SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 90,165
LT CASE NO. 82-352-CF-B
(Martin County)

ALPHONSO CAVE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee
_____/

INITIAL BRIEF OF APPELLANT

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

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CERTIFICATE OF INTERESTED PERSONS

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PRELIMINARY STATEMENT

Alphonso Cave is the Appellant. The Appellant will also be referred to by name or as the "Defendant".

The State of Florida is the Appellee and will also be referred to as the "State".

This is an appeal from a Final Judgment imposing the death penalty entered by Senior Circuit Judge C. Pfeiffer Trowbridge (R1258-64, 77-80) in the Circuit Court of the Nineteenth Judicial Circuit, Judge Trowbridge was also specially appointed by the Chief Judge to try this case in the Sixth Judicial Circuit pursuant to a change of trial venue.

The symbol "R", followed by the page number, will refer to the documentary portion of the record on appeal. The documents appear in volumes 1-8.

The symbol "T", followed by the page number, will refer to the transcript portion of the record on appeal. The transcripts appear in volumes 9-26.

STATEMENT OF CASE AND FACTS

PRE-TRIAL MATTERS

The United States District Court for the Middle District of Florida entered a habeas corpus order vacating the sentence of death and requiring a new sentencing hearing. The district court's decision was affirmed on appeal and this resentencing follows. *See Cave v. Singletary,* 971 F.2d 1513 (11th Cir. 1992).

Pursuant to the habeas corpus order, a resentencing commenced on May 3, 1993 in Pinellas County, Florida. Cave was sentenced to death in conformance with the jury recommendation of death. A timely appeal followed.

The Florida Supreme Court vacated the death penalty and remanded for a new sentencing hearing. *Cave v. State*, 660 So.2d 705 (Fla. 1995). This resentencing follows.

CONSTITUTIONAL OBJECTIONS

The trial court heard and denied Defendant's Pre-Trial Motions #5-19(SR) and #30(SR) (T16-19, R25-81, 110-186, 429-46). These motions dealt with procedural and constitutional attacks on the death penalty statute and the standard jury instructions.

PRELIMINARY MOTIONS AND JURY INSTRUCTION OBJECTIONS

On October 14, 1996, Cave presented his Petition For Writ of Habeas Corpus AD Testificandum argument and ancillary matters, which were denied (T50-63, R312-323). The petition was denied as were Cave's extraordinary appeals to the Florida Supreme Court and to the United States Supreme Court. On November 12, 1996, Cave presented a number of pre-trial motions and objections for consideration by the court (T79-223). These objections were denied (R1202, 04).

Cave submitted the "preliminary instruction" portion of Defendant's Special Requested Jury Instruction #1 for consideration which was denied (T176-86, R777-98). The trial court overruled Defendant's objections to the court's preliminary instructions (T185-86, 222-23, R1212-13).

THE STATE'S CASE IN CHIEF

The victim, Frances Julia Slater, was working the 11 p.m. - 7 a.m. shift on the night of April 26, 27, 1982 at a Stuart convenience store[1]. The store manager[2] checked on Ms. Slater and confirmed that she was still working at approximately 2:20 a.m. (T948). At approximately 3:00 a.m., a customer[3] found the store empty and the cash register appearing to have been tampered with. After two or three minutes the customer called the police. The police arrived within five minutes (T980-983).

After arriving at the store, Officer Margaret Schwarz found the clerk was missing. She observed Ms. Slater's car still parked in the parking lot and the cash register open, but with no cash (T993). The drop safe hd been tampered with (T998-999). The clerk's purse was found beneath the counter (T1005).

Officer Schwarz's investigation established that a cooler could not be locked from the outside (T1006). Likewise, neither the bathroom nor a back storage area could be locked from the outside (T1006-07, 955-56). It would not have been possible to have locked the clerk

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[1] The Lil' General store was located on the north side of Stuart, Martin County, Florida near the intersection of U.S. Highway 1 and State Road 707 (T943,47).

[2] Karen Pergilozzi

[3] Mark Hall

inside these areas.

The ensuing investigation located a motorist who happened to be stopped at a traffic light not far from the subject store a few minutes before 3:00 a.m.[4] The motorist observed three (3) black men inside the store and a fourth black man sitting in the back, passenger side seat of an older car parked in front of the store. She had a clear sight of the men in the store (T962). The men appeared to be nervous (T963). After the light changed, the motorist drove on for a short distance. She stopped at a Fina station and saw a clock showing 3:00 a.m. (T961-62, 969, 972, 974-75).

The store manager was summoned. She found that money was missing from the register and floor safe (T949). She estimated that approximately $134.00 was gone (T949-950).

The clerk's body was discovered in the late afternoon of the following day. It was found in a swale along side a rural highway (T1009-10). The area where the body was found was primarily agricultural and undeveloped land (T1012). There were, however, at least three homes within 200 yards of where the body was found (T1059-61; *see* T1023). The body was found approximately 12-13 miles from the L'il General Store (T1011).

It was estimated that it would have taken approximately 15-20 minutes to drive from the convenience store where the body was found. This assumed that the driver observed normal speed limits at approximately 3:00 a.m. in 1982 (T1012).

State's Exhibit #13 is a sketch describing the area where the body was recovered. The

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[4] Danielle Girouard

sketch includes measurements of a tire impression. The overall length of the tire track was 55 feet. The body was found approximately 17 feet on the west side of the paved portion of the highway (T1035-36, R1368). The tire marks appeared to be made by a vehicle proceeding west bound (T1037)[5]. The body was found "close" to where the tire marks began (T1036).[6]

The crime scene technician, Lt. Thomas Madigan, testified that the body was found laying on its right side on the sloping portion of the swail (T1062-63). Photographs were taken after the crime scene had been secured and before the body had been tampered with (T1062, 1019, 1023-25, State's Exhibit #3).

During the early morning hours of April 27, 1982, St. Lucie County Deputy Timothy Bargo was on routine patrol on Rangeline Road in southwest St. Lucie County (T1078-79). Shortly before 4:00 a.m., Deputy Bargo observed a northbound vehicle which had a "flickering" tail light (T1083). Deputy Bargo conducted a traffic stop of the vehicle after it had turned right on Glades Cut-Off Road in the same direction as Fort Pierce (T1084-85).

As part of the traffic stop, he determined that John Earl Bush was driving the 1975 Buick Century[7] (T1173, 1086-87). After Deputy Bargo ran each of the names, he told Bush that he was free to go but should have the tail light corrected (T1093-99).

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[5] The road was SR 76 in Martin County, Florida. Indiantown was the next town to the west. Rangeline Road links Indiantown and the back side of Ft. Pierce (see T1130-1132, R1368 [State's Exhibit #1 - St. Lucie/Martin County map]).

[6] State's Exhibit 11 is a photograph showing the position of the body in relation to the tire track (T1032, R1368).

[7] Bush's car was a two door (T1173). See State's Exhibit #28, a photograph depicting the car (T1065-66, R1369).

The following information was given by the car occupants to Deputy Bargo (and illustrated by a drawing introduced as State's Exhibit #36) (T1088, 95 R1369):

1. John Earl Bush was the driver (identified by driver license) (R1369, State's Exhibit #27);

2. Mike Goodman was in the front passenger seat. He gave a birth date of June 11, 1963 (no identification). Deputy Bargo described him as having "no longer than medium hair dressed casually and medium build." He was estimated by Deputy Bargo to be 6 feet tall and 150-160 pounds (T1096, 1108-09) Parker was shown to have been born on June 11, 1963 (T1156-57, R1370, State's Exhibit #33);

3. Willie Jerome Brown was in the rear passenger-side seat. He gave a birth date of January 28, 1958 (no identification) (T1096);[8] Johnson was shown to have been born on January 27,1957 (T1157, R1370, State's Exhibit #34).

4. Alphonso King Brown was in the rear driver-side seat. He gave a birth date of November 12, 1958 (no identification) (T1088, 1092-94, 1096). Cave was shown to have been born on November 12, 1958 (T1163-64).

Deputy Bargo did not smell alcohol on Bush's breath or about his person. He testified that Bush had no problem with balance, speech, no erratic driving or other indication of intoxication (T1097; 1112-13). He questioned the passengers from a position just outside the driver's door. He did not smell the odor of alcohol emanating either from the car or from the persons in the car (T1098, 1114) but he did see an empty liquor bottle on the driver's side

[8] Deputy Bargo was only able to give a vague description of the back seat passengers. He described them as being "casually dressed, some with a hairstyle and very little further" (T1111-12).

rear floorboard (T1112). He testified that the behavior of the passengers, including their speech, did not indicate intoxication (T1098-99).

Deputy Bargo had left the scene when he was advised by dispatch that there was a problem with the registration. As a result, Deputy Bargo stopped the Bush vehicle a second time (T1099-1100). During the second stop, Deputy Bargo obtained the vehicle identification number from Bush's vehicle in an attempt to clear up the problem. The identification number confirmed that Bush was the proper owner of the car so he was told he could go (T1100-01).[9]

At that point the Bush vehicle would not start. Bush and the front seat passenger got out and looked under the hood.[10] After a short period of time the car started and left (T1101).

Deputy Bargo admitted speaking with Investigator Ranew because Ranew was gathering information in connection with this murder investigation (T1107, 09). He did not remember telling Ranew that Goodman weighed approximately 200 lbs. with a round face, scraggly beard and heavy muscular build (T1109-10).[11] He denied telling investigator Ranew that the back seat passenger on the driver's side might have some type of mental problem (T1114). Although he was somewhat hesitant in answering, Deputy Bargo said that Alphonso Brown did not appear confused and did not have difficulty speaking (T1117-18).

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[9]Cpl. Willie Williams was present during the second stop as a back up officer (T1104), but he did not testify at this resentencing.

[10] The rear seat passengers never got out of the car (T1093, 1110).

[11] Sheriff Crowder testified that, as of May 4, 1982, J.B. Parker "was a fairly muscular individual...probably five ten to maybe six feet tall. He could have weighed 185 to 200 pounds." (T1143).

Miles J. Heckendorn, III, a lieutenant in the identification section, spoke with Deputy Bargo by telephone on April 29, 1982 about the early morning stop (T1160-62). Heckendorn testified that the actual birth date of J.B. Parker matched the birth date given by "Mike Goodman". He testified that the actual birth date of Terry Wayne Johnson nearly matched the birth date given by "Willie Jerome Brown". The differences were that January 27, 1957 (Terry Wayne Johnson) as compared to January 28, 1958 (Willie Jerome Brown). He testified that the actual birth date of Alphonso Cave was identical to the birth date given by "Alphonso Brown" (T1163-64).

During the course of the autopsy examination, Dr. Ronald Wright observed a "very superficial" cut on the ring finger. The laceration may have been caused by either something sharp or dull (T1198-99). He could not determine whether the laceration occurred at or about the time of death or even whether it might have occurred two or three hours before the time of death (T1220).

The examination disclosed a stab wound the victim's abdomen (T1199) which was caused by a single-bladed knife. The wound penetrated into the colon, a distance of approximately two inches. A wound of this nature would be expected to cause great pain, said Dr. Wright, if the victim was still alive when the wound was inflicted (T1201-04).

The victim did not feel pain from the gunshot because brain death was instantaneous (T1213). Despite evidence of bleeding at the abdominal stab wound, Dr. Wright was not able to say whether the knife wound was inflicted before or after the gunshot. If the knife wound was inflicted after the gunshot wound, Dr. Wright agreed that there would have been no pain

associated with the knife wound (T1217).[12]

During the course of the autopsy examination, Dr. Wright observed that the slacks were stained in the area of the right hip (T1221). He agreed that it was impossible to say whether the urine release was a post-mortem phenomenon or a pre-mortem phenomenon (T1224). Dr. Wright was simply unable to determine how the bladder became voided (T1225).[13]

A crime scene technician collected evidence at the autopsy. This evidence included head hair combings and the bullet. He took these items to the crime laboratory for further processing (T1055, 69).

The crime scene technician also collected carpet fibers from several places within Ms. Slater's residence. These carpet fiber exemplars where returned to the crime lab for further processing (T1056).

As the yellowish fibers obtained from Bush's vehicle and the victim's clothing were indistinguishable from carpet exemplars from the victim's home, Nippes formed the opinion that the carpet fibers could have been first transferred from the carpet to the victim's clothing, then transferred to Bush's car as a result of the victim's presence in the car. This would be an example, Nippes said, of secondary transfer (T1175-81, R1369, State's Exhibit

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[12] The autopsy disclosed no other indications of injury such as bruising, burns or ligature marks (T1210-11).

[13]During the course of redirect examination, Dr. Wright acknowledged that the urine stain and body positioning were "probably a little bit more consistent with it (the urination) being post-mortem", but he also said the complete "emptying of the bladder on the other hand...is highly improbable for it to have occurred at any time other than while she was alive" (T1228). It should be noted, however, that these latter comments were made over Defendant's relevancy objections based on Section 90.401 and 90.403. The Defendant argued that such opinion was irrelevant if not held within a reasonable degree of medical certainty or, if marginally admissible, the probative value would be outweighed by the prejudice of the speculation (T1226-27).

#23).

Also located on the victim's clothing was a bluish carpet fiber. This fiber was compared to carpet fiber exemplars taken from Bush's vehicle. Nippes testified that the bluish fiber from the victim's clothing was indistinguishable from the exemplars taken from Bush's vehicle (T1177-78). Nippes testified that the presence of the blue carpet fiber on the victim's clothing would be consistent with a primary transfer resulting from contact with the Bush vehicle (T1181-82).

A Caucasian head hair was also recovered from the Bush vehicle (T1177). Nippes testified that this hair was indistinguishable from head hair exemplars obtained from the victim during the autopsy (T1182).[14]

Further examination of the head hair suggested that the hair had been "prematurely extracted from the scalp" due to the presence of "molecular tissue attached to the root". Nippes suggested that the hair might have been "forcibly removed" (T1183-84).

Nippes acknowledged that it was "pretty hard to say" how much force it would take to remove a human hair. He said:

> You can remove a hair, it can take a lot of force or not a lot of force. Depending on how many you are grabbing it may take quite a bit, or you can actually extract hairs prematurely from fingers manipulation of the scalp with a hairbrush or teasing as women do so, you know, it all depends on what stage the hair is in. But kind of hard to say how much force.

Nippes was not able to say whether the hair had been "yanked" out of the victim's head. He

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[14] The yellow carpet fibers and single Caucasian head hair were all found in what Nippes described as the right-rear quadrant of the vehicle (T1184-86). This quadrant included the seat, the floor and the hump area (T1177).

acknowledged that a hair might be removed by brushing or by rubbing against a course object (T1186-87).

Nippes further acknowledged that the hair may have been removed from the victim's head at a different location. He specifically agreed that it was consistent with the evidence for the subject hair to have been removed someplace else, such as at her home, then deposited upon her clothing or about her person. It would have been consistent with his examination that the hair was deposited into the Bush car as a result of a secondary transfer. In short, Nippes admitted that he could not determine where the hair had been removed from the victim's scalp (T1187-88).

Nippes confirmed that crime scene photographs depicted a hair braid in the victim's hand. He acknowledged that the forensic examination of the victim's clothing disclosed another hair braid in the pocket of the white slacks. Nippes specifically agreed that it would be very common for an elastic-type hair braid to prematurely remove hair from the scalp (T1188-89, State's Exhibits #3 and #4, T1041, 63).

During the course of the examination of the Bush vehicle for trace evidence, Nippes made a point to look for evidence of a urine stain. There was no evidence found of urine or a urine stain in the rear seat area of the Bush vehicle (T1190-91) and, therefore, no correlation to the urine stains found on the victim's pants.

