and see if anyone else was in the store other than the clerk, and there was not (TV 21, 1271/2-6).

Appellant also testified in this matter, stating that (1) when he went in the Li'l General store the second time, he had the gun (TV 21, 1323/2, 1324/9); (2) he asked the clerk for the money, and she gave it to him (TV 21, 1323/5-10); (3) subsequently, someone

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[4] The transcript reflects the following: Q. Anything else that you remember? A. (Inaudible.) Indiantown. Well, we thought maybe that was the quickest way out (TV 21, 1266/2-5). The same original transcript mentioned in the previous footnote indicates the following colloquy: Q. Is there any...anything else that you remember? A. Not right off. Ah,... Q. Why'd you go to Indiantown? ..go to Indiantown? A. Well, we thought maybe that was the quickest way out.

told the clerk to get the money out of the safe, but he could not recall who (TV 21, 1323/12-19);[5] (4) when the victim was taken out of the store, he still had the gun (TV 21, 1324/12); (5) he put Frances Slater into the backseat of the car at gunpoint (TV 22, 1418/19-24), where he sat (TV 21, 1324/13021); (6) when he got into the car, he put the gun in the front seat, where it remained until they later stopped the car (TV 21, 1329/1-5); (7) they took the back road to confuse Frances Slater as to their location and intended to drop her off by the side of the road (TV 21, 1325/25-1326/4); (8) he had Frances Slater put her head down while they were driving around discussing what they were going to do, not so people would not see her but to confuse her (TV 22, 1419);[6] (9) Frances Slater did not beg them not to hurt her (TV 22, 1428/18), he never told Deputy Jones or anyone that she had (TV 22, 1428/23-1429/4), and if she did say that, he had forgotten (TV 22, 1429/7-10); (10) when they stopped, he got out of the car and took Frances Slater with him (TV 22, 1425/16-20), and just he and she walked

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[5] On cross-examination, appellant testified that Frances Slater was sweeping when they returned to the store; that it was he who walked up to her with the gun in hand, pointing it at her, and indicated that it was a robbery; that is was he who walked Frances Slater back to the cash register, with the gun in his hand, and ordered her to get the money; that it was he who asked her where the rest of the money was, and she pointed down to his feet where the safe was located; that it was he who had Frances Slater open the safe; and that it was he who told Frances Slater to hand the money to John (Bush) (TV 22, 1412-17).

[6] Appellant's mother testified that he told her that he pushed Frances Slater's head down, so she would not be seen (TV 22, 1590).

down the road past the back of the car (TV 21, 1326/12-17); (11) they did not speak (TV 22, 1430/3); (12) he turned around (although he does not know why [TV 22, 1429/21]) and went back to the car, but Frances Slater just kept walking (TV 21, 1326-19-21) away from the car (TV 22, 1430/23); (13) as he got to the door of the car, both Bush and Parker went around him walking fast and saying nothing (TV 21, 1326/21-25; TV 22, 1432/5);[7] (14) Bush "walked up on her real fast and stabbed her," she fell, and Parker leaned over and shot her in the head (TV 21, 1327/3-8; TV 22, 1432/24); and (15) after Bush stabbed her, he came back to the car commenting on how she bent the knife (TV 21, 1328/4). Then they drove back to Fort Perce (TV 21, 1327/20), where they went to his rooming house and split up the money (TV 21, 1332/16-21).

Appellant also admitted that at first he did not tell Detective (Lloyd) Jones the truth about his involvement in the robbery and murder (TV 22, 1444). He testified that he kept on lying, until Detective Jones confronted him with (John) Bush's taped statement (TV 22, 1444-45).

Ronald Wright, the medical examiner who conducted the autopsy on Frances Slater (TV 20, 1197/3), testified that the victim had a superficial cut on her left ring finger (TV 20, 1198/24), a stab wound in her abdomen and a gunshot wound to the back of her head

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[7] He testified that Terry Johnson stayed in the car during the homicide (TV 21, 1327/16).

(TV 20, 1199/3). The cause of death was the gunshot wound (TV 20, 1210/6). He testified that the stab wound would have caused great pain, because it was inflicted in an area containing many pain fibers and because it caused bleeding into the peritoneal cavity, which also has many nerve fibers which would have become irritated (TV 20, 1202/17-1203/13). He testified that the stab wound occurred while Frances Slater was alive; however, on cross he admitted that he could not determine whether the stab wound was inflicted before or after the gunshot wound, and that if it were inflicted after the gunshot wound the victim would not have felt any pain associated with the knife wound (TV 20, 1203/14 - 1204/11, 1217/8).[8] He also testified that the victim's slacks were stained with urine (TV 20, 1221/3-9). He testified that the victim's bladder was empty, which is not indicative of a post-mortem discharge of urine but more consistent with discharge before death (TV 20, 1222/3, 1227/4). He testified that it is highly improbable for a complete emptying of the bladder to have occurred at any time other than while the victim was still alive (TV 20, 1228/5).

[8] Appellant repeatedly confirmed, however, that Frances Slater was shot in the back of the head, after Bush had stabbed her in the abdomen.

SUMMARY OF ARGUMENT

POINT I

The *Enmund/Tison* test has been fulfilled under the facts of this case, in that he was a major participant in the underlying felonies of robbery and kidnaping, and his actions show a reckless disregard for human life. Appellant admitted to taking a gun into the Li'l General store and holding this gun on Frances Slater as he robbed the store and then kidnaped her and forced her into the backseat of the car with him; appellant was present during the thirteen-mile journey to the rural location where Frances Slater was killed, during which Frances Slater begged for her life to be spared; appellant put Frances Slater's head down in the car, so she would not be seen; appellant removed Frances Slater from the car and walked her to the location, where John Earl Bush stabbed her in the stomach and J.B. Parker shot her in the back of the head; and after the killing appellant went with the others back to his rooming house and split up the booty.

Based on a totality of the circumstances, the facts show that appellant was just as culpable as Bush and Parker, and they show that appellant was more culpable than Terry Johnson, who remained in the car both during the robbery and the murder.

POINT II

There is competent substantial evidence to support the CCP aggravating circumstance, even though appellant did not inflict the

knife or drug wounds, because he was a present and an active joint-participant in the entire criminal episode. Clearly, the homicide was cold, due to the thirteen-mile ride during which there was ample time for reflection. The homicide was calculated, in that it was not committed during the robbery, and they did not need to take Frances Slater with them to make a getaway. They instead kidnaped her, discussed what they would do with her on their journey, and intentionally executed the only witness to the robbery. The heightened premeditation requirement was fulfilled, not only based on the above facts, but also because Frances Slater was killed after she begged appellant and the others not to hurt her.

POINT III

The HAC circumstance is also applicable although appellant's capital conviction may be based on the felony murder theory, because appellant was present throughout and a principal in and fully participated in the underlying felonies of robbery and kidnaping. The facts show that Frances Slater was subjected to both mental and physical torture. She was in such obvious fear, that she begged for her life. Further, the knife wound was not lethal and unnecessary to accomplish the homicide, but it was extremely painful.

POINT IV

Again, there was competent substantial evidence to support the avoid arrest aggravating circumstance, although appellant's

conviction may be based on a felony murder theory, because appellant was a principal and fully participated in the underlying felonies. Clearly, the facts show that Frances Slater, the only witness, was taken to a remote cite and killed for no other apparent motive, other than witness elimination.

POINT V

The trial court did not double the CCP and avoid arrest aggravating factors. The CCP circumstance was based on facts relating to the manner in which the crime was executed, while the avoid arrest circumstance was based on facts relating to the motivation for the crime. Each was supported by distinct facts.

POINT VI

The trial court did not abuse his discretion by giving little weight to the no significant history of prior criminal activity circumstance. Again, although appellant may not have inflicted the mortal wound, he was nonetheless a major participant in the entire criminal episode.

POINT VII

There was competent substantial evidence to support the trial court's rejection of the minor accomplice circumstance and that appellant was not a relatively minor participant in the capital felony, which by definition includes a homicide committed under a felony murder theory.

POINT VIII

There was also competent substantial evidence to support the trial court's rejection of the age mitigator. Appellant was twenty-three when the homicide took place. There was no evidence that appellant's mental, emotional or intellectual age was lower than his chronological age, or that appellant's age in any manner ameliorated the enormity of appellant's guilt. Further, the facts show that appellant quit school to get a job. He also left home and rented an apartment, so he could live with a woman he loved. When he had a child, he loved the child and accepted the responsibility for his support. Although appellant had moved away from home, he continued to look in daily on his sister, who was pregnant and had a sick son. These facts dispute appellant's notion that he was immature for his age and support the trial court's rejection of this circumstance.

POINT IX

The trial court did not abuse his discretion by giving the mitigating circumstance of remorse little weight, in that the only record evidence supporting it was appellant's self-serving statements and the fact that appellant confessed. However, appellant did not confess, until after being confronted with the taped confession of a co-defendant.

Although the trial court failed to ascribe a weight to his finding that appellant was not the actual killer, this is not

reversible error. It is apparent from the sentencing order that the trial court weighed this circumstance and all the other proven mitigating factors against the proven aggravators and detailed the result of this weighing process.

There is competent substantial record evidence to support the trial court's rejection of appellant's self-serving assertion, that he did not know or intend for the killing to occur, as a mitigating circumstance. It was appellant who used the deadly weapon during the robbery and kidnaping; it was appellant who guarded Frances Slater, as they drove to the rural area; it was appellant who gave the gun to Parker, who then used it to kill Frances Slater; and it was appellant who walked Frances Slater away from the car to the place where she would die.

The trial court did not err by failing to find as a mitigating circumstance, that appellant was less culpable, because a totality of the circumstances shows that appellant was a major participant in the entire criminal episode and displayed a reckless disregard for human life.

The trial court did not abuse his discretion by giving little weight to the finding that appellant had saved a relative from drowning, when appellant was ten years old.

The trial court also did not abuse his discretion by giving little weight to the finding that appellant had consumed alcohol and smoked marijuana on the evening of the homicide, in that it

obviously only had a slight influence on appellant. Not only did appellant admit that he knew what he was doing during the criminal episode, he recalled many specific details such as what Frances Slater was doing when they went into the Li'l General, what Frances Slater and he were wearing at the time and that there was a car in the parking lot.

The trial court also did not abuse his discretion by giving little weight to the remaining nonstatutory mitigating circumstances, since reasonable persons would agree that they should be accorded such weight.

POINT X

The trial court is not required to state in his sentencing memorandum each fact used to support his finding of an aggravating circumstance. All that is required is competent substantial record evidence to support such a finding. There is competent substantial record evidence in this matter to support each of the trial court's findings.

POINT XI

There is competent substantial evidence to support the finding that Frances Slater's bladder release was pre-mortem. Doctor Ronald Wright testified that her bladder was empty, and that it was "highly improbable" for the bladder to have completely emptied at any time other than when Frances Slater was alive.

POINT XII

This court has ruled that the new standard jury instruction on the HAC aggravator is not unconstitutionally vague. Appellant has provided no adequate reason for this Court to recede from this ruling.

POINT XIII

Appellant has waived this issue for appellate review. However, this court has ruled that the HAC aggravating circumstance is constitutional. Appellant has provided no adequate reason for this Court to recede from this ruling.

POINT XIV

Appellant has not preserved but waived this issue for appellate review. Appellant requested that the standard instruction concerning the avoid arrest aggravator be modified, and the added language was language requested in-part by appellant. The instruction actually given was the result of a compromise between the prosecutor and appellant. Although appellant never specifically stated agreement, he acquiesced in the resulting language and made no further specific objection to this language. Therefore, not only was the added language requested by appellant, but appellant waived his claim that it was error not to include the additional language he requested. Further, the additional language requested by appellant either is not a proper statement of the law or is not applicable to the facts of this case.

POINT XV

Appellant has waived this issue for appellate review. However, this Court has ruled that the avoid arrest aggravator is not unconstitutionally vague. Appellant has provided no adequate reason for this Court to recede from this ruling.

POINT XVI

This Court has previously ruled that the jury instruction regarding the felony murder aggravator is not an automatic aggravator for a person convicted of first-degree felony murder. Further, this instruction is not unconstitutionally vague. On the contrary, the instruction could not be more channeling and limiting. Not a single word in the instruction would not be readily understandable by people of common intelligence.

POINT XVII

Appellant has waived this issue for appellate review. Nonetheless, the felony murder aggravator is not unconstitutional, based on the preceding argument.

POINT XVIII

Appellant has waived this issue for appellate review. However, this Court has previously ruled that the CCP aggravator is not unconstitutionally vague. Appellant has provided no adequate reason for this Court to recede from this ruling.

POINT XIX

It was not error for the trial court to submit the CCP

aggravator to the jury, although this circumstance was not found by the trial court in the first sentencing. A resentencing is a completely new proceeding, and a capital sentencer's failure to find a particular aggravating circumstance does not amount to an acquittal of that circumstance for double jeopardy purposes.

POINT XX

Appellant has waived this issue for appellate review. However, this Court has previously ruled that the standard procedure of instructing the jury, that they must be reasonably convinced that a mitigating circumstance exists, does not impermissibly put any particular burden of proof on capital defendants.

