IN THE SUPREME COURT OF FLORIDA

MICAH LOUIS NELSON,

Appellant,

vs. **CASE NO. SC00-876**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Micah Nelson was charged in a multi count indictment in Polk County, the primary offense being first degree murder of Virginia Brace (R1, 3-6). Nelson was also charged by information in Highlands County with burglary and sexual battery of the same victim (R1, 9-11). The defense chose a single trial in Polk County (R3, 440). A jury trial resulted in guilty verdicts of first degree murder, kidnapping, grand theft and burglary as to charges in the indictment and guilty verdicts on burglary and sexual battery as charged in the information (R4, 859-864; See also R23, 2821-28). Following a nine to three jury death recommendation, the trial court imposed a sentence of death after finding the presence of six statutory aggravators and some mitigation (R4, 881; R7, 1073-1082). The court also imposed life imprisonment sentences for the burglary offenses, sexual battery and kidnapping offenses and fifteen years imprisonment on the grand theft charge (R7, 1056-1072). Nelson now appeals.

(1) Guilt Phase:

Crime lab analyst Lynn Ernst was notified of the case being handled in the Avon Park area on November 18, 1997 at about 7:15 a.m. After being briefed she arrived at 24 West Palmetto Street about 11:50 a.m. and made a cast impression of the footwear impression outside the suspected point of entry. Subsequently, on December 3, she took aerial photographs of six different locations

from a helicopter (R16,1546-65). Senior crime lab analyst Stephen Stark went to the Avon Park residence on the morning of November 18. The crime scene had been secured, no forced entry was noted but there were two unlocked windows in the apartment(east bathroom and north bedroom east). The screen on the window was unusual, the tabs were on the top rather than the bottom-and seemingly was put into the window in the upside down position (R1570-82). The front door was locked, a woman's handbag purse was on the kitchen table and he observed a telephone on the wall with the cord pulled from it and placed back. There were eyeglasses on the center of the dresser and hearing aids on the table. A pair of women's underwear was located on a blanket (R1586-96). He stayed there for four hours to complete his work and identified a number of exhibits that were removed for possible evidentiary value (R1611-29). Stark then went to the police department to examine a blue 1989 Ford Marquis that had already been towed there and latent lifts were taken from the vehicle (R1630-40). A fire extinguisher was located on the rear floor behind the driver's seat, now at the almost zero recharge gauge, a tire iron was located in the trunk under the spare tire and the witness explained a number of other exhibits including sand and dirt samples (R17,1642-58). The next morning at about 2 a.m. on November 19, he got a call on the location of a body believed to be Virginia Brace so he and analyst Cooper went to process the scene at the orange grove; the body was found about 175

feet from the edge of the road into the orange grove (R1660,1666). The victim was wearing only a blue nightgown and there was a yellow powdery substance on her body around the face, mouth area and ground. They worked at this location from 7 a.m. to 10:30 a.m., the medical examiner came to the scene and went to the Lakeland hospital and waited for the autopsy. Stark identified a number of exhibits obtained as evidence or for evaluation (R1691-1705).

Highlands County road patrol deputy Keith Starling became involved in the missing person's report at 12:48 a.m. on November 18. He went to 17 Adams Street in the Avon Park area and made contact with Judy Bolton. He asked to speak to her brother Micah Nelson and took into his possession some articles of clothing from the bedroom where appellant apparently was sleeping (R1714-18). Later, about 2 a..m. he returned and retrieved a set of car keys, and returned again at 4:42 a.m. to ask Ms. Bolton if he could obtain boots that were there. Nelson was present only at the first visit. He appeared to have just awakened but overall was fairly calm (R1720-25).