In the early morning hours of May 5, 1982, Detective Lloyd Jones met with Cave at the Fort Pierce State Attorney's Office (T1239-40). Cave initially denied any knowledge or involvement in the homicide, abduction and robbery (T1242). After this denial, the tape recording of the Bush statement was played for Cave. After hearing this statement, Cave

told Detective Jones that he committed the armed robbery, took the victim out of the store, and put her into the car; that the victim pleaded for her life while being transported in the car; that Bush stabbed her; that Parker shot her; and that the victim had said she would do anything to be let free (T1243-44).

Detective Jones stated that Cave continued to cooperate and gave a tape recorded statement (T1250-51). In this tape recorded statement, Cave admitted being with Bush, Parker and Johnson (T1258); admitted "casing" the store earlier that night (T1270-71); said he, himself, had the gun, went into the store, and demanded money (T1258, 59), which she gave to Bush (T1270); and that the victim pulled money out of the cash register (T1259). She got the rest of the money from the floor safe (T1259, 1270), then they put her in the car (T1259).

Cave said that he and Johnson discussed letting the clerk go (T1420-21, 26-27); that, after the car stopped, everyone got out of the car; that Bush stuck the girl with the knife, then she fell; and that Parker shot her in the head. Cave said he actually saw Bush knife her; and was certain Parker shot her with Bush's .38 caliber pistol (T1259-60). Cave said that she was shot lying down; and that Parker was standing right over her when he shot her (T1260). Cave said he was drunk, but knew what he was doing (T1262). Cave denied knowing she was going to be killed and denied any plan to kill the clerk (T1265-66). After the killing, Bush was driving back to Fort Pierce when the car was stopped twice (T1261). The money from the robbery was split up at the rooming house where Cave lived (T1264-65).

In advance of and at trial the Defendant had moved to preclude victim impact testimony. These objections were overruled (T1655-63, R1219-25 [Special Requested Jury

Instruction #2 (SR)], 1008-25 [Pretrial Motion #30(SR)], 1202 [Order denying]. Specific objections were set forth at trial concerning the appropriateness of the victim impact testimony (T1285-87, 1292-93).

The victim's twin sister, Sherry Lee Wojcieszak, gave a compelling eulogy on behalf of her deceased sister. Ms. Wojcieszak's description of the victim did not connect her personality traits to uniqueness and loss to the community (T1283-89).

The victim's mother, Sally Slater, delivered a gripping description of the adverse impact that this homicide had upon both the witness and her family. There was no connecting of this testimony to the effect on the community at large (T1292-96).

After the State rested its case, the Defendant moved for a judgment of acquittal and requested for the jury not to be instructed as to each aggravating factor outlined in Section 921.141(6)(a)thru(j) (T1297-1306, 1312-14). The motion was denied as to the five (5) aggravating circumstances put forth by the State (T1314-16).

THE DEFENSE CASE IN CHIEF

Tom Ranew was a State Attorney Investigator in 1982 and continued in that occupation up to and including the present Resentencing (T1529). Ranew testified that he spoke with Deputy Bargo in the period following this homicide about the stops of Bush's car (T1530). He endeavored, he said, to make his written report a true and accurate reflection of what he was told (T1531).

Although Ranew reviewed the report, it did not assist in refreshing his recollection. He did acknowledge that the written report was reviewed by him for accuracy after it was first prepared and that he was not aware of any errors or omissions (T1531-32). It was

admitted into evidence as Defendant's Exhibit #28 (T1535, 46-47).

The report detailed that Deputy Bargo told Ranew that the rear, 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 the deputy his name" (T1537).

On cross-examination, the prosecutor asked Ranew the following questions:

> Q: And is there any secret here that Alphonso King Brown is that man sitting right over there, Alphonso Cave?
> A: No, sir.
> Q: That's your understanding as an investigator?
> A: Yes, sir.

(T1539).

Georgeanne Williams explained that she was dating Bush during the period before April 26, 1982 (T1554). She said that Bush came to her house at about midnight of April 26 asking for $20.00 and the use of her car. She would not let him use the car, but she gave him $20.00 and he left. She confirmed that he had been drinking (T1554-55).

Several days after Bush was arrested, Williams met with him at the Martin County Jail during visitation. Bush told her that he stabbed the clerk and that Parker shot her in the back of the head (T1555-56). After speaking with Bush, she approached Parker, who was also at the Martin County Jail at that time. Parker confirmed that Bush had stabbed the clerk and that he shot her in the back of the head (T1556-58). Williams testified to these facts on behalf of the State both at the Bush trial and at the Parker trial (T1559-60).

The Defendant testified on his own behalf at the Resentencing (T1317-1459). Cave said they got together sometime in the afternoon of April 26 (T1402-03). They obtained two or three bags of marijuana and a gallon of gin (T1318). They - meaning J.B. Parker, Terry

Wayne Johnson and John Earl Bush - rode around drinking the gin and smoking the marijuana (T1318-19). Cave said he was "really high" when they went to the beach at Jensen Beach (T1407).[15]

Cave admitted "casing" the store which would be robbed later (T1320, 1408-09). As they were riding around, they had only one gun which belonged to Bush (T1321). When they returned to the subject store a second time, Cave went in holding the gun[16]. He demanded money from the clerk (T1412, 14-15). He said Bush, Parker and Johnson were all in the store at the time of the robbery (T1322-24), but also indicated uncertainty whether Johnson was in the store when it was robbed (T1421-22).

Cave admitted holding the gun as they escorted the clerk out of the store. The clerk got into the backseat between Cave and Johnson. Bush was driving and Parker was in the front passenger seat (T1324-25, 1417-18, 38). After Cave got in the car, he put the gun on the front seat (T1328-29). He had the clerk put her head down so that she could not be seen (T1419). Cave denied telling Detective Jones that she had been begging to be let go (T1428).

Cave said the clerk was abducted with the idea of releasing her unharmed on a "back road"[17] (T1325-26, 1330, 1424). He said that he did not intend, and that there was no agreement or plan, for Ms. Slater to be killed (T1329), but that he could not hear what Bush and Parker might have been saying in the front seat (T1352-53). Except for the effects of

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[15] Jensen Beach is a community just north of Stuart. *See* State's Exhibit #1.

[16] Cave said he did not have the .38 caliber revolver when the store was cased out (T1409-11).

[17] Originally, Cave said he had no intention of abducting the clerk. He thought they would tie her up using tape (T1412-13, 20).

alcohol, Cave said he would not have participated in these criminal activities (T1348-49).

When Cave was thinking that the clerk would be released unharmed, he did not know that Bush had been previously convicted of robbery and rape and sentenced to thirty years in prison (T1349-50). Similarly, Cave said he didn't know much about Parker's background and did not know he had been previously convicted as an accessory to armed robbery. If he had, Cave said that he would not have chosen to spend time with them (T1349-52, 1450-52).

When Bush stopped the car on the side of the road[18], Cave got out of the car to let her out. Cave said he walked with the clerk along the side of the road, then turned and began walking back to the car (T1425-26). She kept walking (T1429-30). As Cave got in the back seat of the car, Bush and Parker began walking toward the victim (T1431-32). As Bush and Parker walked toward the victim, Parker had the gun (T1329). He said Bush stabbed her, she fell, then Parker leaned over and shot her in the head (T1326-27, 1433-34). Cave said he was at the car door when the killing occurred. Johnson was still in the car (T1327).

Cave explained that there was no financial gain from the homicide. He said that the money had been taken at the store and that the robbery had been completed before the killing took place. Likewise, Cave said that the abduction had been completed upon her release (T1330-31).

The robbery proceeds were "split up" back in Fort Pierce between each of the four men (T1332-33).

Cave said that he couldn't sleep after returning to his room. He felt so bad about

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[18] Bush did not drive directly to this spot in order to disorient the clerk (T1424).

what happened that he had to try and get it off his chest. He first told his girlfriend what had happened, then his mother, then his grandmother. Several days later he confessed his involvement to the police (T1333-34).

Cave apologized to the victim and her family. He explained that he thinks about this murder everyday of his life and that he has tried to make peace with God. He has admitted his accountability for these crimes and has asked God for forgiveness (T1336-37). He said:

> I did something bad, something real bad. I did something that only God [is] suppose[d] to be able to do from - I mean, I was involved in someone losing their life and I know this was wrong. This was a bad thing. I can't give life so why should I try to take it. That's the way I see it. I mean, I did a bad thing. Unforgivable thing.

(T1365).

Cave placed into evidence the following documents relating to John Earl Bush:

1) Judgment and Conviction for rape and robbery (T1392-93, Defendant's Exhibit #20);

2) Judgment of Conviction and Sentence in connection with the instant murder, armed robbery and kidnaping (T1393, Defendant's Exhibit #21);

3) Death Warrant and certification by the Secretary of State that the execution had been carried out (T1393-94, Defendant's Exhibit #22).

The following exhibits were admitted pertaining to J.B. Parker:

1) Judgment of Conviction for accessory after the fact to armed robbery (T1394 R465, Defendant's Exhibit #23);

2) Judgment of Conviction and Sentence for the instant murder, armed robbery and kidnaping (T1394-95, Defendant's Exhibit #24);[19]

3) Commitment to the Department of Corrections in connection with this case (T1395, Defendant's Exhibit #25).

The Defendant also submitted a copy of the Judgment of Conviction and Sentence for Terry Wayne Johnson in connection with this case. It shows that Johnson was not sentenced to death (T1395-96, Defendant's Exhibit #26).

In comparing his actions and responsibility with those of his co-defendant's Cave said, "I don't put myself on the same level with J.B. Parker or John Earl Bush". He elaborated:

> I have never killed anyone. I have never stabbed anyone, not Miss Frances Julia Slater or anyone else as I was growing up and I understand that they have. I don't put myself on the same level with them. I know that I was with them and I know people [are] gonna say, you know, why you don't put yourself on the same [level]? You was with them. Yes, I was with them. Back then, just stupid.

(T1366).

Being born on November 12, 1958, Cave was 23 when these crimes occurred (T1338). He had gone through 10th grade, but had been held back twice. He never graduated and had

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[19]As jury selection commenced in Cave's Sentencing hearing, word was received that Parker's death sentence had been set aside. Because the court was advised that the State intended to appeal the action giving Parker a new sentencing before a jury, Judge Trowbridge instructed the jury with respect to Defendant's Exhibit #24 (the Judgment of Conviction and Sentence of Death):

> It will be admitted into evidence, however, the jury's informed and I am telling you that the death sentence has vacated and remanded for a new sentencing hearing. The ruling to that effect has is subject to appeal by the State of Florida.

(T1394-95).

been placed into "slow learner's class". When he left school, Cave said that he could barely read (T1339). After leaving school, Cave said he went to work. He did farm labor for Minute Maid; he worked in the laundry room at Lawnwood Medical Center; he participated in the government-run CETA job program; and he had worked for the City of Fort Pierce (T1340).

He met a woman named LaTricia Freeman. A child was born to this relationship, named Alphonso Freeman (T1341, 91-92, Defendant's Exhibit #14). Cave testified that he loved his son and helped to support him (T1341). Cave said that he stayed in touch with his son over the course of these many years. His son would occasionally visit him at the prison and they would write. He continued to love and cherish his son as best he could under the circumstances. Tragically, Cave's son was killed by a hit and run driver (T1353-55, 91-92, 1499, Defendant's Exhibit #15). His father also died while Cave has been imprisoned (T1353).

These deaths at first embittered Cave. He said that he was angry with God. After a period of time and after counseling with the prison chaplain, Cave came to reconcile himself to these deaths. Through the experience of losing his loved and cherished son, Cave said that he has gained understanding of the pain suffered by the victim's family (T1355-56).

Cave described his family, including his mother, stepfather, brother and sister. Cave said that he sought to be a good son to his parents (T1345).

Cave described a cousin named Frank Andrews, approximately 3 years younger than himself. He described an incident where they went fishing near the south bridge in Fort Pierce. When this incident occurred, Cave was about 10 years old. Frank fell into the

water, but he couldn't swim. There was a big current, and Frank was in danger of drowning. Cave jumped in and brought the young cousin back to shore (T1346-48). The account was corroborated by Andrew who said that Cave's action saved his life (T1566-67).

Cave described his efforts to improve himself through education. Through fourteen (14) years of these efforts, Cave said that his reading skills have improved to the extent that he is now able to read on his own (T1356-59).

Cave described himself as "brain dead" during the years before these crimes. He described quitting school as the "dumbest mistake I made". He said he had no direction and no plan. He was using drugs and involved in heavy drinking (T1360-61).

Cave had been arrested only one time before this incident. He had been arrested in Pennsylvania. He was released on his own recognizance and the charges were subsequently dropped. He has never been convicted of any other crime (T1361).

Cave explained that he would prepare for a hoped-for release from prison by learning a trade (T1362-63). He said that he would help repay his debt to society by trying to educate young people as to what goes on in prison (T1363-64). Cave told the jury that he was not fundamentally a bad person and that he could be rehabilitated (T1365).

Livinia Lockhart testified that she was Cave's cousin and approximately the same age (T1460). They grew up together and lived in houses almost next to each other until she left for college (T1461-62). She said that Cave got little support for education at home. Cave's mother was often working and that his stepfather was rarely ever home (T1463). She said that Cave was a good child, easy to get along with and was a good friend (T1465). She said Cave was loved by his mother and stepfather. They disciplined him, but did not abuse him

(T1472). She entrusted the care of both her children to Cave and found him to be helpful and reliable (T1465-66).

Carl Simon is the Defendant's uncle (T1476). He described Cave as a "pretty good kid" who "never got into anything that I know of". Cave was respectful to his parents and helpful to Simon (T1477). June Dunn met Cave when he was 15 or 16 years old (T1483). She described Cave as friendly and polite, always smiling. She said that he was helpful with her own children. She said he got along well with his family and with other children. When Cave was a teenager, he helped his family doing chores around the house (T1485-87), but he was especially helpful toward an older lady, Versie Wells, who lived next to Cave's home (T1487).

Patricia Young, Cave's younger sister, described him as a protective and good brother, and obedient child to his parents (T1493). She said Cave got along well with other boys did not get into any fights (T1494-95), and did know of him getting into trouble growing up (T1499). When Cave was older, he helped his sister by babysitting for her children (T1497), and would come by just about everyday to "check on us" (T1499-1502).

James and Valerie Carswell owned a rooming house in Fort Pierce in 1982 (T1505). He described the Defendant as respectful and a "very able young man". After renting a room to him for about six months, Carswell gave Cave the job of cleaning out the rooming house. He said Cave kept the place very neat and that he "didn't have a bit of trouble with him at all". He said Cave was reliable and performed all of the work obligations that were expected of him" (T1506). She described Cave as the "quiet type" who stayed mostly to himself. She said Cave performed his work duties properly (T1508-09).

Versie Wells testified that she met Cave when he was about six years old (T1516). Wells said that Cave helped her out around the house, by doing yard work, going to the store for her, helping her bring groceries in, and helping her care for her sick daughter. He helped mow and rake the yard. Yet, Wells said, Cave never asked for money (T1519-20). Even after Cave moved away from home, Wells remained friendly with him and he continued to do errands for her (T1521).

Frank Andrews, Cave's first cousin, testified that, when they were younger, they were almost like brothers. He said Cave appeared to have a good relationship with his family (T1564-67).

Frank Hines, Cave's stepfather, first met Cave when he was about 7 or 8 years old. He treated Cave as if he were his own son and tried to raise him the right way (T1571-72). He described Cave as a good boy who loved sports, was a good listener and a fast learner. Hines, who coached Cave's team in Little League baseball, said Cave seemed to get along with all the kids. He said that he was helpful around the house and to neighbors (T1572-73).

