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
_____/

APPELLANT'S AMENDED REPLY BRIEF

On Appeal from the Circuit Court of the Nineteenth Judicial Circuit in and For Martin County, Florida
(Criminal Division)

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CONSTITUTIONS

REPLY TO STATE'S STATEMENT OF THE CASE AND FACTS

The State incorrectly asserts that Detective Jones "testified that Appellant told him...that he knew that she was going to be killed"(AB 3).[1]

The actual transcript shows only that Cave believed it was Bush's idea to kill:

> Q(by prosecuting attorney): And did he indicate to you that at some point John - he thought it was John Earl Bush's idea to kill her?
> A: Right, yes, sir.
> Q: So he knew that she was going to be killed?
> A: Yes, sir. (Emphasis supplied).

(T1274-75). The context shows that "he" refers to Bush:.

On cross-examination, Det. Jones was asked to repeat verbatim what Cave had told him about his own involvement before the tape recorder was turned on:

> He told me that they went to the store, he got out of the car with the gun, went into the store at gunpoint, robbed the store, took the clerk out of the store at gunpoint, put her into the car and after he left the store while they were - before they - while they were going to the murder scene, so to speak, that Frances begged for her life and she said she'll do anything to let her go. After that

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[1] The State's Answer Brief will be referred to by "AB" followed by the page number. The Appellant's Initial Brief will be referred to by "AIB" followed by the page number.

> they arrived at the murder scene, they all got out of the car, John Earl Bush stabbed the victim and Pig Parker shot her, sir.

(T1276). Det. Jones did not testify that Cave admitted foreknowledge of the killing during the unrecorded statement.

A review of the transcript of the Defendant's 1982 statement does not anywhere show that the Defendant admitted agreeing to or knowing in advance that the victim was to be killed. During redirect-examination of Det. Jones, prosecutor Bruce Colton further confirmed that Cave did not admit foreknowledge of the killing during the recorded statement:

> Q (by prosecuting attorney): Detective/Captain Jones, while the defendant did say in the statement, that was just played to the jury, at one point that he didn't know that she was going to be killed, didn't he also when he's asked: "Who's idea was it to kill the clerk?" Didn't he answer, "Uh, John's. You know, it was somebody"?
> A: Right, yes, sir, that's correct.
> Q: So he did know, he did indicate that John had come up with the idea?
> A: Right, yes, sir.
> Q: Of killing her?
> A: Yes, sir.
> Q: Of course, him saying that it was John's idea came right after he had heard John Earl Bush's statement implicating him in this crime, too?
> A: Yes, sir.
> Q: <u>Clearly, he indicated that in the statement - well, he indicated once that he didn't know she was going to be killed</u>, later on he indicated who's idea it actually was to kill her?
> A: Yes, sir. (Emphasis supplied).

(T1278-79).

The State's Answer Brief also refers to a transcript previously submitted during the 1993 trial[2] (AB at 3, fn3). A review of this transcript further supports Cave's assertion that he did not know the victim was going to be killed:

> Cave: Yeah, when we got...when we...Well, when we...When all this was goin' on...when all this was goin' on, uh,...After we got...After we, uh, took her, you know, I didn't know that, you know, she was gon' be killed 'cause I knew it wud't enough money to kill her over.
> Sgt. Jones: Had ya'll planned to kill the store clerk?
> Cave: No. It wasn't, you know, it wasn't really in the plan.
> Sgt. Jones: Whose idea was it to kill the clerk?
> Cave: John, uh, John's. You know it was somebody, you know, I heard...I 'member...
> Sgt. Jones: Was this John's idea?
> Cave: Umhmm (yes)[3] (Emphasis supplied).

(Transcript of Cave statement at p. 7).

The transcript reflects Cave's complete denial of foreknowledge that the clerk would be killed: "Well, I...I'll say this, though. I...I participated in the robbery, but I didn't participate in the killin'. I didn't know they's gonna kill her: (emphasis supplied)." (Transcript of Cave statement at p. 8).

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[2] State's Exhibits 29 and 31 at the 1993 resentencing.

[3] The "yes" in parentheses appears in the transcript. "Yes" is not said on the tape recording.