POINT XXI

The death penalty procedure is not unconstitutional because it fails to inform a jury of whether they must find aggravating and mitigating circumstances by a majority or plurality vote. The cases cited by appellant hold that a sentencer may not be precluded from considering all mitigating evidence. Such was not the case in this matter, where the trial court instructed the jury to consider all the evidence tending to establish one or more mitigating circumstances. Further, this court has repeatedly upheld the constitutionality of Florida's death statute and the standard jury instructions.

POINT XXII

This Court has previously affirmed that the victim impact portion of the death penalty statute is constitutional. Appellant has provided no adequate reason for this Court to recede from this ruling.

POINT XXIII

Appellant has waived appellate review of this issue. Further, this Court has previously held that the death penalty statute is not unconstitutional because it only requires a majority of jurors to recommend the death penalty. Appellant has provided no adequate reason for this Court to recede from this ruling.

POINT XXIV

Appellant has waived this issue for appellate review. Further, this Court has repeatedly held that the death penalty statute is not unconstitutional for lack of appellate procedure. Appellant has provided no adequate reason for this Court to recede from this ruling.

POINT XXV

Appellant was not deprived of his right to present a defense, due to the court's denial of his motion to stay the execution of co-defendant Bush. Appellant had ample opportunity to take Bush's deposition to perpetuate his testimony; however, appellant made no effort to do so.

POINT XXVI

Appellant waived this issue for appellate review. Further, the testimony given by Frances Slater's family was in accordance with the Florida's death statute, so there was no abuse of discretion by allowing it.

ARGUMENT

POINT I

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATELY WARRANTED UNDER THE FACTS OF THIS CASE (RESTATED)

A. THE *ENMUND/TISON* TEST HAS BEEN FULFILLED UNDER THE FACTS OF THIS CASE

Appellant alleges that his status as a nontriggerman precluded the trial court from sentencing him to death under *Enmund v. Florida*, 102 S. Ct. 3368 (1982) or, *Tison v. Arizona*, 107 S.Ct. 1676 (1987). Specifically, appellant claims that his participation in the entire criminal episode establishes that he did not know that Frances Slater was going to be killed during the robbery and kidnaping. Appellant bolsters this claim with these facts: he relinquished control of the murder weapon after he successfully used the gun to rob and kidnap the victim, he did not remove her from the car at the murder scene, he did not participate in the actual stabbing or shooting of the victim, and he testified that he did not know that Ms. Slater was going to be killed. (TV 21, 1265-66).

This Court previously rejected this very argument in Cave's original direct appeal. Cave's confession, which was played for this resentencing jury, was also played at the original trial. Therein, Cave admitted his involvement in the robbery and kidnaping of Ms. Slater, but also claimed that he did not know that his accomplices were ultimately going to kill her. In rejecting Cave's claim that he lacked the intent to kill Ms. Slater, this Court held the following:

> Appellant argues that the trial court erred in not precluding the imposition of the death penalty in violation of *Enmund*. We disagree. In *Enmund*, the Court held that the death penalty was impermissible under circumstances where an accomplice defendant aided and abetted a felony during which a murder was committed by others but who himself did not kill, attempt to kill, or intend that a killing take place or that lethal force be employed. The instant case is clearly distinguishable. Appellant Cave was the gunman who admits to holding the gun on the clerk during the robbery and forcing her into the car; he was present in the car during the thirteen-mile ride and heard her plead for her life; and he was present when she was forcibly removed from the car in a rural area, stabbed, and shot in the back of the head. Under these circumstances, it cannot be reasonably said that appellant did not contemplate the use of lethal force or participate in or facilitate the murder. *Bush; State v. White*, 470 So.2d 1377 (Fla.1985); *White v. State*, 403 So.2d 331 (Fla.1981), cert. denied, 463 U.S. 3571, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983).

Cave v. State, 476 So. 2d 180, 187 (Fla. 1985). Cave's *Enmund/Tison* claim was also rejected by the Eleventh Circuit Court

of Appeals during federal habeas review. *Cave v. Singletary*, 971 F. 2d 1513, 1515 n.1 (11th Cir. 1992).

Thirteen years later, in the instant case, Cave again claims that he did know that his accomplices were ultimately going to kill Ms. Slater. In his written sentencing order, the trial court made the following relevant findings in connection with Cave's proposed statutory mitigator regarding "minor participation"[9]:

> The defendant's role in this murder, as noted above, included leadership activities. He participated in casing out the convenience store, he carried the gun throughout the robbery and the kidnaping, and only relinquished it to Parker for the execution. Defendant personally directed the victim out of the store and into the car. He held her captive in the back seat during her pleas for life. He got her out of the car and turned her over to Bush and Parker who promptly stabbed and shot her.
>
> These activities were more than that of an accomplice and cannot be characterized as "relatively minor." The Court finds that this statutory mitigator has not been proven.

(ROA 1260). In discussing and weighing Cave's proposed nonstatutory mitigating factors, the trial court made these additional findngs:

> b. Not the triggerman/not the knifer.
>
> The Court finds that this mitigator has been proven. However, the evidence shows that Cave played a leadership role in the entire criminal episode and turned the means of execution over to Parker shortly before the

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[9] Section 921.141 (6)(b), Fla. Stat. (1993).

> actual killing. Defendant's statement that he did not know that the others would kill the victim is not believable under the circumstances.
>
> c. Cave did not know or intend that the killing occur:
>
> As stated above, his protestations to the Court to this effect are not believable and this mitigator is not proven. The Court should not be bound to accept such self[-] serving statements as there is no way for them to be rebutted. If the Court is so bound, then the mitigator has little weight because it conflicts so seriously with the defendant's actions at the time.

(ROA 1261).

On appeal, Cave resubmits the same argument. This Court should again uphold the trial court's rejection of this claim. The trial court's findings are more than supported by the record. First of all, Cave's reliance on his self-serving statement that he did not know his accomplices were going to kill the victim is of no moment since it is rebutted by his own statements to the police. In appellant's taped statement to Deputy Jones, he admitted that he knew that John Bush intended to kill Frances Slater (TV 21, 1265/22-1266/1). Consequently, through his own admission, it is clear that Cave in fact knew that Ms. Slater was going to be killed.

Secondly Appellant's actions that night overwhelmingly establish Cave's knowledge/intent that lethal force was going to be used. He and his gang first went into the Li'l General store but

they did not take the gun inside. Although the clerk was alone and opportunity was ripe, they did not rob the store at that time.[10] When they went into the store the second time, appellant walked up to Frances Slater, pointed the gun at her and told her it was a robbery. He then walked Frances Slater to the cash register and demanded that she give him the money, which she did. When appellant asked where the rest of the money was, Frances Slater pointed to the floor safe and appellant told her to open it. It was appellant who took Frances Slater from the store at gunpoint and placed her in backseat of their car. It was appellant who relinquished possession of the gun to J.B. Parker. On that thirteen-mile drive, appellant had Frances Slater put her head down. When they stopped, it was appellant who got out of the car and took Frances Slater with him. It was appellant who watched and did nothing as John Bush stabbed Frances Slater and J.B. Parker shot her. After the killing, appellant continued back to Fort Pierce with the rest of his gang and divided the stolen money (TV 21, 1331/10, 1332/21).

These facts clearly demonstrate that Cave knew and intended that lethal force was to be used during the robbery and kidnaping of Ms. Slater. At the very minimum, these facts support the finding that Cave was a major participant in the underlying

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[10] Appellant testified that he did not know why they did not rob the store at that time (TV 22, 1409).

felonies of robbery and kidnaping, and that his overall actions supported a finding of reckless indifference to human life.

In conclusion, this Court again should affirm the trial court's findings with regard to Cave's participation in the felonies and the murder. Cave has not presented this Court with any different evidence than that which was previously rejected by the trial court and this Court. Therefore, the trial court's findings under *Enmund/Tison* should be upheld. *Dubois v. State*, 520 So. 2d 260, 266 (Fla. 1988) (finding death sentence permissible under *Enmund/Tison* where defendant participated in underlying felony and was present when victim was killed); *State v. White*, 470 So. 2d 1377 (Fla. 1985); *Bush v. State*, 461 So. 2d 936 (Fla.1984) (same).

B. **APPELLANT'S SENTENCE IS PROPORTIONATELY WARRANTED UNDER THE FACTS OF THIS CASE (RESTATED)**

Appellant claims that his sentence of death is disproportionate to the sentences of his codefendants because his culpability was "relatively less than Bush and Parker, and equal to Johnson." He also notes that he has fewer aggravating factors than Bush or Parker, and far more mitigation than either. (AB 36). This Court has consistently considered the relative culpabilities and disparate treatment of codefendants when analyzing the proportionality of death sentences. However, it has previously weighed such as mitigation against any aggravation. It has not merely considered it, as Cave desires, as a proportionality

analysis unto itself. In other words, this Court has previously considered co-defendants' relative culpability as part of the total equation, factored into the weighing of the aggravators and mitigators, rather than in a vacuum. *E.g., Colina v. State*, 634 So. 2d 1077, 1082 (Fla. 1994) (affirming trial court's rejection of disparate treatment as mitigation where defendant responsible for barrage of lethal blows after codefendant hit victim once and knocked him to ground), *cert. denied*, 115 S. Ct. 330, 130 L. Ed. 2d 289 (1995); *Hayes v. State*, 581 So. 2d 121, 127 (Fla. 1991) (finding sentence proportionate where codefendant proposed robbing a cabdriver and obtained gun from friend, but Hayes concocted plan, shot driver, and rifled victim's pockets while codefendants wiped fingerprints from cab), *cert. denied*, 502 U.S. 972 (1992).

Importantly, the trial court in this case rejected as mitigation both the statutory mitigating circumstance that Appellant was an accomplice whose participation was relatively minor, and the nonstatutory mitigating circumstance that Cave was less culpable than Bush or Parker. (R 1260, 1261-62). Although Appellant challenges the rejection of these mitigating factors, the record supports the trial court's findings that Cave "had a leadership participation in the entire criminal episode" and that his culpability was equal to that of Bush and Parker, and far greater than that of Johnson. *See* Issues VII & IX, *infra*. Moreover, this Court affirmed the rejection of the "minor

participation" mitigator by Cave's original sentencing court, and found on appeal that Cave "was present at all times and was a major actor in the robbery, kidnaping and murder." *Cave v. State*, 476 So. 2d 180, 186, 187-88 (Fla. 1985).

Despite the lack of the "minor participation" and "lesser culpability" mitigators, Appellant wants to compare his culpability and sentence to those of Bush, Parker and Johnson. He wants to compare the number of aggravating and mitigating factors found in his case with the number found in Bush's and Parker's cases. But this Court has repeatedly stated that proportionality is not a numbers game. Rather, when determining whether a death sentence is appropriate, careful consideration should be given to the totality of the circumstances and the weight of the aggravating and mitigating circumstances. *Floyd v. State*, 569 So. 2d 1225, 1233 (Fla. 1990), *cert. denied*, 501 U.S. 1259 (1991).

In sentencing Cave to death, the trial court found four aggravating factors: commission during a robbery and kidnaping, HAC, CCP, and avoid arrest. (R 1258-59). Two of these aggravators--HAC and CCP--are extremely weighty factors. *Maxwell v. State*, 603 So. 2d 490, 494 n.4 (Fla. 1992) ("By any standards, the factors of heinous, atrocious, or cruel, and cold, calculated premeditation are of the most serious order.") Together, all four present an especially strong case for death.

To mitigate this senseless crime, Cave presented, and the

trial court found, one statutory mitigating circumstance, namely, the "no significant history" mitigator. However, the trial court gave it little weight "in view of the enormity of the crimes committed in this episode." It did not believe that this mitigator warranted greater consideration merely because this was Cave's first murder or first criminal episode. (R 1263). The trial court also gave little weight to (1) Cave's feelings of remorse, being communicated for the first time in 14 years and following two prior death sentences; (2) Cave's actions in saving his cousin's life, so many years prior to this criminal episode; (3) Cave's ingestion of alcohol and marijuana at the time of the offense, because its degree of influence was slight; (4) Cave's good and considerate nature to his mother, because his actions in this criminal episode have brought her much grief; (5) Cave's unselfish concern toward his neighbors, because his actions ended any further such behavior; Cave's steady work and support for his son, because his actions precluded further work and support; (6) Cave's love and nurturing of his son, because he ended the victim's mother's ability to love and nurture her daughter; (7) Cave's loss of his only son, because he ended the life of another parent's child; and (8) Cave's educational and religious study while on death row for 14 years, because he had little else to do during those years. The trial court gave "some weight" to Cave's confession, although Cave failed to acknowledge his culpability in the murder, and it gave

unspecified weight to Cave's status as the nontriggerman, although it found that Cave "played a leadership role in the entire criminal episode and turned the means of execution over to Parker shortly before the actual killing." (R 1261-63). Ultimately, the trial court found that "the statutory and nonstatutory mitigating circumstances found proven above are not individually or in toto substantial or sufficient to outweigh the aggravating circumstances." (R 1261).

Cave's attempt to equate his culpability with that of Terry Johnson, who received a life sentence, is completely unavailing. Danielle Girouard testified that when she went past the Li'l General store, one man remained in the back passenger-side seat of Bush's car. (TV 19, 972). Appellant identified this person as Terry Johnson. (TV 21, 1324/22-1325). Appellant also testified that Terry Johnson remained in the car during the murder. (TV 21, 1327/16). Cave, on the other hand, admitted wielding the gun on the victim during the robbery, forcing her into the car, holding her head down during the 13-mile ride, removing her from the car at the scene of the murder, and walking her away from the car, where Bush stabbed her and Parker shot her. (TV 21, 1323-29, ; TV 22, 1412-14289). Without question, the totality of circumstances in this case show that appellant is more culpable than Terry Johnson. Therefore, any comparison between his sentence and that of Johnson reveals that they are proportionate to their respective levels of

culpability.

