IN THE SUPREME COURT OF FLORIDA

ADAM DAVIS,

Appellant,

vs. **CASE NO. SC00-313**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Adam Davis was convicted of first degree premeditated murder, grand theft, and grand theft auto for his actions in killing Vicki Robinson, stealing her van, and withdrawing hundreds of dollars from her bank account with her stolen ATM card. The evidence at trial revealed that Davis had been dating Mrs. Robinson's fifteen-year-old daughter, Valessa, for about nine months before the murder (R. V11/835).[1] Mrs. Robinson had many difficulties raising Valessa; Valessa ran away from home repeatedly, and Mrs. Robinson and her boyfriend, Jim, had Valessa evaluated under the Baker Act around the summer of 1997 (R. V11/809-810, 818-819).

On June 26, 1998, Mrs. Robinson spent the day running errands with Valessa, Davis, and Jon Whispel (R. V11/836). Jim had dinner with Vicki at the Robinson house (R. V11/810-811). Valessa, Davis, and Jon Whispel arrived home about 11:20 p.m. and went into Valessa's bedroom (R. V11/812, 838). Jim offered to give Davis and Whispel a ride home, but they declined; he left shortly thereafter (R. V11/813). Whispel and Davis later left on their bikes, and Valessa snuck out of the house and met them at a Denny's restaurant (R. V11/838-839). The trio left Denny's to consume some acid, then

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[1]References to the record on appeal will be designated as "R." followed by Volume/Page Number.

returned to the restaurant (R. V11/840).

As they sat around the table, Valessa giggled and said "Let's kill my mom" (R. V11/840). Whispel testified that he initially took it as a joke, but Valessa and Davis started discussing different ideas and Davis ultimately came up with the idea to have Mrs. Robinson overdose on heroin (R. V11/841, 907). They returned to the Robinson house, waited outside smoking a cigarette for a few minutes, then put up the garage door, waiting to make sure Mrs. Robinson was not awake (R. V11/841). They put the van in neutral and rolled it out to the street so that they wouldn't wake her up when they started it (R. V11/842).

They drove to a party at a friend's house, and Davis went inside to try to buy some heroin while Valessa and Whispel waited in the van outside (R. V11/843; V12/1067-68). Davis was asking to buy four bags of heroin and a syringe, saying he was going to kill someone and make it look like an accident (R. V12/1068). He was not able to obtain any heroin but he did purchase the syringe (R. V11/843-844). They returned to the Robinson house, parking several houses away to avoid waking Mrs. Robinson (R. V11/844). They went into Valessa's bedroom; Davis told Valessa they needed bleach, and she went to get some from the laundry room (R. V11/845-846). Valessa then got Davis a glass and he poured in some bleach, then filled the needle with bleach (R. V11/846). Davis took the needle

and a pocketknife and he and Valessa left the room, but they returned in a minute or two saying Mrs. Robinson woke up and they didn't know what to do, so they came back to Valessa's room and Davis put the cup, bleach, knife and needle in the closet (R. V11/847).

Mrs. Robinson knocked on the door, calling for Valessa (R. V11/848). She told Valessa to get her sleeping bag and go into another room (R. V11/848). Davis handed a sleeping bag to Valessa, then Davis followed Mrs. Robinson out of the room (R. V11/848). Whispel and Valessa remained in Valessa's room and heard whispering noises, then silence, then choking noises (R. V11/848-849). They looked at each other, then ran into the hallway, where they saw Davis wrestling Mrs. Robinson in a choke-hold on the kitchen floor (R. V11/849). Davis asked for the needle and Whispel and Valessa went back to her room, but Valessa couldn't find the needle and Whispel did not want to volunteer where it was (R. V11/849-850). Davis yelled for Valessa to come hold her mom while he got the needle; Valessa left the bedroom and Davis came in and got the needle (R. V11/850). Whispel followed Davis back out to the kitchen and saw Valessa straddling her mom, sitting on her legs (R. V11/850). Davis walked over to Mrs. Robinson and tried to stick the needle in the right side of her neck; Robinson asked what they were doing to her (R. V11/851). Davis had trouble with the needle,

but when he pulled it out the bleach was gone (R. V11/851-852).

A few minutes later, Davis said it wasn't working; Whispel went into Valessa's room, saw the knife on the dresser, and took it out to the kitchen (R. V11/852). Whispel said "use this," and someone took the knife out of his hand (R. V11/852, 922-923). Whispel went back to Valessa's room and put his head in his hands (R. V11/852). He looked up when he heard scuffling and Davis and Valessa came in the room (R. V11/852). Davis was holding the knife limply in his left hand; there was blood on his hands and on the knife (R. V11/852). Whispel did not see any blood on Valessa's hands (R. V11/934). Valessa told Davis to go wash his hands, which he did, then he came back to the bedroom and they all sat around smoking a cigarette (R. V11/853). They heard moaning from the kitchen and Davis said, "the bitch won't die," and took the knife back to the kitchen (R. V11/853). Davis told Whispel that he stabbed Robinson two more times; that after the bleach didn't work, he cut Robinson, stabbed her, and tried to break her neck (R. V11/854).

They sat around smoking in Valessa's room for a time, then realized it was getting late and they needed to clean up (R. V11/854). They pulled the van into the garage, took out the seats, and put Robinson's body in a trash can and into the back of the van (R. V11/854-855). They cleaned up the blood with bleach and

brushes and took the towels, mops and buckets they used, loading everything into the back of the van (R. V11/857). Robinson's dog, Lady, growled at them as they left the house (R. V11/857).

They took the body by some trails near a dirt road behind Whispel's house (R. V11/858). They started digging a hole in the middle of a trail, but hit the limestone and decided they would need something like speed to give them enough energy to dig the hole (R. V11/859). So they put the trash can near the hole and covered it with palm fronds (R. V11/860). They went by Whispel's house and picked up some clothes, a boombox, and a pool stick; then they returned to Valessa's to pack up her stuff (R. V11/861-862). Whispel asked about money and Davis said they could use Robinson's credit cards; Valessa knew her mom's ATM number (R. V11/862). They took cash, credit cards and the ATM card and went to Ybor City (R. V11/863).

The trio spent the rest of that Saturday, Sunday, and Monday around Ybor City, getting tattoos and staying in different area hotels with Robinson's money (R. V11/863-867; V12/1045-1050). On Monday evening, Whispel and Davis went to Home Depot to purchase supplies to bury Robinson's body in cement and dump it in a nearby canal; however, Davis got a call from a friend named Matt saying they were all on television, so they decided to leave and headed for Phoenix, Arizona (R. V11/867-868; V13/1124, 1129).

Along the way, they continued to use Robinson's ATM card for cash, ultimately withdrawing over $1800 (R. V11/868; V13/1140). Robinson's credit union began tracking the card use, and a sheriff in Pecos County, Texas, responded to an alert that the van was coming his way (R. V11/869, 951; V12/976-988). The van did not stop when directed but, following a high-speed chase of about ten miles, the van spun out and stopped on the side of the road (R. V11/869-871; V12/976-988).

Valessa, Davis, and Whispel were arrested and taken into custody by Texas authorities (R. V11/953). Hillsborough sheriff's detectives flew out to Texas to interview the defendants (R. V11/954). Det. Iverson and Lt. Marsicano first went to a youth center where Valessa was being held, as it was closest to the airport (R. V11/955). Valessa was calm and casual; she did not seem upset (R. V11/955). Then they went to the county jail where Whispel and Davis were held, speaking to Whispel about 4:30 a.m. Tampa time (R. V11/956). Whispel was also calm and willing to talk; he told them what had happened and drew a map to Robinson's body (R. V11/957).

They talked with Davis about 5:30 a.m., Tampa time (R. V11/957). Davis was sleepy but calm and also willing to talk (R.

V11/958).[2] He signed a written waiver of rights form and also drew a map to Robinson's body (R. V11/962). Then, he provided a tape recorded statement in which he admitted slicing Robinson's neck and stabbing her twice in the lower back (R. V12/991-1002). He described planning and committing the murder, cleaning up, and the activities in the days following the murder (R. V12/991-1002).

State witness Leanna Hayes had been transported with Davis and Whispel to Florida following their arrests (R. V13/1146-48). Hayes related conversations she had with Davis where he told her that he had done the murder for his girlfriend, a juvenile being transported separately; that they were modern-day Romeo and Juliet on a big adventure, capped off by a chase scene in Texas (R. V13/1150-51). Davis said they were very happy to be in the newspaper, and he was especially proud of a headline about Valessa mouthing "I love you" to him at the jail (R. V13/1151). According to Hayes, Davis was bragging about how he cut the victim up because he loved his girlfriend and wanted to be with her (R. V13/1157, 1159).

Other evidence presented against Davis included testimony that

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[2]Prior to trial, the court conducted a suppression hearing regarding Davis's claim that his statements had been obtained in violation of his constitutional rights (R. V15/1446). Testimony was taken from Det. Iverson, Lt. Marsicano, and Davis, and the court denied the motion to suppress (R. V15/1450, 1502, 1509, 1540). Additional facts from the suppression hearing are provided in Issue I, addressing Davis's claim that the court erred in denying his motion to suppress.