The victim's sister-in-law Genevieve Olson testified that the victim lived in the Avon Park condo six months a year and the other six months in New York. The victim arrived in Avon Park on November 5, driven down by Catherine and Gary Vellam. Brace kept everything locked up but would leave the bathroom window cracked open. She never allowed anyone to borrow her car; she didn't know

that many people in Avon Park to be friendly with to allow them the car use (R1732-38). On Sunday she and the Vellams went to the victim's residence for dinner, played cards until 9 and then drove home. On Monday after supper, she phoned Brace about 8 p.m but there was no answer. When there was no answer on repeated calls, she became concerned, drove over and saw her purse on the table. The billfold was there but there was no money in it; the driver's license and credit cards were still there. Olson began to get worried, looked in the bedroom , saw the covers had been thrown back and the hearing aids and glasses were on the dresser. The spot where Brace parked her car was empty. The police were called (R1739-46). Catherine Vellam similarly testified about last seeing the victim at dinner Sunday and Gary Vellam testified about driving the victim down from New York. At that time the fire extinguisher was not on the floor when he drove the car. (R1751-59; 1762-65) Arlene Dorman lived in the same building as the victim and knew her for sixty years. On the previous Friday they went to the bank and Brace withdrew some money (R1768-72). Jessie and Luther Dick lived next door to Brace; their bedroom matched up side by side to the victim's. She saw car lights from the bedroom window after her husband went to the bathroom and he heard the car engine start from the carport about 1:30 or 2:00 a.m. (R1788-1804).

Officer Davidson responded to 24 West Palmetto Street, a missing person's report of an elderly female at about 9:56 p.m. He

and Sergeant Hofstra arrived at the same time and spoke to Genevieve Olson, Ethel Olson and Arlene Dorman. Inside he observed the purse on the table which was open but seemed ordinary. There was a wall telephone and the cord had been forcibly removed from the handset. Davidson obtained identification information about the victim and requested communications to check local hospitals (R18, 1811-14). Shortly afterwards, Deputy Pope contacted him on the radio and had information about the Brace vehicle and joined Pope in an area off Valencia Drive out in Avon Lakes in the Highlands County area at about 1 or 2 a.m. The car was towed around 5:00 to the Avon Park police department and they were unsuccessful in trying to find any signs of her around the vehicle, even with the use of a bloodhound. At 3 p.m. he went home to get some sleep and returned to work at 8 p.m. They drove to an area on South Lake Buffum Road and the body was covered with a sterile emergency blanket. Nelson was alert and awake, slumped forward with his forehead touching the front seat (R1816-42).

Joann Lambert lived in Avon Lakes, the county area outside the Avon Park city limits. She first saw a car parked behind her and her brother's house on Valencia Road at an angle around 3:30 on Monday, November 17. It was parked in an area where people would not customarily park. She kept watching and nobody came back to it. She mentioned it to her brother at about 4 or 4:30. Earlier she had seen a black man walking down the road but didn't pay

attention (R1855-60). She contacted the Highlands County Sheriff's Office; she pointed out the car to the deputy. The officer knocked on the car window and she saw a black man get out of the back seat. After a few minutes, the officer put the man in the police car, locked up the parked vehicle and left (R1855-63). Deputy Vance Pope responded to the suspicious vehicle report at 6:15 or 6:30, spoke to Lambert, and saw the vehicle about 500 feet off Fantasy. Pope woke up the man by knocking on the window. He explained he was coming from his girlfriend's house, got tired and stopped to sleep. Pope ran the tag number but the computer was down at the time. There was an insurance card on the floor board with the name Virginia Brace. Nelson said he didn't have a driver's license. Pope locked the car and drove Nelson to his sister's house at 17B Adams Street in Avon Park, about four miles away (R1871-85). When Pope subsequently heard the name Virginia Brace on the radio, he talked with Officer Davidson and returned to the parked vehicle(R1887-89). When he was relieved he went with Officer Starling to Adams Street at about 11:00 p.m . Nelson who had been in bed agreed to talk to the officers and he was turned over to the Avon Park police department. Appellant did not seem disoriented (R1888-95). Law enforcement officers Godwin, Hamilton, Moore, Velong and Emerson described the continuing search for the missing woman (R1904-34).

Betty Jackson, office manager for Elberta Crate and Box

Company testified appellant came to work there, his last day was November 7 and he just quit coming to work (R1940-42).

