

IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,902

BYRON BRYANT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA
(Criminal Division)

ANSWER BRIEF OF APPELLEE

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CASE NO. 94,902

BYRON BRYANT v. STATE OF FLORIDA

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as "Appellant" or "Defendant". Appellee, State of Florida, was the prosecution below and will be referred to herein as "Appellee" or the "State". Reference to the record on appeal will be by the symbol "R", to the transcripts will be by the symbol "T", to any supplemental record or transcripts will be by the symbols "SR[vol.]" or "ST[vol.]", and to Appellant's brief will be by the symbol "IB", followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Subject to the following additions, corrections, and/or clarifications set forth below and in the argument portion of this brief, Appellee accepts Appellant's statement of the case and facts for purposes of this appeal.

The instant appeal is from Appellant's retrial for the murder of Leonard Andre ("Andre") which occurred on December 16, 1991 during the course of the armed robbery of Andre's Market in Delray Beach, Florida (T26 - 502-07, 541, 543-45; T27 - 594-95, 606-07; T28 - 816-23, 832). At point blank range, Andre was shot two or three times in the back, chest, and arm with a .357 magnum handgun as he wrestled with Appellant during the robbery (T26 - 541-45, 550; T27 - 575, 582-86, 594-602, 606-07, 614-15, 647; T28 - 819-23, 825-35. As confessed by Appellant, the shooting occurred in order

to free himself from Andre's grasp and to escape the scene (T28 - 818-23, 830, 832, 835). In spite of Appellant's assertion that the confession was coerced, the jury found him guilty (T29 - 883-99, 933-36, 945-48, 1041-43).

Following the verdict, Defendant waived the jury for the penalty phase. Appellant conceded the statutory aggravators of prior violent felony convictions and homicide was committed during the course of a felony (T30 - 1057-58). Defendant raised one statutory and six non-statutory mitigating factors (T30 - 1059-64). Finding three aggravators (1) prior violent felony convictions, (2) capital felony committed during the course of a robbery, and (3) murder committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody along with one non-statutory mitigator, remorse, but giving it very little weight, the trial judge weighted the aggravation and mitigation and imposed the death sentence (R22 - 3857-67).

Judge Mounts presided over both Appellant's trials for murder and robbery. During the course of Appellant's re-trial, restraints were worn as the judge was aware of Appellant's prior courtroom behavior and actions while incarcerated (T28 - 743-47). Based upon the accounts of the trial court, defense counsel, and prosecutors, Appellant's 1993 courtroom behavior was memorialized. Following the reading of the jury's guilty verdict at the conclusion of the first phase of Appellant's 1993 trial, he stood up and threw a 26 pound chair at least 12 feet through the air at the prosecutor and

in the direction of the jury, even though defense counsel had gotten their hands on the chair (R17 - 3096, 3100-01, 3104, 3111-12). While being restrained forcibly by deputies, Appellant struggled, used profanity, and shouted threats, such as "you will pay for this, or you will have to answer to this", toward the prosecutor and maybe the jury as he was being led from the courtroom (R17 - 3095-96, 3101, 3104). Several jurors were brought to tears; they were shaken visibly and frightened by Appellant's actions (R17 - 3096, 3099, 3101-02). The trial court was informed that in a prior trial, upon conviction, Appellant threatened the prosecutor's life, telling him he was a "dead man." (R17 - 3104). Over the defense objection, Appellant was ordered to be kept in restraints. (R17 - 3108). Judge Mounts related, and defense counsel confirmed, Appellant had thrown a book at Judge Colbath during another hearing and had been held in contempt (R17 - 3109).

On February 2, 1998, pre-trial, the judge inquired whether defense counsel had discussed with the Correctional Staff the restraints Appellant would wear and his court attire. Faced with the defense objection to restraints worn in front of the jury, the court noted there was a painless restraining belt which could be worn under Defendant's clothing (ST1 - 37-39). At the February 4, 1998 hearing, defense counsel informed the trial court that he had conferred with Corrections and the restraints would not be an issue; Appellant would cooperate and wear the belt, although he objected to the restraints (ST1 - 73-74; ST2 - 257).

Just prior to the commencement of the voir dire, Appellant instructed his counsel to not participate in the trial if any form of restraint would be required because he found the belt uncomfortable. (R23 - 8-9, 13). Appellant tried to bargain with the court and offered to form some sort of "contract", so he would not have to wear restraints (R23 - 15). Judge Mounts found Appellant was addressing the issue intelligently, but Corrections wanted the restraints, therefore, they would remain (R23 - 16-17).

In response to defense counsel's question to the venire about Appellant's shackling, Ms. Licata, Mr. Neumeister, Mr. Paul Hoffman, Mr. Maurice Hoffman, and Mrs. Tower thought Appellant had been incarcerated and denied bail; Ms. Licata and Mr. Paul Hoffman served on the jury, but the other were excused either for cause or by peremptory challenge (R24 - 262, 334, 413). Those jurors, Mr. Karp and Mr. Martin, who felt they could not serve because of the armed guards in the courtroom and Appellant's restraints, were excused without objection (R24 263, 454-55). While Mr. Karoly noted Appellant's restraints and the defense moved for a mistrial, counsel did not insist that the trial court rule on his motion (T25 - 413). In fact, counsel did not seek to strike Mr. Karoly for cause or on a peremptory basis (T25 - 413, 453-69). Appellant accepted the jury panel subject to his prior objections (R25 - 469). After the jury was sworn, defense counsel, Mr. Dubiner, made a record of the history of this case stating:

I just wanted to put on the record that

the incident described by the experts in their testimony, specifically Mr. Bryant throwing a chair and throwing a book which leads to the, as you put it, restraints that he's wearing, the book throwing incident occurred in 1990 and the chair throwing incident occurred in February 1993.

(R25 - 473-74).

On the second day of testimony, Mrs. Derks advised the court her husband had asked her if the man in handcuffs was guilty, to which she replied she could not discuss the matter. Neither an objection to Mrs. Derks continuing as a juror, nor an inquiry into the impact of this admission was sought by the defense (T28 - 749).

Upon the jury's return of a verdict of guilty for first-degree murder and armed robbery, their services were waived for the penalty proceedings (T29 - 1041-43). During the penalty phase, the State introduced certified copies of Appellant's prior violent felony convictions and asked the judge to note the murder was committed during a robbery. Upon the State's request, the trial testimony was incorporated by reference (T30 - 1056-57).