Davis had been involved in an exchange after Valessa and Mrs. Robinson had angry words several days before the murder; Davis was angry, saying Robinson was always accusing him of things that he didn't do, and he was going to "knock her ass out plain as day" (R. V12/1055-57). Also, Davis's fingerprint was found on a bleach bottle at the Robinson home and Mrs. Robinson's blood was identified, through DNA, on one of Davis's shoes (R. V13/1143-45; 1169, 1172).

The associate medical examiner testified that Robinson's body was in an advanced state of decomposition; he had difficulty, due to the passage of time, locating any puncture wounds from a needle or testing for any type of substance that may have been injected into Robinson (R. V13/1184, 1184-85). Law enforcement advised him to look for possible wounds in the neck and back, and he found a stab wound on the left side of her neck which he probably would not have discovered otherwise and which he characterized as the probable cause of death (R. V13/1187-90, 1196). He also noted three other stab wounds: one under the left collarbone, and the other two just above the hipline on her back, one on each side (R. V13/1191). According to Dr. Miller, the injuries to Robinson would have been painful and she would have been conscious thirty seconds to a minute or two after the stab to her neck (R. V13/1192-93, 1195).

Davis was convicted as charged and, in a penalty phase proceeding, presented background evidence from a clinical psychologist, Dr. Michael Gamache, and testimony from an aunt, a step-aunt, a friend, a counselor from a foster group home, and Davis's biological mother (R. V14/1316, 1344, 1347, 1355, 1357, 1364). The jury was also aware that Whispel had pled guilty to second degree murder, grand theft, and grand theft auto, receiving a sentence of twenty-five years, and that Valessa was too young to be eligible for the death penalty (R. V11/834-35, 876).[3] The jury returned a recommendation for a death sentence by a vote of seven to five (R. V14/1387-88). On December 17, 1999, the trial court sentenced Davis to death, finding three aggravating circumstances (felony probation; heinous, atrocious or cruel; and cold, calculated, and premeditated), and weighing, in mitigation, Davis's age; the influence of LSD on the night of the murder; the lack of any prior assault convictions; Davis's deprived childhood and hardships through youth, including his father's death; Davis's skills as a writer and artist and his appropriate courtroom behavior; and the different treatment of Davis's codefendants (R. V4/636-643; V15/1554). This appeal follows.

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[3]After Davis's trial and sentencing, Valessa was convicted of third degree murder and grand theft auto. See Robinson v. State, Second DCA Case No. 2D00-2603.

SUMMARY OF THE ARGUMENT

The trial court did not err in denying Davis's motion to suppress his confession. The court correctly held that Davis's waiver of his constitutional rights was voluntary and knowing. His taped statement was only secured after a written waiver of his rights had been executed, and no coercive police tactics have been identified in getting Davis's statements.

No new trial is warranted due to the trial court's rulings during voir dire with regard to cause challenges on prospective jurors. A trial judge's conclusions during jury selection are entitled to deference, and Davis has failed to demonstrate any abuse of discretion in the denial of his challenges for cause. The record fully supports the rulings made below, and no relief is compelled on this claim.

Davis's argument concerning the exclusion of defense testimony about Valessa Robinson's statements to law enforcement has not been preserved for appellate review, as no specific question asked by the defense was objected to and no particular evidence was excluded. The argument presented on appeal was not directed to the court below. Even if considered, however, Davis's claim on this issue does not warrant relief, as a codefendant's out of court statements are properly excluded as hearsay under facts as presented in this case.

Davis has failed to demonstrate any abuse of discretion in the trial court's ruling to admit an autopsy photograph of Mrs. Robinson. The picture was relevant to explain the medical examiner's testimony on the nature and extent of Robinson's injuries, and no reversible error is presented in the admission of this evidence.

The trial court did not err in denying Davis's request for a special jury instruction on the mitigating circumstance of disparate treatment. Davis's jury was completely and accurately instructed on the proper procedures in assessing the penalty phase evidence and weighing the aggravating and mitigating circumstances. Davis was not denied an opportunity to submit evidence or argument with regard to this mitigator, and the denial of his requested instruction does not interfere with the validity of his death sentence.

The trial court did not err in finding and weighing the aggravating circumstances of heinous, atrocious or cruel, and cold, calculated and premeditated. The sentencing order filed below establishes that the correct legal standards were applied, and the court's findings are supported by substantial, competent evidence. No error has been presented with regard to the application of these aggravating factors.

Florida's capital sentencing statute is not unconstitutional

facially or as applied in this case. This Court has repeatedly rejected all of the constitutional challenges presented by Davis, and no reasonable basis for reconsideration of the well-established law rejecting these arguments has been provided.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING DAVIS'S MOTION TO SUPPRESS STATEMENTS.

Davis initially challenges the trial court's denial of his motion to suppress statements, alleging that his constitutional rights were violated when Hillsborough sheriff's detectives interviewed him after his arrest in Texas. The trial court denied the motion, finding, from the totality of circumstances, that Davis was not suffering from any cognitive defect or sleep deprivation which interfered with his ability to understand and waive his constitutional rights (R. V15/1540). This ruling is presumed to be correct and must be upheld where, as here, it is supported by the record. See Chavez v. State, 27 Fla. L. Weekly S517 (Fla. May 30, 2002); Rhodes v. State, 638 So. 2d 920, 925 (Fla. 1994); Owen v. State, 560 So. 2d 207, 211 (Fla. 1990).

A trial court's ruling on a motion to suppress comes to this Court clothed with a presumption of correctness; the evidence, and reasonable inferences and deductions derived therefrom, must be interpreted in a manner most favorable to sustaining the trial court's ruling. See Connor v. State, 803 So. 2d 598, 607-8 (Fla. 2001) (noting that trial court's application of law to factual findings is reviewed de novo); Murray v. State, 692 So. 2d 157, 159 (Fla. 1997); Walker v. State, 707 So. 2d 300, 311 (Fla. 1997). A

review of the record demonstrates that this issue is without merit, and Davis is not entitled to a new trial.

Testimony presented at the suppression hearing indicated that Det. Iverson and Lt. Marsicano interviewed Davis at the Pecos County Jail on July 3, 1999, at about 5:15 a.m. Tampa time (R. V15/1451-52, 1458). Davis, Jon Whispel, and Valessa Robinson had been arrested the previous day and Davis had been sleeping in his cell when Iverson and Marsicano arrived (R. V15/1480, 1510). The officers had spoken with Valessa and Whispel prior to speaking with Davis, and felt that the case was a homicide at that point although it was still being investigated as a missing persons report (R. V15/1451, 1456).

Iverson testified that he did not immediately read Davis his constitutional rights, as Iverson wanted to establish a rapport with Davis initially and did not intend to use any preliminary conversation against Davis (R. V15/1457-59, 1464). According to Iverson, this was his standard practice when possible, as his style was to get someone comfortable and at ease before breaching a difficult subject (R. V15/1457-48, 1465). This pre-interview lasted about eight to ten minutes; Davis was asked questions and admitted his involvement in Robinson's murder at that time, but the State made no attempt to admit these statements at the trial (R. V15/1459, 1466, 1529).

Thereafter, Iverson and Marsicano advised Davis of his rights, and Davis voluntarily signed a written consent to interview form (R. V15/1466-69, 1481, 1507). Iverson described, at the suppression hearing, how he explained the rights individually to Davis, and that Davis understood and acknowledged his rights (R. V15/1469-72). Davis never asked for an attorney or requested that the interview be stopped at any time (R. V15/1475, 1507-08, 1522). Both Iverson and Marsicano testified that Davis was coherent and alert, and that he did not seem to be injured or under the influence of drugs; he never appeared to have any problems understanding what was happening (R. V15/1460-64, 1507-08).

After waiving his rights, Davis agreed to provide a map to help the officers locate Robinson's body (R. V15/1476). He drew the map and agreed to allow the officers to tape record his statement (R. V15/1476, 1489-1500). He then repeated his involvement in plotting and carrying out Mrs. Robinson's death (R. V15/1489-1500).

Davis's only real argument on appeal is that the court erred in denying his motion to suppress because Davis had already made incriminating statements before his Miranda rights were read. However, the United States Supreme Court has expressly recognized that the failure to administer Miranda warnings initially does not taint all subsequent statements obtained. In Oregon v. Elstad, 470

U.S. 298, 310-11 (1985), the Court held that if "careful and thorough administration" of the warnings are later given, and constitutional rights are thereafter waived, any further statements may properly be used against the defendant. The facts of this case fit squarely within this principle; Davis's rights were carefully explained to him and voluntarily waived before he made the statements which were admitted into evidence. Thus, no error is demonstrated in the denial of Davis's motion to suppress. See also Davis v. State, 698 So. 2d 1182, 1187-89 (Fla. 1997) (although untaped statement, provided in the absence of Miranda warnings, should have been excluded, the second, taped statement was properly admitted).