REPLY TO STATE'S ARGUMENT

POINT I

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

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

The State inappropriately refers to the factual findings made in the original direct appeal taken in *Cave v. State*, 476 So.2nd 180 (Fla. 1985), *cert denied*, 476 U.S. 1178 (1986). The evidence presented at this 1996 resentencing is drastically different from the evidence considered by the Florida Supreme Court in the original *Cave* appeal. 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 involuntary released, and 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.2nd 404 (Fla. 1992) *cert. denied*, 113 S.Ct. 1619 (1992); *Teffeteller v. State*, 495 So.2nd 744 (Fla. 1986); *King v. Dugger*, 555 So.2d 355 (Fla. 1990).

The State incorrectly suggests that Cave admitted foreknowledge that Bush intended to kill the victim (AB 21). This assertion is mere speculation which is not established by the evidence in this case. Cave has, in fact, consistently maintained since 1982 that he had neither foreknowledge of the killing nor intent for the killing to occur.

The State points to the trial judge's finding that Cave "carried the gun throughout the robbery and the kidnapping, and only relinquished it to Parker for the execution". This factual finding is clearly incorrect, not supported by the evidence in the record, and inconsistent with the evidence adduced at the 1996 resentencing (AB 20). On this point, Cave testified that he put the gun on the front seat upon getting into the car (T1328-29). The answer brief interprets the evidence on this issue as follows: "when they got back into the car, Pig [J.B. Parker] got the gun" (AB 4).[4] There is no evidence contradicting Cave's assertion when

[4] Detective Jones did not question Cave, during either the recorded or unrecorded statement, as to what he did with the gun on getting into Bush's car following the robbery.

he "gave up" the gun and no evidence that Cave relinquished the gun for the purpose of killing.

The State points to the following statement by the trial judge refusing to find as mitigation that Cave was not the killer and had no foreknowledge of the killing:

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

(AB 21) (R1261 [Sentencing Order]). The State confuses its burden of proving Cave's degree of involvement with Cave's burden of proving mitigators. The trial court's refusal to accept Cave's testimony on this mitigating point does not substitute for proof that Cave had foreknowledge of murderous intent.

Essentially, the State argues that the robbery, kidnapping and killing should be treated as a single ongoing event. The trial court rejected this argument, finding that the financial motive attendant to the robbery no longer existed at the time the killing

took place because the robbery was over. Consequently, the trial court ruled that the financial gained aggravator was not proven. Contrary to the State's argument, the transaction must, therefore, be viewed as three separate events: robbery, kidnapping and the killing.[5]

B. THE DEATH PENALTY IN CAVE IS DISPROPORTIONATE FOR CASE SPECIFIC REASONS

The State erroneously suggests that Cave is similar to Bush and Parker in having no mitigation. (AB 28). In fact, Bush had absolutely no mitigation. *Bush v. State*, 461 So.2d 936 (Fla. 1984), *cert. denied*, 106 S.Ct. 1237 (1986). Parker was found to have had only the statutory age mitigator and non-statutory mitigators involving acceptable trial behavior and the fact that the victim was not sexually molested. *Parker v. State*, 476 So.2d 134 (Fla. 1985).

In contrast, Cave has the benefit of extensive mitigation. For reasons argued under other point headings, Cave submits that only the felony murder aggravator has been proved. Recently, in *Jones v. State*, 23 *Fla. Law Weekly* S36 (Fla. January 15, 1998), the

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[5] *Dubois v. State*, 520 So.2d 260, 266 (Fla. 1988) is distinguishable from the case at bar because Dubois personally raped the victim after she was robbed and abducted. The killing was foreseeable because the victim recognized one of Dubois' cohorts (AB 23).

Florida Supreme Court stated:

> [W]hile this Court has on occasion affirmed a single-aggravator death sentence, it has done so *only where there was little or nothing in mitigation*. *See Nibert v. State*, 574 So.2d 1059, 1063 (Fla. 1990) ("[T]his Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation;"); *Songer v. State*, 544 So.2d 1010, 1011 (Fla. 1989) ("We have in the past affirmed death sentences that were supported by only one aggravated factor...but those cases involved either nothing or very little in mitigation."). *See also Thompson v. State*, 647 So.2d 824, 827 (Fla. 1994) (same). To rule otherwise on this issue would put Florida's entire capital sentencing scheme at risk (emphasis in original) (footnote omitted).