As for Bush and Parker, their levels of culpability were greater than Cave's only to the extent that Bush stabbed and Parker shot Frances Slater. At all points prior to their murderous assault, they were co-equal participants in the robbery and they were present during the 13-mile ride out of town. Like Cave, they each had numerous weighty aggravating factors and little or nothing in mitigation.[11] Thus, Cave's sentence of death is proportionate to those of his co-defendants, Bush and Parker.

Similarly, Cave's sentence of death is proportionate to that of other defendants who committed first-degree murder under similar circumstances. In *Preston v. State*, 607 So. 2d 404 (Fla. 1992), the defendant robbed and kidnaped the night clerk from a convenience store and transported her to a more remote location, where he killed her. This Court found Preston's death sentence proportionate based on four aggravating factors ("felony murder," "pecuniary gain," "avoid arrest," and HAC), one statutory mitigator (age), and five (unspecified) nonstatutory mitigators that were given only minimal weight. *Id.* at 412.

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[11] John Bush, who has already been executed, had three aggravating factors--"prior violent felony," commission during the course of a robbery and kidnaping, and CCP--and no mitigation. Bush v. State, 461 So. 2d 936 (Fla. 1984). J.B. Parker had five aggravating factors: "prior violent felony," "felony murder," "pecuniary gain," HAC and CCP. In mitigation, the court found his age as a statutory mitigator, and his acceptable behavior at trial and the victim's lack of sexual molestation as nonstatutory mitigation. Parker v. State, 476 So. 2d 134 (Fla. 1985).

Similarly, in *Hall v. State*, 614 So. 2d 473 (Fla. 1993), the defendant and a co-defendant abducted a young, pregnant housewife from a grocery store parking lot in order to steal her car to use in a robbery. Hall forced the victim into the car and drove her to a secluded area, where he shot her to death. This Court found his death sentence proportionate based on seven aggravating factors, four mitigating factors, and more than 20 nonstatutory mitigators.[12] *Id.* at 479.

Finally, in *Swafford v. State*, 533 So. 2d 270 (Fla. 1988), the defendant kidnaped and shot a gas station attendant whose body was found in a wooded area by a dirt road about six miles from the station. Again, this Court found Swafford's death sentence proportionate based on four aggravating factors (the same four as in Cave's case) and one nonstatutory mitigator (that Swafford was an Eagle Scout in his youth). *Id.* at 278.

This case is indistinguishable from the above cases. Frances Slater was abducted from the scene of the robbery, driven to a remote area and killed to eliminate her as a witness to the robbery. As in each of these cases, Cave has especially weighty aggravation and minimal mitigation. Thus, Cave's sentence of death is proportionate not only to those of his co-defendants, but to other defendants under similar circumstances. Therefore, this

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[12] This Court's opinion does not itemize the mitigating evidence; thus, it is difficult to discern exactly what was found in mitigation.

Court should affirm his sentence for the first-degree murder of Frances Julia Slater.

POINT II

WHETHER THE EVIDENCE SUPPORTS THE COLD, CALCULATED AND PREMEDITATED (CCP) AGGRAVATING CIRCUMSTANCE (RESTATED)

Appellant argues that the evidence does not support a finding of the CCP aggravator, because the evidence failed to establish that appellant himself intentionally participated in the killing or the necessary heightened premeditation. However, this Court has held that where an entire criminal episode of armed robbery and murder was the joint operation of the defendant and another, and although the defendant may not have done the actual killing but was present and actively participated in the events, the cold, calculated and premeditated aggravator was nonetheless applicable to the defendant whose conviction was based on the felony murder rule. *James v. State*, 453 So. 2d 786 (Fla. 1984). *See also Copeland v. State*, 457 So. 2d 1012 (Fla. 1984), *vacated*, 108 S.Ct. 55 (1987).

Clearly, the evidence shows that appellant was a joint participant throughout the entire criminal episode and that he was present, a principal and fully participated in the underlying crimes of robbery and kidnaping. He took the gun into the store and demanded the money. He took the victim out of the store at gunpoint and put her into the backseat of the car. He pushed the

victim's head down so she would not be seen, while he and the others discussed what they were going to do. He knew that it was Bush's intent to kill Frances Slater. When they stopped, he took the victim out of the car and walked her away from the car. He watched as Bush stabbed her and Parker shot her. They then all drove back to Fort Pierce and went to his rooming house, where they split up the money.

Appellant also argues that the evidence fails to establish the heightened premeditation requirement, a careful plan or a prearranged design. In that regard, appellant cites to *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992), which holds that in an entirely circumstantial evidence case, a plan to kill cannot be inferred solely from a plan to commit another felony, and that the premeditation of a felony cannot be transferred to a murder, which occurs during the course of that felony. However, this case is different in several aspects. In *Geralds*, the homicide occurred during a burglary, whereas in this case the homicide took place after the robbery at a different cite in a remote area. Also in *Geralds*, the evidence only showed that the victim was bound first rather than immediately killed, which in turn showed that the homicide was not planned; that there was a struggle prior to the killing; and the murder weapon, a knife, was a weapon of opportunity found in the kitchen rather than being brought onto the scene. In this case, on the other hand, the victim was not bound

and left in the store but kidnaped and taken thirteen miles away. In this case, there was no struggle. Quite to the contrary, Frances Slater peacefully and quietly away from the car, likely knowing that it would be the last walk she would ever take. Further, the weapon of death in this case was not a weapon of opportunity but a gun that appellant insisted on having before committing the robbery, that appellant used throughout the robbery and kidnaping, and that appellant turned over to Parker for the homicide.

A case more on point is *Card v. State*, 453 So. 2d 17 (Fla. 1984), where a murder culminated a criminal episode, which also began with a robbery and a kidnaping. A Western Union office was robbed of approximately $1,100, and the female clerk was found missing. The next day her body was found in a secluded area about eight miles away. This court found that during these series of events the defendant had ample opportunity to reflect on his actions and their attendant consequences, and that therefore the facts demonstrated the required heightened level of premeditation. This case is regrettably all too similar to *Card*, with the exception that the death ride in this case was approximately thirteen miles, which offered almost double the time for appellant and his gang to reflect on their actions. Further, the facts in this case show that they did more than reflect but actually discussed what they were going to do. Appellant knew that Bush

intended to kill Frances Slater. Appellant tries to distinguish *Card* from this case, in that appellant in this matter was not the actual killer; however, as previously mentioned this is of no consequence.

Appellant also cites to *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988), and to *Clark v. State*, 609 So. 2d 513 (Fla. 1992), in support of his argument that the heightened level of premeditation must be demonstrated by a substantial period of reflection. However, in *Rogers*, again the killing occurred during the course of a planned robbery, when Rogers saw a man slipping out of the back of the store. Of course, Rogers could not have planned that someone would try to be a hero and what his resulting actions would be. In this case, the victim was kidnaped to afford appellant and the others a good escape, and the murder took place after the victim was taken to an isolated area thirteen miles away, giving appellant and his gang plenty of time to reflect on her homicide. In *Clark*, the facts show that the victim only by chance got into the vehicle driven by Clark, after another in the party invited the victim along. In this case, it was appellant who abducted the victim and forced her into the car and onto her journey to death.

In *Hall v. State*, 614 So. 2d 473 (Fla. 1993), this court found that the murder was committed in a cold, calculated and premeditated manner, where the defendants decided to steal a car to

use in a robbery. They spotted a twenty-one year old, seven-month pregnant housewife in a parking lot and forced her into her car. Then they drove to a secluded area, where she was raped and killed. This court concluded that the defendants' intent was to steal the victim's car, and to that end they could have simply left the victim in the parking lot. However, they instead kidnaped her, drove her to a secluded area and killed her. This Court noted that even if Hall did not fire the shot that killed the victim, he was still a willing if not predominant participant in the other acts, and that therefore this aggravator was applicable. *Id.* at 478.

This case is very similar, in that appellant and his gang could have just left Frances Slater at the store, but they instead kidnaped her, drove her to a secluded area and killed her. Although appellant may have not fired the shot that killed Miss Slater, the facts show that he was a predominant participant in the other acts.

Appellant attempts to distinguish *Hall*, arguing that the facts show that after the victim was abducted and prior to her death, both defendants raped and beat the victim. However, the facts do not show that both men beat the victim, they only show that they both raped her. Nonetheless, this does not distinguish the rationale of *Hall*, that the facts show heightened premeditation, because, the defendant's could have left the victim in the parking lot but instead kidnaped her and drove her to a secluded area.

Appellant also attempts to distinguish *Hall*, in that after killing the young woman, the defendants continued their criminal enterprise, which resulted in the subsequent killing of a law enforcement officer. However, these facts support this Court's conclusion that Hall could be sentenced to death, even if he did not fire the fatal shot, because he was a willing if not predominant participant in the other acts, and Hall continued in the joint venture after the first victim was killed. Similarly, after Frances Slater was killed, appellant continued the joint venture to the end by subsequently dividing the spoils.

Heightened premeditation has also been defined as deliberate ruthlessness. *Fennie v. State*, 648 So. 2d 95 (Fla. 1994). In *Bonifay v. State*, 680 So. 2d 413 (Fla. 1996), this Court held that evidence of the victim's begging for his life was relevant to show deliberate ruthlessness and heightened premeditation. In this case, Deputy Lloyd Jones of the Martin County Sheriff's Office testified that appellant told him while en route to the murder scene, Frances Slater begged for her life indicating that she would do anything if they would let her go (TV 21, 1245/7-11). Appellant's mother also testified that appellant told her that Miss Slater was pleading and begging them not to kill her (TV 22, 1591/2-13). Although appellant denied having told this to anyone, a trial court is not required to accept a defendant's self-serving statements when evaluating the existence or weight of aggravating

or mitigating factors. *Pardo v. State*, 563 So. 2d 77, 80 (Fla. 1990). Further, the function of this court is not to reweigh the evidence to determine whether this aggravating circumstance has been proven, but to determine whether there is competent substantial evidence to support its finding. *Willacy v. State*, 696 So. 2d 693 (Fla. 1997). Competent evidence is evidence which is probative of the fact to be proven. *Brumley v. State*, 500 So. 2d 233 (Fla. 4th DCA 1986). Evidence is substantial if a reasonable mind might accept it as an adequate support for the conclusion reached. *Id; Cohen v. State*, 99 So. 2d 563 (Fla. 1957). There was competent substantial evidence that Frances Slater begged for her life, before stopping at the murder scene. Therefore, this fact supports a finding of the required heightened premeditation.

Further, bringing a weapon to the scene supports the heightened premeditation requirement. *Lamb v. State*, 532 So. 2d 1051 (Fla. 1988). In *Lamb*, the defendant planned and perpetrated a burglary, taking a weapon with him, during which a murder was committed. In this case appellant and his gang planned a robbery and a kidnaping. Part of their plan was the necessity of a weapon. During the commission of these felonies, a murder was committed.

Appellant also argues that the necessary coldness element of this aggravator was not established. "Cold" means "calm, cool reflection, and not an act prompted by emotional frenzy, panic, or

a fit or rage". *Jackson v. State*, 648 So. 2d 85 (Fla. 1994); *Richardson v. State*, 604 So. 2d 1107 (Fla. 1992). The deliberate nature of the actions by appellant and his gang clearly establish that the murder was not prompted by emotional panic or a fit of rage. The thirteen-mile journey from the Li'l General Store to the murder scene provided ample opportunity for reflection and clearly shows that the killing was not prompted by frenzy, panic or fit of rage. Miss Slater's murder was a protracted execution-style slaying which is by its very nature cold. *Fennie v. State*, 646 So. 2d 95 (Fla. 1994). This aggravator is primarily reserved for contract, execution-style and witness-elimination killings. *See Archer v. State*, 673 So. 2d 17, 19 (Fla. 1996), *cert. denied*, 117 S. Ct. 197 (1996). Frances Slater was the sole witness to the robbery and was killed by a single shot to the back of the head. The facts of this case reasonably show that she was killed execution-style for purposes of witness elimination.

Appellant finally argues that there was a pretense of moral or legal justification for the murder, that being that he released Frances Slater unharmed. In support of this argument, appellant argues that any ambiguity in a criminal statute must be construed favorably to the accused, citing to Justice Anstead's dissenting opinion in *Hill v. State*, 688 So. 2d 901, 908 (Fla. 1996). However, the issue in *Hill* was whether Hill's moral opposition to abortion was a presence of moral or legal justification for the

killing of an abortion clinic physician and volunteer. Justice Anstead quoted a legal commentator as saying:

> The pretense clause means that even if one kills a victim in a cold and calculated manner, and if the killer thinks he is morally or legally justified in doing so, the aggravating factor should not apply.

This clearly has no application in this case. This clause stands for the proposition that, "I did it, but I believed that I was morally or legally justified in doing so." Appellant does not take this position. His position is that he did not kill Frances Slater. He argues that he released her unharmed. However, the facts show that he was very much a part of a criminal enterprise that ended in the killing of Frances Slater. He was the one that took her from the store and put her in the car at gunpoint. He knew that Bush intended to kill Frances Slater. He nonetheless was the one who took her out of the car in a secluded area. He was the one that walked away from Frances Slater as Bush and Parker attacked her with a knife and gun.