Connie Hines, Cave's mother, described Cave as playful and nice and said he followed the household rules. He was helpful around the house and seemed to love his family (T1576-77). He mowed the yard, kept the yard tidy and washed the car, as well as anything else that was asked of him (T1578). She confirmed that Cave helped Versie Wells with chores around her house without expecting payment (T1578). After he grew up, Hines said he always seemed to have a job (T1581) and he loved his child (T1583).

Emma Andrews, Cave's aunt (T1592) had close contact with Cave until 1970 when she moved with her family to New York. She returned to Florida in 1977 (T1595). She said

Cave was kind and friendly and never used bad language. He worked and payed his own way (T1596-97). He loved his son and had a good relationship with him (T1597).

Annie Pearl Anderson lived next door to Cave's residence 1977-1982 (T1600-01). She described Cave, during that time period, as being a good person from a close family (T1601-02). Even after he moved away from home, Cave checked on his mother just about everyday (T1603).

CHARGE CONFERENCE

Cave submitted numerous requested jury instructions and made numerous objections to the standard instructions during the charge conference (T1609-83). These included Defendant's Special Requested Jury Instruction #2 (R1219-25 [victim impact evidence]), #3 (R1226-28 [felony murder aggravator]), #4 (R1229-30 [witness elimination aggravator]), #6 (R1234-39 [HAC aggravator]), #7 (R1240-43 [non-statutory mitigation]), and #8 (R1244-56 [reasonable doubt]). The Defendant also presented the balance of Notice of Objection to Florida Standard Jury Instructions in Capital Cases/Proposed Modifications to Cure Infirmities, etc. (R777-98).

JURY INSTRUCTIONS AND VERDICT

The trial court instructed the jury (T1802-13). The jury was provided with a complete copy of the instructions (R1252-55).

The jury voted 11-1 in favor of death (T1815, R1256).

ALLOCUTION HEARING

At the allocution hearing, the Defendant submitted two (2) exhibits for consideration. The first item was a letter written by the Defendant to his nephew. The second item

(Defendant's Exhibit A) was a videotaped interview by a television reporter (Defendant's Exhibit #17).[20]

The Defendant submitted a sentencing statement detailing his legal argument (R903-39) and orally argued against the aggravators, in favor of mitigators, and for a weighing process favorable to a life sentence (T1386-69, 93-99). The State submitted a sentencing letter to Judge Trowbridge which was not, apparently, included in the record on appeal.

SENTENCING

On January 27, 1997, Judge Trowbridge filed and simultaneously read into the record his sentencing order styled "Sentence and Findings of Fact" (T1904-19, R1258-64). Judge Trowbridge found the following aggravating factors:

1) The 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 or kidnapping;

2) The crime for which the Defendant is to be sentence was especially heinous, atrocious and cruel;

3) The crime for which the Defendant is to be sentenced was committed in a cold and calculated and premeditated manner, and without pretense of moral or legal justification; and

4) The crime for which the Defendant is to be sentenced was committed

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[20] The handwritten letter appears in the record at R1378-86. The handwritten letter was typed in a more legible form and appears in the record at R1375-77. This letter was read into the record at T1829-36. The videotape was played, but was not transcribed by the court reporter (T1828-29). The videotape depicted an interview of the Defendant discussing his involvement in the case, expressing his remorse for the pain caused by his actions and the actions of his co-defendants, and apologizing to the victim's family.

for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (witness elimination).

The trial court found that the statutory mitigator of no significant history of prior criminal activity was proved, but accorded it little weight. Judge Trowbridge rejected as unproved the following statutory mitigators:

1) The Defendant was an accomplice in the offense for which he is to be sentenced that the offense was committed by another person and the Defendant's participation was relatively minor;

2) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

3) The age of the Defendant at the time of the crime.

Judge Trowbridge found the following non-statutory mitigating factors, but accorded them little weight:

1) Remorse;

2) Not the triggerman/not the knifer;

3) The Defendant saved the life of Frank Andrews;

4) The Defendant was under the influence of alcohol and/or marijuana at the time of the offense;

5) The Defendant was a good and considerate son to his mother;

6) The Defendant demonstrated unselfishness and concern toward his neighbors;

7) The Defendant worked steadily and supported himself and his son;

8) The Defendant loved and nurtured his son;

9) The Defendant's only son was killed as a result of a criminal act;

10) The Defendant has improved himself through education and religious study while in prison; and

11) The Defendant confessed his involvement.

Judge Trowbridge rejected as unproven the following non-statutory mitigators:

1) Cave did not know or intend that the killing occur; and

2) Proportionality.

The Defendant was sentenced to death.

This timely appeal follows.

SUMMARY OF ARGUMENT

POINT I

State's evidence failed to meet the *Enmund/Tison* standard. As a result, Cave is not eligible for the death penalty. As the robbery/kidnapping were already over, his role in the killing was relatively minor. Lack of evidence and mitigating circumstances establish insufficient culpability.

POINT II

The circumstantial evidence failed to establish that Cave had been party to any plan to kill the clerk. The circumstantial evidence did not rebut Cave's explanation that she was to be released unharmed in a remote location. The CCP aggravator is not established.

POINT III

The circumstantial evidence did not establish that the events before the killing were "unnecessarily tortuous", nor did such evidence establish that Cave knew that a knife would be used. Cave cannot be held vicariously liable for what Bush and Parker did. The HAC aggravator is not established.

POINT IV

The circumstantial evidence did not contradict Cave's explanation that the clerk was to be released unharmed in a remote location. Consequently, the evidence failed to show that witness elimination was the sole or only reason for the killing. The witness elimination aggravator is not proved.

POINT V

Assuming, *arguendo*, that the evidence support the CCP and witness elimination

aggravators, one of them should be disregarded due to improper doubling. Both aggravators are predicated on the same operative facts.

POINT VI

The trial court erred in according little weight to the finding that the statutory mitigator of no significant history of criminal acts.

POINT VII

The trial court erred in failing to find the statutory mitigator that the Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

POINT VIII

The trial court erred in failing to find the statutory age mitigator as Cave was 23 at the time of the offense. The Defendant's actions were, in part, governed by his youthful and ignorant assumptions as to the intentions of his co-defendants.

POINT IX

The trial court erred in giving little weight to the findings of eleven non-statutory mitigating circumstances. The trial court's failure to give serious consideration to multiple aspects of the Defendant's character and the offense violates the death penalty procedure and the federal and state constitutions. Additionally, the court erred in failing to find that Cave did not know or intend for the killing to occur, and that Cave's death sentence is disproportionate to his cohorts' roles, backgrounds and sentences.

POINT X

The "four corners doctrine" should apply to the sentencing order. If the

circumstances supporting an aggravator are not described in the sentencing order, then those circumstances have not been found as proven. As a result, the CCP, HAC and witness elimination aggravators are not proved.

POINT XI

The circumstantial evidence does not establish that the urine stains were either a pre-mortem or post-mortem phenomenon. As a result, this circumstance cannot be used to draw additional inferences.

POINT XII

The HAC jury instruction is unconstitutionally vague and fails to limit jury discretion.

POINT XIII

The HAC aggravator is unconstitutionally vague.

POINT XIV

The witness elimination jury instruction is defective because it fails to advise the jury that "the mere fact that the victim knew and could identify the Defendant, without more, is insufficient to prove the aggravating factor beyond a reasonable doubt" as described in *Geralds v. State*.

POINT XV

The witness elimination aggravator is unconstitutionally vague.

POINT XVI

The felony murder jury instruction is unconstitutional because it suggests that every felony murder is eligible for the death penalty. This instruction fails to properly channel jury discretion.

POINT XVII

The felony murder aggravator is unconstitutionally vague and fails to channel jury discretion.

POINT XVIII

The CCP aggravator is unconstitutionally vague and fails to channel jury discretion.

POINT XIX

The CCP aggravator should not have been submitted to the jury because the 11th Circuit Court of Appeals, in *Cave v. Singletary*, found that there was ineffective assistance of counsel with respect to a premeditated murder theory. It violates double jeopardy, the right to effective assistance of counsel and due process to permit a CCP aggravator in the context of a felony murder conviction.

POINT XX

Section 921.141 is unconstitutional for failing to define and allocate burdens of proof and persuasion.

POINT XXI

Section 921.141 is unconstitutional for failing to provide proper guidance to the jury as to how to weigh and apply the aggravating and mitigating circumstances.

POINT XXII

Section 921.141(7), permitting the admission of "victim impact" evidence, is unconstitutional for putting extraneous and prejudicial issues before the jury. The victim impact evidence, as defined, is not necessarily relevant to any aggravating circumstance.

POINT XXIII

Section 921.141 is unconstitutional because it allows a bare majority of jurors to make a recommendation of death. The Defendant submits that a unanimous recommendation should be required.

POINT XXIV

Section 921.141 is unconstitutional due to inconsistent standards of appellate review.

POINT XXV

Cave was denied a fundamental right to present a defense when the court refused to enter an order postponing Bush's execution. This State action deprived Cave of a critical witness.

POINT XXVI

The trial court erred in permitting the victim's twin sister and mother testify to personal feelings and observations without connecting them up as required by Section 921.141(7). The testimony should not have been admitted because it failed to show the "victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death."

ARGUMENT

POINT I

THE IMPOSITION OF THE DEATH PENALTY UPON CAVE IS DISPROPORTIONATE TO BOTH THE TREATMENT OF HIS CO-DEFENDANTS AND TO THE TREATMENT OF NON-KILLERS IN OTHER MULTI-DEFENDANT CASES

It is uncontested that Cave was not the triggerman in this case and that he did not inflict the stab wound on the victim. As argued later on in this brief, Cave maintains that only the felony murder aggravator has been proved in this circumstantial evidence case.[21] Cave, in addition, maintains that the circumstantial evidence was insufficient to establish the gatekeeping requirement of *Tison v. Arizona*, 107 S.Ct. 1676 (1987), to wit: that it was shown beyond a reasonable doubt that Cave had either an actual intent to kill or a state of mind culpable enough to rise to the level of reckless indifference to human life. Even if, *arguendo*, some of or all four of the aggravators are upheld in this appeal, the imposition of the death penalty on Cave would be disproportionate on the basis of the mitigation established, on the treatment of co-defendants in this case, and on the treatment of non-killers in other multi-defendant cases. Under these circumstances, Cave may not sentenced to death consistently with the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Consitution.

A) THE *ENMUND/TISON* TEST HAS NOT BEEN MET

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[21]Cave maintains that the felony murder aggravator is unconstitutional or unconstitutional as applied, especially because of the 11th Circuit's determination that Cave received ineffective assistance of counsel with respect to a guilt phase, premeditated murder theory. Consequently, the same facts which form the basis for the felony murder conviction also form the basis for the felony murder aggravator.

The core focus of the *Enmund/Tison* problem is the disproportionality of executing an actor convicted of first degree murder on a felony murder theory. Addressing these problems, *Enmund* explained:

> The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence". *Lockett v Ohio* [98 S.Ct. 2964, 2965] (Emphasis in original).

Enmund v. Florida, 102 S.Ct. 3368, 3377 (1982). *Enmund* held that death may not be imposed in the absence of evidence that the defendant killed, attempted to kill or contemplated that life would be taken. 102 S.Ct. at 3379.

Enmund was modified by *Tison v. Arizona*, 107 S.Ct. 1676 (1987):

> [W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is insufficient to satify the *Enmund* culpability requirement (fn 12)
>
> fn12. Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant suppport for such a finding.

107 S.Ct. at 1688.

In *Jackson v. State*, 575 So.2d 181 (Fla. 1991), the Florida Supreme Court has wrestled with these rules:

> In *Enmund* and *Tison*, the court said that the death penalty is disproportional punishment for the crime of felony murder where the defendant is merely a minor participant in the crime

> and the State's evidence of mental state did not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery that resulted in a murder is not enough culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally forseeable or foreseen". *Tison*, 107 S.Ct. at 1684. However, the death penalty may be proportional punishment if the evidence shows that the defendant was a major participant in the crime and that the defendant's state of mind amounted to reckless indifference to human life. As the court said, "We simply hold that major participation in the felony committed combined with reckless indifference to human life, is sufficient to satify the *Enmund* culpability requirement." *Tison*, 107 S.Ct. at 1688. Courts may consider a defendants "major participation" in a crime as a factor in determining when the culpable state of mind existed. <u>However, such participation alone may not be enough to establish the requisite, culpable state of mind</u>. *Id.*, 107 S.Ct. at 1688 n.12 (Emphasis supplied).

Jackson, 575 So.2d at 190-91.

After engaging in a survey of the operative facts in *Tison, Diaz v. State*, 513 So.2d 1045 (Fla. 1987) and *DuBoise v. State*, 520 So.2d 260 (Fla. 1988), the Florida Supreme Court in *Jackson* concluded:

> Although the evidence against Jackson shows that he was a major participant in the crime, but does not show beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder. *See Tison*, 107 S.Ct. at 1684-85. The entire case is based on circumstantial evidence. The totality of the record shows that Jackson previously indicated his intent to rob Phillibert's store; that Jackson was seen driving in the vicinity of the store shortly before and after the crime; that Jackson had been driving with his brother, whose fingerprints were found on the cash register; that Jackson said afterwards "we had to do it because he had buffed the Jack"; and that Jackson asked his mother to tell his brother to say "he hadn't been nowhere around the hardware store and get

> rid of the gun." The reasonable inference could be drawn from the evidence in this record that either of the two robbers fired the gun, contrary to the finding of the trial judge. There was no evidence presented in this trial to show that Jackson personally possessed or fired a weapon during the robbery or that he harmed Phillibert. There was no evidence that Jackson carried a weapon or intended to harm anybody when he walked into the store, or that he expected violence to erupt during the robbery. There was no real opportunity for Jackson to prevent the murder since the crime took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistence. No other innocent lives were jeopardized.
>
> Upon this record, we find insufficient evidence to establish that Jackson's state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder...to give Jackson the death penalty for felony murder on these facts would qualify every defendant convicted of felony murder for the ultimate penalty. That would defeat the cautious admonition of *Enmund* and *Tison,* that the constitution requires proof of culpability great enough to render the death penalty proportional punishment, and it fails to "generally narrow the class of persons eligible for the death penalty" *Zant v. Stephens*, 103 S.Ct. 2733, 2742 (1983) (Footnote omitted).

Jackson, 575 So.2d 192-93.

Although the evidence in the case at bar showed that Cave carried a gun during the robbery and in the initial part of the kidnapping, he put the gun on the front seat after getting into the car (T1328-29). Throughout the rest of the kidnapping, and as the clerk was being released, Cave was not armed in any manner. As Cave was returning to the car, Bush and Parker walked quickly toward the clerk (T1429-32). After catching up with the clerk, Bush knifed her in the abdomen, and Parker shot her (T1326-27, 1433-34). There was no opportunity for Cave to prevent the murder as his own, uncontradicted testimony was that he did not know that a killing would take place. Nobody else was jeopardized during the

course of this robbery and kidnapping.[22]

Based on these facts, it would be disproportional to uphold the death sentence against Cave based on a lack of proof that Cave's state of mind was culpable enough to rise to the level of reckless indifference to human life. This court should vacate the sentence of death and remand to the circuit court for imposition of a sentence of life imprisonment.

B. THE DEATH PENALTY FOR CAVE IS DISPORPORTIONATE FOR CASE SPECIFIC REASONS

Even if, *arguendo*, the facts of the instant case surpass the *Enmund/Tison* test, the death penalty against Cave is not warranted due to case specific considerations. In particular, Cave's culpability was relatively less than Bush and Parker, and equal to Johnson. Depending upon the court's findings, fewer aggravating factors had been shown against Cave than against Bush or Parker. Unlike Bush and Parker, Cave has benefited from extensive mitigation evidence.