Id. at 536-37. *Accord Williams v. State*, 23 *Fla. Law Weekly* S78, 79 (Fla. February 12, 1998) (Death penalty held disproportionate where a single aggravator was weighed against a statutory mitigator given in "substantial weight" by the trial court and six non-statutory mitigators given, at most, little weight).

POINT II

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

The State's arguments as to vicarious liability fails to take into account the jury instruction to which the State agreed

(T1677). The State agreed to the following modification of the standard jury instruction:

> Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings. The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence as to this Defendant. (emphasis supplied).

(T1803-04).

The State's agreed modification to the standard instruction specifically addressed vicarious liability. To the extent that the modified instruction may be erroneous, the State has invited any such error. *Gupton v. Village Key & Saw Shop*, 656 So.2d 475, 478 (Fla. 1995) ("A party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make."). It is extremely inconsistent for the State now to deny the legal standard by which this resentencing jury was instructed.

The core issue is whether the law requires for the mental state attendant to each aggravator to be proved as to each individual participant in a multi-defendant homicide prosecution. In this case, the State has already agreed that the mental state must, in fact, be proved as to each defendant and each aggravator.

The State should be procedurally barred from now arguing the exact opposite position without having preserved the error. *See Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982) ("Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court."); *Bell v. State*, 699 So. 2d 674, 678 (Fla. 1997) (Defense counsel's stipulation to jury instruction procedurally barred review).

The State now argues that Cave was a "predominant participant" in the homicide (AB 34). This argument runs counter to the Florida Supreme Court's findings in *Bush v. State*, 682 So.2d 85, 87 (Fla. 1996), which stated "most importantly, however, is the fact that Bush played a predominant role in this crime".

The State also argues that Cave "knew that Bush intended to kill Frances Slater." (AB 32-33; also AB 38). However, the State's argument fails to establish that Cave had foreknowledge of the killing. Quite obviously, Cave became aware of the homicidal intent of Bush and Parker not later than at the same time as the killing. Cave has maintained continuously that he became aware of their homicidal intent at the time of the killing. The State's supposition that Cave had foreknowledge of such homicidal intent is sheer speculation unsupported by the evidence. Indeed, the sentencing order refers only to a "general plan...to find a

convenience store to rob" (R1259)[6]. *See Hoskins v. State*, 702 So.2d 202, 210 (Fla. 1997) ("Many of the facts used by the State to support a finding of CCP are based on speculation."); *Gordon v. State*, 704 So.2d 107, 114-16 (Fla. 1997) (CCP upheld where Gordon offered "no reasonable explanation of what happened that differs from what the trial court found.").

POINT III

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

The State inappropriately points to the original appeals in *Cave v. State*, 476 So.2d 180, 188 (Fla. 1985) and *Parker v. State*, 476 So.2d 134, 139-40 (Fla. 1985), to support the finding of this aggravator. As previously described in Point I, *supra*, this is a new proceeding which is not governed by what went before. More importantly, the evidence adduced at this resentencing differs drastically than what was presented at the original Cave and Parker trials.

As argued in Point II, *supra*, the State is now seeking a

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[6] The trial court observed that the "did not know or intend that the killing occur" non-statutory mitigator would be proved if Cave's statements are believed (R1261 [Sentencing Order]). If the trial court could point to no objective evidence to reject Cave's testimony supporting this mitigator, then on what evidence does the CCP aggravator stand?

different legal standard as to vicarious liability than was argued at the trial court. (AB 41-43). The State should be procedurally barred from making this inconsistent argument without having first preserved the issue for review.

In the case at bar, there is absolutely no evidence that Cave knew that a knife might be used at any point in the transaction. Therefore, the use of the knife by Bush was completely unanticipated by him and it cannot be a basis by which to hold him vicariously responsible. Obviously, Cave could not have had the mental state necessary to intend the infliction of torture with the knife if he did not know that a knife would be used.