Dr. Alexander Melamud, an expert in forensic Pathology, received a call in the early morning hours of November 19 that an elderly woman's body was found in an orange grove(initially thought to be in Highlands County, then determined to be Polk County). He arrived at the scene about 8 a.m. and performed the autopsy the same day at 12:30 p.m. (R19, 2009-13). The victim was reported to be 78 years old and wearing a light green nightgown. She was wearing rings (R2020-22). He described lacerations and abrasions including a laceration in the back of the oral cavity, another on the back right aspect of the neck just behind the ear (an iron object could have been put in her mouth and went through to the back of the neck) (R2025-27). A fracture of the fifth cervical vertebra was the result of compression and one of the causes of death was asphyxiation as a result of compression of her neck (R2031). The exhibit 22 tire iron could have been the object to cause the wound in the mouth and back (R2032). The victim died of multiple injuries plus asphyxia due to compression of the right side of the neck and choking asphyxia as a result of the fire extinguisher substance pumped in her mouth (the yellow substance was found in the air pipe and bronchi which means she inhaled it). She was alive at the time the fire extinguisher was discharged in her mouth(R2033). Also, there were fractures of the ribs, three

were actually broken. In combination all could cause death - the substance in the bronchial tubes and the object penetrating through the back of the neck, and strangulation. The injuries occurred close in time to each other (R2034-37).

Calvin Fogle, a cousin of appellant, testified on Sunday evening when he got home from work he had a difference of opinion with Nelson–he wanted to go to bed and Nelson wanted to watch television. Nelson left and Fogle assumed he went down the street to his girlfriend's house. When he woke up to go to school the next day, appellant was not back at the house (R2062-64).

Kenneth Dwayne Morgan and Steven Weir described the incident on Monday morning at 10:30 or 11:00a.m. when a black man driving a car with a New York license tag got stuck in the sand and asked for help. When Weir put his hand on the back of the trunk, he felt a bump. When he asked what that was appellant told him it was a dog, then went to crank up the radio from country music to rap. The man was nervous and wouldn't look Weir in the eye. The man drove off as soon as the car was pulled out without thanking him. The man did not smell of alcohol or seem impaired (R2074-85, 2086-2102).

Appellant's former girlfriend Reagis Ishmael testified appellant sometimes stayed with her; neither of them had a car. When she got up Sunday morning Nelson was still there about 8:30 a.m. She went to church until 2:30 or 3:00 and appellant was not home when she arrived; she did not see him until it was dark. He

said he'd be back and left. She did not see him again and he did not come back (R2108-18). Appellant's sister Judy Bolton lived on Adams Street with her husband. Nelson stayed with her when he came back to town in Avon Park. He had his own bedroom, kept his clothes there and normally ate his meals there. He did not have his own vehicle (R2118-20). She was working that Sunday and got off at 3:00 p.m. Nelson was at her brother Andy's doing some work. When she got home from work Monday night, appellant was not there but showed up later in the evening. After dinner they played cards. Later some officers came by a couple of times to get boots and keys from her. She gave the police the boots and clothing he had worn. They were asleep when the police arrived. Nelson put on some clothes and went with the officers for questioning. It did not appear that appellant had been drinking, she assumed he had been at his mother's house and there was nothing out of the ordinary (R2119-28). Willy Bolton also testified. Nelson came in about 7:30 or 8:00, they played cards, watched TV and went to bed. Appellant did not act differently, everything seemed ordinary (R2129-32). Nelson's older cousin Andrew Eiland Jr. testified that he was painting his shed on Sunday with appellant, starting about 11 or 12 and finishing when they ran out of paint between 3:30 and 5:00. Eiland drove Nelson to Judy's house, took a shower, went to Mulberry in Eiland's car to pick up his truck, came back, went to a bar in Avon Park for one hour and drank one beer. They left the

bar about 10:30 and he dropped Nelson off at Eiland's mother's house. Neither of them was intoxicated.. Appellant acted normally; there was nothing out of the ordinary. (R2136-41).