Davis does not discuss or address the evidence presented below with regard to this claim, he simply asserts that the facts are controlled by Ramirez v. State, 739 So. 2d 568 (Fla. 1999). In fact, the language of Ramirez supports the decision reached below. In that case, this Court stated:

> As to the statements elicited after the *Miranda* warnings were finally given, the United States Supreme Court explained in *Oregon v. Elstad*, 470 U.S. 298, 310-11, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), that the failure to administer the *Miranda* warnings before eliciting a confession does not necessarily render any subsequently warned statement inadmissible. Instead, if a "careful and thorough administration" of the *Miranda* warnings are later given, and the *Miranda* rights are waived, the condition that "rendered the unwarned statement inadmissible"

> is "cure[d]." *Elstad*, 470 U.S. at 311, 105 S.Ct. 1285; see *Davis*, 698 So.2d at 1189; *Henry v. State*, 613 So.2d 429, 431 (Fla.1992).
>
> In *Elstad*, the police first questioned the defendant, who was eighteen and in his home in the presence of his parents, without the *Miranda* warnings having been administered. 470 U.S. at 300-01, 105 S.Ct. 1285. The defendant responded to the questioning with inculpatory statements. See *id*. at 301, 105 S.Ct. 1285. Police then transported him to the station and fully advised him of his rights, whereafter he executed a written statement. See *id*. at 301-02, 105 S.Ct. 1285. The Supreme Court concluded that the first statements were properly suppressed, but that it was not necessary to suppress the statements made after the *Miranda* waiver, which was knowing, intelligent and voluntary. See *id*. at 315-18, 105 S.Ct. 1285.
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> By contrast, in this case police began questioning Ramirez at the police station after failing to first administer the *Miranda* warnings. When the police finally administered the *Miranda* warnings, the administration was not careful and thorough. To the contrary, there was a concerted effort to minimize and downplay the significance of the *Miranda* rights.

739 So. 2d at 574-739.

To the extent that Davis claims to be entitled to the same relief as the defendant in Ramirez, however, his reliance on Ramirez is misplaced as that case is factually different. The court below was provided with the Ramirez decision and distinguished that case by noting that Ramirez was a juvenile who did not sign a written waiver of rights form.

Davis claims that his motion to suppress should have been

granted because the police coerced Davis into confessing by advising him of his rights after he had already admitted his involvement in this crime. Although Davis properly cites Colorado v. Connelly, 479 U.S. 157 (1986), as to the need for improper police action in order to vitiate the voluntariness of a confession, he cites no authority for his claim that the reading of rights to Davis was sufficient coercion to compel the suppression of his statements. In fact, there was nothing improper substantively or procedurally with Davis's waiver of rights.

As this Court has observed, freely given, voluntary confessions are "an unqualified good." Sapp v. State, 690 So. 2d 581, 586 (Fla. 1997). The record in this case, contrary to Davis's claim, supports the trial court's finding that Davis's waiver was knowing and voluntary. Davis's statements were not the product of an illegal arrest or detention; Davis has not cited any factors suggesting his statements were involuntary, and he has not attempted to identify any specific error in the trial court's ruling on his motion to suppress. In addition, any possible error in the admission of this evidence would be harmless in light of the other strong, direct evidence of Davis's guilt, including the testimony of witness Jon Whispel, which corroborated Davis's statements and independently established the details of Mrs. Robinson's murder. On these facts, Davis has failed to demonstrate

any abuse of discretion in the denial of his motion to suppress, and he is not entitled to any relief in this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENSE REQUESTS TO STRIKE PROSPECTIVE JURORS FOR CAUSE.

In his next issue, Davis asserts error in various trial court rulings during voir dire. Davis claims that prospective jurors Pritchett, Mosier, Whitman, Eustace, Junda, and Lopez all should have been excused on cause challenges, and that the trial court's denial of additional peremptory challenges to compensate for the ones he used to excuse these prospective jurors warrants a new trial. However, a review of the record demonstrates support for the rulings now challenged, and clearly establishes that Davis is not entitled to any relief.

Appellate review of rulings on motions to strike prospective jurors for cause is highly deferential. In reviewing a judge's denial of a challenge for cause, this Court must give deference to the judge's determination of a prospective juror's qualifications. Hertz v. State, 803 So. 2d 629 (Fla. 2001); Castro v. State, 644 So. 2d 987, 989 (Fla. 1994). "It is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error." Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999) (citing Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997)). This Court has acknowledged that a trial court has wide latitude in ruling upon a challenge for cause because the

court has a better vantage point from which to evaluate prospective jurors' answers than does a review of the cold record. Mendoza, 700 So. 2d at 675.

A review of the record establishes clear support for the challenged rulings on these prospective jurors below. As will be seen, no manifest error has been demonstrated, and Davis is not entitled to a new trial on this issue.

Davis first alleges that prospective jurors Pritchett and Mosier should have been stricken from the panel for cause. According to Davis, Pritchett and Mosier were not qualified to serve as jurors because they indicated that they could not consider mercy in recommending an appropriate penalty. Davis asserts that Thomas v. State, 403 So. 2d 371 (Fla. 1981), and Poole v. State, 194 So. 2d 903 (Fla. 1967), required the excusal of Pritchett and Mosier for cause. As to Pritchett, the record does not support Davis's claim since Pritchett never stated that he could not consider mercy; Davis's assertion that he did (without any record cite) is an unfortunate misrepresentation of the record. This was not the basis for the excusal sought below, and no relief is due.

In addition, Davis's reliance on Thomas and Poole is clearly misplaced. In those decisions, the jurors indicated that they could not consider a recommendation of "mercy" -- that is, a recommendation for a life sentence -- under any circumstances. The term "mercy" is not used in those cases as it was by defense

counsel below in asking the jurors if they could consider mercy, it is used to describe a life recommendation. The question asked of prospective juror Mosier was whether Mosier thought that mercy for the defendant should play any part in his decision as a juror about a penalty (R. V5/81-82). Mosier stated clearly and unequivocally that he did not believe in an eye for an eye, that he could follow the law from the judge on weighing aggravating and mitigating circumstances and returning a sentencing recommendation, and that he accepted the idea that a person could be convicted of first degree murder and sentenced to life (R. V5/78-79, 81). There is no indication that Mosier would not recommend a life sentence where appropriate, and the challenge for cause was properly denied.

Davis has not cited any authority which required the court below to excuse Pritchett and Mosier for cause if they indicated that they would not consider mercy should this case result in a penalty phase. In fact, there is no requirement for a jury to "consider mercy" in deliberating the appropriate penalty phase recommendation. See Valle v. State, 581 So. 2d 40, 47 (Fla. 1991) (State may properly argue that the jury should not be swayed by sympathy). The cause challenges were properly denied.

As to prospective juror Whitman, Davis is offended by her comment that the victim suffered a terrible death and alleges she was equivocal as to whether this might cause Whitman "problems." However, Whitman clearly stated that she would listen to all of the

evidence, and consider all of the mitigation, before making a penalty phase recommendation (R. V6/161-62). Her slight equivocation on any concerns regarding the manner of death did not demonstrate that she could not be fair or impartial and did not require the court to excuse her for cause. No error has been shown in this ruling.

Similarly, prospective juror Eustace is challenged for allegedly maintaining a pre-formed opinion as to guilt. Yet Eustace unequivocally told the court that he could "disregard" any prior opinion and decide the case fairly based on the evidence presented (R. V6/192). Furthermore, at a later point in voir dire, Eustace clarified that his opinion was only that law enforcement believed Davis was guilty based on his arrest, not that Eustace believed Davis to be guilty (R. V8/537-38). Eustace properly acknowledged that he did not have any opinion on guilt, but would have to wait to hear the evidence. Once again no basis for a cause challenge has been demonstrated.

Davis's claim that prospective juror Junda unequivocally stated that he could not be fair and impartial is also refuted by the record. Although Junda initially said he could not be impartial IF any of the witnesses happened to be police officers that Junda knew personally -- Junda was retired from the military and knew many officers from the reserves and in the military police -- Junda admitted that he could follow the law, and the trial judge

was in a better position to weigh Junda's remarks and determine his qualifications than this Court (R. V6/142, 148-49; V9/649-50).

Finally, Davis also cites equivocation as a reason to have excused prospective juror Lopez for cause. Davis asserts that Lopez's qualifying responses with "probably" and his difficulty in articulating his feelings on the death penalty demanded that the court grant a cause challenge on Lopez. Once again, Davis's allegations are refuted by the record. Lopez clearly stated that he could follow the penalty phase law given by the judge (R. V7/322). He only equivocated when asked about his specific feelings regarding the death penalty, and he responded that his decision about it "depends on the circumstances" (R. V7/324-26). He stated definitively that he could return either a life or death recommendation, depending on how he felt about the evidence presented (R. V7/324). Once again, no basis for a cause challenge is apparent on these facts.

The test for juror competency is whether a juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions from the court. Kearse v. State, 770 So. 2d 1119, 1128 (Fla. 2000). Each of the challenged jurors in this case met this test. The law does not require a juror to be free from bias, it only requires any personal views to be set aside as necessary to follow the law. Gore v. State, 706 So. 2d 1328, 1332 (Fla. 1997) (although some challenged members of venire

expressed certain biases, court not required to excuse them for cause).

Thus, the record fully supports the trial court's rulings during voir dire as challenged on appeal. Davis has failed to demonstrate any error in the trial court's rulings on his challenges for cause. No new trial is warranted on this issue.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY EXCLUDING THE CONFESSION OF CODEFENDANT VALESSA ROBINSON.