The State states that the medical examiner "surmised that the victim became incontinent prior to her death" (AB 40). This "surmise" is simply not proved beyond a reasonable doubt. Dr. Wright did agree, after all, that it was impossible to say whether the urine release was a post-mortem phenomenon or a pre-mortem phenomenon (T 1224). Notably, the trial court made no determination on the issue simply finding "at some point her panties were wet with urine (emphasis supplied)" (R 1259). *See Arroyo v. State*, 705 So.2d 54, 56 (Fla. 1997) ("If the State does not offer evidence inconsistent with the defendant's hypothesis, then the State's evidence would be insufficient as a matter of

law.").

POINT IV

THE EVIDENCE DOES NOT SUPPORT THE WITNESS ELIMINATION AGGRAVATING CIRCUMSTANCE

The State, once again, makes a vicarious liability argument inconsistent with the position taken before the trial court. As argued in Point I, *supra*, the State should be procedurally defaulted from making this different, unpreserved legal argument before this Court.

The cases cited by the State are not on point with respect to the vicarious liability issue (AB 45). *Preston v. State*, 607 So.2d 404 (Fla. 1992); *Hall v. State*, 614 So.2d 473 (Fla. 1993), *cert. denied*, 114 S.Ct. 109 (1993); and *Swafford v. State*, 533 So.2d 270 (Fla. 1988), each involve situations where the accused is either the actual killer or involved with committing additional, independent crimes following a kidnapping. All may be distinguished from the case at bar in that Cave did not participate in any crimes after what he perceived to be the end of the kidnapping, i.e.: the release of the store clerk in a sufficiently remote location to enable a getaway. Curiously, the evidence established that a number of residences were located a short distance from the scene of the killing. The proximity of these

residences is consistent with Cave's professed belief that the clerk would be released unharmed. With so much vacant rural land nearby, why pick this relatively occupied area to shoot a pistol during the wee hours of the morning?

POINT VI

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

The State suggests that the erroneous weighing of this statutory mitigator would constitute harmless error (AB 52). As a non-killer with no prior record and significant other mitigation, the correct weighing of this statutory mitigator could easily tilt the matrix in favor of a life sentence. This would be especially true if the court were to strike at least one aggravator or determine that at least one other mitigator was also improperly weighed. Therefore, the erroneous weighing of this mitigator constitutes prejudicial error.

The Appellant does not accept the State's claim that the relative weight accorded a mitigator by the trial judge is subject to an abuse of discretion standard (AB 51). Cave submits that weight is a mixed question of law and fact which is subject to *de novo* review on appeal. The "abuse of discretion" standard imposes

an unconstitutional roadblock in the way of effective review required under 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 921.141(4). *White v. State*, 616 So.2d 21 (Fla. 1993) (A sentence of death is not clothed with a presumption of correctness and the clear abused of discretion standard does not apply.).

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 trial judge made a clearly incorrect finding that Cave "carried the gun throughout the robbery and the kidnapping, and only relinquished it to Parker for the execution." *See* Reply to Point IA, *supra*; *Compare Blanco v. State*, 22 *Fla. Law Weekly* S576, 77 (Fla. September 18, 1997); *Campbell v. State*, 571 So.2d 415, 419 n.5 (Fla. 1990) with *White v. State, supra*. This reviewing court should independently review the evidence to determine whether this statutory mitigator is established by competent substantial evidence. If this reviewing court determines that the mitigator is proved, then the mitigator should be accorded substantial weight.

POINT IX

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

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

The State fails to explain how the trial judge did not commit constitutional error in holding Cave's silence against him. The consideration of this mitigator has been tainted by adverse inferences drawn from Cave's exercise of a fundamental right. *Burns v. State*, 699 So.2d 646, 651 (Fla. 1997) (Defendant cannot be penalized for exercising his right to remain silent). This reviewing court should independently evaluate whether remorse has been reasonably established. *White v. State, supra.* Significant weight should be accorded this mitigator if it is established.

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

The State argues that a sentencing order does not have to "articulate the weight assigned to each non-statutory mitigator" (AB 61). To the contrary, this reviewing court recently ruled:

> Clearly then, the "result of this weighing process" can only satisfy *Campbell* and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. We do not use the word "process" lightly. If the trial court does not conduct such a deliberate inquiry and then document

> its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order.