When a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent substantial evidence to support it. *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988). The trial court stated in his sentencing memorandum:

> Clearly there was no pretense of moral or legal justification for this killing. The cold, calculated,

> and premeditated nature of it was shown by the general plan of the defendant and his associates to find a convenience store to rob, by defendant being the one with the gun during the robbery, by defendant being the one who chose to lead the victim out of the store at gunpoint, by the defendant keeping her in the back seat of the car for the long ride out to the scene of the murder, and by the defendant taking her out of the car and turning her over to Bush and Parker who knifed and shot her. The Court finds that this aggravating circumstance has been established beyond a reasonable doubt (R 1259).

Clearly, there was competent substantial evidence presented to support the trial court's finding of this aggravating circumstance.

POINT III

WHETHER THE EVIDENCE SUPPORTS THE HEINOUS, ATROCIOUS, OR CRUEL (HAC) AGGRAVATING CIRCUMSTANCE (RESTATED)

For this circumstance to apply, the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim. *Richardson v. State*, 604 So. 2d 1107 (Fla. 1992). Torturous murders are those that evince an extreme and outrageous depravity as exemplified either by a desire to inflict a high degree of pain or an utter indifference to or an enjoyment of the suffering of another. *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990). This torture can be either physical or mental torture. *Hartley v. State*, 686 So. 2d 1316, 1323 (Fla. 1996). Although this circumstance does not normally apply to most instantaneous deaths, or deaths that occur fairly quickly, where there is fear, emotional strain or terror of the victim during events leading up to the murder, an otherwise quick death may become heinous, atrocious or

cruel. *Preston v. State*, 607 So. 2d 404 (Fla. 1992); *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994). Moreover, the victim's mental state may be evaluated for purposes of this determination in accordance with a common-sense inference from the circumstances. *Pooler v. State*, 22 Fla. L. Weekly S697, 698 (Nov 6, 1977); *Swafford v. State*, 533 So. 2d 270,277 (Fla. 1988).

The facts do support a finding of this aggravating factor. Although appellant and his gang could have bound Frances Slater and left her in the store as they made their getaway, they kidnaped her and drove her thirteen miles before stopping and killing her. During that ride, Frances begged for them not to hurt her. Nonetheless, they took her to a remote site, where again they could have let her go, but instead murdered her. They had a gun, which was alone sufficient to take the life of Frances Slater and was used to that end. Nonetheless, before Parker put the death shot into the back of her head, Bush stabbed her in the abdomen, which caused her great pain. Either this pain, which the medical examiner surmised (TV 20, 1225/10, 1228/19), or her fear caused Frances Slater to become incontinent prior to her death (TV 20, 1227-28). Based on these facts, this court found this aggravating circumstance applicable in both appellant's original appeal and in J.B. Parker's appeal. *Cave v. State*, 476 So. 2d 180, 188 (Fla. 1985); *Parker v. State*, 476 So. 2d 134, 139-40 (Fla. 1985).

Appellant cites to *McKinney v. State*, 579 So. 2d 80 (Fla.

1991) and to *Robertson v. State*, 611 So. 2d 1228 (Fla. 1993) to support his argument that this circumstance is not applicable, because the evidence did not show that appellant himself intended to torture the victim. However, in both *McKinney* and *Robertson*, the defendant was the shooter. This case is different, in that it was Bush who stabbed the victim and Parker who shot her. Therefore, in regard to the killing itself, the issue becomes whether a co-defendant intended to torture the victim and whether appellant should be liable for the acts of a co-defendant, which was clearly the case in this matter. Further, appellant was directly responsible for the mental torture endured by Frances Slater on her thirteen-mile ride, in that he was the one who took her from the store at gunpoint and placed her in the car with her head down.

Appellant again argues that he cannot be vicariously liable for the actions of his co-defendants in regard to this aggravating circumstance. However, in *Copeland v. State*, 457 So. 2d 1012 (Fla. 1984), *vacated*, 108 S.Ct. 55 (1987), this Court indicated that this aggravating circumstance is applicable even though a defendant's conviction for the capital felony may be based on the felony murder theory, where the evidence shows that the defendant was a principal in and fully participated in the underlying felonies. *See also James v. State*, 453 So. 2d 786 (Fla. 1984). Without question, appellant was a principal in the underlying robbery and kidnaping.

This was elaborated on more fully in the preceding issue.

In regard to the physical torture of Frances Slater, the facts show that the stabbing caused great pain, and it was the gunshot that subsequently killed her. The stabbing was not necessary to accomplish the killing but was an additional act evincing extreme and outrageous depravity. The facts also show that after Bush stabbed the victim, he held up the knife and exclaimed how she had bent it (TV 21, 1328/1-7), further evidence of a depraved mind. Bush's girlfriend, Georgeann Williams, testified that Bush told her in a joking manner that he had stabbed Frances Slater (TV 23, 1556). Clearly, Bush stabbed Frances Slater to impose great pain or because he was utterly indifferent to her suffering.

Appellant also argues that this circumstance is not applicable, because he was not immediately present at the site of the killing, citing to *Omelus v. State*, 584 So. 2d 563 (Fla. 1991), *Archer v. State*, 613 So. 2d 446 (Fla. 1993), and to *Williams v. State*, 622 So. 2d 456 (Fla. 1993). However, each of these cases involves situations where the defendant hired a third person to commit a killing, and the defendant was not anywhere near the site of the killing. In each of these cases, the extent of the defendant's participation was hiring another to perform a killing. This case is entirely different, because appellant was a part of the entire criminal episode that resulted in appellant's death. Furthermore, for appellant to argue that he was not at the

immediate site of the killing, when it was he who walked Frances Slater away from the car and stood by and watched as Bush and Parker stabbed and shot her only footsteps away, is ludicrous.

In regard to the mental torture of Frances Slater, appellant argues that fear and emotional strain do not establish this aggravator. In support of this argument appellant compares *Robinson v. State*, 574 So. 2d 108 (Fla. 1991), *cert. denied*, 112 S. Ct. 131 (1991) to *Lucas v. State*, 613 So. 2d 408 (Fla. 1992). In *Robinson*, the victim was assured that she would not be hurt, while in *Lucas*, the victim was aware that she was in mortal danger. Appellant also cites to *Hartley v. State*, 686 So. 2d 1316 (Fla. 1996), which holds that mere speculation that the victim may have realized that she was going to be killed is insufficient to support this aggravator.

Nothing in this record reflects that Frances Slater was ever assured that she was not going to be harmed. Although appellant argues that he discussed with Johnson in Miss Slater's presence that she would not be killed (AB 47-48),[13] nothing in the record suggests that she heard this conversation. To the contrary, the evidence shows that although the robbery was complete, Frances Slater was kidnaped and taken to a remote site. During this journey, Frances begged not to be harmed. Clearly, the evidence

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[13] Again, the trial court is not required to accept a defendant's self-serving statements.

shows that Frances Slater was very aware that she was in mortal danger, much like the victim in *Lucas*. Unlike *Hartley*, there is no speculation in this case, because the evidence shows that Miss Slater was in great fear of harm.

The trial court found that :

> In the instant case this Defendant personally removed the victim from the convenience store at gun point, placed her in the backseat of the car in which he and a co-defendant were seated, heard her pleas for her life during a fifteen to eighteen minute ride to an isolated area, removed her from the car and turned her over to Bush and Parker who stabbed and shot her. At some point her panties were wet with urine. The terror she experienced must have been horrible and meets the definition of especially heinous, atrocious and cruel. The situation here is in contrast to a killing that is sudden and unexpected. The Court finds that this aggravating circumstance has been established beyond a reasonable doubt (R 1259).

There is ample evidence from which the trial court could have concluded that this crime was consciousless or pitiless and unnecessarily tortuous to the victim.

POINT IV

WHETHER THE EVIDENCE SUPPORTS THE AVOID ARREST CIRCUMSTANCE (RESTATED)

Appellant again argues that he cannot be vicariously liable for this circumstance; however, both *James v. State*, 453 So. 2d 786 (Fla. 1984) and *Copeland v. State*, 457 So. 2d 1012 (Fla. 1984), *vacated*, 108 S.Ct. 55 (Fla. 1987), hold that he can be vicariously liable for this circumstance, if he was a principal and fully

participated in the underlying felonies, which appellant certainly was in this case.

Appellant also argues that there was insufficient circumstantial evidence to support a finding that witness elimination was the dominant motive of the murder. However, this circumstance is allowed most often when the victim is abducted from the scene of one crime and taken to a remote area and killed for no other apparent motive. *Preston v. State*, 607 So. 2d 404, 409 (Fla. 1992); *Hall v. State*, 614 So. 2d 473, 477 (Fla. 1993); *Swafford v. State*, 533 So. 2d 270 (Fla. 1988). *Preston* is very similar to this case, in that the defendant robbed and kidnaped the night clerk from a convenience store and transported her to a more remote location where he killed her. Based on these facts this Court found that the only reasonable inference was that the defendant kidnaped the victim and transported her to a more remote location in order to eliminate the sole witness to the crime. The facts of this case are virtually identical.

In *Hall*, this Court also found that the evidence left no reasonable inference except that the defendant killed the victim to eliminate the only witness. Again, there the defendant stole a car, that he intended to use in a robbery, from a young pregnant housewife in a grocery store parking lot. The defendant forced the victim into the car and drove her to a secluded area, where he shot her to death.

In *Swafford* a witness arrived at a FINA gas station to find no attendant on duty, although the store was open and the lights were on. Two witnesses had seen the attendant at the store only minutes before. Later that day, the victim's body was found in a wooded area by a dirt road about six miles from the FINA station. She had been sexually battered and shot. Although Swafford had made an incriminating statement to an Ernest Johnson, the statement did not contain any clear reference to his motive for the murder specifically. Nonetheless, this Court found that the circumstances of this murder where sufficient to support a finding of this circumstance.

This case is indistinguishable from the above cases. Frances Slater was abducted from the scene of the robbery, driven to a remote area and killed for no other apparent motive. She was the only witness to the robbery. Further, in this matter there is direct evidence that Frances Slater was kidnaped for purposes of avoiding arrest. Appellant himself testified that she was kidnaped, so they could make a getaway (TV 21, 1325). The facts show that appellant and his gang perceived Frances Slater as an obstacle between them and their continued liberty. She wound up dead. There was competent substantial evidence presented to support the trial court's finding that this murder was committed to avoid arrest. As this Court has noted, the evidence leaves no reasonable inference but that the victim was kidnaped from the

store and transported some thirteen miles to a rural area in order to kill and thereby silence the sole witness to the robbery. *Cave v. State*, 476 So. 2d 180, 188 (Fla. 1985). In his sentencing memorandum, the trial court stated:

> The Court finds beyond a reasonable doubt this aggravating factor has been proven. The purpose of the abduction and killing was clearly to eliminate the only witness to the robbery. The Court is not bound to believe defendant's statement that he did not intend or expect the victim to be murdered. The evidence shows that defendant had a leadership participation in the entire criminal episode (R 1259).

However were this or any of the above aggravating circumstances found not to be supported by the evidence, appellant's sentence should nevertheless be affirmed. There would remain sufficient valid aggravating circumstances and little in mitigation. Therefore, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different. *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988); *Capehart v. State*, 583 So. 2d 1009 (Fla. 1991), *cert. denied*, 112 S.Ct. 955 (1992).

POINT V

WHETHER THE TRIAL COURT IMPROPERLY DOUBLED THE CCP AND AVOID ARREST AGGRAVATING FACTORS

Appellant argues that the trial court improperly doubled the CCP and avoid arrest (witness elimination) aggravating circumstances, because the trial court allegedly based his finding

of these aggravators on the same facts (that Frances Slater was killed to avoid apprehension) (AB 53). However, in regard to the CCP circumstance, the trial court wrote:

> Clearly there was no pretense of moral or legal justification for this killing. The cold, calculated, and premeditated nature of it was shown by the general plan of the defendant and his associates to find a convenience store to rob, by defendant being the one with the gun during the robbery, by defendant being the one who chose to lead the victim out of the store at gunpoint, by the defendant keeping her in the back seat of the car for the long ride out to the scene of the murder, and by the defendant taking her out of the car and turning her over to Bush and Parker who knifed and shot her (R 1259)

In regard to the witness elimination circumstance, the trial court wrote:

> The purpose of the abduction and killing was clearly to eliminate the only witness to the robbery. The Court is not bound to believe defendant's statement that he did not intend or expect the victim to be murdered. The evidence shows that defendant had a leadership participation in the entire criminal episode (R 1259).

Appellant cites to *Morton v. State*, 689 So. 2d 259, 265 (Fla. 1997); *Stein v. State*, 632 So. 2d 1361, 1366 (Fla. 1994), which both hold that there is no improper doubling of circumstances, when each is supported by distinct facts. More importantly, in *Stein* this Court found that there was no improper doubling of these same circumstances. Although Stein, as appellant, contended that there was a doubling, because these two aggravators were based on a

finding that the murders were committed to eliminate witnesses, this Court explained that the avoid arrest aggravator focused on the defendant's motivation for the crime, while the CCP circumstance focused on the manner in which the crime was committed.