In the penalty phase, Mark Gaines ("Gaines"), Appellant's friend since birth, saw no difference in Appellant's personality after his 1985 head injury. During Appellant's incarceration, he and Gaines, a Deacon at the Turner Faith Temple, kept in telephone contact and prayed together (T30 - 1124, 1129, 1131-32, 1134, 1136-37, 1139). Fairly intelligent, articulate, and able to share sophisticated ideas on theology, religion, and scriptures, was the way Gaines described Appellant (T30 - 1135, 1140). When questioned

by the trial court, Gaines recounted he considered Defendant to have had a healthy, happy, normal childhood with a supportive father who perhaps had had an extramarital affair (T30 - 1140).

Greg Otto ("Otto"), a license clinical social worker called by the defense, admitted his predecessor, Hilary Sheehan¹, had failed to turn up any independent evidence to support the allegations of abuse reported by Appellant's family, in spite of putting in over 1,500 hours of investigative work. There were no police reports or confirming accounts from neighbors (T30 - 1144, 1184). Otto did no independent investigation; his report was rendered almost exclusively on what Appellant and his sisters claimed (T30 - 1185). According to Otto, while it would have been helpful to have independent confirmation of the history chronicled by Appellant's family, Ms. Sheehan could not authenticate any of the incidents reported (T30 - 1187). Otto concurred that even if Defendant's father may not have been supportive, Appellant had the support of his mother, teachers, and neighbors (T30 - 1189). When questioned by the trial judge, Otto admitted his work on six other death penalty cases was always at the behest of the defense (T30 - 1214-15). Also, while interviewing Defendant, Otto saw no reason to question Appellant's competency or understanding (T30 - 1216).

When Defendant's mother, Veonice Bryant, was questioned by the trial judge, she admitted she had not reported the alleged acts of

¹Hillary Sheehan never produced a formal report, but merely discussed her findings with Otto (R30 - 1193, 1196).

violence perpetrated upon her by Appellant's father, Willie Bryant, while they lived in Connecticut. It was not until she moved to Florida that she spoke of the violence and filed police reports (T31 - 1267-68). Up until 1996, even though this violence was recurring, Willie Bryant resided with his wife sporadically (T31 - 1269-70). Conversely, Willie Bryant testified he had never committed or been accused of a violent act against his family while his son was living at home (T31 - 1288-89).

Identifying and weighting the aggravating and mitigating evidence presented by the parties, the trial court announced the sentence (R 3857-67; T31 - 1332-40). Following the imposition of the death penalty for the first-degree murder of Leonard Andre and life in prison for the armed robbery, Appellant appealed.

SUMMARY OF THE ARGUMENT

POINT I - The trial court did not err in requiring Appellant to be kept in restraints during the trial. Based upon Appellant's prior violent behavior in the courtroom as well as in jail, the use of restraints was proper. An evidentiary hearing was not necessary. However if a hearing should have been granted, failure to do so was harmless beyond a reasonable doubt.

POINT II - Appellant's challenge to execution by electrocution is moot as Florida has switched to execution by lethal injection.

POINTS III, IV, AND VI - The trial court's conclusions regarding the challenged non-statutory mitigating factors have record support. The sentencing decision should be affirmed.

POINT V - The record supports the trial judge's decision Defendant was competent to stand trial.

POINT VII - The instant sentence is proportional when compared to other death sentences in similar cases.

ARGUMENT

POINT I

IT WAS NOT ERROR TO REQUIRE DEFENDANT BE TRIED
WHILE WEARING RESTRAINTS (restated).

Appellant asserts it was error to require he wear restraints. He also claims the judge refused to permit the use of a restraining belt (IB 53). The State disagrees that the court refused to permit the use of the restraining belt, and submits it was not error to rule Appellant must be in restraints during court proceedings.

Dignity, order, and decorum in the courtroom is essential to the proper administration of criminal justice. Illinois v. Allen, 397 U.S. 337, 343 (1970). Under proper circumstances, a trial court's duty to maintain courtroom safety and security outweighs the risk the defendant's presumption of innocence may be impaired. Diaz v. State, 513 So.2d 1045, 1047 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988). Generally, while a defendant has the right to appear free of physical restraints, it is a right which may be forfeited based upon his conduct. Allen, 397 U.S. at 343-44; Diaz, 513 So.2d at 1047 (reasoning shackling proper in light of defendant's convictions, escape record, and violent incidents); Dufour v. State, 495 So.2d 154, 162 (Fla. 1986)(finding shackling defendant during trial proper where he had planned escape), cert. denied, 479 U.S. 1101 (1987).

Upon a showing of extreme need, a court may order physical restraints at trial where it has reason to believe them necessary

to maintain courtroom security. Harrell v. Israel, 672 F.2d 632, 635-36 (7th Cir. 1992). A judge has wide discretion in determining if this standard is met. Id. at 636. The decision to order a defendant to wear restraints is appropriate, and within the court's discretion, where the judge has been advised or is aware the defendant poses a security risk. Correll v. Dugger, 558 So.2d 422, 424 (Fla. 1990). Requiring restraints was proper because the instant judge had both first hand knowledge and had been informed of Appellant's incidents of inappropriate, dangerous behavior.

A review of the record reveals Judge Mounts presided over both Appellant's trials and witnessed him throw a 26 pound chair 12 feet through the air at the prosecutor and toward the jury. This act was accompanied by threats and profanity (R17 - 3095-96, 3100-01, 3104, 3111-12). Given this violence, the judge decided Appellant would have to wear restraints in court.

A week before Defendant's re-trial, the judge noted:

Okay. As to Mr. Bryant, as we all know has been restrained and I assume the trial, you have given thought to and discussed with Correctional staff, Mr. Dubiner, the method of restraint and the method how he will be dressed.

(ST1 - 37). Clearly, the court considered and decided to continue requiring Appellant be restrained in court. However, in response to a defense objection, the judge stated, "so that's a bridge you need to start to cross and there's a method we used in another case, there is a muscle type control that can be activated by an

observer and it's a device worn underneath the clothing²..." (ST1 - 37-38). Recognizing Corrections had "some say so" in the matter because ultimately it was responsible for the participants' safety, the court offered the defense an opportunity to talk to Corrections to see if the restraints could be dispensed with altogether (ST1 - 38-40). Two days later, counsel announced he had conferred with Corrections and the restraints would not be an issue as Defendant would wear the belt even though he objected (ST1 - 73-74). At no time prior to trial did Appellant request an evidentiary hearing on the issue. Five days later, trial commenced.

