SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC00-2366

LLOYD DUEST,

Appellant,

- versus -

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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Preliminary Statement

Appellant, defendant in the trial court below, will be referred to as "Appellant", "Defendant" or "Duest". Appellee, the State of Florida, will be referred to as the "State". References to the record will be by the symbol "R", to the transcript will be by the symbol "T", to any supplemental record or transcript will be by the symbols "SR" or "ST", and to Aults' brief will be by the symbol "IB", followed by the appropriate page numbers.

Statement Of The Case and Facts

In Duest v. State, 462 So.2d 446 (Fla. 1985), this Court found the following facts surrounding the conviction:

> On February 15, 1982, defendant was seen by witnesses carrying a knife in the waistband of his pants. Subsequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold Camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriff was contacted. Upon arrival, the deputy sheriff found Pope on the bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April 18, 1982. Defendant was tried and found guilty of first-degree murder.

The conviction was upheld in Duest v. Singletary, 967 F. 2d 472 (11th Cir. 1992) *rev'd on other grounds* Duest v. Singletary, 997 F. 2d 1336 (11th Cir. 1993).

In Duest, 997 F. 2d at 1340, the Eleventh Circuit Court of Appeals reversed the district court's denial of habeas corpus, vacated the death sentence and remanded the case for a new sentencing hearing.

At the resentencing, Dr. Ronald Wright, the medical examiner, testified that he conducted the autopsy on Mr. Pope, visited Mr. Pope's home, where the murder took place and reviewed the photos taken at the crime scene (R. Vol. 3 pp. 335-338). Mr. Pope sustained multiple stab wounds, some superficial injuries to his arms, a head wound to the temple, multiple stab wounds to his right shoulder, a double wound to his armpit, a wound right through his right rib, and three stab wounds to his back, one of which penetrated the right lung (T. Vol. 4 pp. 357-364). The wounds to Mr. Pope's arms were consistent with defensive wounds (T. Vol. 4 p. 367). Dr. Wright opined that Mr. Pope was stabbed in his bed, but died in the bathroom (T. Vol. 4 p. 368). Mr. Pope was alive when the wounds were inflicted, and was conscious for a matter of minutes after being stabbed in the heart (T. Vol. 4 p. 365). Mr. Pope passed out from the loss of blood and when he passed out he no longer had a blood pressure (T. Vol. 4 p. 364-366). Dr. Wright testified that the amount of blood found on the victims bed equated to approximately 1/5 of Mr. Pope's blood volume (T. Vol. 4 p. 343). In the bathroom, there was pooling of blood at the base of the commode which was consistent with Mr. Pope sitting on the commode while bleeding (T. Vol. 4 p.

347). Mr. Pope also stood at the sink bleeding and most of the blood came from the wound to his temple (T. Vol. 4 p. 347). There was a blood smear on the side of the tub which happened when Mr. Pope collapsed in the bathroom (T. Vol. 4 347-348).

On cross examination, Dr. Wright testified that none of the wounds would have killed anyone quickly (T. Vol. 4 p. 386). Dr. Wright testified that even if Mr. Pope had only the wound to the temple, it could have been fatal (T. Vol. 4 p. 387). Dr. Wright opined that it was difficult to determine how long a person could have survived, but said he could have lived if he had called for help within the first five minutes after the attack (T. Vol. 4 p. 406). Defense counsel was able to impeach Dr. Wright with his 1983 deposition. In the deposition, Dr. Wright testified that Mr. Pope died within five minutes after the attack, now his opinion is that it may have taken between 15 and 20 minutes for Mr. Pope to die (T. Vol. 4 pp.401-405).

David William Shiflett testified that in 1981 he lived with Mr. Pope (T. Vol 4 p. 412). On the day of the murder, Shiflett returned home from work and noticed that Mr. Pope's Camaro was not in the driveway and assumed that he had gone out to dinner (T. Vol. 4 p. 413-414). Shiflett testified that when he got into the home, the stereo was blasting, the lights were on, the sliding glass door was open, and this was all unusual (T. Vol. 4 p. 414). Shiflett's friend Vickie Geene arrived at the house later

in the evening. Shiflett went into Mr. Pope's room to borrow some money where he and Green saw that the sheets on Mr. Pope's bed were covered with blood (T. Vol. 4 p. 420). They did not go into the bathroom, they ran to a neighbors, to call the police, and the police discovered the body (T. Vol. 4 pp. 418-419).

Neil O'Donnell's testimony from the first trial was read into the record as he had died. O'Donnell was a bar manager at Lefty's, a neighborhood gay bar (t. Vol. 5 p. 444). O'Donnell was shown a picture of Mr. Pope by the police and while he did not know his name he recognized him as a patron (T. Vol. 4 p. 446-447). O'Donnell saw Mr. Pope in the bar on February 15, 1982 with Duest (T. Vol. 5 p. 449-463). Joanne Avery testified that Duest came to her home on February 15, 1982 with Mr. Pope, and they were driving a gold Camaro (T. Vol. 5 p. 483-486). About an hour and a half later, she saw Duest alone, driving the Camaro, he showed her some jewelry and said he was going to get it appraised (T. Vol. 5 p. 487-490). Tammy Dugan was unavailable to testify so her testimony from the prior trial was read into the record. Dugan testified that on February 15, 1984 Duest said that he was "going out to roll a fag" because he needed money (T. Vol. 5 p. 503-504). Dugan said that Duest told her he was going to go to a gay bar, pretend to be gay, pick up a man, bring him home, then steal his money (T. Vol. 5 p. 504). Michael Demizio owned a knife and it was missing. Duest said he had the knife (T. Vol. 5 p. 507).

Michael Demizio testified that on February 11, 1982, he met Duest on a Bus which was going from Albany to Fort Lauderdale (T. Vol. 5 p. 522-523). Duest told Demizio that "he used to beat up fags, roll fags, take them back to their houses and rob them" (T. Vol. 5 p. 524). Demizio and Duest arrived in Fort Lauderdale on February 13, 1982, and while looking for a place to stay met a man named John who offered them a place to stay at the Alpha Apartments (T. Vol. 5 p. 525-527). On Monday, February 15, 1982, Demizio saw Duest at the apartment between 3:30 and 4:00 P.M., he had pulled up in a brown Camaro (T. Vol. 5 p. 5290). Duest was driving the car with a towel on the steering wheel and a towel on the stick shift (T. Vol. 5 p. 529). Duest was wearing a jogging suit , and Demizio saw that there was blood on the sleeve and collar, Duest had scratches on his face, that Demizio had not seen before (T. Vol. 5 p. 529-531). The State presented victim impact testimony through Robert Harris a friend of Mr. Pope (T. Vol. 6 pp. 568-585). David Pope, Mr. Pope's son testified that he was a good father, a loving husband, and the community loved him (T. Vol. 6 pp. 647-654). Lillian Pope, Mr. Pope's daughter testified that he was a special person and he guided her to become a Human Resources Director (T. Vol. 6 p. 660). Not a day goes by that Lillian does not feel her father's loss (T. Vol. 6 p. 661).

The defendant called John Boone as his first witness. Boone was the

Commissioner of Corrections for Massachusetts, in charge of the entire Massachusetts prison system from 1971-1993 (T. Vol 6 p. 591). Boone met Duest when he was an eighteen year old inmate at Concord. Duest spoke of a problem and Boone referred him to a staff person (T. Vol. 6 p. 593). Boone later learned the Duest had been an inmate at Walpold. This was Duest's first incarceration and he had been placed in Walpold, which is reserved for the most hardened of criminals. This was due to a poor classification system (T. Vol. 6 pp. 593-597). Boone testified that prison riots were common in Massachusetts prisons, and in 1972, a massive riot at Concord caused Duest to be transferred to Walpold (T. Vol. 6 p. 598). There was stress and tension at every level of the prisons (T. Vol. 6 p. 599). Young inmates were abused by gangs, drug runners and money collectors, and such a dehumanizing situation was especially damaging to the young inmates like Duest (T. Vol. 6 p. 600) Drug abuse was rampant in the prisons and the medical staff was routinely threatened by inmates who wanted prescriptions (T. Vol. 6 p. 601). Boone testified that he only met Duest once and that he reviewed his file but can't recall much because it was in 1973 (T. Vol. 6 p. 605).