Clearly, in regard to the CCP circumstance, the trial court in this matter also focused on facts relating to the manner in which the crime was executed, for example appellant's having taken Frances Slater out of the store at gunpoint, having placed her into the car, the thirteen mile ride to her death, and appellant's having turned her over to Bush and Parker, who knifed and shot her. In regard to the avoid arrest circumstance, the trial court in this matter, as the trial court in *Stein*, focused purely on facts relating to the motivation for the crime, witness elimination. Contrary to what appellant has stated, the trial court did not base both circumstances on the fact that Frances Slater was killed to avoid apprehension.

Since independent facts do support each aggravator, there was no improper doubling by the trial court. *Morton v. State*, 689 So. 2d 259, 265 (Fla. 1997); *Stein v. State*, 632 So. 2d 1361, 1366 (Fla. 1994).

POINT VI

WHETHER THE TRIAL COURT ERRED IN GIVING LITTLE WEIGHT TO THE NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY CIRCUMSTANCE

Although the trial court found this mitigating circumstance to exist, he gave it little weight "in view of the enormity of the crimes committed" (robbery, kidnaping and murder)(R 1260). Appellant argues that the trial court erred in giving this mitigating circumstance little weight, because he was not the triggerman or knifer (AB 54). Further, appellant merely came to this conclusion, without one scintilla of legal support. Appellant has the burden of demonstrating that prejudicial error occurred [Section 924.051(7), Fla. Stat. (1996)], but he has failed to show any error. The only case cited by appellant to support his argument was *Lockett v. Ohio*, 98 S.Ct. 2954 (1978); however, *Lockett* merely held that a state statute should not preclude a sentencing judge from considering as a mitigating circumstance any aspect of a defendant's character or record and any of the circumstances of the offense that the defense proffers as a basis for a sentence less than death. This holding is not applicable to this issue. Furthermore, the *Lockett* Court did recognize that the states have the authority to make aiders and abettors equally responsible with principals or to enact felony-murder statutes.

As has already been stated, although appellant may not have stabbed or shot Frances Slater, he was a major participant in the

entire criminal episode. Appellant insisted on having a gun, when he went inside the Li'l General. Appellant took Frances Slater from the store and put her in the car. Appellant put her head down, so she would not be seen. Appellant gave the gun to Parker and stood by while Bush and Parker murdered her. After Frances Slater had been brutally murdered, appellant got back into the car and drove with the others to his rooming house and split up the money. Based on appellant's deep involvement in this criminal episode, he is responsible for the acts of co-defendants. To suggest that greater weight should be given this circumstance, because appellant did not actually shoot or stab Frances Slater is without merit.

So long as the sentencing court recognizes and considers a mitigating factor, the weight which it is given will generally not be disturbed. *Quince v. State*, 414 So. 2d 185 (Fla. 1982). The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to an abuse of discretion standard. *Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997). Discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Booker*

v. State, 514 So. 2d 1079, 1085 (Fla. 1985). Clearly, the record supports the weight given by the trial court, and, without question, reasonable persons would agree that the crimes committed by appellant and his gang were horrific.

However, even if error it would be harmless, in that it is apparent from the record that even if the trial court had given this circumstance greater weight, the trial court would have nonetheless still found that the aggravating circumstances outweighed the mitigating circumstances. *See Capehart v. State*, 583 So. 2d 1009 (Fla. 1991). The trial court found the existence of four aggravating circumstances, which included CCP and HAC, while other than this mitigator he found only nonstatutory mitigation that he gave little weight.

POINT VII

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND THE MITIGATING CIRCUMSTANCE THAT APPELLANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR

Whether a mitigating circumstance has been established by the evidence is a question of fact and subject to the competent substantial evidence standard. *Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997); *Stano v. State*, 460 So. 2d 890, 894 (Fla. 1984). Competent evidence is evidence which is probative of the fact to be proven. *Brumley v. State*, 500 So. 2d 233 (Fla. 4th

DCA 1986). Evidence is substantial if a reasonable mind might accept it as an adequate support for the conclusion reached. *Id; Cohen v. State*, 99 So. 2d 563 (Fla. 1957).

Based on the above, the issue becomes whether a the record supports the trial court's rejection of this "minor participation" mitigator. The trial court concluded that:

> the defendant's role in this murder ... included leadership activities. He participated in casing out the convenience store, he carried the gun throughout the robbery and the kidnaping, and only relinquished it to Parker for the execution. Defendant personally directed the victim out of the store and into the car. He held her captive in the back seat during her pleas for her life. He got her out of the car and turned her over to Bush and Parker who promptly stabbed and shot her (R 1260).

Based on these facts, a reasonable person would accept the trial court's conclusion that appellant's participation in the capital felony was not relatively minor but instead major. This murder was a combination of a course of events that began when appellant went into the store, robbed the clerk at gunpoint and abducted her, making appellant a principal and full participant in the crimes.

However, appellant points out that Section 921.141(6)(d), Fla. Stat., indicates that this mitigating circumstance is applicable if a defendant is an accomplice but a minor participant "in the capital felony." He further contends that the rule of lenity requires a construction favorable to himself, in that his major

participation in the robbery and kidnaping do not make him a major participant in the "capital felony," which he defines as the killing itself. Appellant argues that the term "capital felony" must refer to either a premeditated killing or to that portion of the transaction where the killing occurs.

This is clearly inaccurate. A "capital felony" is defined to include the unlawful killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate *inter alia* a robbery or a kidnaping. Section 782.04(1)(a), Fla. Stat. (1981). This definition is quite clear and does not limit a capital felony under a felony murder theory to only the transaction where the actual killing occurs. The rule of lenity is not necessary for a construction of this statute.

Even if error, however, it would be harmless, in that it is apparent from the record that had the trial court found the existence of this circumstance he would have assigned it little weight and would have still found that the aggravating circumstances outweighed the mitigating circumstances. *See Capehart v. State*, 583 So. 2d 1009 (Fla. 1991).

POINT VIII

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND THE AGE MITIGATOR APPLICABLE

Appellant argues that the trial court erred in failing to find this mitigating circumstance applicable, because he was twenty-

three when the homicide took place. In support of this position, appellant cites to *Huddleston v. State*, 475 So. 2d 204 (Fla. 1985), which in turn cites to *Cannady v. State*, 427 So. 2d 723 (Fla. 1983). Neither of these cases is applicable to this case, in that they are both jury override cases, where this Court pointed out that the jury could have considered age as a mitigating factor in reaching its advisory sentence to life in prison. Granted, the defendant's age in *Cannaday* was twenty-one, and the defendant's age in *Huddleston* was twenty-three, as was appellant's, but the *Huddleston* opinion also points out that there is no per se rule which pinpoints age as an automatic mitigating factor. Also, this Court has held that a trial court is not required to find age a mitigating circumstance, just because the defendant was twenty-three. *Simmons v. State*, 419 So. 2d 316 (Fla. 1982).

More specifically, chronological age alone is of little import. *Campbell v. State*, 679 So. 2d 720 (Fla. 1996). Further, mitigating circumstances must, in some way, ameliorate the enormity of a defendant's guilt. *Eutzy v. State*, 458 So. 2d 755 (Fla. 1984), *cert. denied*, 471 U.S. 1045 (1985). In other words, the court must determine whether the facts extenuate or reduce the degree of moral culpability for the crime committed. *Rogers v. State* 511 So. 2d 526 (Fla. 1987). Therefore, age is a mitigating circumstance when it is relevant to mental and emotional maturity and defendant's ability to take responsibility for his own acts

and to appreciate the consequences flowing from them. *Eutzy v. State*, 458 So. 2d 755 (Fla. 1984); *cert. denied*, 471 U.S. 1045, (1985). When there is no evidence that a defendant's mental, emotional or intellectual age was lower than his chronological age, and without more, this Court has found neither age twenty or age twenty-four to be mitigators. *Sims v. State*, 681 So. 2d 1112 (Fla. 1996, *cert. denied*, 117 S.Ct. 1558 (1997); *Garcia v. State*, 492 So. 2d 360 (Fla.), *cert. denied*, 107 S.Ct. 680 (1986).

Appellant has not in any way shown that his mental, emotional or intellectual age was lower than his chronological age, or how his age was relevant to his maturity, his ability to take responsibility for his actions or how his age ameliorates the enormity of his guilt. On the other hand, the trial court stated in part:

> [T]he purposes of this circumstance would appear to be to give some mitigation where youthful inexperience and immature decision making entered into the crime. Nothing in the evidence establishes such factors. Defendant had left home and was living in an apartment with his girlfriend. He showed criminal sophistication in casing out the convenience store and in eliminating the only witness. There was no childish action involved. (R 1260-61).

The record reflects that appellant's sister, Patricia Young, testified that when appellant was arrested for this offense he was a grown man living apart from their parents in a rooming house (TV 22, 1499/21 - 1500/7). At the time, she was eight months pregnant,

and her oldest son was sick with asthma (TV 22, 1500/15). Appellant came by every day to check on her and her family (TV 22, 1502/5).

Appellant's mother testified that appellant quit school, because he wanted to work (TV 23, 1580/3). She also testified that appellant was grown when he moved away from home at the age of nineteen or twenty (TV 23, 1581/10-16). She indicated that appellant had fallen in love and moved out to live with the girl; she would not let them live in her house, because they were not married (TV 23, 1583/4-8). She testified that appellant had a child (TV 23, 1583/12) and loved him very much (TV 23, 1583/22). Appellant testified that he gave his son love and affection and helped support him (TV 21, 1341).

These facts certainly do not ameliorate the enormity of a defendant's guilt in any manner, and any relevancy they have to appellant's emotional maturity would be to show a greater maturity than normal for his age. Appellant was mature enough to want to move out from under his parents' wings and earn his own living. He was in love and wanted to live with this woman. When he fathered a son, he loved that son and was financially responsible for his well being.

Again, this Court should not reverse a trial court's finding if the record contains competent substantial evidence to support it. *Bryan v. State*, 533 So. 2d 744 (Fla. 1988); *Nibert v. State*,

574 So. 2d 1059, 1062 (Fla. 1990). Only when a reasonable quantum of competent uncontroverted evidence of a mitigating circumstance is present does the trial court have to find that the mitigating circumstance has been proven. *Id.* Based on the above, there is competent substantial evidence in the record, which not only disputes appellant's argument that he did poorly in school and made youthful assumptions about his co-defendants (AB 59), but also supports the trial court's rejection of this mitigating circumstance.

Even if error, however, it would be harmless, in that it is apparent from the record that had the trial court found the existence of this circumstance he would have assigned it little weight and would have still found that the aggravating circumstances outweighed the mitigating circumstances. *See Capehart v. State*, 583 So. 2d 1009 (Fla. 1991).

POINT IX

WHETHER THE TRIAL COURT ERRED IN REGARD TO NON-STATUTORY MITIGATING CIRCUMSTANCES

A. WHETHER THE TRIAL COURT ERRED IN GIVING LITTLE WEIGHT TO THE FINDING OF REMORSE

Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989) indicates that genuine remorse is a mitigating circumstance. The trial court obviously is in the best position to make this determination. However, appellant's position is that this circumstance should be

given great weight, because he fully confessed his involvement in these crimes (AB 59). Appellant also argues that the trial court improperly based his weight of this circumstance on the fact that appellant initially lied to the authorities, before making his confession.

While a defendant's cooperation with the police may be mitigating in nature, based on appellant's initial evasion the confession does not merit more than little weight. *See Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997). Furthermore, since appellant's cooperation did not begin until after he was confronted with the taped statement given by his co-defendant John Bush, the trial court could have ignored this as mitigation and certainly did not abuse its discretion by giving it little weight. *See Washington v. State*, 362 So. 2d 658 (Fla. 1978).

The only other record evidence of appellant's remorse is his self-serving statement that he is sorry for what he did (TV 21, 1336/4), but again a trial court is not required to accept a defendant's self-serving statements when evaluating the existence or weight of aggravating or mitigating factors. *Pardo v. State*, 563 So. 2d 77 (Fla. 1990).

As was stated, so long as the sentencing court recognizes and considers a mitigating factor, the weight which it is given will generally not be disturbed. *Quince v. State*, 414 So. 2d 185 (Fla. 1982). The weight assigned to a mitigating circumstance is within

the trial court's discretion and subject to an abuse of discretion standard. *Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997). If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985). Based on the above, the trial court did not abuse his discretion by giving this factor little weight.

B. **WHETHER THE TRIAL COURT ERRED BY FAILING TO ASCRIBE A WEIGHT TO HIS FINDING THAT APPELLANT WAS NOT THE ACTUAL KILLER**

Appellant concludes, without legal support, that the trial court erred by failing to assign a weight to this circumstance in his sentencing order. The burden is on appellant to demonstrate prejudicial error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1980). He has failed in this burden.

Nonetheless, a sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990). *Campbell* also holds that the trial court must weigh the aggravating circumstances against the mitigating circumstances and expressly consider in its written order each established mitigating circumstance. *Id.* at 420. *Campbell* does not indicate that a trial court is required to articulate in its order what weight was given

to each nonstatutory mitigator; nor does section 921.141(3), Florida Statutes.

In *Ferrell v. State*, 653 So. 2d 367 (Fla. 1995), this Court reemphasized that a sentencing judge must expressly evaluate each mitigating circumstance in his sentencing order. The opinion again states that the sentencing judge must weigh established mitigators against any aggravating circumstances, but the opinion only states that it is the result of the weighing process that must be detailed in the sentencing order. Again, this opinion does not state that the trial court must articulate the weight assigned to each nonstatutory mitigator.