There were three aggravating circumstances found agianst Bush and no mitigating circumstances. The aggravators were: (1) previous conviction of a felony involving the use of threat of violence to the person; (2) felony murder; and (3) CCP. *Bush v. State*, 461 So.2d 936 (Fla. 1984), *cert. denied*, 106 S.Ct. 1237 (1986).

The trial court found five aggravating circumstances as to Parker: (1) previously convicted of a delinquent act involving the use or threat of violence to a person; (2) felony murder; (3) pecuniary gain; (4) HAC; and (5) CCP. The only mitigation found was that the

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[22]It is noteworthy tha the trial court found the robbery had terminated such that the killing was not for financial gain (R1258). Cave has maintained that the kidnapping, too, terminated with the clerk's release.

victim had not been sexually molested, Parker's behavior at trial was acceptable and the statutory age mitigator.

Just before Bush was executed last year, the Florida Supreme Court addressed Bush's proportionality argument and found that "Bush played a predominant role in this crime". *Bush v. State*, 682 So.2d 95, 87 (Fla. 1996).

While Cave was a major actor during the robbery and kidnapping, the evidence at Cave's sentencing establishes that he did not know that the victim was going to be killed. As pointed out previously by the Florida Supreme Court, Bush was the "predominant" actor in this case. Cave's role in these events compares favorably to Parker who was the actual triggerman.

Based upon the evidence that the convenient store had been cased out earlier in the evening, it is clear that Johnson were just as guilty of felony murder as Cave. *See Johnson v. State*, 484 So.2d 1347 (Fla. 4th DCA 1986). In short, Johnson had the same intent to rob, kidnap and use a gun that Cave did.

The evidence established that Cave had the gun during the robbery and at the first part of the kidnapping, but Johnson did not. After Cave handed the gun away, Cave was just as unarmed as Johnson. Both Cave and Johnson were unarmed at the time of the killing and neither had an opportunity, at that point, to prevent it. Cave submits, therefore, that Johnson's sentence is relevant in determining whether Cave's sentence is proportional.[23]

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[23]It is noteworthy that Parker has been granted a new sentencing hearing before a jury, although the order is presently being appealed by the State. The fact that Parker, who is obviously more culpable than Cave, may receive a life sentence would require further proportionality review. *Scott v. Dugger*, 604 So.2d 465, 469 (Fla. 1992).

Henyard v. State, 689 So.2d 239, 254 (Fla. 1996) ("Under Florida law, when a co-defendant is equally culpable or more culpable than the defendant, disproportionat treatment of the co-defendant may render the defendant's punishment disproportionate").

In light of the substantial statutory and non-statutory mitigation in Cave's favor, his sentence of death is disproportional as to his role in this offense and disproportionate to the sentences received by the co-defendants. Cave's death sentence should be vacated. The matter should be remanded to the trial court with instructions to impose a life sentence.

POINT II

THE EVIDENCE DOES NOT SUPPORT THE COLD AND CALCULATED AND PREMEDITATED (CCP) AGGRAVATING CIRCUMSTANCE

The evidence failed to establish that the Defendant intentionally participated in the killing as is necessary to establish the CCP aggravating circumstance under Section 921.141(5)(i) (R1259). The record is devoid of evidence demonstrating either heightened premeditation or circumstances under which the Defendant may be held vicariously accountable, for penalty phase purposes, for the actions of his co-defendants. The CCP aggravating circumstance may not be applied to Cave consistently with the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution.

The present jury instruction specifically defines the terms "cold", "calculated", "premeditated", "heightened level of premeditation" and "pretense of moral or legal justification". The evidence as to the Defendant's actions, as well as his subjective mental state, does not establish the applicability of the CCP aggravating circumstance: *Standard Jury*

Instructions In Criminal Cases, 665 So.2d 212, 213-214 (Fla. 1995) ("[T]here are four independent elements to this aggravating factor and that all four must exist before the aggravating factor may be found"); *Besaraba v. State*, 656 So.2d 441 (Fla. 1995); *Jackson v. State*, 648 So.2d 85 (Fla. 1994).

Although there was evidence suggesting that Bush knifed the victim and that Parker shot her execution style, there was little or no evidence showing either that the Defendant had knowledge that the killing would take place or that he had an opportunity to keep the killing from happening. There was no evidence of calm and cool reflection by Cave with respect to the events leading up to and culminating in the murder. Since the definition is in the conjunctive, each of the elements must be established. Since the necessary coldness was not established, the CCP aggravating circumstance must fail.

The evidence failed to establish that Cave participated in, or knew of, a careful plan or prearranged design to commit murder.[24] Although the evidence established Defendant's participation in both a robbery and kidnaping, there was little or no evidence to contradict Cave's explanation, to wit: that the victim would be abducted in order to facilitate an escape, then released unharmed in a remote location. Further, there was little or no evidence to contradict the Defendant's claim that he did not know, let alone agree, that the victim would be killed. Since the evidence failed to establish that Cave consciously decided to kill, that the decision to kill was in Cave's mind at the time of the killing, and that there was a heightened

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[24] The evidence during the guilt phase of this trial established that the Defendant was guilty on a felony murder theory. In fact, the 11th Circuit Court of Appeals did not reverse the guilt phase because the conviction was based upon a felony murder theory. In Pretrial Motion #38(SR), the Defendant maintained that the 11th Circuit's decision in *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992) precluded evidence or argument regarding the CCP aggravating circumstance. The Defendant renews this argument. *See* Point XIX, *infra*.

level of premeditation as to Cave, the element that the killing be "calculated" has not been established.[25] The CCP aggravating circumstance has, therefore, not been established. *See Geralds v. State*, 601 So.2d 1157, 1164 (Fla. 1992) ("In light of the fact that the evidence regarding premeditation in this case is susceptible to these divergent interpretations, we find the State has failed to meet its burden of establishing beyond a reasonable doubt that this homicide was committed in a cold, calculated, and premeditated manner.")

Cave's explanation, although insufficient to reduce the degree of the murder, nevertheless rebuts the otherwise cold, calculated and premeditated aggravator. While the State has expressed skepticism as to this explanation, the State has offered little or no evidence to contradict it. As he was then unaware of the criminal background of Bush and Parker, Cave explained that he had no reason to suspect a different "agenda" on their part. Even if the killing were otherwise cold and calculated and premeditated, the CCP aggravating circumstance would not be established due to the presence of a pretense of a moral or legal justification, to wit: that she was to be released unharmed. *See Hill v. State*, 688 So.2d 901, 908 (Fla. 1996) (J. Anstead dissenting).[26]

The evidence failed to establish a "heightened level of premeditation". The jury instruction required that this heightened level of premeditation must be "demonstrated by a substantial period of reflection". *Rogers v. State*, 511 So.2d 526 (Fla. 1987), *cert. denied*,

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[25]The CCP intent must be subjectively established "as to this defendant" as the jury was so instructed. *See* Point I, *supra*.

[26] As recognized in the *Hill* dissent, the rules of statutory interpretation require for ambiguity in a criminal statute to be construed favorably to the accused. F.S. § 775.021(1); U.S. Const., Amend. V, VI, VIII, XIV; Art. 1, § 9, 6, 17, Fla. Const.

484 U.S. 1020 (1988); *Clark v. State*, 609 So.2d 513 (Fla. 1992) (Heightened premeditation not established where evidence consistent with the lack of preplanning).[27] According to Cave's 1982 statement and 1996 Resentencing testimony, there was no period of reflection on his own part. The circumstantial evidence does not rebut Cave's claims. Even if there were some internal inconsistency in Cave's explanation given at the 1996 Resentencing, the proof of this, or any, aggravating circumstance is limited to the evidence adduced during the State's case in chief.[28]

Cave's situation may be distinguished from *Card v. State*, 453 So.2d 17 (Fla. 1984), where the evidence established that Card was a regular customer of the Western Union office. Card planned the crime by wearing surgical gloves and hiding a knife inside his pants. Card robbed the Western Union office alone. After completing the robbery, he kidnapped the attendant and murdered her, thus disposing of the only witness to the crime. The evidence showed that Card disposed of the gloves, knife, and the victim's wallet, evidence which could have linked him to the crime. The Florida Supreme Court specifically found:

> There was much time for the defendant to reflect on the seriousness of his acts, to plan his acts, and to realize the

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[27]The CCP aggravating circumstance was not found by the trial court during the course of the 1982 trial. *See Cave v. State*, 476 So.2d 180 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986).

[28] The sufficiency of evidence as to each aggravating factor must be determined at the close of the State's case when Cave moved for a judgment of acquittal (T1297-1316). *See Walker v. State*, 604 So.2d 475, 476-477 (Fla. 1992) ("This Court has ruled that a defendant's motion for judgment of acquittal at the close of the State's case is not waived by the defendant's subsequent introduction of evidence..."); *Pennington v. State*, 526 So.2d 87 (Fla. 1988). Cave additionally moved the trial court at the close of the State's case in chief not to instruct on those aggravating factors not supported by the evidence (T1306). *Johnson v. Singletary*, 612 So.2d 575 (Fla. 1993).

> penalty for his acts. The evidence leaves no doubt that the crime was planned and premeditated and that the murder was carried out on a cold and calculated manner.

Card, 453 So.2d at 23. In contrast to *Card*, Cave was not the actual killer and Cave explained that he did not know that the killing would take place. *Card* did not have to address the issue of vicarious responsibility for the acts of a co-defendant.

Cave's situation may be distinguished from *Hall v. State*, 614 So.2d 473 (Fla. 1993), which involved the following facts:

> In February 1978 Hall and Mack Ruffin decided to steal a car to use in a robbery. Spotting a 21 year old housewife, who was 7 months pregnant, in a grocery store parking lot, Hall forced her into her car and drove that car to a secluded wooded area. Ruffin followed in his car. After reaching their destination, both men raped the victim, after which she was beaten and shot and her body dragged further into the woods. Later that day, they drove the victim's car to a convenience store where they killed a deputy sheriff. The handgun shown to have killed the female victim was found under the deputy's body.

Hall, 614 So.2d at 475. *Hall* may be contrasted, principally, with the evidence which established the joint involvement of both Hall and Ruffin in raping and beating the victim after the abduction, then their subsequent joint involvement in the killing of a law enforcement officer.

Cave's situation may likewise be distinguished from *Ferrell v. State*, 686 So.2d 1324 (Fla. 1986), also a multi-defendant case where the CCP aggravator was found against a non-triggerman. However, there were specific admissions by Ferrell to a jailmate that the cohort conspired, in advance, to rob and kill. *Id.* at 1326-27. Compare *Besaraba*, 656 So.2d at 446 ("Although the record may support a suspicion that such a plan existed, this is insufficient

to support this (CCP) aggravating circumstance").

Before CCP can be found as to Cave, the State must demonstrate a basis for holding him vicariously liable for the actions of Bush and Parker. It has been expressly held that an aggravating factor cannot be vicariously applied unless the State shows that the defendant directed or knew the victim would be killed. *Williams v. State, supra; Omelus v. State, supra.* The circumstantial evidence is not inconsistent with Cave's explanation that the clerk was being transported to an isolated area to be released unharmed in order to facilitate the escape. *See Clark v. State*, 609 So.2d 513 (Fla. 1992) (heightened premeditation not established where evidence consistent with the lack of preplanning).

In the case at bar, there was no evidence that the victim was sexually assaulted or beaten. There was little or no evidence showing Cave's joint involvement in the actions of Bush and Parker to shoot and knife the victim - other than those actions attendant to the robbery and kidnapping. Cave offered the reasonable, and uncontradicted, explanation that the victim was abducted to be released unharmed in a remote location.

POINT III

THE EVIDENCE DOES NOT SUPPORT THE HEINOUS, ATROCIOUS OR CRUEL (HAC) AGGRAVATING CIRCUMSTANCE

The evidence failed to establish the elements of the HAC aggravating circumstance under Section 921.141(5)(h) (R1259). There is little or no evidence demonstrating that the victim was told she would be killed before arriving at the place of execution. Although Parker's execution-style shooting of the victim was preceded by Bush's knife wounding, there is little or no evidence showing that the Defendant knew a killing was to take place, let alone

that the victim should suffer before such killing. Even if, *arguendo*, the Defendant knew of a plot to kill, there is little or no evidence suggesting that Cave knew or intended that a knife wound would be inflicted before an execution-style killing. There is little or no evidence demonstrating circumstances under which the Defendant may be held vicariously accountable, for penalty phase purposes, for the actions of his co-defendants.[29] The HAC aggravating circumstance may not be applied to Cave consistently with the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution.

The present jury instruction specifically defines the terms "heinous", "atrocious" and "cruel". The evidence of the robbery, abduction and killing does not establish, as to Cave's subjective mental state, the applicability of the HAC aggravating circumstance:

The jury was instructed that cruel means "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others". As the evidence did not establish, Cave's participation in an agreement that a knife would be used to assist in the murder, the evidence fails to show that an apparent execution-style killing via a single bullet to the head would be designed to inflict a high degree of pain. There was absolutely no evidence suggesting that Cave enjoyed the suffering endured by the victim. The evidence did, in fact, establish that the victim was rendered brain dead instantaneously by the single bullet. Ordinarily, this type of homicide would not qualify for the HAC aggravating circumstance. *Burns v. State*, 609 So.2d 600, 606 (Fla. 1992); *Clark v. State*, 609 So.2d 513,

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[29] *See* Point I, *supra* as to vicarious liability and *Tison* issues.

514-15 (Fla. 1992); *Lewis v. State*, 398 So.2d 432, 438 (Fla. 1981).

In the case at bar, the HAC aggravating circumstance cannot be based upon the knife wound because of an absence of evidence that the Defendant knew or intended that a knife be used to inflict pain. In this multiple defendant case, the State agreed that Cave's jury should be instructed regarding Cave's mental state as to each aggravating circumstance. *See* Point I, *supra*. Cave's 1982 statement and 1996 Resentencing testimony established that he did not have the mental state necessary for the HAC aggravating circumstance, i.e.: that he did not know or intend that a murder be committed, that he did not know or intend that a knife would be used, and that he did not know or intend to torture the victim. *See McKinney v. State*, 579 So.2d 80 (Fla. 1991) (HAC circumstance not shown where victim received multiple gunshot wounds and evidence did not show that the Defendant intended to torture the victim). In *Robertson v. State*, 611 So.2d 1228, 1233 (Fla. 1993), the Florida Supreme Court said:

> The evidence here does not establish that Robertson shot [the victim] with the intention of torturing her or with the desire to inflict a high degree of pain or with the enjoyment of her suffering, thus the court erred in finding the heinous, atrocious or cruel aggravating circumstance.

In *Omelus v. State*, 584 So.2d 563, 566 (Fla. 1991), a defendant who was not present at the scene of the murder could not be held vicariously liable for the HAC aggravating circumstance when the execution went far beyond what had been agreed to:

> We must agree with Omelus that the trial court erred in instructing the jury that it could consider this [HAC] factor in determining its recommendation. No where in this record is it established that Omelus knew how Jones would carry out the murder of Mitchell, and, in fact, the evidence indicates that

> Jones was supposed to use a gun. There is no evidence to show that Omelus directed Jones to kill Mitchell in the manner in which this murder was accomplished. Under these circumstances, where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously.