Davis's third issue attacks the trial court's response to a defense request regarding cross-examining law enforcement officers about extra-judicial statements made by codefendant Valessa Robinson at the time of her Texas detention. However, a review of the record reflects that the trial court did not enter any particular ruling, as no specific defense question was asked and objected to by the State. When defense counsel asked about the admission of this testimony, the judge instructed counsel that she could not rule prematurely and he would have to posit whatever question he deemed relevant (R. V12/1030-33). She specifically advised that she would allow some hearsay, but would not allow tremendous latitude, and she directed the prosecutor to make any appropriate objections (R. V12/1030). Since the defense did not thereafter ask any question for which an objection was sustained, there is no ruling before this Court to review, and Davis's claim must be denied as unpreserved. Castor v. State, 365 So. 2d 701 (Fla. 1978).

In addition, pursuant to Section 90.104(1)(b), Florida Statutes, a party may only challenge the exclusion of evidence when the substance of the evidence is made known through a proffer or is apparent from the context of the questioning. See Finney v. State, 660 So. 2d 674 (Fla. 1995). In this case, Davis asserts that no

proffer was necessary because the judge was aware of the substance of Robinson's statement; that is, Robinson "confessed" to the crime. Securing an isolated statement from Valessa Robinson's later trial as the "unrefuted" evidence that Valessa admitted stabbing her mother does not meet Davis's burden of presenting an adequate record for this issue. Neither Robinson's actual statements nor the circumstances of her comments are fully before this Court; other evidence from her trial which may reveal suggestions of unreliability[4] are not included in the current record on appeal, rendering appellate review of this alleged error impossible.

Another bar to appellate review is the fact that Davis did not present the specific contention which he now asserts on appeal at the time of trial. In his brief, Davis claims that Valessa's statements to the officers should have been admitted as an exception to the hearsay rule as a declaration against interest (Appellant's Initial Brief, p. 47-48). However, at the bench conference during trial, Davis's counsel repeatedly acknowledged that Robinson's statements were hearsay, but suggested that the State had "opened the door" during Whispel's testimony because he was relating statements which Valessa had made (R. V12/1027-29). Counsel never suggested to the court below that the statements should be admitted under this hearsay exception, and never

[4]Valessa's jury convicted her of third degree murder.

attempted to lay a foundation to support its admission as a declaration against interest. Since the basis of Davis's current claim has changed, his appellate argument has not been preserved for review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Even if the merits of this claim are reviewed, no error can be shown. Rulings on the admissibility of evidence are reviewed for an abuse of discretion. On the facts of this case, no abuse of discretion can be demonstrated.

Davis claims that defense counsel informed the court that he wanted to elicit testimony from Det. Iverson about Valessa's statements, and that the court "indicated that it understood these statements and that they would not be admitted due to the hearsay rule." (Appellant's Initial Brief, p. 45). The record reflects that, prior to cross-examination of Det. Iverson, defense counsel approached the bench and asked the judge for guidance on questioning witness Iverson about statements from the other defendants involved in this case. The entire exchange occurred as follows:

> MR. TRAINA: Judge, the reason I've asked to approach the bench at this time is because I want some guidance as to the discretion the Court's going to allow me with respect to questioning Detective Iverson on the specific subject matter is, what type of information I would be allowed to question him about regarding the statements made by Valessa Robinson.
>
> I'm taking the position that Jon Whispel this morning opened the door to the testimony regarding what Valessa Robinson has said about

the incident which I think would then allow me to even ask Detective Iverson what she told him about the incident. I didn't want to do that in open court before we talked about it at the bench and have counsel have an opportunity to respond to that, though.

THE COURT: Ms. Williams?

MS. WILLIAMS: Judge, I would object. It's hearsay and I don't know of any exception to that.

THE COURT: I'm not sure how you think Mr. Whispel opened the door.

MR. TRAINA: Well, I think he did, Judge, and let me at least say what my observation was and maybe the Court doesn't remember this the same way I do. I believe right off the bat Jon Whispel testified using hearsay statements that - - regarding Valessa, for example, her explanation at the Denny's. Later on he testified regarding Valessa being willing to take the blame for the incident.

MR. TERRANA: She stood up and said, "Let's kill my mother."

MR. TRAINA: That comes out by her - -

MR. TERRANA: Statements from her.

MR. TRAINA: He also testified very clearly that Adam Davis and Valessa Robinson entered into a conversation in his presence in which they both said they were going to take the blame for this incident. I think again that opens the door for us to proceed further. It's very, very important to our defense, obviously, because we are not in this alone is our projected position of this, so that's why I'm asking the Court to allow me some latitude here.

THE COURT: I don't think it allows you the latitude to have Valessa's statement put in through this witness or to question him concerning that.

MR. TRAINA: Judge, if the Court is making that ruling then I wish to ask Detective Iverson this: If my client had given him a statement indicating that someone else had done it, would that statement have been consistent with what he's learned from other statements.

THE COURT: If your client told him

someone else had done it?

MR. TRAINA: One of the other three. Obviously, what I want to do is preface this because he even said himself - - I don't think there is any violation of any sort. Even Detective Iverson indicated that he took a statement from all three people. By having taken the statement and having an idea I believe I can ask him whether or not all of them admitted they were involved in drugs, all of them made the same kind of statements involving that, I can ask him if they were - - if all the statements I believe were consistent in one way or the other. He's going to say - - I don't see why I can't ask these questions.

MS. WILLIAMS: Judge, the fact that hearsay is admitted at some time during the trial without objection does not open the door.

THE COURT: Allow you to bring in the additional hearsay. I'm not going to allow you tremendous latitude, but I certainly would ask you to make the appropriate objections.

MS. WILLIAMS: Yes.

MR. TRAINA: So you're not going to let me at least inquire to a certain extent about the statement?

THE COURT: That Valessa made to him?

MR. TRAINA: Well, no. The way I will approach it, given your ruling about what I just asked for is, I would ask Detective Iverson to tell me in ways my client's statement, which I believe I certainly can ask him about, was consistent or inconsistent with that investigation he already acquired from the two statements he took prior to my client's statement. In other words, I would elicit any such testimony directly to, Valessa said this about this, but he might be able to answer in that regard.

THE COURT: No.

MR. TRAINA: You're not going to allow me to do that either?

THE COURT: No, I have no idea what you're asking in that situation so I'm going to ask that you ask the question, I'll allow the State to make the objection. I mean, I can't

give you an advisory opinion.

MR. TRAINA: Well, I just didn't want to do something in open court without telling you.

MR. TERRANA: Tell the Judge what the facts are, what the cold facts, are what you're interested in and then maybe we can get there.

MR. TRAINA: I think the Judge knows what the facts are, Valessa Robinson made a confession to this crime. She admitted she did it.

THE COURT: I understand that, but you are - - in this case it is hearsay and it's not coming in through this witness.

MR. TRAINA: All right. Judge, having heard your ruling as to my - -

THE COURT: Let me explain this to you, though, Mr. Traina, I can't - - you can't give me a list of questions and say, "Judge, check off which ones I can ask and which ones I can't."

MR. TRAINA: I'll go ahead. That will be fine, Judge.

THE COURT: I have no way of doing that in the middle of this trial.

MR. TRAINA: I'll go - -

THE COURT: There's no motion in limine and there's no way for me to give you an advisory opinion on what questions you can ask or not ask in a trial.

MR. TRAINA: No. And don't get me wrong, Judge, nine times out of ten I might just go ahead and ask the witness. I didn't want to create a problem that would later cause - -

THE COURT: I don't want you to create a problem you know you cannot ask the, question, either but at this point in the middle of this trial with the witness on the stand there's no way we can anticipate every question that you may ask.

MR. TRAINA: Uh-huh.

THE COURT: Okay.

(R. V12/1027-1033). Thereafter, when Lt. Marsicano was called as a witness, defense counsel interposed, "the same request in terms

of my ability to question Detective Marsicano I asked for the latitude to question Detective Iverson because of -- they're the same type of witness, and whatever the Court rules I --," to which the court again noted counsel was asking for an advisory opinion which the court declined to provide (R. V12/1039). Counsel responded:

> Well, Judge, I understand that. I would be eliciting hearsay testimony and I know that's against the rules normally. Our position was that the door was opened and that was the basis for my request. If the Court denies it, then you're denying it, I just want to let you know I feel the same way about Marsicano that I feel about Iverson.

(R. V12/1040).

Although it is not readily apparent what exact testimony Davis sought to elicit, the exclusion of inculpatory statements by other defendants has been routinely upheld in many appellate decisions. Third party inculpatory statements are often found to be unreliable by trial judges, and the exclusion of hearsay accounts of such statements are unanimously upheld as an appropriate exercise of the trial judge's discretion.

In Jones v. State, 678 So. 2d 309, 314 (Fla. 1996), cert. denied, 519 U.S. 1152 (1997), this Court reviewed the propriety of excluding similar evidence during a postconviction evidentiary hearing where the statements were the basis of a claim of newly discovered evidence. After initially determining that the statements could not be admitted pursuant to Section 90.804(2)(c),

since the defendant had failed to establish that the declarant was unavailable, this Court stated:

> Even if Jones had established that Schofield was unavailable for purposes of section 90.804(2)(c), Jones also had the burden of establishing that Schofield's alleged confessions were statements against penal interest within the meaning of section 90.804(2)(c). *Rivera v. State,* 510 So.2d 340, 341 (Fla. 3rd DCA 1987); see also *United States v. Seabolt,* 958 F.2d 231, 233 (8th Cir. 1992), *cert. denied,* 507 U.S. 971, 113 S.Ct. 1411, 122 L.Ed.2d 782 (1993) (concluding that "a statement by one criminal to another criminal ... is more apt to be jailhouse braggadocio than a statement against his criminal interest"). Moreover, Jones had the burden of presenting corroborating circumstances demonstrating the trustworthiness of Schofield's alleged confessions. *Rivera,* 510 So.2d at 341.