Further, the trial court's failure to articulate in his sentencing order what weight he was giving to this nonstatutory mitigator does not mean or show that he failed to weigh it with the other mitigators against the aggravating circumstances. *Harich v. State*, 542 So. 2d 980 (Fla. 1989).

Although the trial court failed to indicate a weight in his sentencing order, he did state:

> However, the evidence shows that Cave played a leadership role in the entire criminal episode and turned the means of execution over to Parker shortly before the actual killing. Defendant's statement that he did not know the others would kill the victim is not believable under the circumstances (R 1261).

Clearly, this language indicates that the trial court did evaluate this circumstance. The sentencing order also stated that the

mitigating circumstances found proven were not individually or in toto substantial or sufficient to outweigh the aggravating circumstances, and that after weighing all the aggravating and mitigating circumstances, he found that there were sufficient aggravating circumstances (and insufficient mitigating circumstances) to justify the imposition of the death penalty (R 1264).

The trial court's sentencing order in this matter comports with the above requirements. The order shows that the trial court evaluated this circumstance and determined that it was supported by the evidence. It also shows that the trial court considered each proven mitigating circumstance and weighed the proven aggravating circumstances against the proven mitigating circumstances. Finally, the trial court detailed the result of his weighing process, indicating that, "there are sufficient aggravating circumstances beyond a reasonable doubt (and insufficient mitigating circumstances) to justify the imposition of the death penalty."

C. WHETHER THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE EVIDENCE ESTABLISHED THAT APPELLANT DID NOT KNOW OR INTEND FOR THE KILLING TO OCCUR

At the sentencing, appellant testified that he did not know Bush and/or Parker were going to kill Frances Slater, and that he had no intention of doing so (TV 21, 1328-29). He later argued that this testimony constituted a nonstatutory mitigating

circumstance (TV 24, 1787). However, in the sentencing order the trial court made the following findings:

> c: Cave did not know or intend that the killing occur:
>
> As stated above, his protestations to the Court to this effect are not believable and this mitigator is found not proven. The Court should not be bound to accept such selfserving statements a there is no way for them to be rebutted. If the Court is so bound, then the mitigator has little weight because it conflicts so seriously with the defendant's actions at the time (R 1261).

Appellant argues that the trial court was obligated to accept as true his testimony that he did not know or intend that the killing occur, simply because his testimony was uncontroverted. (AB 62). In support of this argument, appellant cites to *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990); however, *Nibert* holds that a trial court must find that a mitigating circumstance has been proven only when a reasonable quantum of competent, uncontroverted evidence has been presented. Citing to *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), the *Nibert* opinion also states that a mitigating circumstance must also be reasonably established by the greater weight of the evidence. "Greater weight" is the equivalent to "preponderance," which both mean "that which is more probable." *Walls v. State*, 641 So. 2d 381 (Fla. 1994).

A trial court may still reject a defendant's claim that the circumstance has been proven, if the record contains competent substantial evidence to support the trial court's rejection of the

mitigating circumstance. *Nibert* at 1062. It is important to note that the supporting evidence in *Nibert* was the testimony of Nibert's sisters and a Dr. Sidney Merin. The evidence was not the mere self-serving statements of Nibert himself. It is also important to note that the *Nibert* opinion cites to *Pardo v. State*, 563 So. 2d 77, 80 (Fla. 1990), where the only supporting evidence was the self-serving statements of the defendant. In the *Pardo* opinion, this Court stated that in regard to the trial court's failure to find a mitigating circumstance, the trial court did not have to accept Pardo's self-serving testimony regarding his motives.

In sum, a trial court does not have to accept the self-serving testimony of a defendant, so long as there is competent substantial record evidence to support the trial court's rejection of a mitigating circumstance. Alternatively, the trial court found this factor to exist, but gave it little weight "because it conflicts so seriously with the defendant's actions at the time" (R 1261). The record evidence does belie appellant's testimony. It was appellant who did not rob Frances Slater, during the "casing" of the store when she was alone and he was unarmed. Appellant waited until he could bring a deadly weapon into the equation. The facts show that he used the weapon to intimidate Frances Slater, pointing it at her while he robbed and kidnaped her. The facts show that appellant took Frances Slater to the car with gun in hand and put her in the

car at gunpoint. Appellant surrendered this deadly weapon to Parker, who used it to kill Frances Slater. It is unreasonable to conclude that a person who interjects a deadly weapon into a serious criminal episode, who kidnaps the only witness at gunpoint, and who guards this witness as she is driven to a remote location does not know or intend that a killing occur. Certainly, there is competent substantial record evidence to support the trial court's rejection of this circumstance.

D. WHETHER THE TRIAL COURT ERRED BY NOT FINDING PROPORTIONALITY OR APPELLANT'S RELATIVE CULPABILITY A NONSTATUTORY MITIGATING CIRCUMSTANCE (RESTATED)

The trial court considered, but rejected, as mitigating evidence the various culpability levels of the four co-defendants:

> d. Proportionality:
>
> Clearly, Parker and Bush had more culpability than defendant here, as they shot and stabbed the victim and had serious prior records. And clearly, also, Johnson had the least of all four as he remained in the car during the robbery and the murder. Parker and Bush have both received death sentences. Bush's sentence has been carried out. Parker's sentence has been set aside at the trial level but is on appeal. At worst, Parker could not be factored into proportionality as his final sentence is unknown. Johnson received a life sentence as the law at the time of his trial appeared to forbid consideration of a death penalty and the matter was not submitted to the jury or the Court.
>
> This defendant's role in the entire criminal episode, as discussed above, shows that he exercised a leadership role throughout. He had already surrendered the

> gun to Parker when he took the victim out of the car and turned her over to the two who executed her.
>
> The Supreme Court's statement in *Bush v. State*, 682 So. 2d 85 (Fla. 1996) that: "Therefore, even if Cave were to receive a life sentence, it could not be said that Bush's death sentence would be disproportional," is not an adjudication in this case that defendant cannot receive a death sentence. It is a recognition only, as this Court has above, that Parker and Bush were more culpable. The Supreme Court should not be considered as making a binding ruling in a case not before it.
>
> The Court finds that this mitigator has not been proven (R 1261-62).

Appellant argues that the trial court erred by failing to find his lesser culpability a mitigating circumstance. In that regard, appellant again argues that Bush and Parker were more culpable than he, while Johnson was equally culpable. This argument was discussed in Point I, sub-issue B, and is incorporated herein. In support of his argument, appellant cites to this Court's opinion in *Bush v. State*, 682 So. 2d 85 (Fla. 1996), where this Court indicated that Bush played a predominant role the crime, so even if Cave (appellant) were to receive a life sentence Bush's death sentence would not be disproportionate. However, this Court also found that the evidence in this case shows that appellant was present at all times and was a major actor in the robbery, kidnaping and murder. *Cave v. State*, 476 So. 2d 180 (Fla. 1985). Be that as it may, the opinion of *Henyard v. State*, 689 So. 2d

239, 254 (Fla. 1996) holds only that disparate treatment may render a defendant's treatment disproportionate, and that an equally or more culpable co-defendant's sentence is relevant to a proportionality analysis. Nonetheless, whether a co-defendant's relative culpability is sufficient to warrant the death sentence is controlled by *Tison v. Arizona*, 107 S.Ct. 1676 (1978), which was discussed in Point I, sub-issue A above and is incorporated herein. Unquestionably, appellant meets the *Tison* threshold.

Again, whether a mitigating circumstance has been established by the evidence is a question of fact and subject to the competent substantial evidence standard. *Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997). Competent evidence is evidence which is probative of the fact to be proven, *Brumley v. State*, 500 So. 2d 233 (Fla. 4th DCA 1986), while evidence is substantial if a reasonable mind might accept it as an adequate support for the conclusion reached. *Id; Cohen v. State*, 99 So. 2d 563 (Fla. 1957).

Based on the above and the argument presented in Point I above, there is competent substantial record evidence to support the fact that appellant was a major participant in the crimes and that his relative culpability was at least equal to that of Bush and Parker and far less than that of Johnson. Therefore, the trial court was correct in not finding this mitigating circumstance.

E. WHETHER THE TRIAL COURT ERRED IN GIVING LITTLE WEIGHT TO THE FINDING THAT APPELLANT SAVED HIS COUSIN'S LIFE

Appellant argues that the trial court erred by giving little

weight to this mitigator, but he cites to *Fuente v. State*, 549 So. 2d 652 (Fla. 1989), where although this mitigator was found the opinion had nothing to do with the weight that should be accorded such a circumstance. Further, Fuente saved an apparently unrelated drowning woman's life six months after the murder, whereas in this case appellant saved his cousin's life many years before the murder, when appellant was around ten years of age (TV 21, 1347/22, AB 19). Appellant has failed to sustain his burden of showing any error.

Again, so long as the sentencing court recognizes and considers a mitigating factor, the weight which it is given will generally not be disturbed. *Quince v. State*, 414 So. 2d 185 (Fla. 1982). The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to an abuse of discretion standard. *Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997). If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985).

Certainly reasonable persons could differ in their opinion of the weight to be given to the fact that appellant saved his cousin thirteen years before the homicide, during his formative youth.

F. **WHETHER THE TRIAL COURT ERRED IN GIVING LITTLE WEIGHT TO THE FINDING THAT APPELLANT WAS UNDER THE INFLUENCE OF ALCOHOL AND/OR MARIJUANA AT THE TIME OF THE OFFENSES**

Although Investigator Ranew's report indicated that Deputy Bargo told him that the back driver's side passenger had some type of mental problem due to the fact that he answered questions quite slowly, especially when attempting to give his name (TV 22, 1535/7, 1537/4), Investigator Ranew testified Deputy Bargo may not have used the term, "mental problem" but another term that he interpreted to mean "mental problem" (TV 22, 1541). Furthermore, Deputy Bargo testified that he did not tell Investigator Ranew that appellant had a mental problem, but that this passenger was sluggish or hesitant (TV 19, 1114/15). He also testified that this passenger (appellant) did not appear to be confused, did not have a thickened tongue and articulated well; he testified that it just appeared as though appellant did not want to give his name (TV 19, 1118/9-17). Deputy Bargo also testified that he has on many occasions stopped cars containing multiple passengers, where he could smell alcohol emanating from an open window (TV 19, 1119/9-18). Deputy Bargo testified that when he stopped the Bush car shortly after the homicide, he did not smell any alcoholic beverage on anyone's breath and none of them had a problem with their speech or appeared to be intoxicated (TV 19, 1097-99).

During appellant's taped statement to the authorities, appellant indicated that he and the others had been drinking, but

that he knew what he was doing (TV 21, 1262/4-7). Also during the taped statement, appellant was able to recall that Frances Slater was sweeping when they went inside the Li'l General; that she was wearing a 7-11 type coat and a pair of blue pants; that there was a car parked in front of the Li'l General; and that he had on a pair of blue jeans and a white t-shirt (TV 21, 1262/20, 1263/18-22, 1270/2; V 22, 1415/16).

Clearly, even if appellant had been drinking and smoking marijuana earlier in the evening, the degree of influence on appellant was slight. This was the trial court's basis for giving this circumstance little weight (R 1262).

The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to an abuse of discretion standard. *Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997). Again, reasonable persons could conclude that this circumstance deserves little weight, so there was no abuse of discretion. Furthermore, in light of the contradictory evidence, i.e. that appellant had consumed alcohol and marijuana, but that there was little to no evidence that it had any influence on him, the court did not abuse its discretion by giving little weight to this mitigating factor. *Quince v. State*, 414 So. 2d 185 (Fla. 1982).

G. WHETHER THE TRIAL COURT ERRED IN GIVING LITTLE WEIGHT TO THE REMAINING NONSTATUTORY MITIGATING CIRCUMSTANCES

Appellant argues that the trial court erred by giving the

remaining nonstatutory mitigating circumstances little weight; however, the only law provided by appellant is law that holds that these circumstances are mitigating in nature. Appellant has completely failed to show any error by the trial court for giving little weight to them. Thus, he has failed to sustain his burden on appeal. The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to an abuse of discretion standard. *Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997). If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985). Since reasonable people could conclude that the trial court was correct in giving these circumstances little weight, based on competent substantial record evidence and on the comments of the trial court in his sentencing order. Therefore, there was no abuse of discretion.

Even if there was error in regard to these nonstatutory mitigating circumstances, it also would be harmless, in that it is apparent from the record that had the trial court would have still found that the aggravating circumstances outweighed the mitigating circumstances. *See Capehart v. State*, 583 So. 2d 1009 (Fla. 1991).

POINT X

WHETHER RECORD FACTS NOT MENTIONED IN THE SENTENCING ORDER MAY BE USED BY THIS COURT TO AFFIRM THE TRIAL COURT'S FINDING OF AN AGGRAVATING CIRCUMSTANCE (RESTATED)

Appellant argues that facts not squarely included within the four corners of a sentencing order may not be used to support a trial court's finding of an aggravating circumstance. However, appellant again has failed to provide legal support for this conclusion. Appellant cites to Section 921.141(3), Florida Statutes (1995), which states that the determination of a trial court to impose the death sentence must be supported by specific findings of fact, but it does not state that the trial court must include in the sentencing order every fact relied upon in reaching that determination. Appellant also cites to *Hernandez v. State*, 621 So. 2d 1353, 1357 (Fla. 1993); however, *Hernandez* is not on point, in that the trial court totally failed to give oral or written reasons supporting the death penalty at sentencing, and filed a written statement twelve days later. At the time, this was a basis for reversing and for imposing a life sentence. *Hernandez* does not discuss the issue now presented by appellant.