Crime lab analyst Karen Cooper, an expert in footwear analysis, examined the exhibit 7 boots provided to her and they could have made the tracks at the orange grove Polk County site (R2141-50). Latent fingerprint expert Steven Stark testified that appellant's prints were found in the bathroom of victim Brace: the right ring finger on the towel rack, the left ring finger from the tile under the bathroom tile, the left ring and middle finger on the bathroom window, the right ring finger on the bathroom tub and a latent palm print from the interior bathroom door jam (R20,2159-64). Crime lab analyst Jennifer Garrison, an expert in DNA analysis, testified that semen stains on the flowered bedspread matched the DNA profile obtained from the defendant (R2176-80). Crime lab analyst Darrin Esposito, an expert in DNA analysis, testified that in the vaginal swab he identified a mixture of DNA from more than one individual and that mixture is consistent with what he would expect of a mixture between Brace and Nelson (R2192-95). Jeannie Eberhardt, an expert in forensic serology, got a positive result of blood on the tire iron but it was too small to be seen. Semen was detected on the blanket and white bedspread. She found sperm on the vaginal smears (R2242–52). Martin Tracy, an expert in the field of population genetics, was familiar with the

data bases used by Garrison and Esposito; he got the same answer manually that she got using a computer and he agreed with Esposito's results (R2261-73).

Road sergeant Booker Johnson became involved in the investigation about 10:15 p.m. on November 17 . He met with Detective Pope at the Adams Street address and came into contact with appellant Nelson. Appellant was calm but had just been awakened by their knocking at the door (R2275-78). Detective Timothy Lethridge of the Highlands County Sheriff's Office was called at home the evening of the 18th and was asked to come to the office to assist. He arrived about 8:30 or 9:00 p.m. Nelson had been taken into custody and was in the county jail; his assistance was requested to transport him from the jail to the detective bureau and to make sure he was in custody. He was not involved in the questioning and remained outside the interrogation room. The entire thing was done sometime after midnight and he dealt with appellant for about five hours. Several times while he waited outside, detectives would come out and tell him Nelson had requested a drink or use of the bathroom and Lethridge escorted him (R2279-85). He rode in the same vehicle with Nelson into Polk County. Appellant's demeanor was very calm, he was not confused and gave good directions. He stayed with the appellant as the others walked into the grove and he remained very calm and quiet. They were there for twenty or thirty minutes. After the interviews

were completed and while walking down the stairs to the jail, Nelson had a very large grin on his face, the first real emotion he saw him display the entire evening (R2286-94).

Avon Park police commander Frank Mercurio testified that Nelson arrived at the police department about 1 a.m. on November 18. He first had contact with him at 3:10 a.m. in the detective division's interview room after he had already been questioned by detectives. Nelson appeared calm, had his wits about him, was soft-spoken and acted as a perfect gentleman (R2304-05). Nelson told him in an unrecorded statement that he stayed at his mother's house at 318 Lakeside Park, then went to his sister's residence on Adams Street. Nelson stated that on Monday about 7 a.m. he went to the Brace residence (he claimed he had known her for four years and had rekindled their relationship) and had borrowed the vehicle from Ms. Brace. After she gave him the car he went to his place of employment, then left around 10 or 11 a.m. He claimed that before coming into contact with Deputy Pope in the Brace vehicle he had gone to a residence in Avon Park Lakes in an attempt to locate a friend. At that point they stopped the conversation and Nelson agreed voluntarily to take Detectives Robinson and Burke to attempt to identify the residence of the friend he was intending to visit. Nelson claimed he had no idea where the victim was but agreed to take the detectives to this friend's residence (R2306-09). Mercurio stayed at the police department coordinating matters and