678 So. 2d at 314.

The unreliability of such statements is also recognized in Voorhees v. State, 699 So. 2d 602 (Fla. 1997). Voorhees was similar to the instant case in that it was the codefendant, Robert Sager, that had allegedly made statements indicating that he was the one that actually cut the victim's throat. Sager's inculpatory statements to both Mississippi and Florida law enforcement officers, as well as to fellow inmates in Florida, were excluded by the trial judge. Although this Court held that the trial judge should have permitted the statements to the police officers (but finding the error in excluding the statements to be harmless), the exclusion of the statements to the fellow inmates was upheld as

within the trial court's discretion, since "the statements did not have sufficient corroborating circumstances." 699 So. 2d at 613, n. 11.

Similarly, in Pittman v. State, 646 So. 2d 167 (Fla. 1994), cert. denied, 514 U.S. 1119 (1995), this Court rejected a similar claim. In that case, the trial court excluded hearsay testimony from an inmate who alleged that someone else had implicated himself in the murders. This Court agreed that the proffered testimony was hearsay, not admissible under any exception to the hearsay rule. See also, Czubak v. State, 644 So. 2d 93, 95 (Fla. 2d DCA 1994) (third party's purported confession to several witnesses properly excluded as unreliable), rev. denied, 652 So. 2d 816 (Fla. 1995); Denny v. State, 617 So. 2d 323, 324-25 (Fla. 4th DCA 1993) (inculpatory pretrial statements of codefendants properly excluded, where trial court found there was not sufficient corroboration).

Davis's brief does not identify any reasonable corroboration to lend support for admission of this testimony. He notes that Valessa related a number of details, but he does not specify how her information was corroborated and, significantly, there is no corroboration of her admission to actually stabbing her mother. To the contrary, her account is inconsistent with the direct, eyewitness testimony of Jon Whispel on this point. According to Whispel, Davis had the knife, and had blood on his hands; Whispel did not believe that Valessa had stabbed Mrs. Robinson because

Valessa did not have blood on her hands (V11/852-53, 926, 932, 934-35). Whispel also testified that Davis returned to the kitchen for the final stabbings while he and Valessa were in Valessa's bedroom (V11/853-54).

In addition, the circumstances refute any finding of reliability: Davis and Valessa had discussed taking the blame for each other, and Valessa had demonstrated a continued interest in helping Davis after their arrests, mouthing the words, "I love you," to him as they were being separated (R. V11/937; V13/1151).

Davis's claim that the court below violated Chambers v. Mississippi, 410 U.S. 284 (1973), is without merit. In Chambers, the Court recognized that an accused seeking to exercise his right to present witnesses in his own defense must comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." 410 U.S. at 302. Chambers specifically noted that "[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300. As this Court has noted, Chambers must be "limited to its facts due to the peculiarities of Mississippi evidence law which did not recognize a hearsay exception for declarations against penal interest." Gudinas v. State, 693 So. 2d 953, 965 (Fla.), cert. denied, 118 S.Ct. 345 (1997). Since no reliability was found

in the instant case, Davis's reliance on Chambers is misplaced.

Finally, when the alleged "confession" is considered in context, it is clear that any possible error in its exclusion was harmless beyond a reasonable doubt. Valessa's statements only implicated herself in the murder; she never exculpated Davis. Even if she stabbed her mother at some point, Whispel's testimony established that Davis had also stabbed Robinson repeatedly, in addition to the other he committed on her (R. V11/852-54). Moreover, the jury was clearly aware of the complicity of the other defendants in this offense. See LeCroy v. State, 533 So. 2d 750, 754 (Fla. 1988) (any possible error in excluding codefendant's statements of involvement could not have affected verdict, since evidence that codefendant had been charged and had some role in the crime or in concealing the crime was given to jury), cert. denied, 492 U.S. 925 (1989); Voorhees, 699 So. 2d at 613. Therefore, any possible error in the failure to admit this testimony was harmless beyond a reasonable doubt. No new trial is warranted on this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ADMITTING GORY PHOTOGRAPHS.

Davis also disputes the trial court's ruling to allow the State to admit a picture from the victim's autopsy. A trial court's ruling on the admissibility of photographic evidence is reviewed under an abuse of discretion standard. Dennis v. State, 27 Fla. L. Weekly S101 (Fla. Jan. 31, 2002); Mansfield v. State, 758 So. 2d 636, 648 (Fla. 2000). No abuse of discretion can be found on the facts of the instant case.

A review of the record reflects that, as in Dennis, the autopsy photo admitted into evidence below was relevant to demonstrate the nature and extent of the injuries to the victim, Mrs. Robinson. According to Davis's confession and relevant trial testimony, the defendants attempted to inject bleach into Robinson's neck with a syringe as one method of killing her (R. V11/850-53; V12/993-94). However, the medical examiner testified that he could not detect any physical manifestations of this, using this photo to explain the difficulty (V13/1184-87). Since Davis's intent to kill was an issue for the jury, it was certainly relevant for the jury to understand how the crime occurred, and therefore the photograph was relevant to establish the State's ability to prove the manner in which the murder had been committed.

The fact that Davis did not specifically contest the manner of death in this case does not make this photograph irrelevant. This

Court has long recognized that the test of admissibility of photographs in a situation such as this is relevancy, and not necessity. Meeks v. State, 339 So. 2d 186 (Fla. 1976). In Henderson v. State, 463 So. 2d 196 (Fla. 1985), the defendant argued that the trial court erred by allowing into evidence gruesome photographs which he claimed were irrelevant and repetitive. This Court found that the photographs, which were of the victim's partially decomposed body, were relevant:

> Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.

463 So. 2d at 200. This Court further held that it is not to be presumed that gruesome photographs so inflamed the jury that they will find the accused guilty in the absence of evidence of guilt, but it is presumed that jurors are guided by logic and thus, that pictures of the murder victims do not alone prove the guilt of the accused. 463 So. 2d at 200.

Although the photograph in this case may show the affects of some deterioration and insect presence, it is not unduly gruesome in that Mrs. Robinson's body was not horribly scarred or disfigured. This Court has approved the admission of autopsy and other relevant photos under similar circumstances. Burns v. State, 609 So. 2d 600 (Fla. 1992); Marshall v. State, 604 So. 2d 799 (Fla.

1992); Nixon v. State, 572 So. 2d 1336 (Fla. 1990). In Gore v. State, 475 So. 2d 1205 (Fla.), cert. denied, 475 U.S. 1031 (1985), this Court disagreed with Gore's contention that the trial court reversibly erred in allowing into evidence two prejudicial photographs, one depicting the victim in the trunk of Gore's mother's car and the other showing the hands of the victim behind her back. This Court held that the photographs placed the victim in the car, showed the condition of the body when first discovered by police, showed the considerable pain inflicted by Gore binding the victim, met the test of relevancy, and were not so shocking in nature as to defeat their relevancy. Id. at 1208.

Davis's reliance on Ruiz v. State, 743 So. 2d 1, 18 (Fla. 1999), to demonstrate reversible error in this case is misplaced. In Ruiz, the State presented a two by three foot, blown-up picture of the victim's head and upper body in the penalty phase. No basis for the relevance of the photo was offered, and a standard size of the same picture had already been admitted during the guilt phase of the trial. This Court cited admission of the picture as an instance of prosecutorial misconduct which, along with numerous improper comments, warranted a new trial. In the instant case, the picture was not enlarged or unnecessarily inflammatory, and the medical examiner was able to articulate the relevance at the time of trial.

This Court has previously upheld the admission of pictures

when relevant to explain a medical examiner's testimony, or to show the manner of death and/or the location of the wounds. See Floyd v. State, 808 So. 2d 175, 184 (Fla. 2002); Mansfield, 758 So. 2d at 648; Pope v. State, 679 So. 2d 710, 714 (Fla. 1996); Larkins v. State, 655 So. 2d 95, 98 (Fla. 1995). The photo admitted against Davis meets this test, and no abuse of discretion has been demonstrated in the ruling to admit this exhibit.

Furthermore, any possible error in the admission of this evidence would clearly be harmless beyond any reasonable doubt. Davis challenges only the admission of one picture, which was referred to and published for the jury during the testimony of the medical examiner. Given the direct evidence establishing Davis's guilt, including the testimony of eyewitness Jon Whispel, and Davis's own incriminating statements, the minor role played by this photo in the State's case renders any possible error harmless. Hertz v. State, 803 So. 2d 629, 643 (Fla. 2001); Almeida v. State, 748 So. 2d 922, 930 (Fla. 1999).

The autopsy photo was relevant and was not unduly prejudicial. The trial court did not err in admitting this exhibit, and no new trial is warranted. On these facts, Davis is not entitled to any relief in this issue.

ISSUE V

WHETHER THE TRIAL COURT ERRED DENYING A REQUESTED JURY INSTRUCTION ON MITIGATION.