What is required under section 921.141(3) was clarified in *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990) and *Ferrell v. State*, 653 So. 2d 367 (Fla. 1995). The sentencing judge must expressly evaluate in his or her written sentencing order each

statutory and nonstatutory mitigating circumstance proposed by the defendant. This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the nonstatutory mitigating circumstance is truly of a mitigating nature. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each circumstance. The result of this weighing process must be detailed in the written sentencing order. To be sustained, the trial court's final decision in the weighing process must be supported by sufficient competent evidence in the record. *Campbell* at 420; *Ferrell* at 371. Although *Campbell* and *Ferrell* deal specifically with mitigating circumstances, they both construe section 921.141(3), which makes no distinction between aggravating or mitigating circumstances in regard to the required factual findings. Notably, what is required to sustain the trial court's findings is sufficient competent evidence in the record, not merely the evidence mentioned in the sentencing order.

In its written sentencing order, the trial court in this matter expressly evaluated each aggravating and mitigating circumstance to determine if they were supported by the evidence. After analyzing whether appellant had established each circumstance, the court indicated how much weight it accorded each circumstance that it found to exist. The trial court then

indicated that he weighed each of the proven mitigating circumstances against the proven aggravating circumstances and detailed the result of this weighing process in the sentencing order. This fulfilled the requirements of *Campbell* and *Ferrell*.

Further, this Court has pointed out that the failure of the trial court to specifically address every conceivable mitigating circumstance or to specifically address all evidence and arguments in his findings of fact in his sentencing order does not demonstrate that such evidence was not considered. *Brown v. State*, 473 So. 2d 1260, 1268 (Fla. 1985); *Mason v. State*, 438 So. 2d 374, 379-80 (Fla. 1983). Again, although these cases focused on mitigating circumstances, the rationale is equally applicable to the finding of aggravating circumstances.

Finally, even if this Court were to find that the trial court made inadequate findings, since the trial court did make findings the remedy would be to remand for a new sentencing order. *Ferrell* at 370, 371).

POINT XI

WHETHER THERE WAS LEGALLY SUFFICIENT EVIDENCE TO PROVE THAT THE VICTIM'S BLADDER RELEASE WAS PRE-MORTEM (RESTATED)

Appellant argues that the evidence failed to prove beyond a reasonable doubt that the victim's bladder release was pre-mortem. However, the standard of review is whether the finding of this fact

is supported by competent substantial evidence. *Long v. State*, 689 So. 2d 1055 (Fla. 1997). Again, competent evidence is evidence which is probative of the fact to be proven. *Brumley v. State*, 500 So. 2d 233 (Fla. 4th DCA 1986). Evidence is substantial if a reasonable mind might accept it as an adequate support for the conclusion reached. *Id; Cohen v. State*, 99 So. 2d 563 (Fla. 1957). Competent substantial evidence, therefore, is such evidence, in character, weight or amount as will legally justify the judicial or official action demanded. *Terry v. State*, 668 So. 2d 954 (Fla. 1996).

In this matter, Doctor Ronald Wright was not asked about the victim's bladder release on direct examination. However, on cross-examination Dr. Wright testified that he found a urine stain on the victim's pants in the area of her right hip, and the victim was found on her right side (TV 20, 1221/8, 23). He testified that the location of the urine and the body both being on the right side was consistent with a post-mortem discharge and the effects of gravity (TV 20, 1222). However, Dr. Wright also testified on cross-examination that the victim's bladder was empty and that this is more a phenomena of a pre-mortem discharge (TV 20, 1222). Although Dr. Wright testified on cross that it was impossible to say with certainty whether the discharge was pre-mortem or post-mortem (TV 20, 1224/17), he did testify on re-direct that the position of the body and stain was a "little bit" more consistent with it being a

post-mortem discharge, but it was "highly improbable" for the bladder to have completely emptied at any time other than when the victim was alive (TV 20, 1228/1-9).

Dr. Wright made it clear that the great likelihood was that the discharge occurred while Frances Slater was alive. Certainly, reasonable minds would accept his testimony as adequate support for the conclusion that the discharge was pre-mortem. Therefore, there was competent substantial evidence of this fact.

Even if there were not competent substantial evidence to support such a finding, any error would be harmless. As appellant pointed out, this fact was used to establish the victim's pain (AB 75). The trial court also used this fact to support the fear experienced by Frances Slater to support his finding of the HAC aggravator (R 1259). Each of these facts was proven by other competent substantial evidence. Dr. Wright testified that the stab wound would have caused great pain (TV 20, 1202/17-1203/13). Appellant's mother testified that appellant told her that Frances Slater was yelling and crying and begging them not to hurt her (TV 22, 1589/23-1591/13). Further, Detective Jones testified that appellant told him that Frances Slater was begging for her life while en route to the murder scene (TV 21, 1245/7-11). Even incorrectly admitted evidence is deemed harmless and may not be grounds for reversal when it is essentially the same as or merely corroborative of other properly considered testimony. *Erickson v.*

State, 565 So. 2d 328, 335 (Fla. 4th DCA 1990); *See Burr v. State*, 550 So. 2d 444, 446 (Fla. 1989). Further, there is no reasonable possibility of a different outcome, even absent the bladder release evidence. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

POINT XII

WHETHER THE HAC JURY INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

Appellant argues that both the HAC aggravator and the standard jury instruction relating to HAC are unconstitutionally vague. The trial court read the new standard jury instruction (TV 24, 1804/20-1805/8). This Court holds that the new standard instruction defines the terms sufficiently to save both the instruction and the aggravator from a vagueness challenge. *Chandler v. State*, 702 So. 2d 186. 201 (Fla. 1997); *Hall v. State*, 614 So. 2d 473 (Fla. 1993), *cert. denied*, 114 S.Ct. 109 (1993); *Preston v. State*, 607 So. 2d 404, 410 (Fla. 1992). Appellant has provided no adequate reason for this Court to recede from its ruling.

POINT XIII

WHETHER THE HAC AGGRAVATOR IS UNCONSTITUTIONAL

Appellant has waived review of this issue, because he has raised the claim by simply referring to argument made below without further elucidation. *Duest v. Dugger*, 555 So. 2d 849, 851-52 (Fla. 1990), *vacated*, 967 F.2d 472 (11th Cir. 1992). Nonetheless, see Point XII above. Further, the United States Supreme Court upheld

the HAC aggravating circumstance against a vagueness challenge in *Proffit v. Florida*, 428 U.S. 2960 (1976).

POINT XIV

WHETHER THE "AVOID ARREST" JURY INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

Appellant also argues that this instruction was unconstitutionally vague. Although appellant indicates that the trial court merely gave the standard instruction in regard to this aggravating circumstance (AB 79), the instruction given was modified by adding the last sentence concerning the elimination of a witness as the sole or dominant motive of the murder (AB 79, TV 24, 1804/14-16). This modification was made as a result of appellant's having requested a modification to the standard jury instruction in his Special Requested Jury Instruction #4 (AB 79, R 1229-30). At the charge conference, the prosecutor first indicated that he would not object to the witness elimination aspect of the request but did object to the residual of the requested instruction on the basis that it was contrary to the law in Florida (TV 23, 1613/9). The prosecutor suggested the following instruction:

> The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody (the standard portion). In order to prove this circumstance, the state must show that the sole or dominant motive for the murder was the elimination of a witness (the amended portion given). This factor may be proved by circumstantial evidence from which the motive

> of the murder may be inferred without direct evidence of the offender's thought process (the portion not given)(TV 23, 1668/17-1669/21).

Appellant responded that his suggested language was a direct quote from *Geralds v. State*, 601 So. 2d 1157, 1164 (Fla. 1992) (TV 23, 1669/23). In his written request, appellant also cited to *Perry v. State*, 522 So. 2d 817 (Fla. 1988)(R 1230). Appellant went on to advise the court that they might be able to modify the instruction to reflect both party's concerns, but that "[c]learly, the case law is held that the sole or dominant motive for the murder had to be witness elimination" (TV 23, 1670/6-12). The prosecutor then stated, "Well, if I may, Mr. Garland, then we would agree just to leave it at that. In order for the State -- In order to prove this circumstance, the State must show that the sole or dominant motive for the murder would be elimination of a witness period." (TV 23, 1670/13-19). The trial court then indicated that he would likely modify the instruction accordingly upon seeing the final version (TV 23, 1671/17-1672/8). Appellant made no further comment at the time in regard to this instruction, and the parties went on to discuss other matters (TV 23, 1673/5). The next day, when the trial court was given the final version of the jury instructions, appellant's only comment was that they were subject to his previous objections (TV 24, 1680/7-16).

This issue has not been preserved for appellate review. After both appellant and the prosecutor expressed a desire to have more

additional language to the standard instruction, than that regarding the sole or dominant motive, appellant stressed that this motive language is clearly the law in Florida, upon which the prosecutor suggested that this language alone be added as a compromise. Although appellant never expressly agreed, he made no further objections in regard to this specific modification to this instruction. The next day, appellant only generally indicated that the final version of the instructions should be subject to his prior objections.

In order to preserve for appellate review an issue regarding a jury instruction during the penalty phase, a contemporaneous objection must be made. *James v. State*, 615 So. 2d 668 (Fla. 1993); *Vaught v. State*, 410 So. 2d 147 (Fla. 1982). The contemporaneous objection rule requires the objection to be sufficiently specific to apprise the trial judge of the putative error and to preserve the issue for review. *Gainer v. State*, 633 So. 2d 480 (Fla. 1st DCA 1994). In *Lacy v. State*, 387 So. 2d 561 (Fla. 4th DCA 1980), the appellate court found that the issue had not been preserved for appeal, where although there was some discussion during the charge conference as to the clarity and meaning of an instruction no clear objection had been made. The State would argue that appellant did not sufficiently apprise the trial court of an objection or of the court's putative error to preserve this issue for appellate review.

Certainly, appellant has waived any objection to the language eventually added to the standard instruction, in that this language was requested by appellant (R 1229). Furthermore, the additional language requested by appellant was improper and properly denied by the trial court. Appellant requested the sentence, "The mere fact that the decedent knew and[14] could identify Alphonso Cave is insufficient to prove this aggravating factor beyond a reasonable doubt" (R 1230). The prosecutor objected to this sentence as an incorrect statement of the law, citing to *Preston v. State*, 607 So. 2d 404 (Fla. 1992). The *Preston* opinion does not include this language, and in *Preston*, much like this case, the defendant murdered a night clerk at a convenience store whom he did not know. On the other hand, appellant cited to *Geralds* and *Perry*, which both did include this language. However, in *Geralds* the defendant was a carpenter who had remodeled the victim's home. In *Perry*, the defendant was a former neighbor of the victim. Both *Geralds* and *Perry* cited to *Caruthers v. State*, 465 So. 2d 496 (Fla. 1985), where, like here, the victim was a clerk at a convenience store. However, in *Caruthers*, not like in this case, the victim recognized the defendant as a customer of the store.

It is apparent that this language requested by appellant is law applicable only when the victim **knows and can identify** the

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[14] In his brief, appellant used the conjunction "or" (AB 79); however, in his written request and in the case law, the conjunction used is "and" (R 1230).

defendant, just like it states. This was clearly established in *Wike v. State*, 698 So. 2d 817 (Fla. 1997). In this case, however, there are no record facts to suggest that Frances Slater knew appellant. The fact that she might have been able to identify him does not alone trigger the holdings of the above cases. Therefore, based on appellant's legal support, the trial court was correct to deny this request, since there was no legal justification to modify the standard instruction accordingly. *Guzman v. State*, 644 So. 2d 996 (Fla. 1994).

Appellant also requested the sentence, "The circumstance does not apply where Alphonso Cave or someone with him may have merely panicked while committing another offense" (R 1229-30). Again, in support of this request, appellant cited to *Geralds* and *Perry*. *Geralds* does not address this at all. Furthermore, in this regard *Perry* merely states that there was no direct evidence of motive, but that there was some evidence that the defendant may have panicked and blacked out during the murder. This statement is not a holding or statement of the law but rather a statement applying the facts of that particular case to the holding that the sole or dominant motive must be witness elimination. Therefore, the trial court also correctly refused to give this portion of the requested instruction.

POINT XV

WHETHER THE AVOIDING ARREST AGGRAVATOR IS UNCONSTITUTIONAL (RESTATED)

Appellant has waived review of this issue, because he has raised the claim by simply referring to argument made below without further elucidation. *Duest v. Dugger*, 555 So. 2d 849, 851-52 (Fla. 1990), *vacated*, 967 F.2d 472 (11th Cir. 1992). Be that as it may, appellant also argues that the avoiding arrest aggravating circumstance is unconstitutionally vague; however, this Court has ruled that it is not. *Whitton v. State*, 649 So. 2d 861, 867 (Fla. 1994). Appellant has provided no adequate reason for this Court to recede from its ruling.