John Gelosi, a Deputy Sheriff testified that Duest once helped him by translating sign language for another inmate (T. Vol. 6 p. 625). The State presented evidence that Duest was convicted of an escape during which he used a homemade knife to back

a deputy into the corner of a holding cell and then left the courthouse (T. Vol. 6 p. 644). Robert Huber, who works at the Wodden Rogers Education center testified that Duest was a student while he was in jail and one of Duest's paintings is hung in the lobby (T. Vol. 6 p. 662-666). Deputy Michael Lynch testified that Duest saved his life because he told Lynch that another inmate was planning to kill him and the facts turned out to be true (T. Vol. 6 p. 667-668). Clair Guzzetti, Duest's cousin testified that she grew up with him and his father was abusive and everybody was afraid of Duest's father (T. Vol. 6 p. 671). Guzzetti has written to Duest for many years now and he has come to know the lord (T. Vol. 6 p. 676-677).

Dr. Patricia Fleming testified that she evaluated Duest in 1989 (T. Vol. 6 p. 693). Dr. Fleming found that Duest was a shy child with low self esteem, little self confidence, who learned from his father (T. Vol. 6 p. 694). Duest survived in the world by being tough, the family was dysfunctional and alcohol and drugs had a strong influence on him since he was a teenager (T. Vol. 6 p. 695). Duest was a neglected child and had a brain dysfunction but she only knew about that from his mother (T. Vol. 6 p. 695). Duest's father was raised by alcoholic parents, was in the marines and was determined to teach his kids to grow up tough (T. Vol. 6 p. 697). Duest was the focus of his father's attention. Duest's father was a hard worker, but became an invalid when he was injured on the job (T. Vol. 6 p. 699). Duest's cousin

Ritchie also had a negative influence on Duest (T. Vol. 6 p. 700). Dr. Fleming testified that Duest never told her about his incarceration at Walpold (T. Vol. 9 p. 702). Dr. Fleming testified that she relied on Duest' prior criminal history in forming her opinions (T. Vol. 6 p. 713-715). The State was able to ask Dr. Fleming what crimes Duest had been convicted of (T. Vol. 6 p. 715-720).

Duest's father testified that he was an alcoholic and he abused Duest (T. Vol. 6 p. 731-737). Duest was addicted to heroin when he was released from Walpold but he does not use heroin anymore (T. Vol. 6 p. 734-736). Duest's mother testified that he was abused and that his father gave him no respect (T. Vol. 6 p. 737-741). Duest's sister, Nancy Kerrigan testified that Duest has a daughter. Kerrigan testified that their father was abusive and beat the children (T. Vol. 7 p. 754-757). Joseph Deauveau testified that he has known Duest since they were 12 years old and Duest was physically abused by his father (T. Vol. 7 p. 777). Maria Craig testified that she writes to Duest in prison, considers him her father and his death would be a big loss to her and her mother (T. Vol. 7 p. 783).

The jury recommended death by a vote of 10-2 (T. Vol. 7 p. 917). At the Spencer Hearing, videotaped depositions of Duest's family member were played for the trial judge (T. Vol. 8 pp. 940-984) . All of the family members said that Duest should not get the death penalty. The trial judge sentenced Duest to death finding

three aggravating circumstances, no statutory mitigators and eleven non-statutory mitigators (R. Vol. 3 p. 384-390). This appeal follows.

SUMMARY OF THE ARGUMENT

POINT I: This court does not have jurisdiction to review Duest's Brady claim, as the conviction is law of the case. Moreover, any claim was not preserved for appellate review as petitioner made no objection below. Lastly, Dr. Wrights changed testimony did not constitute a Brady violation as Duest immediately impeached him with a deposition from 1983.

POINT II: The trial court properly found that the state had no obligation to disclose NCIC criminal records of all State witnesses where Duest failed to show that he diligently attempted to obtain the records from another source.

POINT III: The trial court properly precluded Duest from presenting residual doubt evidence as a defense to the felony murder aggravator.

POINT IV: The trial court properly denied Duest's request to present and instruct the jury regarding residual doubt evidence.

POINT V: The trial court properly refused to instruct the jury on the statutory mitigator that the victim participated in his own death as it was not supported by the record. The trial court properly refused to instruct the jury regarding the statutory mental health mitigators because the were not supported by the record. Furthermore, the trial court properly instructed the jury on the Cold Calculated and Premeditated aggravator because it was supported by competent and credible evidence.

POINT VI: Dr. Fleming was permitted to testify regarding her psychological evaluation of Duest and there is no evidence in the record to support Duest's claim that she was precluded from relating the entirety of her findings.

POINT VII: Dr. Fleming properly testified about Duest's criminal history as she considered it during her evaluation of Duest.

POINT VIII: The trial court properly gave "great weight" to the jury recommendation that Duest be sentenced to death.

POINT IX: The Heinous, Atrocious, or Cruel aggravating circumstance, as well as the mitigating factors, are supported by the record.

POINT X: The death sentence is proportional.

POINT XI: The death sentence does not violate Apprendi v. New Jersey, 530 U.S. 466 (2001).

ARGUMENT I

APPELLANT WAS NOT DEPRIVED OF HIS RIGHTS TO DUE PROCESS AS THE STATE DID NOT FAIL TO DISCLOSE EVIDENCE NOR DID IT PRESENT MISLEADING EVIDENCE.

Primarily, appellant claims that the State committed a Brady violation because the Medical Examiner, Dr. Wright, changed his testimony at trial. Duest asks this court to vacate his conviction and remand the case for a new trial. However, the law of the case doctrine precludes Duest from raising issues related to his conviction on appeal from his re-sentencing. Love v. State, 559 So. 2d 198 (Fla. 1990). Moreover, pursuant to the mandate rule, this Court does not have jurisdiction to deviate from the mandate issued by the Eleventh Circuit Court of Appeals which affirmed Duest's conviction yet vacated the death sentence and remanded the case for a new sentencing proceeding (R. Vol. 1 p. 1). Duest v. Singletary, 997 F. 2d 1336 (11th Cir. 1993).

Under the "mandate rule," an inferior court has no power or authority to deviate from the mandate issued by an appellate court, as the mandate rule is a more powerful version of the "law-of-the-case doctrine", which prevents lower courts from reconsidering issues that have already been decided. Independent Petroleum Ass'n of America v. Babbitt, 235 F.3d 588 (C.A.D.C. 2001). The law of the case doctrine, operates to create efficiency, finality and obedience within the judicial system. U.S.

v. Tamayo, 80 F.3d 1514, 1520 (11th Cir. 1996). An appellate decision binds all subsequent proceedings in the same case not only as to explicit rulings, but also as to issues decided necessarily by implication on the prior appeal. Id. Accordingly, a lower court when acting under an appellate court's mandate, cannot vary it. Id.

In U.S. v. Dass, 10 Fed. Appx. 684 (10th Cir. 2001), the court found that on appeal from a re-sentencing, the issues underlying Dass' convictions, which were affirmed on the first appeal, were not reviewable on an appeal of a re-sentencing. Dass' convictions were the law of the case because the mandate to the lower court was to re-sentence, not to re-try the convictions. Id. The Tenth Circuit ruled that remand does not reopen the underlying convictions for review. Id. Similarly, in the instant case, the Eleventh Circuit Court of Appeals specifically remanded Duest's case for re-sentencing, not for a re-trial of the conviction, hence the conviction is law of the case pursuant to the mandate rule and may not be reopened on appeal of his re-sentencing. This court should deny this claim as it does not have jurisdiction over an affirmed conviction.

Secondly, Duest's claim that Dr. Wright's testimony at the re-sentencing constitutes a Brady violation was not preserved for review because he never objected during Dr. Wrights testimony that the State had committed a Brady violation, rather he chose to impeach Dr. Wright with his 1983 deposition. "An appellate court must

confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made." State v. Barber, 301 So. 2d 7, 9 (Fla. 1974). See Sapp v. State, 411 So. 2d 363, 364 (Fla. 4th DCA 1982) (appellant must bring to appellate court, record that clearly demonstrates trial court's explicit notice of precise grounds of objection); Larkins v. State, 655 So. 2d 95 (Fla. 1995)(defendant failed to preserve issue on appeal by failing to make same objection in trial court); Archer v. State, 613 So. 2d 446 (Fla. 1993)(for issue preservation, it must be presented to lower court with specific legal argument or grounds); Pope v. State, 646 So. 2d 827 (Fla. 5th DCA 1994)(JOA denial not preserved for appeal; failure to raise objection and present argument to trial court for review and ruling precludes issue from appeal). Violation of the right to a fair trial based on prosecution's withholding of exculpatory evidence is normally predicated on defendant's not knowing of withheld evidence; where a defendant is aware of evidence before or during trial, appropriate action is motion to compel discovery or motion to dismiss. Arango v. State, 437 So.2d 1099 (Fla. 1983). Therefore, this claim is not properly before this Court. Hence, there can be no error.

Third, Duest's claim that Dr. Wright's changed testimony constitutes a Brady violation is meritless. The fact that Dr. Wright changed his testimony is not a Brady violation, considering the fact that Duest was prepared to impeach him with the 1983

deposition.