Hudson v. State, 23 *Fla. Law Weekly* S71, 72 (Fla. February 5, 1998). *See Jackson v. State*, 22 *Fla. Law Weekly* S690, 692 (Fla. November 6, 1997) ("We find that the trial court's failure to expressly evaluate each mitigating factor as required by Campbell...precludes meaningful review on this issue.").

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

The State argues that some of Cave's statements should be believed (those that "hurt" him) and some should be disbelieved (those that "help" him). Except for Cave's own statements, this otherwise circumstantial case would never have got to a jury. It is a mockery of the "must accept uncontroverted mitigation evidence" rule for the trial court to reject the portions favorable to the accused, but accept those portions unfavorable.

In this case, Cave has steadfastly maintained that he did not know of or intend for the killing to occur. The trial court has, therefore, misapplied the legal standard for establishing mitigation. *Nibert v. State*, 574 So.2d 1059, 1062 (Fla. 1990) ("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."); *Cook v. State*, 542 So.2d 964, 971 (Fla. 1989) (trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of mitigating circumstance.); *Pardo v. State*, 563 So.2d 77, 80 (Fla. 1990) (Trial court's findings concerning mitigation does not have to be accepted if based on a misconstruction of undisputed facts or a misapprehension of law).[7]

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

The State recites the portion of the Sentencing Order which makes the following incorrect factual assertion about a "ruling in a case not before it":

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[7]The State cites *Pardo* for proposition that "trial court did not have to accept Pardo's self-serving testimony regarding his motives." (AB 64). *Pardo* involved a drug-related execution of 9 persons. Pardo admitted that he intentionally killed all 9, but testified that he "should avoid culpability...because he believed all the victims to be drug dealers, who 'have no right to live'" (footnote omitted). *Id.* at 78. There was a separate witness who testified that Pardo killed one victim because he was an informer and another victim as part of a drug-rip-off. *Id.* at 79. Pardo claimed that his testimony established that the killings were justified because he did not consider drug dealers to be people. In view of the lack of mental status evidence that Pardo did not know killing these victims was wrong or that his ability to conform his conduct was impaired, the Florida Supreme Court stated: "The Court did not have to accept Pardo's self-serving statements regarding his motives". Cave may be distinguished from *Pardo* in that Cave never admitted foreknowledge that Frances Slater would be killed and has always denied having intent that she be killed.

> The Supreme Court's statement in *Bush v. State*, 682 So.2d 85 (Fla. 1996) that: "Therefore, even if Cave were to receive a life sentence, it could not be said that Bush's death sentence would be disproportional, is not an adjudication in this case that defendant cannot receive a death sentence. It is recognition only, as this court has above, that Parker and Bush were more culpable. The Supreme Court should not be considered as making a binding ruling in a case not before it. (Emphasis supplied).

(R1262).

In fact, Cave took two separate emergency appeals to the Florida Supreme Court at the same time that Bush did. *See* Case Nos.: 89,127 and 89,123 (both were denied by Orders dated October 15, 1996). Bush's appeal was also denied on October 15, 1996 by means of a memorandum order which stated that an opinion would follow. The opinion was released on October 16, 1996. *Bush v. State*, 682 So.2d 85 (Fla. 1996). *See also Cave v. State*, 683 So.2d 482 (Fla. 1996) (Affirming 89,123 and denying 89,127). Contrary, therefore, to the trial court's assertion, the directly related appeals taken by Bush and Cave were simultaneously pending before the Florida Supreme Court.[8]

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[8] Cave was seeking review of the trial court's order denying a stay of Bush's execution in order to compel Bush's attendance at his trial. Bush was seeking to stay his own execution based upon, *inter alia*, proportionality grounds, an allegedly unconstitutional prior conviction, and improper CCP jury instruction.

The Sentencing Order notes that Johnson remained in the car during the course of the robbery and murder. The Sentencing Order points out that "Johnson received a life sentence as the law at the time of his trial appeared to forbid consideration of the death penalty and the matter was not submitted to the jury or the court" (R1261).