Davis next challenges the trial court's denial of a requested defense instruction on mitigation. Defense counsel sought an instruction specifically directing the jury's attention to the possibility of disparate sentencing, since there were three defendants charged in the indictment, but only Davis was exposed to the death penalty. The denial of a requested instruction is reviewed for an abuse of discretion. Darling v. State, 808 So. 2d 145, 163 (Fla. 2002).

The record reflects that, in this case, the jury was thoroughly and accurately instructed on its penalty phase responsibilities in accordance with all relevant authority (R. V14/1380-86). Davis asked the court for an additional instruction, specifically advising his jury that, "In determining the appropriate sentence, you may consider, as a mitigating factor, the treatment of other participants in this incident" (R. V4/564). The denial of this request was proper.

This same claim was expressly rejected in Franqui v. State, 804 So. 2d 1185, 1195-96 (Fla. 2001), where this Court held:

> Next, Franqui asserts that the trial court erred in refusing defense counsel's request that the jury be given a specific instruction that it could consider the life sentences of codefendants San Martin and Abreu as a mitigating circumstance. The trial court refused the requested instruction, concluding

> that this issue was covered by the standard jury instruction regarding nonstatutory mitigation. Contrary to the State's assertion, we find this issue was preserved for review. [citations omitted] Nonetheless, we find this issue to be without merit. The trial court gave the standard jury instruction on nonstatutory mitigating circumstances, which explains in part that the jury may consider "any other circumstance of the offense" in mitigation. We have held that this standard jury instruction on nonstatutory mitigating circumstances is sufficient, and there is no need to give separate instructions on each item of nonstatutory mitigation. *See Gore v. State*, 706 So. 2d 1328, 1334 (Fla. 1997); *San Martin v. State*, 705 So. 2d 1337, 1349 (Fla. 1997); *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997). Moreover, the trial court read to the jury a stipulation pertaining to the life sentences given to codefendants San Martin and Abreu prior to closing arguments, and the trial court specifically informed defense counsel that he could argue codefendants' life sentences as a mitigating circumstance to the jury, which counsel did during closing argument.

As in Franqui, counsel in this case argued that the jury should consider the different sentences among the codefendants as a basis to return a life recommendation (R. V14/1378). No error is presented in the denial of this requested instruction.

Davis relies on the fact that the differences between his sentence and his codefendants' sentences is a matter which may properly be considered by the jury in mitigation. Clearly, the court below recognized this and permitted evidence and argument to the jury on this potential mitigating factor (R. V11/834-35, 876; V14/1378). Davis's brief states that the court erred by

"disallowing" argument and consideration of this mitigation, but the disparate sentences were argued to and considered by the factfinders below. The issue presented in this appeal is limited to the denial of Davis's request for a specific jury instruction, yet Davis cites no cases which address any necessity for the instruction sought.

In Boyde v. California, 494 U.S. 370 (1990), the United States Supreme Court considered a similar issue on a case out of California. The challenged jury instruction advised the jurors to consider eleven factors in determining whether to impose a sentence of life or death. The last of these factors was "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This was the only factor that even remotely suggested that the jury could consider evidence about the defendant's character or background in mitigation of the offense. Boyde claimed that the jury instructions interfered with the jury's obligation to consider all relevant mitigating evidence, since the factor could be interpreted as limiting the jury's consideration to evidence related to the crime rather than the perpetrator. The Supreme Court rejected Boyde's claim, holding that there was no reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence. Boyde, 494 U.S. at 380.

Similarly, the denial of the jury instruction in this case did

not preclude the jury from considering any relevant evidence. Davis is not entitled to a new penalty phase proceeding on this issue.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FINDING AND WEIGHING THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, OR CRUEL.

Davis next challenges the applicability of the heinous, atrocious or cruel aggravating factor found below. In considering such a claim, this Court's function is to review the record to determine whether the trial court applied the right rule of law in finding an aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy v. State, 696 So. 2d 693, 695-96 (Fla. 1997). In the instant case, the trial court's findings are supported by competent substantial evidence and the right rule of law was applied. Accordingly, this Court must affirm the lower court's application of the HAC aggravating factor. Willacy, 696 So. 2d at 695-96 (division of labor between trial and appellate courts is essential to "promote the uniform application of aggravating circumstances in reaching the individualized decision required by law"); see also Orme v. State, 677 So. 2d 258, 262 (Fla. 1996) (duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent, substantial evidence); Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990) (court will not substitute its judgment for that of the trial court when there is a legal basis to support finding an aggravating factor).

In finding HAC, the court below stated:

> The constitutional standards of this aggravator indicate the murder of the victim a conscienceless or pitiless and unnecessarily torturous to the victim. The facts of this case include acts perpetrated upon a conscious victim clearly involving foreknowledge of death, extreme anxiety and fear. The victim did not die a quick or painless death. According to the testimony of the co-defendant Jon Whispel, Dr. Lee Miller, and the Defendant's own taped confession, the victim suffered a prolonged, terrifying death, enduring several attempts to kill her.
>
> On the night of this offense, the victim confronted the defendant Jon Whispel, the Defendant and the victim's own daughter, Valessa Robinson, who is also a co-defendant in this case, in the daughter's bedroom of the victim's own home. The Defendant followed the victim out and into the kitchen where he placed the victim in a choke hold, almost to the point of unconsciousness. They struggled on the floor and the Defendant called for the victim's daughter to bring him a syringe of bleach while he sat on top of the victim. When she was unable to locate it, she came to the kitchen and held her mother down while the Defendant retrieved the syringe. Upon his return the Defendant made several attempts to inject the bleach into the victim's neck and finally the needle went into her neck. The two of them continued to hold the victim down waiting for the injection to kill her. After a couple of minutes the Defendant yelled "It's not working." The defendant Whispel then brought the Defendant's knife into the kitchen and left. By his own confession, the Defendant stabbed the victim several times, in the neck and in the back. Defendant Whispel heard the victim call out after which the victim's daughter and the Defendant, holding the bloody knife with blood on his hands, return to the bedroom. The Defendant washed his hands and the three of them began to smoke cigarettes. At that point they heard the victim moaning. The Defendant responded that

> "The bitch won't die." He returned to the kitchen, stabbed the victim again and attempted to break her neck.
>
> The medical examiner, Dr. Lee Miller, testified that the victim was alive throughout this event and that her throat was cut. She remained alive and conscious until she lost so much blood that her heart was no longer able to pump.
>
> This murder was indeed conscienceless, pitiless and was undoubtedly unnecessarily torturous to the victim. Quite contrary to the Defendant's contention that there was no intent on the part of the Defendant to inflict any type of suffering or pain upon the victim, she died a prolonged painful and terrifying death suffering several different attempts to kill her. Imagine the fear and anxiety the victim consciously endured choking, injection of bleach, eventual multiple stabbing and then being left to bleed to death. There is no doubt that this murder was heinous, atrocious or cruel.
>
> This aggravating factor has been proved beyond a reasonable doubt.

(R. V4/637-38).

A review of the record reflects more than adequate support for these legal and factual findings. Many of the details are taken from the testimony of Jon Whispel and from Davis's confession. Thus, application of this factor must be affirmed on appeal.

In order to establish the HAC aggravating factor, the State must prove that the murder was conscienceless or pitiless and unnecessarily tortuous to the victim. Francis v. State, 808 So. 2d 110, 134 (Fla. 2001). These factors are expressly applied and forcefully reflected in the court's findings outlined above, and therefore the correct law was applied below.

Davis alleges that this factor was erroneously applied because 1) he did not have the requisite intent to inflict pain; 2) he speculates that Mrs. Robinson may have been unconscious for much of the attack; and 3) he was under the influence of LSD. However, the court's findings refute these allegations.

As to Davis's claim that there was no "intent" to torture, the facts of this case demonstrate otherwise. In addition, this Court has repeatedly recognized that intent is not a necessary element of this aggravating factor. Francis, 808 So. 2d at 135; Guzman v. State, 721 So. 2d 1155, 1160 (Fla. 1998), cert. denied, 119 S. Ct. 1583 (1999). Prior cases routinely acknowledged that HAC is consistently applied where the victim suffers prolonged torture, as here, without any specific discussion as to the defendant's mental condition. This is because where facts demonstrate that a victim suffered a great deal, the reasonable inference is that the defendant either intended or was indifferent to such suffering. See also Bogle v. State, 655 So. 2d 1103 (Fla.), cert. denied, 516 U.S. 978 (1995) (rejecting claim that HAC could not be upheld because nothing in the case established that defendant intended to cause the victim unnecessary suffering).

Accordingly, the defendant's state of mind is not a dispositive fact that must be determined and weighed every time that HAC is considered. Rather, the relevant facts are typically those showing the manner in which the homicide occurred.

Nevertheless, the facts in the instant case clearly show an utter indifference to the suffering of the victim. The evidence presented below, and outlined in the court's findings on this factor, clearly demonstrate "the defendant acted with complete indifference to the victim's suffering." Bogle, 655 So. 2d at 1109.