During the first day of trial, while the venire was awaiting voir dire, Defendant refused to participate in restraints, thus, prompting dismissal the 50 member panel (T23 - 24-25). Stating he was well aware of what transpired at the end of Appellant's first trial, defense counsel objected to the use of the restraint belt and offered that Appellant had behaved professionally since that trial (T23 - 29). Counsel sought an evidentiary hearing on the necessity of restraints (T23 - 30). The trial court denied the hearing pointing out the parties had been alerted to this pre-trial and, therefore, they were beyond the issue. (T23 - 31). Defense counsel's request for a stay to file an appeal was denied as the

²Judge Mounts advised the parties Mr. Hesse had volunteered for a demonstration of the belt and there was no pain associated with the its activation. It merely incapacitated the wearer's muscles, making him drop to the floor. The belt would permit its wearer to be dressed suitably for court (ST1 - 39-40).

parties had been on notice "for some considerable time" and the judge found it was a "last minute request." (R23 - 44-45). Appellant asked to be removed from court with the knowledge the trial would proceed in his absence (T23 - 48). Audio-visual equipment was ordered to be set up in a separate room so Appellant could monitor the proceedings and join in when and if he changed his mind (T23 - 49-50, 53-56). When the equipment was ready for use, a new panel was called and voir dire commenced (T23 - 58-63).

Part way through voir dire, Appellant sent a message to his counsel to not participate in the trial, prompting the judge to order the trial proceed and noting "that overrides [Defendant's] effort trying to be manipulative with regard to the system..." (T23 - 88). Subsequently, counsel informed the judge Appellant wished to participate, but wanted time to discuss wearing the belt in place of shackles. Reasoning the case had progressed beyond that point and recognizing the need for an orderly progression, the court ruled Appellant would wear shackles. The judge stated, "It seems to me he's manipulated [the trial]...", but permitted Appellant to return to court (T23 - 113-16, 130). The next day, when trial recommenced, Appellant did not request reconsideration of the use of the restraint belt instead of shackles (T24 - 190-92).

The issue of restraints resurfaced at trial when Appellant asked to be permitted to testify without restraints. Declining to grant a hearing, the judge reminded counsel he was present when Appellant threw a huge, heavy chair in court stating he had not

witnessed a more violent act in court. Recognizing the "chair incident" occurred in 1993, the court added that the aggravated battery occurred after the chair incident, while Appellant was incarcerated. Further the court reminded the parties, Appellant had thrown a book at Judge Colbath in 1990, therefore, his testimony would be given in restraints (T28 - 743-47).

From the numerous times this matter was addressed, it is clear the parties agreed Appellant had committed two violent acts in court (throwing a chair and a book) and had been charged with aggravated battery while in jail after the chair throwing incident. Obviously, these acts were forefront in the judge's mind when he denied evidentiary hearings or the removal of restraints, even though he stated he would defer to the Corrections Staff. It was not error to require Appellant to be shackled before the jury.

This Court should find Appellant waived this issue or invited the alleged error by failing to address it completely the week before trial when prompted to do so by the court. Knight v. State, 721 So.2d 287, 296 (Fla. 1998)(reasoning defendant's courtroom misbehavior caused judge's ruling and boarded on invited error), cert. denied, 120 S.Ct. 459 (1999); San Martin v. State, 705 So.2d 1337, 1347 (Fla. 1997)(prohibiting party from creating error then complaining on appeal), cert. denied, 525 U.S. 841 (1998); Czubak v. State, 570 So.2d 925, 928 (Fla. 1990)(stating "[u]nder invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal"). By failing to

request an evidentiary hearing and agreeing to wear the restraining belt just days before trial, Appellant waived the issue. Waiting until the jury panel had been called before refusing to participate and requesting an evidentiary hearing indicates, as the trial court suggested, Appellant was manipulating the system. If it were error to deny the hearing, such was invited due to the late request.

Appellant claims it was error to deny an evidentiary hearing to determine whether restraints were necessary and to defer the decision to Corrections. (IB 49, 52). For support, he cites Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), opinion withdraw in part, 833 F.2d 250 (11th Cir. 1987); Bello v. State, 547 So.2d 914 (1989), cert. denied, 485 U.S. 1014 (1988); Jackson v. State, 698 So.2d 1299 (Fla. 4th DCA 1997), rev. denied, 707 So.2d 1125 (Fla. 1998); and McCoy v. State, 503 So.2d 371 (Fla. 5th DCA 1987).

Factually, Elledge is distinguishable from the instant matter. In Elledge, just prior to selecting the jury which would sentence the defendant, the trial judge announced he would require the defendant to wear shackles based upon information that the defendant had threatened to harm the bailiff and had become proficient in karate while in prison. Elledge, 823 F.2d at 1450. Elledge was not permitted to speak to these allegations. Finding this to be error, the Eleventh Circuit reversed for new sentencing. Id. at 1451. In the case at bar however, there is no challenge to the factual basis for the use of restraints; Appellant does not refute that he threw a book at one judge, and while in Judge

Mount's presence, threw a 26 pound chair at the prosecutor while shouting threats and using profanity causing the bailiffs to remove him forcibly. Moreover, Appellant does not refute he was charged with aggravated battery before his re-trial. Finally, Defendant was offered an alternate for the shackles when the trial court suggested the use of the belt to be worn under Appellant's clothes. See Holbrook v. Flynn, 475 U.S. 560 (1986)(requiring parties consider whether a less restrictive method of restraint is available). The belt was rejected on the day of trial. With this record evidence, and Appellant's failure to seek an evidentiary hearing before trial, he should not be heard to complain.

Similarly, Bello may be distinguished from the instant case. In Bello, the defendant had been shackled during the sentencing phase. In ordering a new penalty hearing, this Court noted there was no record evidence supporting the need for shackles and even though the defendant objected to the restraints and asked for an inquiry, the judge apparently deferred to the sheriff's judgment. Bello, 547 So.2d at 918. In the instant case, there is an ample record of Appellant's violent and disruptive courtroom behavior.

Both Jackson, 698 So.2d at 1302 and McCoy, 503 So.2d at 371 reason that a trial court should not defer blindly to the security measures sought by correctional personnel. However, here, the court did not yield blindly to Corrections. While Judge Mounts stated he would defer to Corrections, he had ordered Appellant to appear in shackles since the 1993 chair throwing incident. This

was a standing valid order and the rule of the case (ST1 - 37; Appendix 1, copy of State's Answer Brief on appeal Point V, pages 33-36 in case number 81,862). As a standing order, there was no need to have another evidentiary hearing. Moreover, the defense did not dispute the fact Appellant committed violent acts in court and jail. This behavior alone warranted restraining the Defendant.