Moreover, should this Court choose to address the merits, Duest has not satisfied the requirements of Brady. A defendant must demonstrate the following elements before a Brady violation has been proven: (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence has been suppressed by the State, either wilfully or inadvertently; and (3) the defendant has been prejudiced by the suppression of this evidence. Johnson v. State, 26 Fla. L. Weekly S718 (Fla. 2001); Strickler v. Greene, 527 U.S. 263 (1999); Way v. State, 760 So.2d 903, 910 (Fla.2000); Thompson v. State, 759 So.2d 650, 662 (Fla.2000).

In this case, at trial Dr. Wright testified that it took between fifteen and twenty minutes for Mr. Pope to die. Duest immediately impeached Dr. Wright with his deposition from 1983, during which he testified that it took between two and five minutes for Mr. Pope to die. Turning to the testimony in question, defense counsel impeached Dr. Wright during the following colloquy;

> Question: Now, with respect to the amount of time that the victim may have lived, today you indicated that it could have been between fifteen to twenty minutes, is that correct?
>
> Answer: Yes
>
> Question: Did you ever make a different statement?

Answer: Yes

Question: In fact during your deposition you testified –

Mr. Cavanaugh: Objection

The Court: Sustained.

Question: What did you testify , what was the different statement?

Mr. Cavanaugh: Objection.

The Court: That's all right.

Answer: I don't remember exactly, it's been awhile since I read the deposition, about a week, but it was much shorter than that.

Question: Well, wasn't it five to fifteen seconds?

Answer: Well, that was the minimum time that would be if he lost all his blood pressure from his– I doubt if I said five seconds, I would like to see that.

Question: Would you like to see your deposition to see if that would refresh your recollection?

Answer: That would help. If I said five I was wrong, then it would be ten to fifteen, it's my usual.

Question: I agree, ten to fifteen, ten to fifteen seconds?

Answer: Right, that's how long you have if you have a wound to your heart and immediately drop your blood pressure.

Question: So he could have lived, according to your opinion within a reasonable degree of scientific certainty, could have lived ten to fifteen seconds?

Mr. Cavanaugh: Woe, objection to the form of the question, misleading.

The Court: No, you can continue.

Question: Is that your opinion?

Answer: No, not now, I don't think it was then. I think I was giving you, whoever was asking the questions at that time of the absolute, absolute lowest possibility under any circumstances that would be loss of blood pressure immediately from the heart.

Question: It would have been ten to fifteen?

Answer: Right.

Question: Then you also said, but no more than five minutes, is that correct?

Answer: That is what I testified to back then.
Question: That was January 13th, 1993, correct?

Answer: Approximately, I don't remember the exact date, I forgot that.

Question: Well, no more than five minutes, that was 1-13-93?

Answer: Right.

Question: Excuse me , '83, correct?

> Answer: Yes.
>
> Question: Today, which is 10-12-98, we are talking fifteen to twenty minutes, correct?
>
> Answer: Yeah, even more. I mean part of that he's unconscious. I mean, we were talking about conscious behavior, I could probably go up to half an hour, if that, he would still have at least the threat pulse or E.K.G. of being alive.
>
> Question: Okay, that had he lived that long is your conclusion that had he picked up the phone and telephoned rescue or police that he certainly would have received treatment and that would have saved his life, is that correct?
>
> Answer: Sure, if he had done that during the first five minutes. There is really just no, he would have done fine and then his–as you go further down the line, ten, fifteen minutes it raises the possibility that he could not be resuscitated but he's not going to cross over to 50/50 until pretty late, that in that time period, that is a 50/50 chance of being successfully resuscitated.

(T. Vol. 4 P. 404-405)

Based on the exchange recounted above the requirements of Brady were not met. Here, the evidence was impeaching, however, immediately after Dr. Wright changed his testimony, defense counsel impeached him with his prior deposition.[1]

[1] Duest's claim is more akin to a discovery violation, rather than a Brady violation. In Bush v. State, 461 So. 2d 936, 938 (Fla. 1984), Bush argued that the trial court should have conducted a Richardson inquiry or granted a mistrial because a state investigator's testimony contradicted his earlier deposition. This court found that the claim was not preserved, and that the prosecutors failure to inform the defense of this

There is no Brady violation because, here, defense counsel had the prior deposition in which Dr. Wright gave different testimony, the State did not willfully nor inadvertently suppress the changed testimony as the record reflects the State represented to the trial court on October 5, 1998, the day voir dire began, that Dr. Wright would testify that it took between two and five minutes for Mr. Pope to die (R. Vol. 3 pp. 43-44), and Duest suffered no prejudice because Dr. Wright was immediately impeached. Hence, it is apparent that Dr. Wright's changed testimony did not constitute a Brady violation.

As an additional claim, Duest argues that the trial courts finding that the CCP aggravator had not been proven negates a guilt phase finding of premeditation. As previously argued, Duest has already been convicted of the murder and that conviction is law of the case. Moreover, this claim is meritless because this court has held that in order to find the CCP aggravating circumstance, there must be a showing of heightened premeditation. Hoskins v. State, 707 So. 2d 210 (Fla. 1997); Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Capehart v. State, 583 So. 2d 1009 (Fla. 1991).

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change in testimony was not a discovery violation and was not grounds for a mistrial. Id. This court further found that when testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side by side for the jury to consider, and that this would discredit the witness, and should be favorable to the defense. Id. This is exactly what occurred in this case, as Dr. Wright changed his testimony, Duest impeached him, and the jury was able to evaluate the testimony and the deposition.

Duest's argument that the trial court's rejection of the CCP aggravator negates the guilt phase finding of premeditation is improper as the State was not required at the guilt phase to prove heightened premeditation. Hence, this claim must fail.

Lastly, Duest argues that the cumulative effect of the Brady violation combined with the States failure to disclose a bus ticket showing that he traveled from Boston to Florida after the murder entitles him to a new trial. Again, Duest's conviction is law of the case and can not be disturbed on appeal of his resentencing. Moreover, any claim with respect to the bus ticket is procedurally barred as it has been fully litigated and found to be irrelevant to Duest's alibi claim. Duest v. Dugger, 555 So. 2d 849 (Fla. 1990).

Moreover, even if this court were to consider that it took Pope fifteen to twenty minutes to die, cumulatively with the bus ticket, such evidence does not undermine the conviction because the fact that Duest traveled from Boston to Florida 49 days after the murder is remains irrelevant and has absolutely no connection to how long it took for Mr. Pope to die. In this case, the death sentence must be affirmed.

ARGUMENT II

THE STATE HAS NO OBLIGATION TO PROVIDE APPELLANT WITH CRIMINAL RECORDS OF STATE WITNESSES.

Appellant claims that the trial court erroneously ruled that the State had no obligation to disclose the NCIC criminal records of all the State witnesses. This claim is meritless as the State is not required to provide such records unless Duest has shown that he exercised due diligence to obtain the records from another source from another source, yet was unsuccessful.

Initially, the claim was not preserved for appellate review as the trial court denied the motion without prejudice for Duest to re-raise it at a later time and he failed to do so. See Philmore v. State, 820 So. 2d 919, 932 (Fla. 2002); Franqui v. State, 699 So. 2d 1332, 1334 (Fla. 1997).

The trial court did not abuse it's discretion as Duest bears the initial burden of trying to discover such evidence and the State is not required to prepare the defense's case. Medina v. State, 466 So. 2d 1046, 1049 (Fla. 1985). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view

adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

In State v. Crawford, 257 So. 2d 898 (Fla. 1972), this Court held that "the prosecuting attorney may be required to disclose to defense counsel any record of prior criminal convictions of defendant or of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial...". However, in State v. Wright, 803 So. 2d 793 (Fla. 4th DCA 2001), on the State's Petition for Certiorari, the fourth district court of appeals found that before granting a capital murder defendants' request for the State to obtain and disclose the criminal histories of its civilian witnesses, the trial court must first ascertain whether the defendant could have obtained the requested criminal records from other sources through due diligence. The District Court reasoned that the trial court must determine whether the defendant had exerted their own efforts and resources to obtain the requested information. Id. Wright was seeking to discover any and all civilian criminal histories including but not limited to NCIC, FCIC, and PALMS.[2] The fourth district court of appeals held that

[2] NCIC reports are generated from data collected by the FBI; FCIC reports are generated from data collected by the Florida Department of Law Enforcement (FDLE); and, PALMS reports are generated from data collected by the Palm Beach County Sheriff's Office.

the trial court cannot require the State to disclose to capital murder defendants the criminal histories of civilian witnesses that were generated by a non-state agency, as disclosure would violate confidentiality agreement with agency. The court also reasoned that there had been no determination on the record what efforts, if any Wright exerted to obtain the criminal records. The district court found that it could find no authority that requires the State to disclose the criminal histories of all listed witnesses.