the detectives returned back with Nelson at about 4:30 a.m. on the morning of the 18th (R2311). He had further contact with Nelson at about 6 a.m. Appellant advised Burke and Robinson he had not been completely truthful as to how he obtained the vehicle. At this time he claimed he stayed the night in question at his mother's house in Lakeside Park , left that residence Monday evening, went to the corner of Hal McCrea Boulevard and Delaney Avenue. He observed the motor vehicle parked on the corner with the keys in it and the engine running and had contact with two individuals who told him he could take the car (he had to go to Sebring). Thus, in fact, he did not have Brace's permission to have the car. At that point it was decided to arrest Nelson on grand theft charges; at 7:10 he was advised of this and the burglary and eventually was taken to the Highlands County jail in Sebring. Mercurio asked if he knew where Brace was and he did not respond verbally, but nodded his head affirmatively (R2312-16). Mercurio escorted him to the car for transport to the jail at about 8:20. (2317). During his contact with him, appellant's demeanor was cooperative, soft-spoken, and he did not exhibit any type of emotions (R21, 2338)

Detective John Wayne Robinson met Nelson at 17 B East Adams Street and conversed with him regarding the Brace vehicle. Appellant agreed to speak with him and agreed he would rather go to the police department but would need a ride. Robinson offered him

a ride. It was about 12:20 a.m. on the 18th, Nelson did not seem sleepy or disoriented. They began the taped interview about 1:30 a.m. A Miranda rights form was filled out. It appeared Nelson could hear and there was no indication he did not understand. He signed the form, no threats or promises were made and Nelson was not handcuffed, shackled or secured. He seemed real quiet, talked low and was calm (R21, 2347-58). The exhibit 69 taped cassette was introduced into evidence and played to the jury without defense objection (R2359-2425). When Robinson exited the interview room about 3:00, he went to the restroom and received some information from Mercurio. There was a conversation about taking the officers to Avon Park Lakes to show where his friend lived. The officers told appellant basically they didn't believe him (R2426-30). They drove to where Mr. Johnson supposedly lived at 4:45 a.m., got a vehicle tag to run and were intending to drive appellant home when Mercurio radioed and asked them to return to the police station. Nelson was agreeable to accompanying them. While Nelson rested in the investigation office, the decision was made to charge him with crimes (R2430-34). At 6 a.m. Robinson went back into the room with him and there was an oral statement (not tape-recorded). Nelson said he wanted to tell him something, that he had lied about some of the previous information and stated that the car was stolen. Robinson asked Mercurio to come in and be a witness. Nelson now claimed he was in the area and some other black males had Brace's

car, and they gave him the car since he had to go to Sebring. Nelson was arrested on burglary and car theft charges at about 7 a.m. (R2434-36). Appellant again denied knowing where the victim was and he was driven to the jail. Robinson went home to get some rest at 12:05 p.m. and returned to the station at about 6:30 p.m.(R2439-40). Robinson was briefed on findings by FDLE lab people on processing the interior and exterior of the Brace residence and vehicle. Lethbridge brought Nelson back from the jail. He was quiet, calm, spoke softly, and hard to understand. Nelson said he had eaten and gotten rest during the day (R2442). He read, appeared to understand and signed a waiver of rights form. No promises or threats were made to him (R2442-46). The officers had information about the car getting stuck in the sand (Robinson later contacted Morgan and Weir and Weir picked out Nelson's photo (R2448)). Throughout the evening they took bathroom breaks, snack breaks, etc. The officers revealed to Nelson the information they had gathered (his fingerprints in the residence, he was in her vehicle and admitted it was stolen). It was written on a blackboard. Appellant looked at it, appeared to be reading it and said "it's over, isn't it" several times. Robinson answered yes, the case was not going away until solved and they found out where Brace was. When reminded to tell the truth, Nelson appeared emotionally upset. Robinson left the room for a minute and Detective Burke stayed. (R2450-53). Burke then told Robinson on