The vicarious responsibility for the HAC aggravating circumstance was addressed again in *Archer v. State*, 613 So.2d 446 (Fla. 1993). The Florida Supreme Court found that the HAC aggravating circumstance could not be applied to an accused who is not present and did not intend the circumstances supporting HAC:

> In *Omelus v. State*, 584 So.2d 563 (Fla. 1991), we held that a defendant who arranges for a killing but who is not present and who does not know how the murder will be accomplished cannot be subjected vicariously to the heinous, atrocious, or cruel aggravator. Here, Archer knew that Bonifay would use a handgun to kill the victim; he did not know, however, that the victim would be shot four times or that he would die begging for his life. Witnesses testified to the manner of the victim's death, and the prosecutor argued the applicability of the aggravator. On the facts of this case, we are unable to say that this error in instructing on and in finding this aggravator is harmless.

Id. at 448.

In the case at bar, the Defendant was nearby when the killing occurred, but did not have an opportunity to intervene in the ultimate event. The State has not suggested that Cave was either the knifer or the triggerman. It is, therefore, clear that Cave's role in the instant homicide is similar to the vicarious roles played by Omelus and by Archer. Applying this vicarious responsibility rule, Cave cannot be held accountable for the HAC aggravator when the killing was unplanned, unexpected and committed by others where Cave was not immediately present. Based upon *Omelus* and *Archer*, and upon the State's agreed

amendment to the standard jury instruction, the evidence does not support imposition of the HAC aggravating circumstance against Cave. *See also Williams v. State*, 622 So.2d 456 (Fla. 1993) ("We have expressly held that this aggravating factor (HAC) cannot be applied vicariously, absent a showing by the State that the Defendant directed or knew how the victim would be killed").

There was little or no evidence that the killing was "unnecessarily tortuous to the victim".[30] The killing was "execution style" and, as described above, the single bullet caused instantaneous brain death. From his viewpoint (which must be the perspective taken in light of the instruction given the jury), Cave should not be held accountable for HAC aggravator purposes for the acts of his co-defendants because the killing was unplanned and unexpected. He participated in no circumstances surrounding the killing which may have caused it to become "unnecessarily tortuous to the victim". Even if, *arguendo*, Cave should be held accountable for the execution-style shooting, there is little or no evidence that he should be held accountable for the unanticipated use of a knife.

The State's jury argument focused upon the fear and emotional strain endured by Frances Slater during the time of the abduction. However, Cave discussed with Johnson, in

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[30] The evidence presented at this 1996 Resentencing is drastically different from the evidence considered by the Florida Supreme Court in the original Cave appeal. *Cave v. State*, 476 So.2d 180 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986). In the original appeal, the Florida Supreme Court upheld the HAC aggravating circumstance based upon evidence barely alluded to at the 1996 Resentencing, and certainly not established beyond a reasonable doubt. In the original appeal, there was evidence that the victim was in "such fear that her bladder involuntarily released, that there was a 'defensive wound' to her (the victim's) hand, in attempting to avoid being stabbed', and that the victim was 'maneuvered or controlled by grasping her by the hair'". *Id.* at 188. None of these facts were established at the 1996 Resentencing. Even if there is a general similarity in the factual findings, Cave's 1996 Resentencing was an "entirely new proceeding" which should proceed *de novo* on all issues bearing on a proper sentence. *Preston v. State*, 607 So.2d 404 (Fla. 1992), *cert. denied*, 113 S.Ct. 1619 (1992); *Teffeteller v. State*, 495 So.2d 744 (Fla. 1986); *King v. Dugger*, 555 So.2d 355 (Fla. 1990).

the clerk's presence, that she would not be killed (T1420-21, 26-27). The fear and emotional strain of the abduction does not establish the HAC aggravator. Compare *Robinson v. State*, 574 So.2d 108 (Fla. 1991), *cert. denied*, 112 S.Ct. 131 (1991) (HAC aggravator could not be predicated upon fear during abduction because the victim was assured "on several occasions that they did not intend to kill her and planned to release her") with *Lucas v. State*, 613 So.2d 408, 411 n.5 (Fla. 1992) (HAC supported by death threats communicated during several days before the murder caused the trial court to conclude that "the victim was aware that she was in mortal danger and reacted to the tremendous fear created by the defendant's threats".)

Frances Slater's fear during the abduction does not distinguish this case from other abduction cases. Although the victim said she would do anything if she would be released, the facts establish that she was not raped or tortured. The facts establish that the knife wound was momentarily followed by the fatal gunshot. The evidence at the 1996 Resentencing did not establish whether the urination occurred before or after death or, indeed, what the operative cause of the urination might have been.

Based upon the lack of evidence regarding the timing of the stab and gunshot wounds, the evidence failed to establish torture or physical suffering. *Compare Nibert v. State*, 574 So.2d 1059 (Fla. 1990) (HAC established where victim remained conscious while being stabbed 17 times and there were several defensive wounds) *with Maggard v. State*, 399 So.2d 973 (Fla. 1981), *cert. denied*, 454 U.S. 1059 (1981) (HAC improper in execution-style murder where victim is unaware of impending death). In *Lewis v. State*, 398 So.2d 432, 438 (Fla. 1981), it was said:

> [A] murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious or cruel.

See also Hartley v. State, 686 So.2d 1316, 1323 (Fla. 1996) ("Speculation that the victim *may* have realized that the defendants intended more than a robbery when forcing the victim to drive to the field is insufficient to support this aggravating factor."); *McKinney v. State*, 579 So.2d 80 (Fla. 1991) (HAC not shown where victim received multiple gunshot wounds and evidence did not show the defendant intended to torture the victim); *Menendez v. State*, 368 So.2d 1278 (Fla. 1979) (HAC not found where victim shot twice with arms in submissive position); *Cochran v. State*, 547 So.2d 928, 931 (Fla. 1989) (HAC not found where death resulted from single gunshot following abduction at gunpoint); *Scull v. State*, 533 So.2d 1137, 1142 (Fla. 1988) (HAC not found where victim died from a single blow to the head), *cert. denied*, 490 U.S. 1037 (1989). Thus, the HAC aggravator has not been proved.

POINT IV

THE EVIDENCE DOES NOT SUPPORT THE WITNESS ELIMINATION AGGRAVATING CIRCUMSTANCE

The evidence failed to establish the applicability of the witness elimination aggravating circumstance ("committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody") under Section 921.141(5)(e) (R1259). Since the Defendant did not personally kill the victim, he cannot be held vicariously liable for an aggravating factor unless he actually intended for the facts underlying the aggravator to occur. *Omelus v. State*, *supra*; *Williams v. State*, *supra*.

In light of the absence of direct evidence relative to Cave's intent to eliminate a

witness, the existence of the aggravator must be established via circumstantial evidence. The witness elimination aggravating circumstance may not be applied to Cave consistently with the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution. The circumstantial evidence rule requires that all reasonable inferences, consistent with the circumstantial evidence, be drawn in favor of the accused. *Simmons v. State*, 419 So.2d 316 (Fla. 1982). The witness elimination aggravator should not be found if the circumstantial evidence is consistent with any non-witness elimination explanation. *Jackson v. State*, 599 So.2d 103 (Fla. 1992) (Circumstantial evidence of aggravator was held insufficient), *cert. denied*, 113 S.Ct. 612 (1992).

As there was no direct evidence of Cave's agreement to kill, or participation in the killing, such a finding could only be predicated upon inferences drawn from the following facts:

1. That the victim was the only identification witness;
2. That no masks were worn during the course of the robberies;
3. That the store and the prospective victim had been "cased out" in advance of the actual robberies; and
4. That the victim was ultimately killed.[31]

During his 1982 statement, as well as his 1996 Resentencing testimony, Cave has maintained that he believed the victim would be transported to an isolated location and released unharmed. Cave denied the existence of any pre-agreed plan to kill the victim. The

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[31] If the killing was done in furtherance of a witness elimination scheme, it does not matter that the victim was transported to a remote location. She could have been killed just as easily, more quickly and with less opportunity for detection at the store. The fact she was transported could just as well have been to release her unharmed as to kill her.

exact time that Bush and/or Parker decided to kill the victim was not established. The circumstantial evidence is consistent with the explanation that Bush and Parker made a unilateral decision to kill the victim. This scenario is not inconsistent with Cave's description of the events and does not establish an agreed upon plan to eliminate a witness.[32]

The failure to attempt a concealment of identity may be explained by stupidity, by impairment due to the consumption of alcoholic beverages and use of marijuana, or by an intention to kidnap the victim for the purpose of releasing her unharmed. Notably, Cave did not have significant criminal experience[33] and testified that he was not familiar with the extent of the criminal records of Bush and Parker. In particular, Cave testified he was unaware that the criminal experiences of Bush and Parker may have motivated them to kill the victim. Although not wearing masks is also consistent with an intent to eliminate the witness, the circumstantial evidence rule mandates acceptance of any reasonable inference consistent with the inapplicability of the aggravating factor. *Simmons v. State*, *supra*.

The fact that the store and the victim had been "cased out" is consistent with a pre-planned robbery and kidnaping with intent to release the victim unharmed. As there was no direct evidence establishing that the killing had been pre-planned, the assumption that a killing had been agreed to in advance would be speculative and should be rejected. *Scull v. State*, *supra* ("Mere speculation" will not substitute for evidence that witness elimination was

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[32] During his 1996 Resentencing testimony, Cave said that Bush and Parker, who were seated in the front of the vehicle, were talking. However, Cave did not hear what they were talking about. The State offered no direct evidence inconsistent with this portion of Cave's testimony.

[33] The State agrees that Cave has no significant history of prior criminal activity. See p.4 of State's January 14, 1997 letter to Judge Trowbridge relative to sentencing issues.

dominant motive behind murder); *Consalvo v. State*, 697 So.2d 805, 819 (Fla. 1996) (*accord*).

The mere fact that the victim was killed, after being transported to a remote location, does not necessarily establish a previous plan of witness elimination. While such evidence is consistent with a pre-agreed plan to kill the victim, it is also consistent with Cave's explanation.

Before the witness elimination aggravator may be found, "the State must show beyond a reasonable doubt that the Defendant's dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness". *Robertson v. State*, 611 So.2d 1228, 1232 (Fla. 1993); *See Reilly v. State*, 366 So.2d 19 (Fla. 1978). In *Hansbrough v. State*, 509 So.2d 1081, 1086 (Fla. 1986), it was said that " the mere fact that the victim may have been able to identify her assailant is not sufficient to support finding this factor"; *Geralds v. State*, 601 So.2d 1164 (Fla. 1992) (*accord*). In *Scull v. State*, 533 So.2d 1137, 1143 (Fla. 1988), the circumstantial evidence rule was applied thusly:

> While several theories have been advanced as to why these murders took place, there is little evidence to support any of them. The trial court in its sentencing order seems to have accepted all of these theories, finding that they were committed for pecuniary gain, to eliminate witnesses, to effectuate escape, or as an underworld contract killing. Unfortunately, the trial court accepted these theories without the support of the record. Therefore, as aggravating circumstances, they must all be stricken.

In the case at bar, the jury was instructed that Cave must personally have had the mental state necessary for the witness elimination aggravator. *See* Point I, *supra*. Even if, *arguendo*, the aggravator was established as to Bush and/or Parker, the circumstantial evidence failed to establish the applicability of the aggravator to Cave.

POINT V

THE TRIAL COURT IMPROPERLY DOUBLED AGGRAVATING FACTORS FOR CCP AND WITNESS ELIMINATION AGGRAVATING FACTORS

Assuming, *arguendo*, that the evidence supports findings for both the CCP and witness elimination aggravating circumstances, one of them should be disallowed due to improper doubling. Improper doubling of these aggravators has been recognized, under limited circumstances, by the Florida Supreme Court in *Morton v. State*, 689 So.2d 259, 265 (Fla. 1997) ("While the improper doubling of these aggravators sometimes occurs, there is no *per se* prohibition against a binding that both aggravators are established").[34]

The trial court based a finding of these aggravators upon the same facts, to wit: that the witness was killed to avoid apprehension (R1259). *Morton* described the problem inherent in distinguishing the "distinct facts":

> In *Stein v. State*, 632 So.2d 1361, 1366 (Fla. 1994), we upheld the trial court's finding of both the CCP aggravator and the avoiding lawful arrest aggravator because each was supported by distinct facts. We noted that the CCP aggravator focused on the manner in which the crime was executed, i.e., the advance procurement of murder weapon, lack of resistance or provocation, the appearance of a killing carried out as a matter of course, while the avoid lawful arrest factor focused on the motivation for the crime. The record clearly reflected that the defendant and his cohort had planned to eliminate any witnesses to avoid arrest in connection with the robbery of a fast food restaurant.
>
> In short, no improper doubling exists so long as independent

[34] The jury was instructed: "The State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance." (T1806, R1253).

facts support each aggravator.

Morton, 689 So.2d at 265. It is noteworthy that *Morton* went on to conclude that the record was insufficient to determine whether either or both of these aggravators existed. *Id.*

There was not a scintilla of evidence that there existed an agreement in advance of the robbery for the clerk to be killed. In light of this, the same facts support both factors and both factors cannot be found to exist consistently with the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution.

POINT VI

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

This mitigator should be given great weight in the case at bar because Cave was not the actual triggerman or knifer §921.141(6)(a). Further, Cave has consistently maintained that he believed the victim would be released unharmed at a remote location. It is partly because Cave does not have a significant prior criminal history that his claim is believable.

The trial court applied the wrong legal standard. Essentially, the trial judge refused to give much weight to this statutory mitigator because this murder arose out of a robbery and kidnapping (R1260). This construction failed to apply the clear legislative intent that a first time criminal is entitled is special consideration.

Since the State has conceded Cave was not the actual killer, the trial judge's failure to give substantial weight to this mitigator is inconsistent with the requirement that death be a special penalty. *Lockett v. Ohio*, 98 S.Ct. 2954 (1978). Consistently, the same statutory

scheme would make a previous violent felony conviction a major aggravator. The trial court's weighing of the no significant criminal history mitigator is not supported by the law or the evidence and is not consistent with the 5th, 6th, 8th and 14th Amendments to the United States Constitution, Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution and Section 775.021(1) (rule of lenity).

POINT VII

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

The evidence reasonably establishes the applicability of the statutory mitigating circumstance under Section 921.141(6)(d) ("The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor"). The trial court erred in failing to find this mitigator was proved (R1260).

Although Cave was a major actor in the robbery and kidnapping, the evidence establishes that he was only an accomplice as to the killing. The evidence reasonably establishes that Cave believed that the victim would be transported to a remote location, then released unharmed. Although responsible for the first degree murder on a felony murder theory, Cave acted as an accomplice to the killing whose role was relatively minor in comparison to Bush and Parker.

The State's argument against this statutory mitigator confuses the language of Section 921.141(6)(d) with the term "major participation" as used in *Tison v. Arizona*, sup*ra*. *Tison* addresses the question when may the death penalty be applied against a non-triggerman who has been convicted on a felony murder theory: "...we simply hold that major participation

in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 107 S.Ct. at 1688.

The question in the case at bar is whether Cave's role in one aspect of the transaction (the robbery and kidnaping) may be distinguished from his role in a different part of the transaction involving the unanticipated (at least by Cave) killing. Applying the rule of lenity required by due process and by Section 775.021(1) ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of different constructions, it shall be construed most favorably to the accused"), the term "capital felony" must refer to either a premeditated killing or to that portion of the transaction where the killing occurs. It is the act of killing which converts the underlying robbery and kidnaping into a "capital felony". In the absence of the killing, the robbery and kidnaping would not be capital.

If the suggested construction is not given to this mitigator, then the mitigator would have no meaning above and beyond *Tison*. As already indicated, *Tison* mandates that a minor participant would not even be eligible for the death penalty. Consequently, Section 921.141(6)(d) must have some meaning in addition to *Tison* if we are to give effect to the terms used by the legislature. Since a jury may not even consider the appropriateness of mitigating circumstances unless the trial court first determines the Defendant's eligibility for the death penalty, it is obvious that this mitigator would never apply if given the construction suggested by the State.