Similarly, here, Duest filed a motion to produce criminal records of State witnesses claiming that records were not otherwise attainable, that disclosure of the material was required to ensure a fair trial, and the materials are readily available to the State Attorney's office (R. Vol. 1 p. 103-105). In the written motion, Duest claimed that he had reason to believe that some or all of the state witnesses have criminal records, Duest argues that they are not readily available to him by due diligence because local police agencies, the Florida Bureau of Law enforcement, and the Federal Bureau of Law Enforcement do not divulge the information to the general public (R. Vol. 1 p. 104). Duest argues that since the materials are readily available to the State, the court should require the State to conduct the search and turn over the information (R. Vol. 1 p. 104). At the hearing held on June 29, 1998, Duest argued that all of the individuals in this case had some kind of nefarious lifestyle and it is possible that they

continued with that lifestyle in other states during the passage of time (ST. 123). Defense counsel argued that the State is readily able to pull an NCIC on all of these individuals (ST. 124). The trial court denied the motion without prejudice finding that Duest had to have something more than just a general assertion that the witnesses may have a criminal history (ST. 124). Duest never raised the issue again, nor did he ever show that he tried to obtain the records through due diligence.

Hence, here as in Wright, the trial court properly denied the motion because Duest failed to show that he engaged in any diligent investigation to support his claim that the witnesses had criminal history's. The death sentence should be affirmed.

ARGUMENT III

APPELLANT WAS NOT DEPRIVED OF HIS RIGHT TO PRESENT A DEFENSE, NOR WAS HE DEPRIVED OF HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AGAINST HIM.

Duest argues that he was deprived of his Sixth Amendment right to present a defense to the felony murder aggravator because the trial court precluded him from presenting evidence that he was not in Fort Lauderdale at the time the underlying felony of robbery was committed. Duest claims that he would have challenged the testimony of the witnesses who identified him as being in Fort Lauderdale at the time the robbery and murder was committed. Duest was improperly attempting to prove that if he was

not in Fort Lauderdale at the time of the robbery, then he was also not guilty of the murder. This is improper lingering doubt evidence and the trial court did not abuse it's discretion when it precluded such evidence.

Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). In Darling v. State, 808 So.2d 145, 162 (Fla. 2002), this Court stated that it follows the holding of the United States Supreme Court that there is no constitutional right to present "lingering doubt" evidence. See Sims v. State, 681 So.2d 1112, 1117 (Fla.1996); Franklin v. Lynaugh, 487 U.S. 164, 173-74 (1988) (rejecting the argument that the Eighth Amendment requires a capital sentencing jury to be instructed that it can consider lingering doubt evidence in mitigation).

Furthermore, in Waterhouse v. State, 596 So. 2d 1008, 1015 (Fla. 1992), Waterhouse argued that he was improperly precluded from challenging the State's claim that the murder occurred during the commission of a sexual battery.

Waterhouse claimed that the trial court, effectively directed a verdict against him on the issue of sexual battery by refusing to allow evidence on the issue of guilt of the murder. Id. This court found that the trial court properly precluded such evidence, finding that Waterhouse was allowed to present evidence to of the occurrence of the sexual battery to rebut the aggravator of felony murder. Id., see generally Way v. State, 760 So. 2d 903 (Fla. 2000).

Similarly in the instant case Duest was not precluded from arguing that a robbery did not occur, he was only precluded from presenting evidence to show that he did not commit the murder. Duest claims that had he been allowed to impeach the witnesses he would have proven that he was not in Fort Lauderdale at the time the robbery occurred to challenge the felony murder aggravating circumstance.[3] This is precisely what Waterhouse precludes, because the presentation of such evidence is actually an attempt to undermine the guilty verdict with respect to the murder. Therefore, the trial court did not abuse it's discretion when it precluded lingering doubt evidence. The death sentence must be affirmed.

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[3] Duest wanted to impeach the four witnesses who identified him as being in Fort Lauderdale on the date the murder was committed. Those witnesses are Neal O'Donnell, Michele Demizio, Tammy Dugan, and Joanne Wioneck. Duest asserts that he should have been allowed to show that these witnesses presented "credibility problems" yet does not explain what is incredible about their testimony (I.B. p. 72, F.N. 36).

ARGUMENT IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO PRESENT RESIDUAL DOUBT EVIDENCE, AND PROPERLY REFUSED TO INSTRUCT THE JURY REGARDING RESIDUAL DOUBT.

Duest claims that the trial court improperly ruled that he could not present any evidence regarding his guilt at the re-sentencing. Duest also argues that the trial court erred when it refused to instruct the jury on residual doubt as a mitigating circumstance. Duest recognizes the longstanding precedent against such a practice, yet asks this court to revisit the issue.

The trial court properly disallowed the presentation of guilt phase evidence and properly denied Duest's proposed instruction regarding lingering doubt as a mitigating circumstance. The standard of review is abuse of discretion. Bogle v. State, 655 So.2d 1103 (Fla. 1995), Downs v. State, 572 So.2d 895 (Fla. 1990). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The abuse of discretion standard is one of the most difficult for an appellant

to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

Moreover, there is no reason for this court to revisit the issue as this Court has previously rejected the presentation of such evidence as it would serve only to create a lingering doubt of the defendant's guilt. Darling v. State, 808 So. 2d 145 (Fla. 2002); Way v. State, 760 So.2d 903 (Fla. 2000); Preston v. State, 607 So.2d 404, 411 (Fla.1992); King v. State, 514 So.2d 354, 358 (Fla.1987). Although the Eighth Amendment of the United States Constitution requires that the jury or court imposing the death sentence not be precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense," Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), this court has rejected the argument that evidence relevant only to establish a lingering doubt of the defendant's guilt is a mitigating circumstance that the Eighth Amendment requires the fact-finder to consider. See King v. Dugger, 555 So.2d 355, 358 (Fla.1990); White v. Dugger, 523 So.2d 140, 140 (Fla.1988); see also Franklin v. Lynaugh, 487 U.S. 164 (1988) (finding that Eighth Amendment does not require that sentencing jury be instructed that it can

consider lingering doubt of guilt as a mitigating factor).

Hence, as Duest has presented no reason for this court to revisit the issue, the death sentence should be affirmed.

ARGUMENT V

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

Duest claims that the trial court erroneously refused to instruct the jury on the statutory mitigating circumstances that the victim was a participant in his own death, that the capital felony was committed while Duest was under the influence of extreme or emotional distress, and on impaired capacity. Duest also complains that the trial court improperly instructed the jury on the aggravating circumstance of cold, calculated and premeditated ("CCP").

The trial court properly instructed the jury. The standard of review is competent substantial evidence. Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992). Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. If there is any evidence to support those factual findings, the lower tribunal's findings will be affirmed. When it comes to facts, trial courts have an institutional advantage. Trial courts can observe witnesses, hear their testimony, and see and touch the physical evidence. Guzman v.

State, 721 So. 2d 1155, 1159 (Fla. 1998) (sitting as the trier of fact, the trial judge has the superior vantage point to see and hear the witnesses and judge their credibility). An appellate court's review of questions of fact is therefore very limited. Elder v. Holloway, 984 F.2d 991 (9th Cir. 1993) (Kozinski, J., dissenting from the denial of a suggestion for rehearing en banc), adopted by Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994). Only where a defendant has presented evidence regarding a statutory mitigator, such as extreme mental or emotional disturbance, should the trial judge read the applicable instructions to the jury. Geralds v. State, 674 So.2d 96, 101 (Fla. 1996); Bryant v. State, 601 So.2d 529, 533 (Fla.1992).

First, Duest claims that the trial court improperly denied his requested instruction that Mr. Pope was a participant in his own murder because he did not seek treatment or help. (T. Vol. 7 pp. 804-805). In the instant case, the trial court properly denied the requested instruction finding that pursuant to Wournos v. State, 676 So. 2d 972 (Fla. 1996), Duest was not entitled to the instruction.

In Wuornos , the defendant contended that the trial court erred in not finding the statutory mitigator that the victim contributed to the acts leading to his death. Wournos claimed that by seeking the services of a prostitute, the victim therefore "assumed the risk" of suffering bodily harm. Id. at 975. This court found that the

theory advanced by Wuornos was insufficient as a matter of law to establish the mitigating factor. Id. By its plain language, the statute permits this factor only where the victim was a participant in the defendant's conduct or consented to the act, therefore it would be absurd to construe this language as applying whenever victims have engaged in some unlawful or even dangerous transaction that merely provided the killer a better opportunity to commit murder, which the victim did not intend. Id. This court ruled that the language of the statute plainly means that the victim has knowingly and voluntarily participated with the killer in some transaction that in and of itself would be likely to result in the victim's death, viewed from the perspective of a reasonable person and the statute does not encompass situations in which the killer surprises the victim with deadly force, as happened here under any construction of the facts. Id.