POINT XVI

WHETHER THE FELONY MURDER JURY INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

Appellant also argues that this instruction is unconstitutionally vague and defective because it mirrors the elements of felony murder, making this an automatic aggravator for one convicted of first-degree felony murder. In regard to this being an automatic aggravator, this Court disagreed with this argument in *Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sept. 18, 1977). The list of enumerated felonies in the provisions defining felony murder is larger than the list of enumerated felonies in the provision defining this aggravating circumstance. Therefore, this

scheme narrows the class of death-eligible defendants. *See also Clark v. State*, 443 So. 2d 973, 978 (Fla. 1983).

In regard to the vagueness issue, appellant argues that the instruction has "standards so vague that they fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing could occur" (AB 82). In support of his argument, appellant cites to *Godfrey v. Georgia*, 100 S.Ct. 1759 (1980) and *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988). It first needs to be noted that neither of these cases involves a ruling on a felony murder aggravator. In *Godfrey* the Court found that the Georgia aggravating circumstance, that the offense of murder was outrageously or wantonly vile, horrible and inhuman, was unconstitutionally vague. In *Maynard*, the Court found that the HAC aggravating circumstance in Oklahoma was vague and overbroad. The *Maynard* opinion points out that claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and therefore leaves them with an open-ended discretion. The opinion went on to state that channeling and limiting the sentencer's discretion is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

The standard felony murder instruction given by the trial court states:

> [T]he crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of or during flight after committing or attempting to commit the crime of robbery and/or kidnaping TV 24, 1804/3-8).

This instruction could not be more channeling and limiting. The jury clearly had to determine whether the homicide was committed during a robbery or kidnaping, or attempted robbery or kidnaping, or during flight thereafter. Further there is not a single word in the instruction that would not be readily understandable by people of common intelligence. This instruction is nothing like the instructions in *Godfrey* and *Maynard*, where words like outrageously or wantonly vile, horrible, inhuman, and especially heinous, atrocious or cruel were used without limiting definitions. This aggravator and instruction are not unconstitutionally vague.

POINT XVII

WHETHER THE FELONY MURDER AGGRAVATOR IS UNCONSTITUTIONAL

Appellant has waived review of this issue, because he has raised the claim by simply referring to argument made below without further elucidation. *Duest v. Dugger*, 555 So. 2d 849, 851-52 (Fla. 1990), *vacated*, 967 F.2d 472 (11th Cir. 1992). Nonetheless, See Point XVI above.

POINT XVIII

WHETHER THE CCP AGGRAVATOR IS UNCONSTITUTIONAL

Appellant has waived review of this issue, because he has raised the claim by simply referring to argument made below without further elucidation. *Duest v. Dugger*, 555 So. 2d 849, 851-52 (Fla. 1990), *vacated*, 967 F.2d 472 (11th Cir. 1992). Appellant argues that this aggravator is also unconstitutionally vague; however, this Court has rejected this contention. *Phillips v. State*, 22 Fla. L. Weekly S607 (Fla. Sept. 25, 1997).

POINT XIX

WHETHER THE CCP AGGRAVATOR SHOULD HAVE BEEN SUBMITTED TO THE JURY

This circumstance was not found by the trial court in the first sentencing. In a subsequent habeas proceeding, the 11th Circuit affirmed the District Court's finding that appellant received ineffective assistance of counsel in both phases, but that he was prejudiced only in the penalty phase. Appellant therefore argues that it would be a violation of double jeopardy, due process and law of the case to now find the existence of this aggravator, when the 11th Circuit "did not approve the guilt phase conviction on that basis" (AB 84).

However, this Court has applied the "clean slate" rule to resentencing proceedings, holding that a resentencing is a completely new proceeding and a resentencing judge is not obligated

to make the same findings as the first judge. *Preston v. State*, 607 So. 2d 404 (Fla. 1992). A capital sentencer's failure to find a particular aggravating circumstance does not amount to an acquittal of that circumstance for double jeopardy purposes and does not foreclose its reconsideration upon resentencing. *Id.* Further, because there was no acquittal of the death penalty,[15] the State was not barred from resubmitting the aggravating factors not found by the judge in the original penalty phase proceeding. *Id.* What a first-sentencing judge finds or does not find in regard to aggravating and mitigating circumstances is not an ultimate fact that collateral estoppel or the law of the case would preclude being rejected on resentencing. *King v. Dugger*, 555 So. 2d 355 (Fla. 1990).

POINT XX

WHETHER THE DEATH PENALTY PROCEDURE IS CONSTITUTIONAL FOR IMPOSING IMPROPER BURDENS OF PROOF OR PERSUASION (RESTATED)

Appellant has waived review of this issue, because he has raised the claim by simply referring to argument made below without further elucidation. *Duest v. Dugger*, 555 So. 2d 849, 851-52 (Fla. 1990), *vacated*, 967 F.2d 472 (11th Cir. 1992).

Appellant, however, argues that the standard procedure of instructing the jury, that they must be reasonably convinced that

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[15] The reviewing courts did not find that the evidence was legally insufficient to justify imposition of the death penalty.

a mitigating circumstance exists, is unconstitutional, in that it imposes on him an improper burden. However, this Court has held that this standard instruction not only does not impermissibly put any particular burden of proof on capital defendants, but that it is needed to guide sentencing discretion. *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990). Appellant suggests that *Brown* is in conflict with this Court's later opinion in *Campbell v. State*, 571 So. 2d 414, 419 (Fla. 1990), but this is inaccurate. *Campbell* merely provided a guideline for the procedure to use when addressing mitigating circumstances, which was completely in harmony with *Brown*.

Furthermore, this Court reasserted that this standard instruction does not improperly shift the burden of proof in *Shellito v. State*, 22 Fla. L. Weekly S554, 556 (Fla. Sept. 11, 1997), citing to *Walton v. Arizona*, 110 S.Ct. 3047 (1990). In *Walton*, the United States Supreme Court affirmed that a state capital-sentencing statute, which imposes on a defendant the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency, but does not lessen the state's burden to prove every element of the offense charged or to prove the existence of aggravating circumstances, does not violate the Federal Constitution's Eighth or Fourteenth Amendment.

POINT XXI

WHETHER THE DEATH PENALTY PROCEDURE IS UNCONSTITUTIONAL FOR FAILURE TO GIVE THE JURY PROPER GUIDANCE (RESTATED)

Appellant also argues that the death penalty procedure is unconstitutional, because it fails to inform the jury of whether they must find aggravating and mitigating circumstances unanimously, by a majority, by a plurality or even individually. Appellant cites to *Mills v. Maryland*, 108 S.Ct. 1860 (1988) and *McKoy v. North Carolina*, 110 S.Ct. 1227 (1990), but these cases do not hold that a jury must be instructed on the standard of proof in regard to these circumstances, they hold that a jury cannot be instructed in a manner which suggests that a mitigating circumstance must be found unanimously by all the jurors before it can be considered. These opinions reiterate that a sentencer may not be precluded from considering all mitigating evidence.

For example, the Maryland instruction in *Mills* stated, "You must consider whether the aggravating circumstance number two has been proven beyond a reasonable doubt. If you unanimously conclude that it has been so proven, you should answer that question yes. If you are not so satisfied, then of course you must answer no." The instruction regarding mitigating circumstances contained the same language, except for the standard of proof being by a preponderance of the evidence. The Court concluded that reasonable jurors may well have thought that they were precluded from

considering any mitigating evidence, unless all twelve jurors agreed on the existence of a particular circumstance.

The Florida standard instruction is not similar to these instructions. The trial court gave this instruction, which in pertinent part reads:

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision ... (TV 24, 1808/8); If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in giving your conclusion as to the sentence that should be imposed. A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established (TV 24, 1809/19-1810/6).

Clearly, this instruction does not suggest that a mitigating circumstance must be found unanimously by all the jurors before it can be considered, nor does it preclude the jury from considering all mitigating evidence. Quite to the contrary, the trial court instructed the jury to consider all the evidence tending to establish one or more mitigating circumstances.

In regard to appellant's concern that the jury is not instructed on whether each of them should make an individual determination as to the existence of circumstances, this Court has held that no such instruction is required under Florida law. *Waterhouse v. State*, 596 So. 2d 1008 (Fla. 1992).

Finally, the constitutionality of Florida's death statute and the standard jury instructions have continuously been upheld. *See Walls v. State*, 641 So. 2d 381, 389 (Fla. 1994), *cert. denied*, 115 S. Ct. 943 (1995); *Robinson v. State*, 574 So. 2d 108, 111 (Fla.), *cert. denied*, 112 S.Ct. 131 (1991); *See Thompson v. State*, 619 So. 2d 261, 267 (Fla.), *cert. denied*, 114 S.Ct. 445 (1993).

POINT XXII

WHETHER THE "VICTIM IMPACT" PORTION OF THE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL (RESTATED)

Appellant argues that this portion of Florida's death statute is unconstitutional, in that it acts as an unauthorized aggravating circumstance, it infringes on this Court's exclusive right to regulate procedure, it leaves the jury and judge with unguided discretion, and it is *ex post facto*.

Each of these issues was addressed in *State v. Maxwell*, 647 So. 2d 871 (Fla. 4th DCA 1994), *opinion withdrawn and republished in full, review granted*, 659 So. 2d 1087, *approved*, 657 So. 2d 1157 (1995), which held that none of these issues has any merit, and this Court approved the district court's decision upholding the constitutionality of section 921.141(7) Florida Statutes (1993). *See also Windom v. State*, 656 So. 2d 432 (Fla. 1995).

POINT XXIII

WHETHER FLORIDA'S DEATH PENALTY PROCEDURE IS UNCONSTITUTIONAL, BECAUSE ONLY A MAJORITY OF JURORS IS SUFFICIENT TO RECOMMEND A DEATH SENTENCE (RESTATED)

Appellant has waived review of this issue, because he has raised the claim by simply referring to argument made below without further elucidation. *Duest v. Dugger*, 555 So. 2d 849, 851-52 (Fla. 1990), *vacated*, 967 F.2d 472 (11th Cir. 1992).

However, appellant argues that Florida's death statute is unconstitutional, because it only requires a majority to recommend the death sentence; however, this Court has held that this has no merit. *James v. State*, 453 So. 2d 786 (Fla. 1984).

POINT XXIV

WHETHER THE DEATH PENALTY PROCEDURE IN FLORIDA IS UNCONSTITUTIONAL FOR LACK OF ADEQUATE APPELLATE PROCEDURE

Appellant has also waived review of this issue, because he again has raised the claim by simply referring to argument made below without further elucidation. *Duest v. Dugger*, 555 So. 2d 849, 851-52 (Fla. 1990), *vacated*, 967 F.2d 472 (11th Cir. 1992).

However, this Court has repeatedly held that Florida's death statute is not unconstitutional for lack of adequate appellate procedure. *San Martin v. State*, 23 Fla. L. Weekly S1 (Fla. Dec. 24, 1997); *Larzelere v. State*, 676 So. 2d 394, 407 n.7 (Fla. 1996); *Hunter v. State*, 660 So. 2d 244, 252 (Fla. 1995).

POINT XXV

WHETHER APPELLANT WAS DENIED AN OPPORTUNITY TO PRESENT A DEFENSE

Appellant has waived review of this issue, because he has raised the claim by simply referring to argument made below without further elucidation. *Duest v. Dugger*, 555 So. 2d 849, 851-52 (Fla. 1990).

Appellant argues that he was deprived of his right to compel testimony, because his petition to stay co-defendant Bush's execution and to bring Bush into the courtroom to testify at appellant's resentencing was denied. However, as pointed out by this Court, there is no legal basis for staying a death warrant pending a subsequent penalty hearing for another co-defendant. *Bush v. State*, 682 So. 2d 85 (Fla. 1996). Furthermore, appellant filed this petition on October 11, 1996 (R 312). His resentencing hearing did not begin until November 12, 1996 (R 312; TV 12, 78). Bush was not executed until October 21, 1996. (See Defense Exhibit 22, TV 22, 1394). Consequently, appellant had at least ten days in which to take Bush's deposition pursuant to Fla. R. Crim. P. 3.190(j). Appellant made absolutely no effort to perpetuate Bush's testimony. Therefore, he was not deprived of his right to compel Bush's testimony and has waived this issue for appellate review.

POINT XXVI

WHETHER THE TRIAL COURT ERRED IN PERMITTING VICTIM IMPACT EVIDENCE

Appellant has waived review of this issue, because he has raised the claim by simply referring to argument made below without further elucidation. *Duest v. Dugger*, 555 So. 2d 849, 851-52 (Fla. 1990), *vacated*, 967 F.2d 472 (11th Cir. 1992).

However, the objection appellant made was to the testimony by the victim's family that gave a description of the victim as a person, describing their loss, which appellant argues does not relate to the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death (TV 21, 1286-87). However, this Court has ruled that clearly the language of section 921.141(7), Florida Statutes (1993) includes the impact to family members. *Bonifay v. State*, 680 So. 2d 413 (Fla. 1996). This Court also recognized that family members are unique to each other by reason of their relationship and the role each has in the family. *Id.* *See also Davis v. State*, 22 Fla. L. Weekly S701, 702-3 (Fla. Nov. 6, 1977). The trial court did not abuse his discretion by admitting this testimony.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court **AFFIRM** the trial court's judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by United States mail to Jeffrey H. Garland, Esq., Kirschner & Garland, P.A., 102 N. Second Street, Fort Pierce, Florida 34950, this 18th day of February, 1998.

DAVID M. SCHULTZ
Of Counsel