However, should this court find it was error to not conduct a separate hearing, such was harmless given the extensive, unrefuted evidence of Appellant's violent courtroom behavior. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). With this ample record of violence the judge's decision to require Appellant stand trial in restraints was proper. Derrick v. State, 581 So.2d 31, 35 (Fla. 1991) (finding decision to shackle defendant proper where defendant had been found in possession of a screw driver in jail), cert. denied, 513 U.S. 1130 (1995); Stewart v. State, 549 So.2d 171, 173-74 (Fla. 1989)(affirming decision to require defendant wear restraints based upon previous violence and allegations of an escape attempt), cert. denied, 497 U.S. 1032 (1990); Diaz, 513 So.2d at 1047 (finding shackles appropriate due to defendant's prior violence and escape). This Court should affirm.

POINT II

APPELLANT'S CHALLENGE TO DEATH BY ELECTROCUTION IS MOOT AS FLORIDA HAS OPTED TO EXECUTE THE CONDEMNED BY LETHAL INJECTION (restated).

Appellant claims death by electrocution is cruel and unusual punishment (IB 54, R17 - 3054-75). This issue is moot.

The State of Florida has elected to carry out electrocutions by lethal injection. See, Chapter 00-2, Laws of Florida. As the United States Supreme Court noted in Bryan v. Moore, 68 U.S. L. Weekly 3281 (January 24, 2000), when dismissing the defendant's constitutional challenge to death by electrocution:

In light of the representation by the State of Florida, through its Attorney General, that petitioner's "death sentence will be carried out by lethal injection, unless petitioner affirmatively elects death by electrocution" pursuant to the recent amendments to Section 922.10 of the Florida Statutes, the writ of certiorari is dismissed as improvidently granted.

Id., at 3281. Unless Appellant chooses execution by electrocution, he will be executed by lethal injection. As such, this issue is moot and the Court should affirm the sentence imposed.

POINTS III, IV, AND VI

THE TRIAL COURT PROPERLY EVALUATED THE NON-STATUTORY MITIGATING EVIDENCE PRESENTED INVOLVING DEFENDANT'S ALLEGED LACK OF EDUCATION, LACK OF A POSITIVE ROLE MODEL, AND NEUROLOGICAL IMPAIRMENT (restated).

Contending the court erred in its decisions regarding the non-statutory mitigators of Defendant's education, positive role model, and neurological impairment, Appellant claims the sentence was constitutionally infirm requiring a new penalty hearing (IB 56, 61-63, 77). The State disagrees because the trial court's findings have record support.

While aggravators must be proven beyond a reasonable doubt. Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), mitigating factors are "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990); Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990)(finding judge may reject claimed mitigator if record contains competent substantial evidence to support decision). In analyzing mitigation, the trial judge must (1) determine whether the facts alleged as mitigation are supported by the evidence; (2) consider if the proven facts are capable of mitigating the punishment; and if the mitigation exists, (3) determine whether it is of sufficient weight to counterbalance the aggravation. Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The trial court "must expressly evaluate in its written order each mitigating

circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factor, it is truly of a mitigating nature." Campbell, 571 So.2d at 419. Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So.2d 450, 453 (Fla. 1991), cert. denied, 503 U.S. 946 (1992); Stano v. State, 460 So.2d 890, 894 (Fla. 1984). Resolution of evidentiary conflicts is the trial court's duty; "that determination should be final if supported by competent, substantial evidence." Id. Also, the relevant weight assigned a mitigator is within the sentencing court's province. Campbell, 571 So.2d at 420. See also, Alston v. State, 723 So.2d 148, 162 (Fla. 1998)(finding sentence within court's discretion where detailed order identified mitigators, and weight assigned each); Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996)(same). A weight assignment is reviewed under the abuse of discretion standard. Cole v. State, 701 So.2d 845, 852 (Fla. 1997), cert. denied, 118 S.Ct. 1370 (1998).

Clearly the trial court complied with the law and fulfilled his sentencing duty in this case. As will be shown below, the judge's reasoning for each challenged mitigator has record support as was outlined in the sentencing order(R22 - 3857-67). There was no error and the imposed death sentence should be affirmed.

A. Lack of Education

Gaines testified he and Appellant were friends from birth and

attended school together through age 13, during which time Appellant was a "straight A student" (T30 - 1124, 1133-34). Appellant's attack on the judge's finding this mitigator unproven because the judge stated Gaines and Appellant attended school together for 12 years does not undermine the conclusion the mitigator was unproven. They started their schooling with pre-school, therefore, they were in school together for 10 to 11 years. This modification certainly does not detract from the overall conclusion Appellant was an intelligent, articulate person.

Not only did Gaines so characterize Appellant when discussing his ability to read, understand, and explain scriptures, but two experienced psychologists also found Appellant to be of average intelligence (ST1 - 6-7, 12, 49-50, 57, 72). Appellant's intelligence and educational background was garnered in part from how he interacted and communicated with others (T30 - 1134-36; ST1 - 12). Otto reported Defendant did well in school before moving to Florida; after attending Florida schools his grades declined (T30 - 1170-71). Based upon this evidence, Appellant was able to grasp difficult topics, such as bible passages, had a good command of English, and was able to discern which areas of his case he should disclose to the psychologists and what information he should withhold (T30 - 1134-36; ST1 - 12-13, 18, 71-72).

With this testimony, as well as the judge's observations of Appellant's courtroom discussions and pro se filings, it was not required for him to follow Appel's conclusion that Appellant had a

low ability to learn (IB 58; R12 - 2040-43, 2494; R15 - 2582; T23 - 16-17). It is within the trial court's province, as fact finder, to disregard unreliable testimony. The mitigator is not established merely by showing formal education ended in the tenth grade. The trial judge did not err, thus, the Court should affirm.

B. Lack of a Positive Role Model

Here, Appellant complains that the judge had a duty to explain his analysis in rejecting this mitigator (IB 63). This Court will note the mitigator at issue is a simple one, whether Defendant had a positive role model. Here, the court listened to the testimony, and instead of recounting the allegations and denials of abuse, succinctly stated the testimony was "extremely conflicting", thus, rejecting Appellant's proof (R22 - 3865).

Appellant cites to Hudson v. State, 708 So.2d 256 (Fla. 1998) in which the death sentence was vacated because the mitigators were disposed of in summary fashion without assigning weight to those established, thus, precluding an appropriate review. Id. at 257-59. However, here it is not a question of weight assignment, but whether the mitigator was established; Hudson does not further Appellant's position. For its review, this Court need look only at the record to find the judge's conclusion supported.