Similarly, in the instant case, the facts show that Mr. Pope met the defendant in a bar, the defendant went home with Mr. Pope, and the defendant subsequently stabbed Mr. Pope multiple times. Duest v. State, 462 So. 2d 446, 448 (Fla. 1985). At the re-sentencing, the medical examiner, Dr. Wright, testified that Mr. Pope was stabbed in his bed, was alive while the wounds were inflicted, and remained conscious for a matter of minutes after being stabbed in the heart (T. Vol. 4, pp. 365-368). Hence, here as in Wournos, the victim was surprised by the deadly force and no

reasonable person could find that Mr. Pope knowingly and voluntarily participated with the killer in his own murder because he failed to get help.

Furthermore, Duest argues that he is entitled to the mitigator because after Mr. Pope was stabbed he did not seek treatment (T. Vol. 7, p. 804, I.B. 82). However this argument is wholly unsupported by the record. Dr. Wright testified that Mr. Pope would have passed out within minutes after being stabbed (T. Vol. 4, p. 367). Dr Wright also testified that Mr. Pope was stabbed in his bed but was able to get himself into the bathroom where he passed out and died (T. Vol. 4, p. 368). Hence, it is apparent from this record that Mr. Pope was trying to help himself by getting out of the bedroom. In this case, there was absolutely no evidence to support the mitigator that Mr. Pope was a participant in his own murder. Hence, the trial court's denial of the instruction that the victim participated in his own murder was proper.

Secondly, Duest claims that the trial court erroneously denied the requested instruction on the statutory mitigator that the capital felony was committed while the defendant was under the influence of extreme or emotional distress. When Duest requested this mitigator he relied on the fact that he had attended a party that had lasted for two or three days and he had been drinking (T. Vol. 7 p. 805).

In this case, the trial court found that there was no expert testimony to support this mitigator. The trial court further found that while there was testimony regarding

all night partying and that there was alcohol and drug consumption, there was no indication from the testimony that at the time of the crime Duest was under the influence of extreme mental or emotional disturbance of any kind, including remaining under the influence of any drugs or alcohol. (T. Vol. 7 p. 805) Joanne Wioncek testified that there was a party all night the day before the murder and that they had been drinking (T. Vol. 5 pp. 491-494). Tammy Dugan testified that she had partied at a bar in 1982 with the defendant (T. Vol. 5 p. 498-500). There was no other testimony in the record regarding Duest's actual or probable mental condition at the time of the murder as contemplated by the statute. See Geralds, 674 So. 2d at 101 (finding that trial court did not err in denying instruction on statutory mitigator of extreme mental or emotional disturbance where defendant presented no evidence of his actual or probable mental condition at the time of the crime). Therefore, here as in Geralds, there was no error.

Duest's third complaint is that the trial court improperly denied his requested instruction on the mitigator of impaired capacity. At trial, defense counsel argued that this mitigator was supported by evidence that Mr. Pope bought Duest a drink at the bar. However, the trial court reasoned that the testimony reflected that Duest only had one drink, which does not support the instruction that Duest was unable to appreciate the criminality of his conduct nor that he was substantially impaired.

The record reflects that Neil O'Donnell, the manager/bartender at Lefty's Bar, saw Mr. Pope at Lefty's on February 15, and Mr. Pope bought Duest a drink (T. Vol. 5 p. 449-450). There was no other testimony that Duest had been drinking at the time of the murder. Moreover, there was testimony from Dr. Fleming that while Duest was once a heroin addict, he is not now (T. Vol. 6 p. 736). Hence, the trial court properly denied the requested instruction because there was nothing in the record that supported the mitigating circumstance of impaired capacity. See Reed v. State, 560 So. 2d 203 (Fla. 1990)(finding trial court did not err in failing to give instruction on statutory mitigator of impaired capacity where there was no evidence that Reed was intoxicated, only testimony that he had drank some beer on the morning of the crime.) Hence, the trial court properly denied the instruction.

Finally, Duest claims that the trial court erroneously instructed the jury that the crime was committed in a cold, calculated and premeditated manner ("CCP"). This claim is meritless as there was competent, credible evidence to support this instruction. A judge should instruct a jury only on those aggravating circumstances for which credible and competent evidence has been presented. Banks v. State, 700 So. 2d 363, 365 (Fla. 1997); Hunter v. State, 660 So. 2d 244, 252 (Fla. 1995), cf. Atkins v. State, 452 So.2d 529, 532 (Fla.1984) (for actual sentencing purposes, the aggravating circumstances must be proven beyond a reasonable doubt). In Hunter, this Court

reasoned that where Hunter deliberately and successively fired bullets from a handgun into four people lying helplessly on the ground without any apparent reason or justification, it was not error to instruct the jury on CCP. Hunter, 660 So. 2d at 252.

In that case this Court noted that there was no error in instructing the jury although the trial court rejected the CCP aggravator. Id. at note 10.

Similarly, in this case, the CCP instruction was supported by competent and credible evidence where the facts show that Duest deliberately and repeatedly stabbed Mr. Pope while he lay helpless in his bed without any justification. Specifically, Dr. Wright testified that Mr. Pope was alive while the multiple stab wounds were inflicted and he was lying in his bed (T. Vol. 4, p. 366-368). Hence, it is apparent from the CCP instruction was supported by the record.

Duest cites to Omelus v. State, 584 So. 2d 563 (Fla. 1991), as support for his position that the trial court erroneously instructed the jury on the CCP aggravating circumstance. However that case is distinguishable because in Omelus, this Court found that the jury was erroneously instructed on the Heinous Atrocious or Cruel aggravator as a matter of law because, the record showed that Omelus did not actually commit the murder, nor did he have any knowledge of how the murder was going to be committed. Whereas here, Duest actually committed the murder. Hence, Omelus is inapplicable and the trial court properly instructed the jury on the CCP aggravator.

In this case, the death sentence should be affirmed.

ARGUMENT VI

THE TRIAL COURT DID NOT PRECLUDE DR. FLEMING FROM TESTIFYING ABOUT HER FINDINGS OF HER EVALUATION OF APPELLANT.

Duest claims that Dr. Fleming was improperly precluded from testifying that she found mitigating circumstances present. Duest also claims that his Eighth Amendment rights were violated because the trial court precluded evidence of mitigating circumstances. However, this claim is meritless as Dr. Fleming was permitted to testify regarding her psychological evaluation of Duest. Consequently, she offered no testimony regarding Duest's state of mind at the time the crime was committed. There is no evidence in this record to show that Dr. Fleming was precluded from relating the entirety of her findings.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion"). Under the abuse of discretion standard of review, the appellate

court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980), Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997).

In Wickham v. State, 593 So.2d 191 (Fla. 1991) this Court found that the trial court did not improperly prevent an expert from testifying about the murder defendant's alleged inability to form the specific intent to commit premeditated murder. Rather the only real limitation upon the expert was that she was not permitted to draw purely legal conclusions from her observations of defendant. Id. In that case, the expert testified fully about defendant's brain damage, psychiatric history, low IQ, and inability to cope with normal life. Id.

Likewise, in the instant case, the trial court did not prevent Dr. Fleming from testifying that mitigation existed. Dr. Fleming testified fully about her psychological findings regarding Duest' mental health and his traumatic upbringing. Specifically, Dr. Fleming testified that Duest was a shy child, had low self esteem, and little self

confidence. She found that Duest's father was an alcoholic, and he severely beat Duest. Dr. Fleming opined that Duest was the product of an abusive/dysfunctional family, was neglected as a child, had a brain dysfunction, and drugs and alcohol had a strong influence in his life. Duest suffered because he was the focus of his father's attention and could never please his father. Duest was influenced by his cousin Ritchie, and the two sampled drugs, including marijuana and heroin. Duest did not detail for her his incarceration at Walpold. Dr. Fleming testified that Duest was a heroin addict when he left Walpold, but he is not an addict now. There is no testimony in the record to support the conclusion that Dr. Fleming evaluated Duest's state of mind at the time of the crime, which would support the finding of any statutory mitigators. Hence, it was not error to prevent Dr. Fleming from drawing any conclusions regarding statutory mitigators because she only evaluated Duest's childhood and upbringing. Therefore, there can be no error.

ARGUMENT VII

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO QUESTION DR. FLEMING ABOUT DUEST'S CRIMINAL HISTORY.