The State has conceded that Cave was not the actual triggerman or knifer. Although the State suggests that Cave's 1982 statement and 1996 Resentencing testimony is self-serving

and/or not believable, the State has offered precious little evidence to contradict Cave's core assertion that he was unaware of any intention by Bush and Parker to kill the victim. This portion of Cave's testimony, although disputed by the State, is uncontroverted by direct or material circumstantial evidence. The legal standard for establishing a mitigating circumstance was set forth in *Nibert v. State*, 574 So.2d 1059, 1062 (Fla. 1990):

> Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. *See Campbell v. State*, 571 So.2d 415 (Fla. 1990)]. Thus, when a reasonable quantum of competent, uncontroverted evidence of of a mitigating circumstance is presented, the trial court must find that that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances". *Knight v. State*, 512 So.2d 922, 933 (Fla. 1987), *cert. denied*, 485 U.S. 929 (1988).

In addition to finding that this mitigator has been established, the trial court should give it great weight because this is the legislative recognition that different treatment may be accorded a non-triggerman and non-knifer where the accused did not intend for a killing to occur and his role in the actual killing was relatively minor. Although Cave is definitely guilty of robbery and kidnapping, and first degree murder on a felony murder theory, the evidence does not establish that Cave premeditated the murder. The failure to properly find and weigh this mitigator violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I,Sections 9, 16, 17, 21 and 22, of the Florida Constitution. *See Lockett v. Ohio, supra.*

POINT VIII

THE TRIAL COURT JUDGE ERRED IN FAILING TO FIND THE AGE MITIGATOR WHEN CAVE WAS 23 AT THE TIME OF THE OFFENSE

The evidence reasonably establishes the applicability of the statutory mitigating circumstance under Section 921.141(6)(g) ("The age of the Defendant at the time of the crime"). Since the Defendant was 23 at the time the instant crime was committed, he is eligible for the age mitigator. *See Huddleston v. State*, 475 So.2d 204, 206 (Fla. 1985) (Age of 23 was mitigating factor). The trial judge erred in failing to find this mitigator was proved (R1260-61).

The evidence established that Cave dropped out of high school after being required to repeat the 10th grade. Cave did not perform well in school and had no interest in education. After dropping out, Cave went on to perform a variety of different jobs. He traveled to visit family in Pennsylvania.

There is nothing about the age mitigator which requires that the accused be "naive" or that he suffer from some specific emotional or mental problem. Such an interpretation would suggest little difference between the age mitigator and the mental status mitigators contained in Section 921.141(6)(b) ("...defendant was under the influence of extreme mental or emotional disturbance"), (e) ("The defendant acted under extreme duress or under the substantial domination of another person".), or (f) ("The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.")

The principal focus of the age mitigator is just that: the age of the accused. The

legislature has intended that youth is a mitigating factor when not contradicted by some particular circumstance such as criminal sophistication, special planning or high intelligence. The evidence in this case established that Cave was not well educated at the time of the instant offenses, that he had little to no experience in criminal matters, and that his actions, in part, were governed by youthful assumptions as to the intentions of his co-defendants. It is precisely in these circumstances that an age mitigator would apply. The failure to find and weigh the age mitigator violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution. *See Lockett v. Ohio, supra.*

POINT IX

THE EVIDENCE REASONABLY ESTABLISHES A VARIETY OF NON-STATUTORY MITIGATING CIRCUMSTANCES

The evidence reasonably establishes the applicability of the following non-statutory mitigating circumstances under Section 921.141(6)(h) ("The existence of any factors in the defendant's background that would mitigate against imposition of the death penalty"):

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

The evidence reasonably establishes that Cave is remorseful for his actions, the actions of his co-defendants, and for the effect of these actions upon the victim, the victim's family and his own family. *Smalley v. State*, 546 So.2d 720, 723 (Fla. 1989) (remorse is non-statutory mitigator). Although the Defendant initially denied his involvement to the police, in short order he fully confessed his role in the robbery, kidnaping and murder. Cave's 1982 statement has been demonstrated to be an essentially correct description of what happened

just before, during and after the robbery. The trial court properly found this mitigator to be reasonably established, but erred in giving it little weight (R1261).

The Sentencing Order fails to reconcile how the Defendant's right to remain silent, which he has continuously exercised since 1982, can be reconciled with the finding "It comes too late - after fourteen years and two death sentences." In fact, no adverse inference should be drawn against the Defendant for exercising his right to remain silent during the time between 1982 and preparation for the 1996 Resentencing under the 5th and 14th Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution.

The trial court's comments display a misunderstanding of the right to remain silent and how the exercise thereof may not be used against Cave. However, the trial judge also found that Cave confessed "after previous lies, prior to this first trial."

The evidence reasonably establishes that Cave fully confessed his participation in these crimes. He did so after making a general denial. Within a short period of time, Cave made an unrecorded confession, then a detailed recorded statement. These statements were made on May 5, 1982 within 10 days of the murder (T1239-44). Moreover, Detective Jones described Cave as cooperative and the State has offered no substantial impeachment of either the 1982 statement or the 1996 resentencing testimony (R1250-51).

Cave's expression of remorse was sincere and heartfelt. Cave explained that experienced the death of his own son. Cave's son was killed by a hit and run driver in December, 1992. If Cave could not already empathize with the victim's family, the experience of losing his only child caused him to go through many of the same feelings

experienced by the victim's family. Cave's remorsefulness should be given significant weight because it offers a "window" into the soul of Alphonso Cave. The light shining through this[35] window offers hope that, if ever released, Cave will assume a contributing role in society.

The trial court's weighing of the non-statutory mitigator for remorse is not supported by the law or the evidence and is not consistent with the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution. *See Lockett v. Ohio, supra.*

B. THE TRIAL COURT ERRED IN FAILING TO DESCRIBE THE WEIGHT GIVEN TO THE NOT TRIGGERMAN/NOT KILLER MITIGATOR

The trial court found that Cave did not personally kill the victim. However, the trial court failed to state what weight, if any, he accorded this finding (R1261). The failure to explicitly weigh this non-statutory mitigator compromises the integrity of the sentencing order.

This finding should be considered in light of the finding that Cave had no significant criminal history and was under the influence of alcohol and marijuana when these events occurred. Similarly, this "non-killer" mitigator should be considered in light of Cave's professed lack of knowledge as to the criminal backgrounds of Bush and Parker and Cave's claim that he thought the clerk would be released unharmed.

In this context, the non-killer mitigator buttresses and reinforces the other mitigators. In fact, it would be virtually impossible to claim many of the other mitigators if Cave were

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[35]The Sentencing Order did not mention either the videotape played at, or the letter to Patrick Young submitted at, the allocution hearing (Defendant's Exhibit #27, R1375-86).

the killer. Consequently, the "non-killer" mitigator should be given great weight. The failure of the trial court to so weigh it violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution. *See Lockett v. Ohio, supra.*

C. THE TRIAL COURT ERRED IN FAILING TO FIND THAT CAVE DID NOT KNOW OR INTEND FOR THE KILLING TO OCCUR

The evidence reasonably establishes that Cave did not know or intend for the killing to occur. The trial court rejected this proposed mitigator as "not proven" (R1261). He rejected Cave's statements as not believable. He stated:

> The Court should not be bound to accept such self-serving statements as there is no way for them to be rebutted.

(R1261).

The foregoing statement of the trial court implies that Cave's statements were not substantially rebutted. However, the trial court applied the wrong legal standard. The correct legal standard is that the court must accept uncontroverted mitigation evidence. *Nibert v. State, supra.*[36]

This mitigating circumstance should be given great weight because it goes to the core of the Defendant's actions and relative culpability. While the law requires that Cave be held accountable for first degree murder, and imposes a minimum life sentence for this involvement, the law permits sentencing judges and juries to consider the various roles of an accused in a multi-defendant homicide. The mere fact of killing does not contradict the

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[36]The trial court went on to say he would accord this mitigator little weight if bound by law to accept it as proven (R1261).

Defendant's testimony regarding his mental state. The Defendant believed that the victim would be released unharmed in a remote location. Perhaps, the Defendant's belief was naive because he lacked criminal experience. Perhaps, the Defendant's belief was naive because he was unfamiliar with the criminal backgrounds of Bush and Parker. Nevertheless, there is no direct or compelling circumstantial evidence by which the State may refute this mitigating circumstance. The rejection of this mitigator (as well as according it little weight if proven) violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution.

D. THE TRIAL COURT ERRED IN FAILING TO FIND CAVE'S DEATH SENTENCE TO BE DISPROPORTIONATE TO HIS COHORTS' ROLES, BACKGROUNDS AND SENTENCES

By any measure, Cave's culpability for the killing of Frances Slater is less than the culpability than John Earl Bush and J.B. Parker. Bush had a criminal history which included a thirty year sentence for robbery and sexual battery. Bush had been released on parole for less than 6 months when he became involved in the instant criminal episode. Bush was clearly the "ring leader" in that it was his car, his gun and he was driving. It was Bush and Parker who, acting together, killed the victim. Bush needlessly knifed the girl knowing that she would be killed but a moment later. Parker had been previously convicted of accessory to armed robbery of a convenience store. Parker was the triggerman who actually shot the victim.

Although Cave held the gun during the robbery, Bush and Parker were present in the convenience store and helped rob the victim. Johnson helped case out the store and was, apparently, a "look out" in the car when the actual robbery occurred. Bush, Parker and Johnson were as equally involved as Cave in the commission of the robbery and kidnaping.

The Florida Supreme Court has recently examined the relative roles of Bush, Parker and Cave in this homicide. *Bush v. State*, 682 So.2d 85 (Fla. 1996). *Bush* clearly establishes the Florida Supreme Court's finding that Bush and Parker were significantly more culpable than Cave based upon their respective roles in the offense:

> More importantly, however, is the fact that Bush played a predominant role in this crime. The four assailants drove in Bush's car, and Bush admitted that they intended to rob the store. While Bush's stab wound was not fatal, he nevertheless inflicted a two-inch wound in the victim's stomach. Bush

> himself said it was Parker, not Cave, who administered the final shot. Moreover, Bush had committed a prior violent felony at the time of the murder, whereas Cave had not done so. Therefore, even if Cave were to receive a life sentence, it could not be said that Bush's death sentence would be disproportional. (citations omitted)

Bush, 682 So.2d at 87.

Just as Bush and Parker are clearly more culpable than Cave as to the killing, Terry Wayne Johnson should be considered equally culpable due to the evidence that both Cave and Johnson did not intend for the killing to take place or help it occur. The guilty verdicts against Johnson suggest that Johnson was directly involved in the robbery, kidnaping and murder. However, Johnson has received a life sentence. The fact that a co-defendant has received a life sentence may constitute a mitigating circumstance. *Demps v. Dugger*, 874 F.2d 1385 (11th Cir. 1989); *Brookings v. State*, 495 So.2d 135 (Fla. 1986); *see Scott v. Dugger*, 604 So.2d 465, 469 (Fla. 1992) ("[I]n a death case involving equally culpable defendants, the death sentence of one co-defendant is subject to collateral review under Rule 3.850 when another co-defendant subsequently receives a life sentence"); *Campbell v. State*, 571 So.2d 415, 419-20 (Fla. 1990).

This Court should consider and weigh the relative roles of each of these four men in the slaying of Frances Slater, as well as the strength of aggravating and mitigating circumstances. This proportionality analysis must conclude that Cave is less culpable than Bush and Parker, and no more culpable than Johnson, as to the killing. The lesser degree of culpability constitutes a mitigating circumstance. The failure of the trial court to find this mitigator violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution

and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution. *See Lockett v. Ohio, supra.*

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

The trial court found that the Defendant saved the life of his cousin, Frank Andrews, during the course of a fishing incident. This incident was established both by the testimony of Frank Andrews and the Defendant. The trial court erred in failing to give substantial weight to this finding (R1261). *Fuente v. State*, 549 So.2d 652, 654 (Fla. 1989) (saving a woman from drowning found to be mitigator).

The fact is that Alphonso Cave has saved a human life. Although his later actions contributed to the death of another human, the saving of Frank Andrews' life is an act which reflects positively on the Defendant's character. The failure of the trial court to give this mitigator substantial weight violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution. *See Lockett v. Ohio, supra.*

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

The trial court found that Alphonso Cave was under the influence of alcohol and/or marijuana at the time of the robbery, kidnaping and murder (R1262). Evidence supporting this finding includes:

1. Deputy Tim Bargo gave a description which placed the Defendant into the back seat. Deputy Bargo's testimony placed an empty liquor bottle into the floor board area

of the same back seat. According to Deputy Bargo, this individual gave a false name of Alphonso "King" Brown with a date of birth identical to Alphonso Cave.

2. Within several days of stopping Bush's vehicle, Deputy Bargo reported his observations to State Attorney investigator Tom Ranew. Investigator Ranew promptly prepared a written report recording in detail the information communicated to him by Deputy Bargo. His report, admitted into evidence as Defense Exhibit #28, establishes that Deputy Bargo reported that the individual in the left rear seat, meeting Cave's description and date of birth, had difficulty speaking and possibly suffered from "mental problems".

3. Cave described smoking marijuana and drinking alcoholic beverages during the course of his 1982 statement, although he conceded that he still knew what was going on.

4. During his 1996 Resentencing testimony, Cave further described the use of marijuana and alcoholic beverages in the hours immediately preceding the robbery, kidnaping and murder. This testimony establishes that Cave was under the influence of alcohol and/or marijuana at the time of these offenses, although not rising to the level of the statutory mitigating factor of Section 921.141(6)(f) ("The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired"). *See Fead v. State*, 512 So.2d 176, 178 (Fla. 1987) (defendant was under influence of alcohol at time of offense); *Amazon v. State*, 487 So.2d 8 (Fla. 1986) (drug use at time of offense may be mitigator), *cert. denied*, 107 S.Ct. 314 (1986); *Smalley v. State*, 546 So.2d 720, 723 (Fla. 1989) (marijuana use at time of offense may be mitigator); *Buckrem v. State*, 355 So.2d 111, 113-114 (Fla. 1978) (drinking on night of homicide).

G. THE TRIAL COURT ERRED IN GIVING LITTLE WEIGHT TO THE REMAINING SEVEN NON-STATUTORY MITIGATING CIRCUMSTANCES

The trial court found that the following non-statutory mitigators were reasonably established (R1262-63):

1) The Defendant was a good and considerate son to his mother;

2) The Defendant demonstrated unselfishness and concern toward his neighbors;

3) The Defendant worked steadily and supported himself and his son;

4) The Defendant loved and nurtured his son;

5) The Defendant's only son was killed as a result of a criminal act;

6) The Defendant has improved himself through education and religious study while in prison; and

7) The Defendant confessed his involvement.

Although these mitigating factors were found to exist, the trial court erred in according them little weight. This misconstrues the requirement of both §921.141(6)(h) ("The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty") and *Lockett v. Ohio, supra*. These require for the court to give serious consideration to any aspect of the Defendant's character or the offense. *See Smalley v. State, supra* (The fact that the defendant worked steadily and supported his family was found to be a non-statutory mitigating circumstance); *Buckrem v. State, supra. (accord)*; *Halton v. State*, 573 So.2d 284 (Fla. 1991) (Quality of being a caring parent may be a non-statutory mitigator).