As far as Davis's speculation about the victim's alleged lack of consciousness, the evidence showed only that unconsciousness could not have come quickly enough for Mrs. Robinson in this case. As outlined by the court below, the evidence clearly established that Robinson was conscious and suffering through much of her ordeal. In Guzman, this Court affirmed the heinous, atrocious or cruel aggravating factor where the defensive wounds and blood trail indicated that the victim was aware of what was happening to him and would have felt pain as a result of the large number of injuries he sustained. Although Davis asserts that Mrs. Robinson may not have been conscious for much of the attack, nothing in Guzman suggests that a victim must be conscious for a "significant portion of the attack." To the contrary, this Court in Guzman only found that the victim was conscious during "at least part of the attack." 721 So. 2d at 1160. Given the description of the murder in this case, the fact that the victim had to be restrained, the medical examiner's testimony that the victim was alive and that her injuries would have been painful, it is apparent that the victim in

this case suffered horribly and that the aggravator should be affirmed.

Davis's suggestion that his use of drugs prior to the murder precluded application of this factor is similarly without merit. The record reflects that the judge below considered evidence of Davis's drug use and weighed the mitigating value of this fact (R. V4/640-41). Davis's drug use did not interfere with the extensive planning, rational thought, and physical skills necessary to commit this murder; it did not present a legal bar to application of this factor. Davis cites Holsworth v. State, 522 So. 2d 348 (Fla. 1998), and Ross v. State, 474 So. 2d 1170 (Fla. 1985), but neither of these cases support his position as both of those cases expressly upheld the HAC factor, despite any use of drugs prior to the crime. 522 So. 2d at 354, n.2; 474 So. 2d at 1174.

The other cases cited by Davis where this Court has reversed a finding of HAC are all easily distinguishable. In Hamilton v. State, 678 So. 2d 1228 (Fla. 1996), the defendant shot his wife and stepson during a domestic quarrel. Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), also involved a shooting murder, during the course of a robbery. See also Elam v. State, 636 So. 2d 1312 (Fla. 1994) (victim was unconscious); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989) (strangulation of semi-conscious victim); Herzog v. State, 439 So. 2d 1372 (Fla. 1983) (victim was under heavy influence of drugs and unconscious).

The finding of HAC in this case is consistent with a number of other decisions from this Court on the applicability of that factor. See Farina v. State, 801 So. 2d 44, 53 (Fla. 2001) (noting factor pertains more to victim's perception of the circumstances than to the perpetrator's); Hannon v. State, 638 So. 2d 39 (Fla. 1994), cert. denied, 513 U.S. 1158 (1995) (beating and stabbing of a screaming victim); Atwater v. State, 626 So. 2d 1325, 1329 (Fla. 1993) (victim beaten prior to or during the stabbing), cert. denied, 511 U.S. 1046 (1994); Randolph v. State, 562 So. 2d 331, 338 (Fla. 1990) (victim repeatedly hit, kicked, strangled, and knifed).

Finally, it must be noted that any error in the finding of this aggravating factor must be deemed harmless. Given the two other strong aggravators of cold, calculated and premeditated and committed by a defendant on felony probation, and the lack of significant mitigation, there is no reasonable possibility that Davis's sentences would have been any different had this factor been rejected below. In Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), this Court affirmed the death sentence after striking three of the five aggravating factors found by the trial court, including cold, calculated and premeditated. In doing so, this Court noted that the reversal of a sentence is only warranted when the correction of errors could reasonably result in a different sentence. There is no reasonable

likelihood of a different sentence in this case, even without consideration of the heinous, atrocious or cruel factor.

Finally, to the extent that Davis attempts to adopt a claim presented below with regard to the constitutionality of this factor at page 58 of his brief (see footnote 7), it must be noted that his failure to assert any legal argument on appeal mandates a finding that he has waived any possible error in this regard. Sweet v. State, 810 So. 2d 854, 870 (Fla. 2002) ("because on appeal Sweet simply recites these claims from his postconviction motion in a sentence or two, without elaboration or explanation, we conclude that these instances of alleged ineffectiveness are not preserved for appellate review"); Peede v. State, 748 So. 2d 253, 256 n.5 (Fla. 1999); Shere v. State, 742 So. 2d 215, 217 n. 6 (Fla. 1999); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). No error is presented.

For all of these reasons, Davis is not entitled to any relief on this issue. On the facts of this case, this Court must uphold the finding and weighing of the heinous, atrocious or cruel aggravating factor and affirm Davis's death sentence.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN FINDING AND WEIGHING THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED.

Davis also challenges the applicability of the cold, calculated and premeditated aggravating factor found below. Once again, this Court must affirm the application of this factor since the court below applied the right rule of law, and its findings are supported by competent, substantial evidence. Willacy, 696 So. 2d at 695-96.

In finding CCP, the court below stated:

> Cold meaning calm, cool reflection and not an act prompted by emotional frenzy, panic or a fit of rage. Calculated meaning the Defendant had a careful plan or prearranged design to commit the murder. Premeditated meaning heightened premeditation as defined as deliberate ruthlessness.
>
> The plot to kill the victim was hatched at Denny's Restaurant by the Defendant, co-defendant Whispel and co-defendant Robinson, the victim's daughter. The victim did not approve of her daughter's relationship with the Defendant, but they wanted to find a way to be together. The plan was to inject the victim with a heroin overdose.
>
> In order to accomplish their plan the trio left the Denny's on their bicycles and returned to the victim's residence. With apparent great caution so as not to wake the victim they pushed the victim's van out of the garage and down the street before they started it up. The Defendant drove and the trio set out to purchase a needle and heroin to kill the victim. Upon attempting to purchase the heroin the Defendant indicated that he wanted the drugs so he could "take someone's ass out." Although unable to obtain the heroin, the Defendant did get a needle. The three of

> them returned to the victim's home and again in order to avoid detection by the victim they parked the van down the street. They went inside the house to Valessa's room to continue to plot the murder. The Defendant instructed defendant Robinson to get some bleach and a glass, which she did and he proceeded to fill the syringe. After waiting enough time to smoke another cigarette, the Defendant and defendant Robinson went to the victim's bedroom to kill her. At that point the victim woke up, the two left the room and the victim was eventually killed in the kitchen.
>
> The initial plan to kill the victim was thought out to make it appear to be a drug overdose. Notwithstanding that they were unable to obtain the heroin they modified the plan to use bleach. Then during the actual commission of the murder when the plan failed, the Defendant finally stabbed the victim.
>
> Although prior to the discussion at Denny's there was no plan or talk of murder and taking into account that the defendants claim to be under the influence of LSD prior to and during the discussion of the plan, but from that point forward there was a continual course of conduct over several hours that would lead to the death of the victim.
>
> The facts of this case clearly establish that this murder was the result of a calm reflection, certainly not an emotional frenzy; a careful plan and prearranged design to kill; heightened premeditation which began several hours before the actual commission; and totally lacking of any pretense of moral or legal justification.
>
> The aggravating factor has been proven beyond all reasonable doubt.

(R. V4/638-640).

These findings are again well-supported by the record, and must be affirmed on appeal. Willacy, 696 So. 2d at 695; Walls v. State, 641 So. 2d 381 (Fla. 1994) (outlining four elements which must be proven to establish this factor), cert. denied, 513 U.S.

1130 (1995). As the court below properly noted, in order to establish the CCP factor, the State must prove four elements: the murder was the product of cool, calm reflection rather than prompted by frenzy or a fit of rage; the murder must be the product of a careful plan or prearranged design; there must be "heightened" premeditation; and there must be no pretense of moral or legal justification. Lott v. State, 695 So. 2d 1239, 1245 (Fla. 1997); Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). All of these factors are reflected in the court's findings outlined above, and therefore the correct law was applied below.

In this case, the evidence demonstrated that this crime was extensively planned, and the defendants were able to modify their plans as necessary to overcome difficulties. There is a notable absence of any indication of resistance, provocation, or mental disturbance that might trigger an emotional frenzy. The ruthlessness of the attack illustrates that the defendants were cool and calm, and that the killing was carried out as a matter of course. The evidence that the defendants sat around at Denny's planning the murder, the efforts to obtain the necessary heroin and syringe for the initial plan, and the ultimate reworking of the plan to adapt to the opportunities available for commission of the homicide all reflect the careful thought that went into this murder. No pretense of justification has been asserted, and there is absolutely no evidence of any possible justification in this

record.

Davis properly identifies the four elements of CCP but emphasizes that CCP is not appropriate where the killing was committed in a fit of rage, in a panic or impulsively, in other contexts such as a heat of passion or domestic situation, or while a defendant is under the influence of drugs or alcohol. However, there is no evidence which suggests that Mrs. Robinson was killed in a fit of panic or in the heat of passion; to the contrary, the court below rejected these suggestions. Similarly, the fact that a murder was not a contract or witness elimination killing does not preclude application of this factor.

Davis also asserts that CCP should not have been found because the murder was planned while LSD was being consumed, citing White v. State, 616 So. 2d 21 (Fla. 1993), and that the entire sequence of events from the time the defendants were ingesting the drugs at Denny's until Robinson was dead constitutes an uninterrupted course of conduct, precluding application of this factor under Thompson v. State, 619 So. 2d 261 (Fla. 1992). These claims are also without merit.