Duest claims that the trial court erroneously ruled that the State could question Dr. Fleming regarding his entire criminal history because she considered it during her evaluation. Appellant claims that his entire history was not admissible because Dr.

Fleming only considered the record not the individual charges. However, appellant cites to no legal precedent to support this position.

The standard of review is abuse of discretion. "The trial court has broad discretion in determining the admissibility of evidence and such a determination will not be disturbed absent an abuse of discretion." Heath v. State, 648 So. 2d 660, 664 (Fla. 1994); Hardwick v. State, 521 So. 2d 1071, 1073 (Fla. 1988). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997).

Moreover, it is proper for a party to fully inquire into history utilized by expert to determine whether expert's opinion has a proper basis. Parker v. State, 476 so. 2d 134, 139 (Fla. 1985); Muehlman v. State, 503 So. 2d 310, 316 (Fla. 1987). In Johnson v. State, 608 So. 2d 4, 10 (Fla. 1992), this court found that a prosecutor was entitled

to question a defendant's mental health experts about their knowledge of defendant's prior criminal history to explore the basis for the experts' opinions about defendant's inability to conform his conduct to requirements of law and his extreme mental or emotional distress at time of murders. Furthermore, in Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1992), this Court reasoned that a defense expert's reliance on a defendant's background opened the door, in the penalty phase of the capital murder prosecution, to testimony on cross-examination regarding records of the defendant skipping class, lying, and stealing, because it is proper for the state to fully inquire into the history utilized by the expert in forming his/her opinion.

In the instant case, Dr. Fleming was classified as an expert in psychology and testified that she relied on his criminal history to understand him, and to understand the impact of the background, to understand the impact of incarceration on his drug addiction, and she reviewed all of the information and all of the conviction both in Massachusetts and Florida (T. Vol. 6 pp. 719-720, 722). Moreover, Dr. Fleming was not permitted to testify to the details of the prior crimes, she only stated that Duest had two larceny convictions, three breaking and entering convictions and one possession fo a firearm conviction (T. Vol 6, p. 725). Hence, since the record reflects that Dr. Fleming relied upon Duest's criminal history in forming her opinions, the State properly inquired about what the convictions were. Hence, the trial court properly

allowed the State to inquire into Duest's criminal history.

If this court finds that the trial court erred, any was error harmless. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

Id. , Burns v. State, 699 So. 2d 652 (Fla. 1997).

In this case, there is no reasonable possibility that any error affected the jury's recommendation. In this case, Dr. Fleming was not permitted to discuss the details of the prior crimes, she only listed them. Moreover, in this case, the State was asking for the prior violent felony conviction aggravating circumstance, therefore, the jury already knew that Duest had a prior criminal history (R. Vol. 3 pp. 391-400).[4] Therefore, based on this record, there is no possibility that listing some of Duest's

[4]While the state understands that the felonies relied upon for the aggravator were not addressed during the cross-examination of Dr. Fleming, the fact remains that the jury already knew that Duest had a criminal history.

prior conviction affected the juries recommendation.

ARGUMENT VIII

THE TRIAL COURT CONDUCTED AN INDEPENDENT SENTENCING.

Duest claims that the trial court erroneously gave "great weight" to the jury recommendation of death. Appellant claims that such deference to the jury's recommendation violates the principles of an independent weighing thereby violating his Eighth Amendment rights.

This claim is wholly without merit, as Duest fails to cite to any precedent to support his argument. Specifically, in Espinosa v. Florida, 505 U.S. 1079, 1081 (1992), the United States Supreme court found that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation. This court has held that a jury determination, irrespective of whether it is for life or death is entitled to great weight. Grossman v. State, 525 So.2d 833, 846 (Fla.1988), King v. State, 623 So. 2d 486, 489 (Fla. 1993), Pangburn v. State, 661 So. 2d 1182, 1188 (Fla. 1995) (jury's recommendation is given great weight in determining the final sentence imposed on a defendant). "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury

recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla.1975). Moreover, in White v. State, 616 So.2d 21, 25 (Fla. 1993), this court found that it is illogical "great weight" means one thing when applied to a life recommendation but something else when applied to a death recommendation.

Hence, Duest's claim that the death recommendation is not entitled to great weight is improper under this Court's longstanding precedent. Moreover, in this case it is apparent from the detailed sentencing order written by the trial judge that an independent sentencing in fact occurred. A review of the sentencing order reveals that the trial court examined the entire procedural history of this case , reviewed the prior opinion and sentence that was reversed, as well as reviewed the facts and circumstances surrounding the murder (R. Vol. 3 pp. 391-393). The trial court then addressed all four aggravating circumstances, detailed the facts which supported each circumstance and weighed them accordingly, rejecting the CCP aggravator (R. Vol. 3 pp. 393- 396). The trial judge also reviewed each mitigating circumstance, the facts which may have supported the existence of the mitigator and weighed them accordingly (R. Vol. 3 pp. 396-399). Here, the trial court specifically reasoned that every one of the aggravators in this case, standing alone, would be sufficient to outweigh the mitigating circumstances (R. Vol. 3 p. 399). The courts well reasoned

and detailed order shows that the judge went to great pains to independently review each aggravator and mitigator, in determining the appropriate sentence. Therefore, it is apparent from the record that an independent sentencing occurred.

Duest also relies upon Muhammad v. State, 782 So. 2d 343, 363 (Fla. 2001), claiming that a jury recommendation of death is not entitled to great weight. However, such reliance is misplaced. In that case, this Court's decision was premised on the fact that Muhammed had refused to present mitigation thereby hindering the jury's ability to fulfill it's statutory role. This court found that where the trial court denies a defendant's request to waive the advisory jury, and the defendant refuses to present mitigation, the trial court has a duty to lessen it's reliance on the jury's verdict. Id. at 363; See Sireci v. State, 587 So. 2d 450, 452 (Fla. 1991). Hence, it is clear that this court did not intend for this reasoning to apply to every case in which a jury makes a death recommendation.

Here, Duest did not attempt to waive the advisory jury and presented mitigation testimony from, experts, friends, and family. Hence, pursuant to this Court's reasoning in Muhammed, it was proper for the trial court to afford the advisory verdict great weight. The death sentence should be affirmed .

ARGUMENT IX

THE TRIAL COURT'S FINDING OF THE HEINOUS,

ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE IS SUPPORTED BY THE EVIDENCE AND THE RECORD SUPPORTS THE TRIAL COURT'S MITIGATION FINDINGS.

Duest claims that the trial court erroneously found that the murder was heinous, atrocious, or cruel ("HAC"), because the State was unable to prove intent to kill, and that the trial court improperly refused to find mental health mitigators.

Initially, the State submits that Duest's claim that the trial court improperly found the HAC aggravating circumstance is meritless. Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997).

This Court has repeatedly stated that fear, emotional strain, mental anguish or terror suffered by a victim before death is an important factor in determining whether

HAC applies. See James v. State, 695 So.2d 1229, 1235 (Fla. 1997)(fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel"); Pooler v. State, 704 So.2d 1375, 1378 (Fla. 1997); Preston v. State, 607 So.2d 404, 410 (Fla. 1992).

Further, the victim's knowledge of his/her impending death supports a finding of HAC, even if the death itself was quick or instantaneous. See Douglas v. State, 575 So.2d 165 (Fla. 1991); Rivera v. State, 561 So.2d 536, 540 (Fla. 1990); Parker v. State, 476 So.2d 134 (Fla. 1985). In evaluating the victim's mental state, common-sense inferences from the circumstances are allowed to be drawn. Pooler, 704 So.2d at 1378 (citing Swafford v. State, 533 So.2d 270, 277 (Fla.1988)).

"Unlike the cold, calculated and premeditated aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death." Brown v. State, 721 So.2d 274, 277 (Fla.1998); See Guzman v. State, 721 So.2d 1155, 1160 (Fla.1998) (holding that the intention of the killer to inflict pain on the victim is not a necessary element of the HAC aggravator); Mahn v. State, 714 So.2d 391, 399 (Fla.1998) (rejecting defendant's contention that HAC did not apply because he did not deliberately inflict pain). Unlike the CCP aggravator, which pertains specifically to the state of mind, intent, and

motivation of the defendant, the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." Brown, 721 So.2d at 277. Therefore, as there is no intent element to the HAC aggravating circumstance, the trial court was not required to show that Duest had an intent to kill.