The evidence put on during the Defendant's case in chief clearly established that the Defendant was a good person up to the time these crimes were committed. The evidence established the Defendant's basic good nature, ability to work at honest labor, and devotion to his only son. All of these are human attributes which reflect positively on the Defendant's character and thereby substantially mitigate his role in these crimes.

The evidence also established that the Defendant's only son was killed by a hit and run driver. If he did not already empathize with the victim's family, this cruel experience has brought the entire situation "home" to him. The sudden loss of a child via criminal agency lends additional support to his claims of remorse and rehabilitation.

The evidence establishes that the Defendant has bettered himself through education and religious study while incarcerated. The Defendant has simply not "passed time" on death row. He has found a "silver lining" in his lengthy incarceration, to wit: an opportunity to advance his education and religious development. These facts establish the Defendant's adjustment to prison conditions and suggest a likelihood that, if ever released on parole, he could return to civilian life in an appropriate fashion. *Skipper v. South Carolina*, 476 U.S. 1 (1986) (Good behavior and adjustment to death row may be mitigator); *Nibert v. State*, *supra* (remorse and good potential for rehabilitation in prison environment is mitigating circumstance); *Brown v. State*, 526 So.2d 903, 908 (Fla. 1988) (Potential for rehabilitation is mitigating factor); *Jackson v. State*, 522 So.2d 802, 805 (Fla. 1988) (Good adjustment to prison life is mitigating factor).

The evidence establishes that the Defendant confessed his involvement first to his girlfriend, then his mother, then his grandmother. Within ten days of the offense, the

Defendant accompanied police officers to the Fort Pierce State Attorney's Office where he subsequently confessed his involvement to Detective Jones. He confessed, once again, his involvement at the 1996 Resentencing. His confessions were true and assisted law enforcement in prosecuting the case against him.

The trial court's weighing of these non-statutory mitigators is not consistent with §921.141(6)(h) and the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution.

POINT X

THE "FOUR CORNERS DOCTRINE" SHOULD BE APPLIED TO THE SENTENCING ORDER TO PRECLUDE THE ASSERTION OF FACTS, WHICH WOULD ALLEGEDLY SUPPORT AN AGGRAVATING FACTOR, WHICH ARE NOT DETAILED IN THE SENTENCING ORDER

The instant sentencing order might be described as terse or "to the point". Cave submits, however, that the brevity of the sentencing order, with respect to findings of aggravators, may not be construed as granting license either to the State or this reviewing court to suppose matters not specifically mentioned. Matters not squarely included within the four corners of the sentencing order, as it applies to findings of aggravators, may not be used to support the sentencing order.

Section 921.141(3), Florida Statutes (1995) provides in part:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the [aggravating and mitigating circumstances] and upon the records of the trial and sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment...

In *Hernandez v. State*, 621 So.2d 1353, 1357 (Fla. 1993), it was said that "the purpose of this requirement is to insure that each death sentence handed down in Florida results from a thoughtful, deliberate and knowledgeable weighing by the trial court of all aggravating and mitigating circumstances...". This requirement is so important that the Florida Supreme Court requires that "all written orders imposing a death sentence [must] be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement". *Grossman v. State*, 525 So.2d 833, 841 (Fla. 1988), *cert. denied*, 109 S.Ct. 1354 (1989). In fact, the failure to provide timely written findings will compel the imposition of a life sentence. *Stewart v. State*, 549 So.2d 171, 176 (Fla. 1989), *cert. denied*, 110 S.Ct. 3294 (1990). *Accord*, *Layman v. State*, 652 So.2d 373, 375 (Fla. 1995).

The reason for the strict application of this rule requiring a written order to be filed contemporaneous with the pronouncement of sentence has been justified thusly:

> The purpose of this contemporaneity requirement is to implement the intent of the legislature - to insure that written reasons are not merely and after-the-fact rationalization for a hasty, visceral, or mistakenly reasoned initial decision imposing death.

Hernandez, 621 So.2d at 1357.

Cave submits that the contents of the sentencing order must be accepted as they are written.[37] The trial judge, for example, failed to make any finding that Cave was a major participant in the homicide and that he had a mental state of intent to kill, did attempt to kill, or acted in reckless disregard for human life - above and beyond that normally attendant

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[37]By arguing this point, Cave does not waive or diminish his other claims that the factual findings and legal conclusions are not supported by the evidence.

to a robbery and abduction. Accordingly, without factual findings of this nature, Cave should be sentenced to life due to a failure of the sentencing order to establish eligibility for the death penalty under the *Enmund/Tison* standard. *See* Point I, *supra*.

With respect to findings in support of HAC, the trial judge failed to find that the clerk had been told, verbally or by some other communicative means, that she would be killed before the killing actually occurred. There was no finding that Cave was party to an agreement that the clerk would be killed. There was no finding that there was an agreement that the clerk would be killed using a knife and a gun, instead of just using a gun. There was no finding either as to why or when the clerk's panties became be wet with urine. There is no finding that the overall transaction was "unnecessarily tortuous". The implication is, therefore, that the court found that each of these items was not proved. As such, the factual findings are inconsistent with the applicability of the HAC aggravator (R1259). *See* Point III, *supra*.

As to the CCP aggravator, the trial judge referred to a "general plan of the defendant and his associates to find a convenience store to rob", but did not specifically make a finding of the HAC elements as defined by the jury instruction. In particular, there was no finding that Cave participated in, or knew of, a careful plan or prearranged design to commit murder. There was no finding that there was a "heightened level of premeditation" as "demonstrated by a substantial period of reflection". There was no finding of a period of calm and cool reflection by Cave of the impending murder. Without making findings on these particular issues, the sentencing order is legally insufficient to establish the CCP aggravator. This reviewing court should not speculate why additional factual findings were

not made. Instead, this reviewing court should assume that the factual findings were not made because the facts were not interpreted by the trial court as supporting the individualized findings (R1259).

The sentencing order, likewise, fails to address the elements of the witness elimination aggravator. The sentencing order does not make a finding that the dominant or only motive for the murder was the elimination of a witness.[38] While the sentencing order professes disbelieve of Cave's claim that he did not intend or expect the victim to be murdered, the sentencing order states no factual basis for this conclusion. Since there was no direct evidence as to Cave's mental state, his intention would be the subject of circumstantial evidence. The sentencing order fails to address which circumstances were relied upon in making a finding. Since the sentencing order fails to state which part of Cave's statement caused the trial court's belief, it may be assumed that the trial court improperly considered testimony given by the defendant during the defense case in chief. It would be inconsistent with the State's burden of proof for the trial court to rely upon defense evidence in establishing an aggravator. Moreover, while the sentencing order concludes that "the purpose of the abduction and killing was clearly to eliminate the only witness, it fails to find that Cave had agreed to that purpose and was a party to that purpose. Since the findings are insufficient, the witness elimination aggravator must be stricken (R1259).

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[38] The sentencing order merely recites that "the purpose of the abduction and killing was clearly to eliminate the only witness to the robbery". This factual finding by the trial court does not indicate whther this was the only purpose, the dominant purpose, or one of several purposes.

POINT XI

THE CIRCUMSTANTIAL EVIDENCE FAILED TO PROVE THE CAUSE OF THE URINATION BEYOND A REASONABLE DOUBT

When circumstantial evidence is relied upon to prove a specific fact, each supporting circumstance must be proved beyond a reasonable doubt. *Mugin v. State*, 667 So.2d 751 (Fla. 1995); *Simmons v. State, supra.* The circumstantial evidence failed to establish beyond a reasonable doubt that the urine release was a pre-mortem phenomenon related to the victim's fear.

Regarding this issue, Dr. Wright was asked on cross-examination:

> Q: Would you agree that its impossible to say whether the urine release was a post-mortem phenomenon or a pre-mortem phenomenon?
> A: Yes.

(T1224).

Dr. Wright was additionally asked on cross-examination:

> Q: So in terms of establishing the circumstances in which the bladder may have become voided, you simply can't say one way or the other, can you?
> A: That's correct.

(T1225).

The following exchange took place during the State's redirect examination:

> Q: (by Mr. Morgan) You say its impossible to say whether it was before death or after death?
> A: That's correct.
> Q: But its not more consistent with being before death, isn't the fact - excuse me, isn't the fact that the bladder was completely empty is (sic) more consistent with being before death than after death?
> A: Precisely.

> Mr. Garland: I'm going to object to that because it calls for speculation, it's either consistent or not consistent. To say that it's more consistent, which he's already indicated he can't form an opinion, it means its not being stated within a reasonable degree of medical certainty which is the standard for expert testimony in this particular area, and we object based on the relevancy, 401, 403, Your Honor.
> Mr. Morgan: Your Honor, he's already asked all of these questions.
> The Court: I'll overrule the objection.
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> ****
>
> A: That's precisely correct. I can't tell about the positionings, probably a little bit more consistent with it being post-mortem, that is to say its on the seat of the clothing that's down at the time. To completely emptying the bladder on the other hand, although its possible, its highly improbable for it to have occurred anytime other than while she was alive.

(T1226-28).

The Defendant submits that the objective to opinion was irrelevant if not held within a reasonable degree of medical certainty. Or, if marginally admissable, the probative value would be outweighed by the prejudice of the speculation as provided by Sections 90.401 and 403, Florida Statutes (1995).

Even if, *arguendo*, all of Dr. Wright's observations and opinions are considered, the evidence fails to establish that the release of urine was a pre-mortem phenomenon as opposed to a post-mortem phenomenon. Therefore, the operative circumstantial fact has not been established.

The State has sought to draw the inference that the release of urine was associated with pain. However, such an association would not exist unless the release of urine was a pre-mortem phenomenon. The only comment by Dr. Wright on this issue was as follows:

> Q: Alright. One other thing. Didn't you mention several times that if it was a pre-mortem emptying of the bladder before death -
> A: Yes.
> Q: - that you would suspect the driving force behind that would be the pain associated with the stab wound of the abdomen; is that correct?
> A: Yes.

(Emphasis supplied)

(T1228).

Quite obviously, the foregoing hypothetical question ("If it was...") does not establish as true that which is supposed. Further, the conclusion only confirms a suspicion. For these reasons, the circumstantial evidence has failed to prove both the timing of the urine release with respect to death and any association between the urine release and supposed suffering.

POINT XII

THE HAC JURY INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

In *Espinosa v. Florida*, 112 S.Ct. 2926 (1992), the HAC instruction was struck down as unconstitutionally vague. Even before the United States Supreme Court compelled it, Florida amended its definition of HAC. *Florida Jury Instructions*, 579 So.2d 75 (Fla. 1991). The Defendant submits that the new HAC instruction, as given in the case at bar, is likewise constitutionally defective and violative of the 5th, 6th, 8th and 14th Amendments to the United States Constitution, and Article I, Sections 9, 16 and 17 of the Florida Constitution.[39]

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[39]The Defendant filed his Motion To Declare Sections 921.141 and/or 921.141(5)(h), Florida Statutes, and/or the Standard (5)(h) Instruction Unconstitutional Facially and as Applied (R141-53 [Pre-Trial Motion #15 (SR)], R222 [order denying]), and his Notice of Objection To Standard Jury Instruction Relating the Heinous, Atrocious, Cruel Aggravating Circumstance Based on Chapter 921.141(5)(h)/Motion To Modify Standard Jury Instruction For Heinous, Atrocious, or Cruel (HAC) (R1234-39 [Defendant's Special Requested Jury Instruction

The jury instruction utilized in the case at bar begins with the very words condemned as meaningless and applicable to all first degree murders. *Cartwright v. Maynard*, 822 F.2d 1477, 1488 (10th Cir. 1987) (*en banc*) *affirmed* in *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Shell v. Mississippi*, 498 U.S. 1 (1990). The instruction does not describe consciousless or pitiless crimes which are unnecessarily tortuous to their victims as a *limit* on HAC, but merely as a "kind of crime intended to be included" as HAC. Florida's new HAC instruction is no better than the old instruction.

Even if the last sentence of the new HAC instruction were read to *limit* the jury's instruction, the jury might well believe it means a "consciousless" crime, even one not "unnecessarily tortuous", would be HAC. Such an instruction provides no guidance defining HAC because "consciousless" is a "catch-all" subjective aggravating factor. It places complete, effectively unreviewable, discretion in the hands of the sentencor, contrary to the 8th Amendment.

The use of the phrase "unnecessarily tortuous", without further definition, is confusing and invites a subjective response. The inconsistency of appellate decisions applying HAC demonstrate that further definition is needed. *See Burns v. State*, 609 So.2d 600 (Fla. 1992) (If crime is not committed for the purpose of causing unnecessary suffering, HAC should not be found); *Hallman v. State*, 560 So.2d 223 (Fla. 1990) (In a shooting case, HAC was not found because defendant "did nothing to increase or prolong" suffering); *Cheshire v. State*, 568 So.2d 908 (Fla. 1990) (HAC is proper only in tortuous murders that "evince

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#6], T1620-32 [denial])

extreme or outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of suffering of another"). No guidance is given to distinguish between "necessarily" and "unnecessarily" tortuous crimes. Absent specific guidance, this phrase does not cure the catch-all nature of the vague language which invites the jury to impose death in an arbitrary and inconsistent manner. The HAC instruction, as given, violates the constitutional requirement that the death penalty not be inflicted in an arbitrary and capricious manner. *See Proffitt v. Florida*, 428 U.S. 242 (1976); *Hodges v. Florida*, 113 S.Ct. 33 (1992), *vacating Hodges v. State*, 595 So.2d 929 (Fla. 1992).

POINT XIII

THE HAC AGGRAVATOR IS UNCONSTITUTIONAL

Caved moved pre-trial to declare Section 921.141(5)(e) unconstitutional facially and as applied (R141-153 [Pretrial Motion #15 (SR)]). This motion was improperly denied by the trial court (R222) and Cave maintains that this section violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution. Cf State's response (R203-06).

POINT XIV

THE WITNESS ELIMINATION INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

In *Espinosa v. Florida, supra*, *Hodges v. Florida, supra,* and *Jackson v. State*, 633 So.2d 1051 (1994), the instructions pertaining to CCP and HAC were struck down because the instructions did not adequately explain the law. For this reason, the instruction pertaining to the witness elimination aggravator is, likewise, defective and unconstitutional.

The following standard jury instruction was given pertaining to witness elimination:

> The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. 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;

(R1252). §921.141(5)(e). This instruction fails to explain the perameters of the witness elimination aggravating factor as it has been interpreted by the Florida Supreme Court. In particular, the standard jury instruction is defective because it fails to advise the jury that "the mere fact that the victim knew and could identify the defendant, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt". *Geralds v. State*, 601 So.2d 1157, 1164 (Fla. 1992). *See Perry v. State*, 522 So.2d 817, 819-20 (Fla. 1988). The defendant did, accordingly, request for the standard jury instruction to be modified to include the following language:

> This circumstance applies only where there is strong proof that avoiding arrest by eliminating a witness was the sole or dominant motive for the murder. This circumstance does not apply where Alphonso Cave or someone with him may have merely panicked while committing another offense. The mere fact that the decedent knew or could identify Alphonso Cave is insufficient to prove this aggravating factor beyond a reasonable doubt.

The Defendant timely objected to the constitutionality of the aggravating factor and the instruction in his Pretrial Motion #12(SR). *See* Motion To Declare §921.141 and/or §921.141(5)(e), Florida Statutes, and/or its Standard Jury Instruction Unconstitutional Facially and as Applied and to Preclude its Use at Bar (R117-26). The Defendant additionally objected to the standard jury instruction, and submitted the above-quoted

modification, in his Notice of Objection To Jury Instruction Relating To the Aggravating Circumstance in Chapter 921.141(5)(e)/Motion To Amend Standard Jury Instructions Relating to the "Witness Elimination Aggravating Circumstance" (R1229-30).