Similarly, in Thompson, this Court reversed the finding of CCP, noting that no evidence of planning prior to the commencement of the conduct leading to the death of the victim had been presented. In doing so, this Court did not create an absolute rule with regard to this factor, but merely another aspect to consider

in determining its applicability. The finding of CCP in this case is consistent with decisions from this Court on the application of that factor, even if Davis's plan to kill Mrs. Robinson was modified as to the manner of killing by the time of the actual murder, since the facts outlined above demonstrate sufficient reflection at the scene to support this factor. Compare Knight v. State, 746 So. 2d 423, 436 (Fla. 1998) ("Even if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill"); Walls, 641 So. 2d at 388 (CCP established by nature of the murder, where victim was killed in mobile home after hearing defendant kill her boyfriend and being terrorized by defendant); Lockhart v. State, 655 So. 2d 69, 73 (Fla. 1995) (prolonged nature of torture murder demonstrated that killing did not occur on the spur of the moment, supporting CCP).

In Bell v. State, 699 So. 2d 674, 677 (Fla. 1997), this Court noted that CCP may be proven by facts such as the advance procurement of the murder weapon, the lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. See also Stein v. State, 632 So. 2d 1361 (Fla. 1994); Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988). No error is presented in the application of this factor below.

In addition, any possible error in the finding of this

aggravating factor must be deemed harmless. Given the two other strong aggravators of heinous, atrocious or cruel and committed while on felony probation, and the lack of significant mitigation, there is no reasonable possibility that Davis's sentence would have been any different had this factor been rejected below. Compare Geralds v. State, 674 So. 2d 96 (Fla. 1996) (this Court struck CCP, leaving aggravating factors of heinous, atrocious and cruel and committed during course of burglary; mitigation of 22 years old; love of family; bipolar manic personality); Barwick v. State, 660 So. 2d 685 (Fla. 1995) (improper finding of CCP harmless where five aggravating factors remained). There is no reasonable likelihood of a different sentence in this case, even without consideration of the cold, calculated and premeditated factor, and Davis's death sentence must be affirmed. See Rogers, 511 So. 2d at 535.

Finally, it must be noted again that Davis's attempt to adopt a claim presented below with regard to the constitutionality of this factor at page 62 of his brief (see footnote 8), is not sufficient, and any possible error in this regard has been waived. Sweet, 810 So. 2d at 870; Duest, 555 So. 2d at 852.

Although Davis does not dispute the proportionality of his death sentences, this Court must still conduct a proportionality review. Trease v. State, 768 So. 2d 1050 (Fla. 2000); Jennings v. State, 718 So. 2d 144, 154 (Fla. 1998). Of course, a proportionality determination does not turn on the existence and

number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). When factually similar cases are compared to the instant case, the proportionality of Davis's sentence is evident.

The court below found three aggravating circumstances: (1) committed by a defendant serving a felony probation sentence, (2) heinous, atrocious or cruel, and (3) cold, calculated and premeditated. The only mitigating circumstances were related to Davis's age, background, and positive character traits (R. V4/636-643). The jury recommended that a death sentence be imposed (R. V14/1387-88).

A review of factually similar cases supports the imposition of the death sentences herein. See Jones v. State, 748 So. 2d 1012 (Fla. 1999) (victim kidnapped from parking lot, strangled and left in woods; defendant took ATM card for cash); Jimenez v. State, 703 So. 2d 437 (Fla. 1997) (woman beaten and stabbed during burglary, statutory mitigator of substantial impairment applied); Spencer v. State, 645 So. 2d 377 (Fla. 1994) (HAC, CCP, and prior conviction weighed against background mitigation); Brown v. State, 565 So. 2d 304 (Fla.) (death sentence for murder committed during the course

of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators), cert. denied, 498 U.S. 992 (1990).

The evidence presented in the instant case established that Davis planned this murder, and carried it out with determination. He hit Mrs. Robinson and restrained her, while repeatedly attempting to inject her with bleach by inserting a syringe in her neck; that failing, Davis stabbed Robinson in the neck and then the back with a knife. Balanced against this heinous crime was a laundry list of character traits which Davis urged as mitigating evidence. This evidence was completely unremarkable and properly afforded minimal weight.

Nor does the fact that Whispel pled to a lesser offense establish that Davis's sentence is disproportionate. This Court has previously recognized that "[p]rosecutorial discretion in plea bargaining with accomplices is not unconstitutionally impermissible and does not violate the principle of proportionality." Garcia v. State, 492 So. 2d 360, 368 (Fla. 1986); see Diaz v. State, 513 So. 2d 1045, 1049 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The facts of this case demonstrate that Davis was more culpable than Whispel in the commission of this murder. Valessa's sentence is similarly not a bar to the death penalty in this case since Valessa, due to her age, was not eligible for death. Farina, 801 So. 2d at 56. Based

on the foregoing, this Court must find that Davis's sentence is proportionate, and reject Davis's plea for resentencing in this issue.

For all of these reasons, Davis is not entitled to any relief on this issue. On the facts of this case, this Court must uphold the finding and weighing of the cold, calculated and premeditated aggravating factor and affirm Davis's death sentence.

ISSUE VIII

WHETHER DAVIS'S DEATH SENTENCE IS UNCONSTITUTIONAL DUE TO A JURY RECOMMENDATION OF DEATH BY A "BARE MAJORITY".

Davis's next claim asserts that his death sentence is unconstitutional because it was secured following a jury recommendation for death by a "bare majority" vote. This Court's review is de novo. This Court has repeatedly rejected this claim, and Davis has not provided any reasonable basis for reconsideration of the issue. See Card v. State, 803 So. 2d 613, 629, n.13 (Fla. 2001), cert. denied, 122 S. Ct. 2673 (2002); Sexton v. State, 775 So. 2d 923, 937 (Fla. 2000); Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994); Brown v. State, 565 So. 2d 304, 308 (Fla.), cert. denied, 498 U.S. 992 (1990).

The United States Supreme Court's recent decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), does not address this issue, and therefore does not compel further consideration of this claim. See 122 S. Ct. at 2436, n.4. Federal law does not reject Florida's scheme or require that capital juries be unanimous. Proffitt v. Florida, 428 U.S. 242 (1976); Johnson v. Louisiana, 406 U.S. 356 (1972) (jury unanimity not required for twelve-person jury); Apodaca v. Oregon, 406 U.S. 404 (1972) (same); Williams v. Florida, 399 U.S. 78, 86 (1970) (Constitution does not require States to provide a jury of twelve persons). There is no basis to recede from prior, established law on this point.

Finally, Davis's assertion that his jury recommendation vote reflects that five jurors found "that no aggravating factors were proven beyond a reasonable doubt," (Appellant's Initial Brief, p. 63), deserves comment. Obviously, this assertion is pure speculation. In the instant case, one of the aggravating factors, murder committed by a defendant under a sentence of probation, was established by a certified copy of conviction and sentence and has never been disputed. The fact that five jurors voted for life in no way suggests that those individuals determined this aggravating factor did not apply. The incontrovertible nature of the felony probation aggravating circumstance establishes that any suggestion that the jury must find at least one aggravating factor unanimously would easily be met in this case, and therefore any possible error in the jury's less-than-unanimous recommendation is harmless.

Florida's capital sentencing scheme is constitutional, and no relief is warranted on this issue.

ISSUE IX

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Davis next offers three additional bases for finding Florida's death penalty statute to be unconstitutional. Davis primarily focuses on numerous alleged deficiencies in this Court's appellate review function as rendering the statute invalid; he also alleges that the burden of proof for mitigating circumstances is unconstitutional and he attempts to adopt other constitutional challenges without specifically identifying the claims. This Court's review is de novo. Davis's allegations do not present any basis for relief.

It must be noted initially that, to the extent Davis attempts to incorporate a motion presented below "in its entirety" in his brief at page 87 without further legal argument, his effort is insufficient and he has waived any possible error. Sweet, 810 So. 2d at 870; Duest, 555 So. 2d at 852.

As to Davis's claims with regard to this Court's appellate review and the burden of proof on mitigating circumstances, this Court has repeatedly rejected the arguments presented herein. Larzalere v. State, 676 So. 2d 394, 407, n.7 (Fla. 1996); Hunter v. State, 660 So. 2d 244, 252-254 (Fla. 1995); Fotopoulos v. State, 608 So. 2d 784, 794, n.7 (Fla. 1992); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991); Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990). Once again, no basis for reconsideration of the well-

established law denying these claims has been presented.

Since the filing of Davis' initial brief, he has submitted the decision of Ring v. Arizona, 122 S.Ct. 2428 (2002), as supplemental authority. Ring provides no support for the arguments presented in this claim, which only challenge the statute under Eighth and Fourteenth Amendment grounds; any Sixth Amendment claim is procedurally barred, as it was not presented at trial and in Davis's initial brief. In addition, Ring is not applicable in Florida because Florida's sentencing statute provides for a maximum sentence of death; since capital punishment is not an "enhanced" sentence for first degree murder, no further jury findings are required. Mills v. Moore, 786 So. 2d 532, 538 (Fla.), cert. denied, 532 U.S. 1015 (2001). Furthermore, the facts of this case, including reliance on the felony probation aggravating factor, render any possible Ring error to be harmless.

Once again, Florida's capital sentencing scheme is constitutional, and no relief is warranted on this issue.

CONCLUSION

Based on the foregoing arguments and authorities, Davis's convictions and sentences 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 by U.S. Regular Mail to GUILLERMO E. GOMEZ, JR., Gomez & Touger, P.A., 3115 W. Columbus Drive, Suite 109, Tampa, Florida, 33607, this _____ day of August, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

COUNSEL FOR APPELLEE