Moreover, in the instant case, the trial court made the following factual finding with respect to the HAC aggravating circumstance:

> C. The crime committed was especially heinous, atrocious, or cruel.
>
> In considering the evidence applicable to this aggravator, the testimony given by Dr. Ron Wright, the medical examiner who conducted the autopsy and testified at the penalty phase was crucial. Dr. Wright was qualified as an expert witness, and advised that Mr. Pope suffered twelve stab wounds, that Mr. Pope suffered massive blood loss, that he remained conscious for as long as fifteen or twenty minutes after the attack, and thus felt the pain of the stabbing. In Dr. Wrights opinion, Mr. Pope was attacked while lying on the bed, and he thereafter stumbled to the bathroom, where ultimately, he died by drowning in his own blood.
>
> Mr. Pope was certainly in tremendous fear and pain as he struggled against his attacker and thereafter saw blood pouring onto his bed and then onto his body and floor in the bathroom. I find that this aggravator has been proven beyond a reasonable doubt and have given it substantial weight.

(R. Vol. 3 p 395).

In this case, Dr. Wright was deemed an expert and testified that he did the autopsy on Mr. Pope (T. Vol. 4 p. 338-340). Dr. Wright testified that Mr. Pope was alive when the stab wounds were inflicted and was conscious for a matter of minutes before he passed out (T. Vol. 4, p. 365). Dr. Wright also stated that Mr. Pope had some defensive wounds to his forearms (T. Vol 4 p. 359). Dr. Wright testified that approximately 1/5 of Mr. Pope's blood volume was on the bed, and there was blood spatter and pooling in the bathroom, where Mr. Pope ultimately died (T. Vol. pp. 343-349). Dr. Wright testified that there were a total of twelve stab wounds, including the wounds to his temple and lungs (T. Vol. 4 pp. 334-409). Dr. Wright stated that while my Pope was able to move around the movement from side to side indicates tat Mr. Pope was not relaxed (T. Vol. 4 p. 347). Hence, after a review of the record and the judges order, it is apparent that the judge properly considered the facts and circumstances surrounding the manner in which the death was inflicted and properly found that the murder was committed in a heinous, atrocious or cruel manner.

Secondly, the trial court properly rejected the statutory mental mitigators. In this case the trial judge did find non-statutory mitigation regarding Duest's mental health. The decision as to whether a mitigating circumstance has been established in penalty phase of capital murder prosecution is within the trial court's discretion and will be upheld as long as the court considered all of the evidence. Rose v. State, 787

So.2d 786 (Fla. 2001); Preston v. State, 607 So.2d 404 (Fla.1992). Moreover, expert testimony alone does not require a finding of a mental health mitigator. See Provenzano v. State, 497 So.2d 1177 (Fla.1986). Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. See Wuornos v. State, 644 So.2d 1000, 1010 (Fla.1994). As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. Provenzano, 497 So.2d at 1184; Foster v. State, 679 So.2d 747, 755 (Fla. 1996)(finding that trial court considered all of the evidence presented and it was not an abuse of discretion to reject the statutory mitigator of extreme emotional disturbance where trial court gave some weight to non-statutory mitigators, finding that the evidence did not rise to the level of statutory mitigation).

Here, Duest argues that the trial judge erroneously required that evidence in support of mental mitigation arise from a disclosure of confidences by Duest to Dr. Fleming. This is not what the trial judges order reflects. Appellant takes the trial court's order out of context and excerpts a sentence. However, after a review of the sentencing order it is apparent that the trial court properly rejected the statutory mitigator that Appellant was under the influence of extreme mental or emotional disturbance. Here, the trial judge found that Duest had presented testimony regarding

his childhood deprivation and brutalization. The trial court found that Dr. Fleming's evaluation regarding Duest's stay in the Massachusetts prisons was based on studies and not on what Duest had told her. (T. Vol. 3 pp. 396-397). In fact, Dr. Fleming testified that Duest did not tell her about his incarceration at Walpold. (T. Vol. 9 p. 702). The judge also reviewed the testimony of John Boone, Former Commissioner of Corrections for the State of Massachusetts, who testified generally about the deplorable conditions in Massachusetts prisons. (T. Vol. 3 pp. 396-397). Here, the trial judge was not requiring the Defendant to disclose confidences, rather she was noting that the Defendant had not informed Dr. Fleming about any problems he encountered while imprisoned at Walpold, nor could John Boone provide any evidence with respect to the impact the poor conditions at Walpold had on Defendant's mental health. Hence, the trial judge's order reflects that she evaluated all of the evidence and found that the statutory mitigator had no record support. It is notable that the trial court did find the following non-statutory mitigator;

> d. Defendant suffered institutional abuse and corruption.
> The Defendant was sentenced to prison at the age of 17 and was incarcerated in two institutions, Walpold and Concord. The evidence established that the conditions in these institutions was deplorable and that the Defendant probably became addicted to heroin as a result of his incarceration. There were no other details of what types of abuse the Defendant may have endured during this period of his life, but the testimony would support a finding that this

> mitigating circumstance existed and I have given it some weight.

(R. Vol. 3 p. 398).

Hence, Duest's claim that the trial court erroneously required him to disclose confidences is meritless. Moreover, it is clear from the record that the trial court did not abuse it's discretion when it properly rejected the statutory mitigator that Duest was under the influence of extreme mental or emotional disturbance, because the trial judge considered all of the evidence presented. Hence, the death sentence must be affirmed.

ARGUMENT X

APPELLANT'S SENTENCE IS PROPORTIONATE.

Duest claims that his death sentence is not proportionate. Duest argues that there was no finding of an intent to kill, and that this case does not involve the "worst of the worst", because the victim was left with the means to save his life.

This claim is meritless and the death sentence is proportional. Here, the record shows that Mr. Pope was stabbed multiple times while he was in his bed. After he was stabbed, he got to the bathroom, where he attempted to clean himself up, yet passed out from his wounds, hitting his head on the tub and dying in the bathroom.

In this case, the trial court found three (3) aggravating factors, (1) prior violent

felony, (2) felony murder/pecuniary gain, and (3) heinous, atrocious, or cruel ("HAC"), no statutory mitigators and eleven (11) non-statutory mitigators (R. Vol 3 pp. 391-400). The trial court specifically found that every one of the aggravators in this case, standing alone, would be sufficient to outweigh the mitigating circumstances (R. Vol. 3 p. 400). As this Court has repeatedly held, the weighing process is not a numbers game. Rather, when determining whether a death sentence is appropriate, careful consideration should be given to the totality of the circumstances and the weight of the aggravating and mitigating circumstances. Floyd v. State, 569 So.2d 1225, 1233 (Fla. 1990). Recently, this court reiterated it's role in determining whether the death penalty is proportionate in a given case and stated:

> It is axiomatic that the death penalty is reserved for only the most aggravated and the least mitigated of first-degree murders. See Urbin v. State, 714 So.2d 411, 416 (Fla.1998); State v. Dixon, 283 So.2d 1, 7 (Fla.1973). As such, in reviewing a sentence of death, this Court must consider the particular circumstances of the instant case in comparison to other capital cases and then decide if death is the appropriate penalty in light of those other decisions. See Urbin, 714 So.2d at 416; Hunter v. State, 660 So.2d 244, 254 (Fla.1995); Woods v. State, 733 So.2d 980, 990 (Fla.1999); Almeida v. State, 748 So.2d 922, 933 (Fla.1999) (stating that proportionality review is "two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders.").

Woods v. State, 733 So. 2d 980, 990 (Fla. 1999).

Moreover, this Court has upheld the death sentence in cases similar to this one. In Morrison v. State, 818 So. 2d 432, 456 (Fla. 2002), this Court rejected Morrison's claim that the death penalty is disproportionate because he did not intend to kill the victim, rather it was an impulsive action in response to the victim's resistance to the robbery. In that case, Morrison stabbed the victim multiple times and took money from the victim. Id. The trial court sentenced Morrison to death finding that he had previously been convicted of a felony involving the use of threat or violence to a person, the crime was committed during the commission of a felony, the crime was heinous, atrocious, or cruel, and the victim was particularly vulnerable due to advanced age. Id. The trial court also found no statutory mitigators and several non-statutory mitigators. Id. There, the trial court found that the aggravating circumstances far outweighed the mitigating circumstance. Id.; See e.g., Bates v. State, 750 So.2d 6, 12 (Fla.1999) (holding death penalty proportionate in stabbing death where court found three aggravators, including that the murder was committed during kidnaping and sexual battery, was committed for pecuniary gain, and was HAC, versus two statutory mitigators and several nonstatutory mitigators and where testimony also indicated some neurological impairment of defendant); Pope v. State, 679 So.2d 710 (Fla.1996) (holding death penalty proportionate in stabbing death where two aggravating factors of commission for pecuniary gain and appellant's prior violent felony conviction

outweighed two statutory mitigating circumstances of commission while under the influence of extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of the conduct, as well as nonstatutory mitigating circumstances of intoxication and that defendant acted under the influence of mental or emotional disturbance); Spencer v. State, 691 So.2d 1062, 1063-65 (Fla.1996) (holding death penalty proportionate where victim beaten and stabbed and court found two aggravators of prior violent felony and HAC versus two statutory mental mitigators plus drug and alcohol abuse and paranoid personality)., Hence, the death sentence is proportionate.