The sentencing order identified this mitigating factor and while it was discussed briefly, it is clear the court found the evidence totally lacking due to the conflicting testimony. It is the trial judge's duty to resolve conflicts in the testimony.

Gunsby v. State, 574 So.2d 1085, 1090 (Fla.) (reasoning "resolution of factual conflicts is solely the responsibility and duty of the trial judge"), cert. denied, 503 U.S. 843 (1991). The trial court resolved the conflicts adversely to Appellant when, in essence, the judge found the mitigation was not proven by the greater weight of the evidence.

According to Gaines, Appellant had a healthy, happy, normal childhood with a supportive father who may have had an affair with another woman (T30 - 1140). According to Otto, the initial private investigator, Hillary Sheehan, logged in hundreds hours, yet was unable to discover any independent support for the allegations of abuse reported by Appellant, his siblings, and their mother. There were neither police reports nor neighbors who corroborated these claims (T30 - 1184). Otto acknowledged that while Appellant's father may not have been supportive, Defendant did have the support of his mother, teachers, classmates, and neighbors (T30 - 1189).

Appellant presented testimony accusing his father of violent acts against his wife which were made know to the children (T30 - 1150, 1157-66; T31 - 1253-60, 1276-79, 1302-04). Conversely, Willie Bryant, denied all allegations of physical violence toward his family (T31 - 1287-89, 1292). Veonice Bryant, Appellant's mother, admitted she did not report to the Connecticut police these incidents of violence which were to have occurred in Bridgeport before Appellant was 13 years-old. Even with Mr. Bryant's alleged abuse and unfaithful behavior, Mrs. Bryant remained married to him

and until 1996, shared a home together (T31 - 1251, 1266-68, 1269).

A review of the record reveals the evidence came down to a contest between Appellant's sisters and mother alleging abuse by Mr. Bryant, and Mr. Bryant denying those allegations. As such, without identifying and paraphrasing the witnesses' testimony on each alleged incident of abuse and counter point that the event did not occur, the judge had nothing more to add to his finding the mitigator not established (R22 - 3865). Having found the mitigator unproven, no weight had to be assigned. Given the contradicting testimony, the judge did not err in concluding Appellant had not established he lacked a positive role model. This Court should affirm.

C. Neurological Impairment

Here, Appellant complains it was error to not find the non-statutory mitigator of neurological impairment proven (IB 77). The trial court's conclusion has record support and should be affirmed.

The trial judge reasoned:

The fifth asserted mitigator was the Defendant's neurological impairment due to head injuries and meningitis. Medical records showed that the Defendant suffered from meningitis as a child and a head injury when he was eighteen years of age. Dr. Antoinette Appel, a licensed psychologist, examined the Defendant and testified that the brain damage caused by the head injury combined with the meningitis could cause the Defendant to suffer from impulsive behavior and impairment. While this may be true, the evidence in this case does not show that the Defendant acted impulsively or had impaired judgment. On the night of the murder, the Defendant and his

conspirators planned to commit two robberies. The first was aborted because there were "too many people" there. So, the group chose to rob Andre's Market. During the robbery, the victim, Mr. Andre, grabbed Defendant's gun. The Defendant told the police in his statement that he was fighting for his life and would have been shot had he lost control of the gun. Additionally, according to his own statement to the police, the Defendant called the [Sheriff's] Office every day after the murder to find out if there was a warrant issued for his arrest. Therefore, if this Court found that the Defendant suffered from neurological impairment due to subsequent brain damage and meningitis, his actions on the night of the murder indicate that he understood what he was doing, why he was doing it, and that it was unlawful. See Davis v. State, 604 So.2d 794, 798 (Fla. 1992), cert. denied, 516 U.S. 827 (1995). Thus, no mitigating circumstance was present.

(R22 - 3865-66). Clearly, the trial court discounted the doctor's testimony in light of Appellant's actions surrounding the crimes.

According to Dr. Fleszar, a diagnostic radiologist, Appellant had an atrophy to his right frontal lobe, but this was only a very small portion of the brain, approximately 1/16 of the right frontal lobe. No damage was found beyond that area and the injury was not degenerative (T30 - 1065, 1078-80, 1086-87, 1096). The brain stem was intact and working well as was the remainder to the frontal lobe (T30 - 1065, 1078-83). It was Dr. Fleszar's opinion that varying degrees of injury affect people differently (T30 - 1084). He could not predict Appellant's ability to function in society or the extent to which a person could function on an intellectual or cognitive level (T30 - 1089-90). The doctor admitted he knew other

patients who had brain atrophies, and had responded well to everyday life (T30 - 1090-91).

It was agreed the pre-trial testimony on competency given by Dr. Antoinette Appel ("Appel")³, Appellant's confidential expert, would be incorporated in the penalty phase. Appel found Appellant's injury altered his impulse control and judgment; he had emotional discontrol. (T30 - 1093-94, 1113-15).

During the guilt phase of the trial, Appellant's taped confession was played. In such statement, Appellant described the planning of the robbery, the selection of the targets, rejection of one due to the number of people at the location, and the election of Defendant and Dexter Kirkwood to enter the second target's market because the victim did not know them, but knew the other accomplices (T28 - 815-17, 831). When fighting with Andre for control of the gun, Appellant called to Dexter Kirkwood to shoot Andre, however, Mr. Kirkwood fired no shots (T28 - 820-21, 823). Continuing to wrestle for the weapon, Appellant gained control of the gun when Andre released his grip, at which point, Defendant shot him in the stomach (T28 - 820-21). As Andre continued to struggle, Appellant shot him in shoulder area and then a third time, at point blank range, as Andre called for his wife (T28 - 821-23). Defendant was concerned because he knew Andre would die from the three shots from the .357 Magnum, and feared he would be

³Appel had an afternoon conflict, thus, to avoid a delay, the State did not recall her for cross-examination (T30 - 1121).

identified by the victim's wife (T28 - 823-24). Both guns used were Defendant's (T28 - 825-26).

Appellant admitted knowing the crime was wrong and stated:

And the only reason that I shot the man because (sic) I had no choice. If he would have, I could see it in his face and how hard he was struggling to fight me. He was fighting for his life just like me. And it just so happened that I had a little more control of the gun which ended up killing him. You know, I can't take back, you know, what happened, and if I could I would. But I didn't go there with the intention of -- of killing him.