While the evidence at Cave's resentencing supports the finding that Johnson remained in the car during the course of this robbery, kidnapping and murder, no evidence was submitted at either Cave's resentencing or Johnson's trial which would establish aggravating and mitigating circumstances as to Johnson. The State suggests that a lack of findings of aggravating factors with respect to Johnson somehow factors against Cave (AB 66-67). The State having failed to introduce any evidence regarding what the aggravation and mitigation against and for Johnson might have been, it would be inappropriate to infer that, under current law, Johnson may have been death in eligible.[9]

It would not be logical to compare Cave's eligibility for the

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[9] Johnson was tried before Judge Trowbridge in 1982. *Johnson v. State*, 484 So.2d 1347 (Fla. 4th DCA 1986). As indicated in the Sentencing Order, Judge Trowbridge precluded the State from seeking the death penalty based upon the law at the time of Johnson's trial (R1261). *Enmund v. Florida*, 102 S.Ct. 3368 (1982), had just been decided. *Tison v. Arizona*, 107 S.Ct. 1676 (1987), was not decided until several years after *Enmund*. Judge Trowbridge implies that the result may have been different if post-*Tison* law had been applied.

death penalty under the more permissive *Tison*'s standard with Johnson's avoidance of the death penalty under the stricter *Enmund* standard.[10] It is simply inappropriate to assume that the lack of aggravation/mitigation findings as to Johnson means either that they were present or absent: it simply means that there were no findings. As a result, it would be speculative for this court to compare Cave's proven mitigation with the mitigation which may or may not have been put forth by Johnson.

As the State was, in fact, seeking the death penalty against Johnson at his trial, it is reasonable to assume that the State believed it could prove one or more aggravating circumstances. The evidence adduced in Cave's resentencing suggests that Johnson would have been susceptible to at least the felony murder aggravator, and possibly the CCP, HAC and witness elimination aggravators, on the same basis that the State is seeking to hold Cave vicariously responsible. In a real sense, Johnson was the fortuitous beneficiary of a window of opportunity in the developing case law. Unlike the effective representation that Johnson apparently received, it has already been determined that Cave received completely ineffective assistance of counsel at his 1982 trial.

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[10] The *Tison/Enmund* issues were addressed in Point I of the Initial Brief.

Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992). If Cave had received effective assistance of counsel at the trial level, perhaps the *Enmund* issue would have been more successfully exploited. As it is, in light of the specific findings of ineffective assistance of trial counsel in the 1982 proceedings, this court should draw no inferences adverse to Cave vis a vis Johnson under the out-dated *Enmund* standard. [11]

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

Appellant maintains that the saving of a human life is a non-statutory mitigator which should be accorded substantial weight. The State responds that the "abuse of discretion standard" precludes review of the weight assigned by the trial court as long as reasonable persons might differ. The State cites as authority, as it has repeatedly throughout its Answer Brief, to *Blanco v. State*, 22 Fla. Law Weekly S575 (Fla. September 18, 1997) and *Quince v. State*, 414 So.2d 185 (Fla. 1982) (AB 68).

Appellant maintains that a death sentence is not clothed with a presumption of correctness:

> We reject the trial judge's suggestion that we

[11] The federal district court applied the *Tison* standard in evaluating Cave's eligibility for the death penalty.

> "recede from *Tedder*[12] and hold that any sentence of death, regardless of the jury's recommendation, is clothed with a presumption of correctness and will not be reversed absent a clear abuse of discretion on the part of the sentencing judge." To do so would effectively result in this State's death penalty being declared unconstitutional. It appears that the trial judge would like us to return to the era of unbridled discretion that resulted in Florida's prior death penalty statute being declared unconstitutional.

White v. State, 616 So.2d 21, 26 (Fla. 1993).

Appellant maintains that questions of law and mixed questions of law and fact should be subject to *de novo* appellate review. *E.g. Gibbs v. Air Canada*, 810 F.2d 1529, 1532 (11th Cir. 1987), *rehearing denied*, 816 F.2d 688 (Questions of law) and *Smith v. Wainwright*, 777 F.2d 609, 615-616 (11th Cir. 1985) (Mixed questions of law and fact). Florida appellate review in capital cases which does not comply with these requirements violates the due process and cruel and unusual punishment clauses of the State and Federal Constitutions.