his return that he's going to tell us where she's at. Nelson agreed to do so and provided the directions as they went. At the site they told him they were not going to make him go down where the body was. Brace's body was recovered (R2454-57). They went back to the sheriff's office and took a taped statement. When Robinson asked him why this happened, Nelson answered he was mad, mad at the world, mad about his life (R2460). The exhibit 72 taped statement was played to the jury (R2461-97), after defense had interposed a continuing objection (R2424-2425). Robinson testified that his younger brother playing with him when he watched television made him mad. Nelson said he was walking around thinking about his life when he came to the Brace residence. Once he entered the residence, he believed he woke her up by accidentally kicking the furniture. She asked him what he was doing there and that she started screaming. She got out of bed and they had a tussle (R22,2596-97). He tried to stop her from screaming by holding her down. When asked why he didn't just leave when she screamed, Nelson answered that he wanted to leave but he was scared she would call the police. He held her down , told her to be quiet, and became angry because she was screaming. He took her out to the car and put her in the trunk. He was in fear that she could identify him. He had selected this residence to go into rather than others because the light was on and the window was open (R2597-99). Originally, he just drove around for a long time with

Brace in the trunk; he went to the Hess market and purchased gas for the vehicle. He went to the Highlands Apartments, a complex north of Hess Mart and arrived there about 5:30 or 6:00 a.m. (R2600). While he drove around he was thinking about what to do. He said he left the car parked on the road on Buffum Road and claimed Ms. Brace walked along with him to the location where her body was found. When they got to that spot he started choking her. She did not lose consciousness. He became scared and started twisting her neck. She didn't pass out so he returned to the vehicle and obtained the fire extinguisher (R2601-02). Nelson returned to the victim, stuck the nozzle of the hose in her mouth and sprayed two or three times; then he went back to the car and got the tire iron. He tried to push the iron into her mouth, she tried to push it out. He tried to clean the tire iron by sticking it in the dirt and when he finished with the fire extinguisher and the tire iron, he put the items back in her vehicle. Appellant explained that he killed her because he was scared and didn't know what to do. He was scared she would call the police, that she would be able to identify him to the police. He denied having any sexual contact with her (R2603-04). He had no explanation for her panties on the bed. Robinson talked to him about the location of Lost Grove Road and Alat Road (where Weir and Morgan had seen him). Nelson said he went to that location and became stuck in the sand in Brace's vehicle. His intention at that time was to kill her at

that location but was stuck in the sand (R2605). He heard the thumping of the banging sound coming from the interior of the trunk. Nelson claimed that he went immediately from there to the Buffum road area, around lunch time. When asked why instead of killing the victim he simply did not threaten her, appellant answered that he didn't make threats. Afterwards, he related that he went to a store at US 27 and 98 and purchased Budweiser beer. He drank the beer behind the Clock Restaurant in Avon Park (R2606-07). He went to his sister's residence on Adams street, washed some dirty clothes other than the ones he was wearing and watched some television. He drove to Sebring at some point. Nelson admitted that he was not under the influence of alcohol or drugs during these different events. Appellant was soft-spoken, showed little emotion or expressions, and avoided eye contact with Robinson (R2608-09).

Police detective Daniel Burke also indicated that appellant understood his rights and there was no coercion or promises made. They were all rested a little bit more than the previous evening. When Robinson left the room, appellant asked him if he knew the road that ran from Frostproof to Ft. Meade. He was nodding his head. Burke asked him if this was where she was at and Nelson nodded his head yes. Burke asked if he'd take them there and he nodded yes (R2624-32). He was not crying at that particular time. On the drive to the site he didn't visually display any emotion.

He appeared somewhat emotional when they arrived at the location. He didn't want to go to where the body was and Robinson told him he wasn't going to have to go down (R2634).

Burke also testified as to certain distances. The distance from appellant's mother's house or the Ishmael residence to the victim's residence was about 2.1 miles. The distance from where the Brace vehicle was recovered to the Adams street residence of Ms. Bolton was about 1.5 miles. The distance from the Brace residence to where the car got stuck was a total of about 16 miles (R2641-46).

The parties stipulated to the identity of the deceased as Virginia Brace (R2654).