(T28 - 835). Appellant confessed calling the Sheriff daily, on the pretense of a misdemeanor traffic warrant, in order to verify whether there was an arrest warrant for him (T28 - 836).

Clearly, the judge interpreted these acts as proof the Defendant acted voluntarily with impulse control. Appel concluded Appellant would not be able to process information and his impulse controls and ability to benefit from feedback were gone (T30 - 1106, 1113). In essence, she implied Appellant is unable to conform his behavior to society's expectations (T30 - 1115). Conversely, the court learned Appellant had decided to not rob one place in favor of a less crowded target, where the victims did not know him. Additionally, Defendant admitted knowing the act was wrong. Defendant's own actions belie Appel's testimony and conclusions. In stead, Appellant's behavior confirms Dr. Fleszar's observation that those with brain injuries could function well (T30 - 1090-91). Hence, the trial court did not err in finding no

neurological impairment rising to the level of a mitigating circumstance. This Court should affirm the judge's decision on this matter as it is supported by competent, substantial evidence. Nibert, 574 So.2d at 1061 (finding judge may reject mitigator if decision supported by competent, substantial evidence).

However, should this Court conclude it was error to not find this non-statutory mental mitigator established, such error was harmless beyond a reasonable doubt. In Wickham v. State, 593 So.2d 191 (Fla. 1991), cert. denied, 505 U.S. 1209 (1992), this Court found the trial judge erred in failing to find mitigation contained in the record. Id. at 194. Recognizing some of the mental mitigation evidence had been controverted, this Court opined:

In light of the very strong case for aggravation, we find that the trial court's error in weighing the aggravating and mitigating factors could not reasonably have resulted in a lesser sentence. Having reviewed the entire record, we find this error harmless beyond a reasonable doubt.

Wickham, 593 So.2d at 194 (citation omitted). See also, Thomas v. State, 693 So.2d 951, 953 (Fla.)(reasoning massive aggravation proven, including killing victim so she could not talk to the police, established failure to find mitigation was harmless beyond a reasonable doubt), cert. denied, 118 S.Ct. 449 (1997); Lawrence v. State, 691 So.2d 1068, 1076 (Fla.)(finding error in failing to find mitigation related to substance abuse, but such was harmless in light of three proven aggravators), cert. denied, 522 U.S. 880 (1997). The same analysis and conclusion should be drawn here.

As this Court will recall, Appellant had prior violent felony convictions in case number 89-16616 for sexual battery and grand theft and in case number 92-2538 robbery with a weapon and aggravated assault with a mask. Further, he was involved with the armed robbery of Leonie Andre, the deceased victim's wife. Appellant does not contest this aggravation. As outlined above, Defendant's actions undermine any claim that mental infirmity caused this homicide. Moreover, the evidence reflects the State produced evidence from Defendant's confidential expert, Appel, that he knew the difference between legal and illegal (ST2 - 149-51) and established through the court appointed mental health experts that Appellant was of average to above average intelligence, able to control his behavior, and had no cognitive, emotional or behavioral mental illness (ST1 - 10, 12-13, 15-17, 32, 57-58, 72). This evidence, coupled with Defendant's confession that Andre's Market was selected for its lack of witnesses, and that he killed Andre in order to free himself from the victim and escape the scene shows that Appellant is capable of planned actions (T28 - 815-17, 831, 835). Given the fact Appellant's mental mitigation was undermined and that there is strong aggravation in this case, it was harmless beyond a reasonable doubt that the trial court failed to find the non-statutory mitigator of "neurological impairment." This Court should affirm the conviction and sentence.

POINT V

THE TRIAL COURT DID NOT ERR IN FINDING
APPELLANT COMPETENT TO STAND TRIAL (restated).

It is Appellant's assertion the evidence in his case was insufficient to establish he was competent to stand trial (IB 73). Disagreeing with Appellant's position, the State submits the judge resolved the conflicting evidence presented by the parties and rested its decision upon substantial, competent evidence presented by the two court appointed psychologists, but also by Appellant's confidential expert. As such, this Court should affirm.

When the issue of a defendant's competency is raised, experts shall be appointed to evaluate the defendant's mental condition pursuant to Florida Rule of Criminal Procedure 3.210. Such examination shall comply with Florida Rule of Criminal Procedure 3.211 which provides in pertinent part:

(a) Examination by Experts. Upon appointment by the court, the experts shall examine the defendant with respect to the issue of competence to proceed, as specified by the court in its order appointing the experts to evaluate the defendant, and shall evaluate the defendant as ordered.

(1) The experts shall first consider factors related to the issue of whether the defendant meets the criteria for competence to proceed; that is, whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings.

(2) In considering the issue of competence to proceed, the examining experts shall consider

and include in their report:

(A) the defendant's capacity to:

(i) appreciate the charges or allegations against the defendant;

(ii) appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against the defendant;

(iii) understand the adversary nature of the legal process;

(iv) disclose to counsel facts pertinent to the proceedings at issue;

(v) manifest appropriate courtroom behavior;

(vi) testify relevantly; and

(B) any other factors deemed relevant by the experts.

This Court has held:

The test for whether a defendant is competent to stand trial is whether "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824, 825 (1960); see also Sec. 916.12(1), Fla. Stat. (1993); Fla. R. Crim. P. 3.211(a)(1). The reports of experts are "merely advisory to the [trial court], which itself retains the responsibility of the decision." Muhammad v. State, 494 So.2d 969, 973 (Fla.1986) (quoting Brown v. State, 245 So.2d 68, 70 (Fla. 1971), vacated in part on other grounds, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972)), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987). And, even when the experts' reports conflict, it is the function of the trial court to resolve such factual disputes. Fowler v.

State, 255 So.2d 513, 514 (Fla. 1971). The trial court must consider all evidence relative to competence and its decision will stand absent a showing of abuse of discretion. Carter v. State, 576 So.2d 1291, 1292 (Fla. 1989), cert. denied, 502 U.S. 879, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991).

Hunter v. State, 660 So.2d 244, 247 (Fla. 1995), cert. denied, 516 U.S. 1128 (1995). It is within the judge's discretion to resolve conflicts, and if an appellant is unable to show an abuse of discretion, the decision must stand. Id. at 247. See also Hardy v. State, 716 So.2d 761, 764 (Fla. 1998)(reasoning where there is conflicting expert testimony regarding competency, it is judge's responsibility to consider evidence and resolve factual disputes; decision will be upheld absent showing of an abuse of discretion).