The witness elimination instruction was unconstitutionaly vague in violation of the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution. In view of the cumulative error in this case, as well as the evidence in mitigation, it cannot be said that the defective witness elimination instruction did not affect the jury's weighing process beyond a reasonable doubt. *Stringer v. Black, supra.* The remedy is to reverse and remand for a new sentencing before a jury.

POINT XV

THE WITNESS ELIMINATION AGGRAVATOR IS UNCONSTITUTIONAL

Cave moved pre-trial to declare Section 921.141(5)(e) unconstitutional (R117-126 [Pre-trial Motion #12 (SR)]). Although the trial court denied the motion (R222), Cave continues to maintain this provision is unconstitutional in violation of the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution. See State's response (R195-98).

POINT XVI

THE FELONY MURDER INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

In *Espinosa v. Florida, supra*, *Hodges v. Florida, supra*, and *Jackson v. State, supra*, the instructions pertaining to CCP and HAC were struck down because the instructions did not adequately explain the law. For this reason, the instruction pertaining to the felony

murder aggravator is, likewise, defective and unconstitutional.

The following standard jury instruction was given pertaining to the felony murder aggravator:

> The 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 kidnapping.

(R1252). *See* §921.141(5)(d). This instruction fails to explain the perameters of the felony murder aggravating factor as it has been interpreted by the Florida Supreme Court. In particular, because it mirrors the elements of felony murder. In the context of the CCP aggravator, the Florida Supreme Court said in *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990):

> Since premeditation already is an element of a capital murder inf Florida, Section 921.141(5)(i) must have a different meaning; otherwise it would apply to every premeditated murder (footnote omitted).

See Zant v. Stephens, 462 U.S. 862, 877 (1983).

In this particular case, the 11th Circuit Court of Appeals determined that the Defendant's underlying murder conviction was only valid under a felony murder theory. *See* Point XIX, *infra*. As such, the felony murder aggravator adds nothing to distinguish Cave's felony murder conviction from other felony murder convictions. Quite obviously, every felony murder conviction will necessarily result in a finding of the felony murder aggravator.

The Defendant timely objected to the constitutionality of this aggravator and the instruction in his Pretrial Motion #11(SR). *See* Motion To Declare §921.141 and/or §921.141(5)(d), Florida Statutes, and/or the (5)(d) Standard and Interim Instructions

Unconstitutional Facially and as Applied and to Preclude Their Application at Bar (R110-16).

The Defendant additionally objected to the standard jury instruction by filing his Special Request Jury Instruction #3. *See* Notice of Objection To Jury Instruction Re: Fla. Stat. 921.141(5)(d) - Motion To Strike Jury Instruction Relating To Felony Murder Aggravating Circumstance (R1226-28).

The felony murder instruction was unconstitutionally vague because, in part, it 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. *Godfrey v. Georgia*, 100 S.Ct. 1759 (1980). *See Maynard v. Cartwright,* 108 S.Ct. 1853, 1857-58 (1988). Felony murder instruction violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution. In view of the cumulative error in this case, as well as the evidence in mitigation, it cannot be said that the defective felony murder instruction did not affect the jury's weighing process beyond a reasonable doubt. *Stringer v. Black, supra.* The remedy is to reverse and remand for a new sentencing before a jury.

POINT XVII

THE FELONY MURDER AGGRAVATOR IS UNCONSTITUTIONAL

Cave moved pre-trial to declare Section 921.141(5)(d) unconstitutional facially and as applied (R110-116 [Pretrial Motion #11 (SR)]). Although this motion was denied by the Court (R222), Cave continues to maintain that this section violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution. See State's response (R193-94).

POINT XVIII

THE CCP AGGRAVATOR IS UNCONSTITUTIONAL

Cave moved pre-trial to declare Section 921.141(5)(i) unconstitutional facially and as applied (R154-168 [Pretrial Motion #16 (SR)]). Although the motion was denied by the Court (R222), Cave continues to assert that this section violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution. See State's response (R207-08).

POINT XIX

THE CCP AGGRAVATOR SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY BASED UPON THE FAILURE TO HOLD A NEW GUILT PHASE TRIAL

The application of the CCP aggravator would be inconsistent with the decision in *Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992), which is the law of this case as it pertains to the ineffectiveness of Cave's original trial counsel in 1982. After extensive analysis of the ineffective assistance of counsel claim, the 11th Circuit concluded that the Defendant was entitled to a new sentencing proceeding, but not to a new guilt phase trial:

> We are disturbed by [Karen] Steger's representation of Alphonso Cave. In particular, we are troubled by the fact that a defendant facing the possibility of execution in Florida's electric chair was defended by counsel who, in the words of the district court, had a "grandiose, perhaps even delusional" belief in her abilities, especially so because she was trying her first capital case. We are convinced that Steger completely misunderstood the law of felony murder, which is a concept that often confuses law people, but should be within the grasp of lawyers, especially those defending a client charged with a capital offense. We believe, however, that even a highly competent lawyer could not have won Cave an acquittal. His confession to robbery sealed his conviction for felony murder

> and Petitioner offers no reason why any other counsel might have succeeded in suppressing Cave's statement. In this case, Cave has not demonstrated that there is a reasonable probability that, but for his counsel's incompetence, the results of the trial would have been different. Hence, we conclude that Cave has failed to comply with the prejudice prong of *Strickland* regarding the guilt phase of his trial (Citation omitted).

Id. at 1518.

The 11th Circuit concluded:

> The representation provided to Cave by the State of Florida constitutes an embarrassment to the legal profession. However, we have found no evidence of prejudice in the conduct of the guilt phase because it is highly unlikely that the result of the trial would have changed even if his counsel had understood the law of felony murder. Our conclusion regarding the penalty phase, however, is different. Competent counsel would have prepared for sentencing and would have produced witnesses that the district court found were ready and willing to testify for Cave. Even without this evidence the sentencing jury came within one vote of recommending life imprisonment. Petitioner has demonstrated prejudice such that our confidence in the sentence of death is greatly undermined. We therefore affirm the district court's order denying relief on the conviction and granting the writ of habeas corpus as it relates to sentencing.

Id. at 1519-20.

It would be illogical for the CCP aggravator to be found in the penalty phase when the 11th Circuit did not approve a guilt phase conviction on that basis. Florida law requires that there be a heightened level of premeditation in order to qualify for the CCP factor. Cave submits that a penalty phase finding of CCP violates double jeopardy and due process in violation of the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution. Allowing the State to go forward with the CCP aggravator would violate the law of the case, the law of the

mandate and the holding of *Cave v. Singletary, supra.*

POINT XX

THE DEATH PENALTY PROCEDURE IS UNCONSTITUTIONAL BECAUSE IS PRECLUDES CONSIDERATION OF MITIGATION BY IMPOSING IMPROPER BURDENS OF PROOF OR PERSUASION

Cave moved pre-trial to declare Section 921.141 unconstitutional because it precludes consideration of mitigation by imposing improper burdens of proof or persuasion (R175 [Pretrial Motion #18 (SR)]). Although the motion was denied by the trial Court (R222), the Defendant continues to maintain that the improper burdens of proof or persuasion, for the reasons outlined in the motion, violate the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution. See State's response (R210-12); Defendant's Notice of Objection to Florida Standard Jury Instructions in Capital Cases/Proposed Modifications to Cure Infirmities in Florida Standard Jury Instructions Relating to Capital Cases/Memorandum of Law, etc. (R777-98).

POINT XXI

THE DEATH PENALTY PROCEDURE IS UNCONSTITUTIONAL FOR FAILURE TO PROVIDE THE JURY ADEQUATE GUIDANCE IN THE FINDING OF SENTENCING CIRCUMSTANCES

Cave filed his motion to declare section 921.141 unconstitutional for failure to provide jury adequate guidance in the finding of sentencing circumstances (R28-39 [Pretrial Motion #6 (SR)]). Although denied by the trial court (R220), the Defendant submits that Section 921.141(2) fails to provide guidance as to how the jury is to go about determining the existence of aggravating factors or how to go about weighing them. It does not state whether the jurors must find individual aggravating factors unanimously, by majority, by plurality,

or even individually. It establishes no standard of proof regarding mitigating circumstances. Hence, the statute is unconstitutional for failure to give the jury adequate guidance in finding and weighing the aggravating and mitigating circumstances. Further, it is unconstitutional as applied because it has been construed in an arbitrary fashion without compliance or due process and the constitutional prohibition of cruel and unusual punishment in violation of the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution. See State's Response (R88-89); Defendant's Notice of Objection to Florida Standard Jury Instructions in Capital Cases/Proposed Modifications to Cure Infirmities to Florida Standard Jury Instructions Relating to Capital Cases/Memorandum of Law, etc. (R777-98).

POINT XXII

THE "VICTIM INJURY" PORTION OF THE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Cave moved to exclude the "victim impact" evidence and argument and to declare §921.141(7) unconstitutional (T1655-63, R429-446 [Pretrial Motion #30(SR)]). Although denied by the trial court (R1202), the Defendant submits that §921.141(7) is unconstitutional under Florida law and a violation of Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution. In short, §921.141 has not been amended to include victim impact evidence either as an aggravating factor or relevant to proven aggravating factor. The addition of §921.141(7) does not alter existing state law limiting aggravating circumstances to those listed in §921.141(5). Thus, such evidence continues to be irrelevant to the statutory aggravators.

The victim impact statute is also unconstitutional because Florida, unlike Tennessee,

is a "weighing state", the introduction of victim impact evidence and argument in a Florida capital proceeding continues to violate the state and federal constitutions, in addition to Florida law. *See Payne v. Tennessee*, 111 S.Ct. 2597 (1991); V, VI, VIII, and XIV, U.S. Const., in a weighing state, aggravating factors must be carefully defined, *See Espinosa v. Florida*, 112 S.Ct. 2926 (1992), and the consideration of matters not relevant to aggravating factors renders a death sentence violative of the 8th Amendment. *Sochor v. Florida*, 112 S.Ct. 2114 (1992); *Stringer v. Black*, 112 S.Ct. 1130 (1992).

The victim impact statute violates Article V, Section 2(a) of the Florida Constitution, which states, in relevant part, "The Supreme Court shall adopt rules for the practice and procedure in all courts." The Florida Supreme Court has consistently held this provision is exclusive and that any statute which invades this prerogative is invalid. *See Haven Federal Savings and Loan Association v. Kirian*, 579 So.2d 730 (Fla. 1991); *State v. Garcia*, 229 So.2d 236 (Fla. 1969).

The admission of victim impact evidence and argument would render Florida's death penalty statute unconstitutional under the Florida and United States Constitutions as it leaves the jury and judge with unguided discretion. The admission of victim impact evidence and argument violates the federal and state constitutions for several reasons. First, such evidence intrudes into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, the proof is highly emotional and inflammatory, subverting the reasoned and objective inquiry which the courts have required in order to guide and regularize the choice between death and lessor punishments. Moreover, victim impact evidence protrays grief-stricken relatives expressing their extreme

sorrow, sense of loss, and anger over their bereavement - often in highly emotional terms. These events have no bearing on the circumstances of the crime or the character and background of the defendant, and victim impact evidence unlawfully interferes with consideration of mitigation.

The victim impact statute is unconstitutional because it places no limits on who can testify or what they can testify to. The terms are no defined in any meaningful way. Regardless what it may mean, the evidence is not relevant to aggravating or mitigating circumstances and the standard jury instructions do not provide guidance as to how to weigh it.

The victim impact law is *ex post facto*. The instant crime occurred in 1982, long before the victim impact law was enacted. The application of this law to the case at bar is prohibited by Article I, Section 10, Clause 1, of the United States Constitution, and Article I, Section 10, of the Florida Constitution. *See Miller v. Florida*, 482 U.S. 423 (1987).

POINT XXIII

FLORIDA'S DEATH PENALTY PROCEDURE IS UNCONSTITUTIONAL BECAUSE ONLY A BARE MAJORITY OF JURORS IS SUFFICIENT TO RECOMMEND A DEATH SENTENCE

Cave filed his motion to declare section 921.141 unconstitutional because only a bare majority of jurors is sufficient to recommend a death sentence (R25-27 [Pretrial Motion #5 (SR)]). In this motion, Cave argued that a substantial majority of jurors is necessary to obtain a constitutionally reliable jury recommendation. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("There is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"). Although this

argument was rejected by the trial court (R220), Cave submits that Section 921.141, to the extent that it permits less than unanimous 12 person jury recommendations, violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution. See State's Response (R94-95).

POINT XXIV

THE DEATH PENALTY PROCEDURE IS UNCONSTITUTIONAL FOR LACK OF ADEQUATE APPELLATE REVIEW

Cave filed his motion to declare section 921.141 unconstitutional for lack of adequate appellate review (R40-62 [Pretrial Motion #7 (SR)]) which was denied by the trial court (R220). As argued in the motion, Section 921.141 is unconstitutional because:

A. A failure to conduct constitutionally mandated harmless error review consistently with *Yates v. Evatt*, 111 S.Ct. 1884 (1991);

B. Capital appeals have an unconstitutional presumption in favor of the State on questions of law. Properly, questions of law and mixed questions of law and fact should be subject to *de novo* appellate review;

C. The failure to apply the due process requirement of strict construction as to aggravating circumstances, burdens of persuasion, means of weighing and numbers of jurors who must be convinced both as to each aggravator and mitigator. *See* § 775.021(1).

These defects violate the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution.

POINT XXV

THE DEFENDANT WAS DENIED THE OPPORTUNITY TO PRESENT A DEFENSE

When Cave first became aware that Bush had agreed to testify on his behalf, Cave immediately filed a Petition For Writ of Habeas Corpus Ad Testificandum and For Stay of Execution (R312-14 [Pretrial Motion #28 (SR)]). The Defendant also submitted a Memorandum of Law describing the basis for relief (R315-23). The Defendant requested the trial court to delay Bush's execution for approximately 30 days so that Bush would be available to testify on Cave's behalf (T50-63).

The trial court refused to grant the stay of execution (R330) and refused to stay Bush's execution pending Cave's emergency appeal (R328). Cave immediately sought review from the Florida Supreme Court which was denied. *Alphonso Cave v. State*, 683 So.2d 482 (Fla. 1996). Cave then sought further review from the United States Supreme Court, but this too was denied.

Based upon these rulings, the Defendant filed a motion to preclude imposition of death penalty alleging that Cave was deprived of his right to compel the attendance of witnesses and due process of law in violation of the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution (R364-67). The motion was denied.

Due to this State action which deprived Cave of an opportunity to present live testimony, his death sentence should be vacated and remanded with instructions to the trial court to impose a sentence of life.

POINT XXVI

THE COURT ERRED IN PERMITTING VICTIM IMPACT EVIDENCE

In advance of and at trial, the Defendant moved to preclude victim impact testimony. These objections were overruled (T1655-63, R1219-25 [Special Requested Jury Instruction #2 (SR)], 1008-25 [Pretrial Motion #30 (SR)], 1202 [order denying]). Specific objections were made at the time the victim impact evidence was offered (T1285-87, 1292-93).

The State called the victim's twin sister and mother to give grief-filled accounts. While these accounts were no doubt, sincere and truthful, they bore no rational connection to the statutory aggravators. The testimony was highly inflammatory and prejudicial. The testimony deprived the Defendant of a fair sentencing hearing consistent with the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution.

CONCLUSION

Based on the foregoing argument and citation of authority, the Defendant, Alphonso Cave, requests the Court to vacate his sentence of life and remand with instructions for the trial court to impose a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Sara Baggett, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401-2299, on this 14th day of November, 1997.

Respectfully submitted

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