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

Appellant contests the State's assertion that the weight assigned to a mitigating circumstance is within the trial court's

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[12] *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

discretion and subject to an abuse of discretion standard (AB 70). Such a standard would eviscerate the statutory and constitutional requirements for automatic review of a death sentence. *White v. State, supra.*

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

With respect to paragraphs g, h, i, j and l, the Sentencing Order demonstrates a lack of proper consideration by the trial court. While each of these mitigating circumstances has been previously upheld, the trial court denigrates them in the following manner:

g. The trial court asks "How could this not be established?" that the defendant was a good and considerate son to his mother. Obviously, the trial court was unwilling to assign substantial weight to this non-statutory mitigator because it presumed that everyone would qualify. This is simply not the case because some children are not "good and considerate" to their parents. Some children are disrespectful and even commit crimes against their parents. The trial court's misapprehension of this mitigator, the trial court's assignment of weight should be disregarded.

h. Again, the trial court asks "How could this not be

established?" that the defendant demonstrated unselfishness and concern toward his neighbors. There are many "neighbors" in this modern age who do not help each other out. The trial court's assumption that all neighbors are equally unselfish is clearly erroneous and fallacious. The trial court's weighing of this mitigator should be disregarded.

i. The trial court accorded little weight to the finding that Cave worked steadily and supported himself and his son. The trial court justified this weight "in view of the defendant's subsequent choice of robbery as a means of obtaining support". According to this fractured logic, the many years of Cave's self-support before the instant robbery accounts for little. While little weight might be meaningful in a situation where the accused derives his livelihood from criminal conduct, the little weight attached to Cave's steady employment and support of his son is clearly wrong.

l. The trial court improperly accorded little weight to Appellant's continuing education and religious study while in prison. The trial court reasoned that an "inmate on death row has little else to do". This logic eviscerates the previous determination that self-improvement during incarceration is a non-statutory mitigating circumstance.

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 Florida Supreme Court has recently elaborated upon the sufficiency of a sentencing order. As pointed out in Point IX B, *supra*, the Sentencing Order must encompass as "thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty". The trial court must document its findings and conclusions in order to assure meaningful review. *Hudson v. State*, 23 Fla. Law Weekly at S72; *Jackson v. State*, 22 Fla. Law Weekly S690, 692 (Fla. November 6, 1997). In the case at bar, the failure of the Sentencing Order to document findings and conclusions supporting aggravators, as well as mitigators, render the Sentencing Order unconstitutionally vague and incapable of adequate review.

POINT XI

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

Even if, *arguendo*, the urination was a pre-mortem phenomenon, the circumstantial evidence does not show when the urination began

in relation to the gunshot and the knife wound. As there was no urine found in the car despite a diligent search by criminalist Dan Nippes (T1190-91), the urination could not have begun before the victim got out of the car. The evidence during the State's case in chief did not establish the amount of time which passed between the victim's exit from the car and the infliction of the knife wound and gunshot injury. Assumptions regarding these time relationships would be purely speculative and not based upon sufficient record evidence.

POINT XIII

THE HAC AGGRAVATOR IS UNCONSTITUTIONAL

The State argues that Appellant's Point XIII has been waived "by simply referring to argument made below without further elucidation" (AB 77). Point XIII of the Initial Brief should be read together with Point XII ("The HAC jury instruction was defective and unconstitutional") (AIB 76-78). Under Point XII, Appellant has argued that the HAC aggravator is unconstitutionally vague. The matter has been preserved for review.