In the instant case, the trial court heard testimony covering the areas of inquiry listed in Rule 3.211, in addition to observing Defendant's actions, reading his pro se filings, and contemplating his argument on those motions. Hence, the judge was apprised of the issue fully and resolved the evidentiary conflicts.

A week before commencement of trial, Judge Mounts held a competency hearing during which he heard from Dr. Stephen Alexander ("Alexander"), a licensed psychologist (ST1 - 6-8). After conducting the exam with the prosecutor and defense counsel present and considering the areas outlined in the Florida laws, Alexander testified Defendant appeared to be of average to above average intelligence with a good command of English and able to communicate effectively. There was no impairment of long or short term memory.

Defendant appeared capable of making independent decisions and utilizing his judgment based upon his appraisal of the circumstances. Alexander saw no indication of any cognitive deficits which would have a bearing on competency (ST1 - 10, 12-13). While choosing not to reveal exact details of his defense, Appellant expressed complete satisfaction and confidence in his counsel. Assuring Alexander he was well aware of defense strategies, Appellant affirmed he was anxious to proceed with his case (ST1 - 13). Appellant claimed he was aware Judge Mounts was presiding, and acknowledged the judge's duty was to make rulings which could be reviewed by a higher court. Also, Appellant knew Mr. Galo was the prosecutor representing the State in this adversarial process (ST1 - 14-15).

As part of the examination, Alexander observed Appellant's posture, energy level, and ability to make eye contact. It was Alexander's opinion Defendant's demeanor was consistent with his emotional expressions. No evidence of cognitive, emotional, or behavioral mental illness was perceived, nor were such conditions expected to arise (ST1 - 15-16). Alexander saw nothing which would detract from Appellant's competency to stand trial (ST1 - 16).

According to Alexander, Appellant knew of the pending charges and of possible penalties he faced. He understood the adversarial process and was able to disclose pertinent facts to his attorneys. Further, Appellant was capable of exhibiting appropriate courtroom behavior and could testify relevantly (ST1 - 16-17). While

Alexander agreed the case facts were not disclosed, therefore, he would be unable to say the Defendant could testify relevantly with regard to his version of the facts, Alexander noted Appellant had stated he would "take the Fifth" and not discuss the facts with him. This tactic was taken because Defendant "did not want to say anything in the presence of the State Attorney that may jeopardize his fair movement through the case" (ST1 - 18-19).

Alexander was aware Appellant had thrown a chair in the first trial and had thrown a book at Judge Colbath. While at that time Appellant had exhibited inappropriate courtroom behavior, Alexander saw the question to be whether the acts were deliberate or involuntary (ST1 - 20-21). There was nothing exhibited during the examination which would lead Alexander to believe the incidents were anything, but deliberate (ST1 -21).

In speaking with Defendant, it was clear he knew where he had been residing, that he had been convicted previously, the case had been reversed on appeal due to an error of the trial judge and, Mr. Springer had filed the appeal which was argued by Mr. Musgrove. It was Alexander's opinion, Appellant was fully informed of all aspects of his case (ST1 - 27-28). Explaining Appellant was capable of cooperating with counsel, Alexander reiterated:

There are no impairments intellectually emotionally, or behaviorally that would interfere with that capability. The choice remains with the Defendant as to whether or not he does, that again is a volitional choice, not a deficit of the representation or incompetency.

(ST1 - 32).

Susan Hession ("Hession"), a licensed mental health counselor with 25 years experience examined Appellant in the presence of his counsel and prosecutor while determining his competency to stand trial. She had examined Appellant in 1993 for the first trial and then on May 27, 1997 for the re-trial (ST1 - 49-53, 69). During the interview, Appellant was able to give a long history of the case (ST1 - 69). While doing no formal testing, Hession was aware of Defendant's head injury and impulsivity, but reasoned those issues went toward mitigation or sanity, not competency to stand trial (ST1 - 55-56).

Hession observed Defendant was able to discuss the pending charges, possible penalties, and his side of the case. In fact, according to Hession, Appellant was quite able to articulate the facts; he was forthcoming, and his answers were consistent with the known facts (ST1 - 56-57). Hession noted Appellant had matured physically, cognitively, and emotionally since 1993. Appellant was capable of controlling his courtroom behavior and any misbehavior would be by his own choice (ST1 - 57-58). It was Hession's conclusion Appellant was competent to stand trial as he was capable of conferring with his attorney, and planning his defense. Moreover, Defendant had the attention, memory, and focus to challenge the prosecution witnesses and seemed motivated to help himself; he had clear coherent thought processes which were goal directed (ST1 - 58, 64). Because Appellant was able to converse

with Hession on a wide variety of issues, she concluded he would be able to talk to others (ST1 - 62-63). Hession opined she believed Appellant to be of average or better intelligence (ST1 - 72).

Confidential expert, Appel, examined Appellant in private (ST1 84-85, 121-22). She administered a battery of tests, reviewed his medical history, and concluded he was a slow learner with a grossly impaired neuropsychological evaluation and an 84 IQ (ST1 - 87-90, 92-94). It was her opinion, Appellant's brain injury, meningitis, drug use, dysfunctional family, impaired cognitive function, and memory, established he was not competent (ST1 - 119-20).

Appel conceded Appellant understood the State Attorney was attempting to prove he committed a crime and it was an adversarial process. Appellant knew the meaning of proof and self-incrimination as well as the difference in the roles of prosecutor, defense counsel, judge, and jury. Defendant understood he had to be found guilty by each juror before sentencing. Appel admitted Defendant grasped what "punishment" was and that he faced the death penalty. She opined Appellant could testify relevantly, but not for complex or trap questions (ST1 - 128-31, 133).

Appel's exam revealed the Defendant understood the appellate process. He knew who his counsel was, comprehended he was charged with a crime which carried certain penalties. Appellant fathomed the difference between legal and illegal, but may not know he should not do something illegal (ST2 - 149-51). The doctor acknowledged she was unaware Appellant had filed several pro se

motions and argued them before Judge Mounts (ST2 - 157). Following Appel's testimony, the trial court found Appellant competent to proceed (ST2 - 165).

On this evidence, clearly, the trial court did not abuse its discretion in resolving the conflicting evidence as both Alexander and Hession testified their examinations revealed Appellant was competent. Turner v. State, 645 So.2d 444, 446 (Fla. 1994) (finding judge did not abuse discretion in resolving conflicts in evidence); Hunter, 660 So.2d at 247 (finding it is function of trial court to resolve conflict in competency evidence); Ponticelli v. State, 593 So.2d 483, 487 (Fla. 1991)(upholding decision defendant was competent based upon two medical experts finding defendant competent and one expert finding him incompetent), vacated on other grounds, 506 U.S. 802 (1992), aff'd after remand, 618 So.2d 154 (Fla. 1993); Ferguson v. State, 417 So.2d 631, 634 (Fla. 1982) (upholding trial court's decision on competency even though medical testimony was conflicting on the issue, there was support for conclusion defendant was competent). This Court should affirm.