ARGUMENT XI

APPRENDI V. NEW JERSEY, 530 U.S. 466 (2001), DOES NOT APPLY TO FLORIDA'S CAPITAL SENTENCING SCHEME.

Appellant argues that Florida law violates the principles recognized in Apprendi, claiming that the jury advisory recommendation does not specify what, if any, aggravating circumstances were proven, and the maximum sentence allowed upon the jury's finding of guilt is life imprisonment.

The Apprendi-based claims are not grounds for relief because Apprendi does not apply to capital sentencing proceedings, as this Court has expressly held. In Mills v. Moore, this Court stated:

> The majority opinion in Apprendi forecloses Mills' claim because Apprendi preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, Apprendi is inapplicable to this case.

Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001). This Court rejected a similar claim in Mann v. Moore, 794 So. 2d 595 (Fla. 2001), and, in Card v. State, stated:

> The United States Supreme Court indicated that Apprendi does not affect capital sentencing schemes, see Apprendi, 530 U.S. at 496-97, 120 S.Ct. 2348; Mills v. State, 786 So. 2d 547, 549 (Fla. 2001), and this Court consistently had held that a capital jury may recommend a death sentence by a bare majority vote. See Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994).

Card v. State, 26 Fla. L. Weekly S670, 675 n. 13 (Fla., Oct. 11, 2001), revised op., 27 Fla. L. Weekly S25, 30 (Fla. Dec. 20, 2001). See also, Hertz v. State, 26 Fla. L. Weekly S725 (Fla., Nov. 1, 2001); Looney v. State, 26 Fla. L. Weekly S733 (Fla., Nov. 1, 2001). The Apprendi decision is inapplicable, and there is no basis for relief.

To the extent that additional discussion of this claim is required, this Court, in Mills, explained the statutory maximum sentence to which a defendant convicted of first degree murder was subject:

> [Mills] argues that the statute in effect at the time of the initial trial made the maximum penalty for his crime life imprisonment. Only after the jury verdict and further sentencing proceedings, Mills argues, could death be a

possible sentence. This particular scheme, Mills argues, puts the sentence of death outside of the maximum penalty available and triggers Apprendi protection.

With regard to the statute in effect at the time of trial, Mills cites section 775.082(1), Florida Statutes (1979), which provided:

A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

§ 775.082(1) Fla. Stat. (1979). Mills argues that this statute makes life imprisonment the maximum penalty available. Mills argues that the statute allowing the judge to override the jury's recommendation makes it clear that the maximum possible penalty is life imprisonment unless and until the judge holds a separate hearing and finds that the defendant is death eligible.

The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is read *in pari materia* with section 921.141, Florida Statutes, **there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death**. (FN4) Both sections 775.082 and 921.141 clearly refer to a "capital felony." Black's Law Dictionary defines "capital" as "punishable by execution; involving the death penalty." Black's Law Dictionary (7th ed.1999). Merriam Webster's Collegiate Dictionary defines "capital" as "punishable by death ... involving execution." Merriam Webster's Collegiate

> Dictionary (10th ed. 1998). Therefore, a "capital felony" is by definition a felony that may be punishable by death. The maximum possible penalty described in the capital sentencing scheme is clearly death.
>
> (FN4.) Section 921.141, Florida Statutes (1979), provides:
>
> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082.
>
> ....
>
> (3) ... Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death....

Mills v. Moore, 786 So. 2d 532, 537-38 (Fla. 2001). [emphasis added]. Under Florida law, as announced by this Court, a defendant convicted of a capital felony enters the penalty phase (or, in the phraseology of the United States Supreme Court, the selection phase) eligible for the death penalty. The version of § 775.082(1), Fla. Stat.(1999) in effect at the time of Duest's trial refers to a sentence of death first, and then to a sentence of life without parole. If the 1979 statute at issue in Mills made death an available sentence, and this Court held that it did, then the 1999 statute applicable to Duest leaves no doubt that death is not an "enhanced sentence" under Apprendi. Because that is so, a death sentence is not an "enhancement" of the

sentence -- it is a sentence that a defendant convicted of a capital felony is eligible to receive, and which can be imposed after the required penalty phase proceedings are conducted, the advisory verdict is rendered, and the sentencing court considers that advisory sentence in accordance with Florida law.

The decisions of the United States Supreme Court interpreting Florida's death penalty act are in accord with the foregoing discussion -- a Florida capital defendant is "death eligible" based upon the jury's verdict of guilty of the capital felony (*i.e.*, first-degree murder). Unlike the statutory schemes in some states, Florida's statute determines the eligibility of a defendant to receive a death sentence at the guilt-innocence stage of the capital trial, not during the penalty (or selection) phase. See, Proffitt v. Florida, 428 U.S. 242 (1976).

In distinguishing between the eligibility and selection phases of a capital prosecution, the United States Supreme Court has stated:

> **The eligibility decision fits the crime within a defined classification.** Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to "make rationally reviewable the process for imposing a sentence of death." Arave, *supra*, 507 U.S., at 471, 113 S.Ct., at 1540 (internal quotation marks omitted). **The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability.** The objectives of these two

> inquiries can be in some tension, at least when the inquiries occur at the same time. See Romano v. Oklahoma, 512 U.S., at 6, 114 S.Ct., at 2009 (referring to "two somewhat contradictory tasks").

Tuilaepa v. California, 512 U.S. 967, 973 (1994). [emphasis added]. The distinction between the analytical basis of the two stages of a capital prosecution is significant, and, under Florida law, no argument can be made that a capital defendant does not enter the "selection" phase eligible for a death sentence. That the capital sentencing statutes in other states may not function in this way is not the issue, and is of no moment here --Florida's statute answers the "eligibility" question at the **guilt** phase of a capital trial. Even if Apprendi is somehow applicable to capital sentencing, there is no basis for relief because of the manner in which Florida's death penalty statute operates. Duest's argument that aggravators are "elements of the crime" has been expressly rejected by this Court. Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995); Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988), aff'd, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). Likewise, the argument that a unanimous jury sentence recommendation is required has been rejected. Evans v. State, 26 Fla. L. Weekly S675 (Fla. 2001); Sexton v. State, 775 So. 2d 923 (Fla. 2000); Alvord v. State, 322 So. 2d 533 (Fla. 1975). These sub-claims are not a basis for relief, and, in any event, are procedurally barred for the same reasons that the Apprendi claim is procedurally

barred.

Moreover, even if Apprendi is somehow applicable to Florida's capital sentencing scheme, that result would not help Duest. One of the aggravating circumstances found by the sentencing court falls within the "prior conviction" class of aggravating circumstances, and, as such, is outside any possible reach of the Apprendi decision. In other words, no matter how Apprendi might at some point be interpreted, the prior violent felony aggravator falls outside the scope of Apprendi, and, under the facts of this case, are sufficient to support a sentence of death even if the other two aggravators are not considered. Apprendi expressly **excluded** prior convictions from the matters that must be found by a jury before "sentence enhancement" is allowable. The State does not concede that a sentence of death, in Florida, is an "enhanced sentence" as that term is used in Apprendi.

To the extent that Duest claims that he is entitled to "notice" of the aggravating circumstances upon which the State intends to rely, that claim has been consistently rejected by this Court, and Duest has suggested no basis for revisiting settled Florida law. In rejecting this claim years ago, this Court stated:

> The aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in section 921.141(5), Florida Statutes (1987). Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove. Hitchcock v.

> State, 413 So. 2d 741, 746 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982). Vining's claim that Florida's death penalty statute is unconstitutional is also without merit and has been consistently rejected by this Court. See Thompson v. State, 619 So. 2d 261, 267 (Fla.), cert. denied, --- U.S. ----, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993), and cases cited therein.

Vining v. State, 637 So. 2d 921, 927 (Fla. 1994); see also, Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Medina v. State, 466 So. 2d 1046, 1048 n. 2 (Fla. 1985) (State need not provide notice concerning aggravators). This claim is not a basis for relief, and Duest's sentence should not be disturbed.

Conclusion

For the foregoing reasons, it is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

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Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to, Martin McClain, 497 Stonehouse Road, Tallahassee, Fl. 32301, this ____ day of _____, 2002.

_____
Melanie Ann Dale

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 14 Point Times New Roman, a font that is not proportionally spaced.

_____
Melanie Ann Dale