POINT XIV

THE WITNESS ELIMINATION INSTRUCTION WAS DEFECTIVE AND UNCONSTITUTIONAL

The State suggests that a contemporaneous objection to the

witness elimination instruction was not made (AB 80). This is simply not the case. At the conclusion of the jury charge conference, Cave's attorney requested permission to stand on the previously made objections without having to renew them after the instructions were read. The trial court agreed to this procedure:

> Mr. Morgan: Your Honor, these are the jury instructions, although I guess Mr. Garland has the same objections he already voiced.
> Mr. Garland: Judge, we went over our various objections and proposed changes to them yesterday. Subject to those objections and proposed changes, you know, we've reviewed these instructions and they reflect the orders of the court yesterday. So subject to our previous objections which we don't recede from, these instructions appear to reflect what the court ordered yesterday.
> The Court: Okay. Without waiving any objections and subject to those objections, the court will give these charges then.
> Mr. Garland: Judge, one of the things that we agreed on, the rules require that the defendant restate his jury instructions in detail before the jury retires. We just ask the court to consider them restated at this particular point and without necessity of restating them before the jury retires.
> The Court: That's fine with me, as long as if I make a mistake in reading them then you can bring that to my attention before the jury retires.
> Mr. Garland: Thank you, sir.

(T1803-04). *See* Motion To Declare Section 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), and 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).

POINT XV

THE WITNESS ELIMINATION AGGRAVATOR IS UNCONSTITUTIONAL

The State argues that review of this issue is waived because Appellant simply referred to "argument made below without further elucidation" (AB 83). Point XV of the Initial Brief should be read together with Point XIV ("The witness elimination instruction was defective and unconstitutional") (AIB 78-80). Under Point XIV Appellant argues that the witness elimination aggravator is unconstitutionally vague. The matter has been preserved for review.

POINT XVII

THE FELONY MURDER AGGRAVATOR IS UNCONSTITUTIONAL

The State argues that review is waived because Appellant simply referred to "argument made below without further elucidation" (AB 85). Point XVII of the Initial Brief should be read together with Point XVI. ("The felony murder instruction was

defective and unconstitutional"). Under Point XVI Appellant argues that the felony murder aggravator is unconstitutionally vague. The matter has been preserved for review.

POINT XX

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

The jury was instructed pursuant to the standard jury instruction that there is a "reasonably convinced" standard regarding mitigation:

> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

(T1803-04).

The "reasonably convinced" standard is different than the standard described in *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990):

> The Court must find every mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81 (Emphasis supplied).

The Court, therefore, seems to have established two standards: "reasonably established" and "reasonably convinced". *See* §775.021(1), Fla. Stat. (1995) (rule of lenity).

The *Campbell* standards violate the principal of strict construction. Article II, Section 3, Fla. Const. The question of the standard of proof regarding mitigating circumstances is one of substantive law, to be resolved by the legislature. The *Campbell* standard violate the Florida Constitution separation of powers.

The requirement that the jury be "convinced" of mitigation evidence is improper and unreasonably high in violation of the 8th Amendment to the United States Constitution. *See Walton v. Arizona*, 110 S.Ct. 3047, 3055 (1990).

Previously, the Florida Supreme Court determined "that, on their totality, the standard instruction [do not] impermissibly put any particular burden of proof on capital defendants." *Brown v. State*, 565 So.2d 304, 308 (Fla. 1990). *Brown* conflicts with the Florida Supreme Court's later holding in *Campbell*.

In *Mills v. Maryland*, 108 S.Ct. 1860 (1988), a death sentence was vacated because the instructions and verdict form could have led jurors to believe that they had to unanimously agree on the existence of any mitigating circumstance before it could be found: "[t]he question...is not what the State Supreme Court declares the

meaning of the charge to be, but rather what a reasonable juror could have understand the charge as meaning." *Mills*, 108 S.Ct. at 1866.

The "reasonably convincing" standard precludes consideration of the many intangible pieces of mitigation evidence. Mitigation may include the life history of the defendant and other "compassionate or mitigating factors stemming from the diverse frailties of human time." *Woodson v. North Carolina*, 420 U.S. 280, 305 (1976). The type of evidence does not easily lend itself to quantification by way of a "reasonably convincing" standard of proof. This standard unlawfully limits the weighing of mitigating circumstances. *See Mills, supra*, and *Hitchcock v. Dugger*, 107 S.Ct. 1821 (1987).

CONCLUSION

Based on the foregoing argument and citation of authority this court should set aside Cave's sentence of death and remand with instructions to resentence him to no more than life without possibility of parole for 25 calendar years.

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 28th day of April, 1998.

Respectfully submitted

KIRSCHNER & GARLAND, P.A.

BY: _____

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