POINT VII

THE IMPOSITION OF THE DEATH PENALTY IN THIS
CASE IS PROPORTIONAL (restated).

Conceding he went to Andre's Market with the intent to rob the establishment, Appellant suggests the resultant killing was an impulsive act committed while he and the victim wrestled for the gun (IB 78). Appellant asserts that although the victim was shot multiple times, had the three non-statutory mitigators challenged in his brief in addition to the remorse mitigator, been analyzed and weighed differently, this Court would find the homicide undeserving of the death penalty (IB 79). Disagreeing, the State submits the sentence is proportional.

Within his argument, Appellant cites to Roberts v. State, 611 So.2d 1228 (Fla. 1993); Shere v. State, 579 So.2d 86 (Fla. 1991), and McKinney v. State, 579 So.2d 80 (Fla. 1991). These cases discuss whether multiple gun shots, by themselves, establish the heinous, atrocious, or cruel aggravator. Such aggravator was not requested by the State nor was it found by the trial court. As such, these cases do not further Appellant's position. Moreover, Defendant has not cited to a case which would call into question the judge's weighing of the aggravating and mitigating evidence or suggest that the death penalty is not proportional.

Here, the trial judge found three aggravators (1) prior violent felony convictions, (2) homicide committed during a robbery, and (3) capital felony committed for the purpose of

avoiding or preventing a lawful arrest or effecting an escape from custody (R22 - 3858-64). The first two aggravators were conceded at trial by Appellant, and the third is not challenged here. Only one non-statutory mitigator was found established (remorse), however, because of Defendant's subsequent actions, very little weight was accorded this circumstance. As argued in Points III, IV, and VI above, there is record support for the trial court's conclusions regarding the non-statutory mitigation of lack of education, absence of a positive role model, and neurological impairment (R22 - 3864-67). Upon these facts, the judge imposed the death penalty. Such was proper and should be found proportionally warranted.

In support of its position that Appellant's death sentence is proportional, the State relies upon Freeman v. State, 563 So.2d 73 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Clark v. State, 613 So.2d 412 (Fla. 1992), cert. denied, 510 U.S. 836 (1993); and Moore v. State, 701 So.2d 545, 547 (Fla. 1997), cert. denied, 118 S.Ct. 1536 (1998). In Freeman, while committing a burglary, the defendant was surprised by the victim. A struggle ensued with the defendant eventually gaining the upper hand and beating the victim to death. The death penalty was upheld based upon two aggravators (prior violent felony conviction and pecuniary gain/felony murder) and little mitigation. Freeman, 563 So.2d at 77.

Likewise, the death sentence was affirmed in Clark where the victim had given the defendant and another man a ride only to have

the defendant decide to steal the victim's truck. During the course of the robbery, Clark shot the victim multiple times and then disposed of the body. Clark, 613 So.2d at 415. The trial court imposed the death penalty upon a finding of two aggravating circumstances (prior violent felony and pecuniary gain/felony murder) and no mitigation. On appeal, this Court found the sentence proportional. Id.

In Moore, this Court affirmed the death penalty for a murder committed during a robbery and arson of the victim's home. Finding the sentence proportional, this Court opined:

... we have examined other cases in which we have imposed the death penalty and find that Moore's sentence is proportionate. The jury recommended death by a vote of nine to three. The trial court found three aggravating factors: 1) Moore had been convicted of the prior violent felonies of armed robbery and aggravated battery; 2) he committed the murder to avoid arrest; and 3) he committed the murder for pecuniary gain. Although the court found one statutory mitigating factor--that Moore was nineteen years old--it was given only slight weight since Moore was first treated as an adult before the court at the age of fifteen. There were no nonstatutory mitigating factors. We have upheld the death sentence in other cases based on only two of the three aggravating factors present here. In Pope v. State, 679 So.2d 710 (Fla. 1996), cert. denied, --- U.S. ----, 117 S.Ct. 975, 136 L.Ed.2d 858 (1997), we held the death penalty was proportionate where there were two aggravating factors (the murder was committed for pecuniary gain and the defendant had been convicted of a prior violent felony), two statutory mitigating circumstances (commission while under the influence of extreme mental or emotional disturbance and impaired capacity to appreciate the

criminality of the conduct), and three nonstatutory mitigating circumstances (defendant was intoxicated, committed the murder subsequent to a disagreement with his girlfriend, and was under the influence of mental or emotional disturbance). In Melton v. State, 638 So.2d 927 (Fla. 1994), we held the death penalty was proportionate where there were two aggravating factors (the murder was committed for pecuniary gain and the defendant had been convicted of a prior violent felony) and some nonstatutory mitigation. We find that the death penalty was proportionate here. See also Consalvo v. State, 697 So.2d 805 (Fla. 1996) (holding death penalty was proportionate where there were two aggravating factors -- avoiding arrest and commission during the course of a burglary--with some nonstatutory mitigation).

Moore, 701 So.2d at 551-52 (emphasis supplied). Here, Appellant was no stranger to the criminal justice system. He had prior violent felony convictions for sexual battery, robbery with a weapon, and aggravated assault with a mask (T30 - 1056). The Court has found prior violent felony convictions strong aggravation. Marshall v. State, 604 So.2d 799, 806 (Fla. 1992) (finding prior violent felony conviction a strong aggravating factor), cert. denied, 508 U.S. 915 (1993). Given the fact the instant murder was committed by a person with prior violent felony convictions, during the course of a robbery, and in order to escape lawful arrest where there is only one non-statutory mitigator (remorse) of very little weight, the death penalty is proportional. This Court should affirm Appellant's convictions and sentences imposed in this case.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Appellee requests respectfully this Court AFFIRM Appellant's conviction and death sentence below.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished by courier, to: MICHAEL DUBINER, ESQ., Dubiner & Wilensky, P.A., Northbridge Centre, Suite 325, 515 North Flagler Drive, West Palm Beach, FL 33401-4349 and MARK WILENSKY, ESQ., Dubiner & Wilensky, P.A., Northbridge Centre, Suite 325, 515 North Flagler Drive, West Palm Beach, FL 33401-4349 on April 28, 2000.

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