(2) <u>Penalty phase</u>:

Dr. Melamud testified that he could not tell which injuries were inflicted first but that a person feels pain prior to losing consciousness. He could not discount the testimony that the first injury was twisting the neck, the second involved the fire extinguisher and the third with the tire iron, and that the victim remained conscious throughout. Pain and suffering would be associated with the injuries sustained (R24, 2968-72). Probation and parole officer Jim Gibbons testified that Nelson had been sentenced to state prison and Gibbons started supervising him following his release from prison on October 27, 1997. He was on felony probation (R2976-78). Arlene Dorman, Barbara Murdock, and

Betty Redmond provided brief testimony about the victim (R2980-89).

Defense witness Lelia Eiland, appellant's aunt, testified that Nelson's mother died in 1980; she was an alcoholic. Nelson and his sister Judy Bolton were raised by Eiland's parents. Nelson's father was not involved in raising him (R2990-95). Eiland's mother also died in 1990 and Nelson took the loss of his mother and Eiland's mother hard (R2995-97). Lelia had six children of her own and she treated appellant as one of her own when raising him (R2997-3002). When he was 14 or 15 Nelson joined the Job Corps. She was not aware of any physical or health problems. Appellant has one child, age 6 (R3006-07). None of the children were mistreated while in her house. She had a lot of contact with him during the six years since he first joined the Job Corps (R3009-11). She never saw any signs of drug or alcohol use (R3012). She saw him on a regular basis, daily, after his return from prison (R3013-14). John Eiland, Lelia's thirty-one year old son, similarly testified about appellant's upbringing (R25, 3017-26). At the time of the murder, appellant had just gotten back in town right after being released from prison (R3030). Even though there wasn't a father figure in the house when appellant and Judy came to live with them, there was a lot of supervision since the older brothers filled that role (R3033).

Barbara Grinslaide, a detective with the Polk County sheriff's office, investigated the 1987 case regarding seven year old Calvin

Eiland who contracted gonorrhea while living in Frostproof with John Eiland, appellant and Judy. Calvin and appellant admitted to having consensual sex with Judy. John had left a pornographic video in the VCR. Grinslaide was unable to find the origin and filed a complaint affidavit for incest against appellant and Judy because they were underage, listing them as both victim as well as complainant (R3034-47). Angela Lovett, a cousin, recalled that appellant seemed fine when she saw him but couldn't recall seeing hugs and kisses with the family, although there was love in the family (R3053-57). Claudia Daily became pregnant by appellant after they met in the Job Corps. She did not tell him he was the father before she left the Corps. She saw appellant in Avon Park when the child was 6-8 months old, but circumstances and family decisions required her to leave. Appellant was financially involved in the child's life for a month and a half (R3061-75). Calvin Fogle, a cousin, stated that appellant is not too open with you until he gets to know you. They were a tight family and could go and talk to each other about problems, nobody was left stranded. He did not sense that his mother did not show affection to Nelson (R3076-82). Reagis Ishmael testified that appellant would occasionally spend the night with her. On one occasion, when he slept he had a bad dream. He would never tell her what was bothering him but it seemed to be something that happened while he was in prison and had to do with when she touched him on the

buttocks or hugged him. He didn't object to general hugging (R3084-90).

Appellant's sister Judy Bolton recalled that Nelson twice had nightmares and wouldn't talk about it (R3097-98). Everything seemed to be okay when he came to live with her in her apartment for two months after he finished Job Corps (R3098). Lelia did not treat her or appellant any differently than the other children, and showed them the same type of love as the others. She was not aware of any mistreatment of appellant; the older brothers acted as father figures (R3105). When he got out of prison he spent three weeks with her, maybe three or four nights a week and sometimes he would spend the night with Reagis. (3106-07).

Dr. Henry Dee testified that when he first saw appellant, Nelson was essentially mute; he didn't respond to questions–although he did nod his head (R25,3129). He thought that Nelson's jail suicide attempt was a combination of depression and remorse. The depression would be normal in a situation like his (R3131-32). Nelson remembered that his mother was strikingly beautiful. Those who knew her described her as an alcoholic (R3134-35). Available records following the sexual incident with Judy and Calvin characterized appellant as adjustment disorder with depressed mood (R3137). Dr. Kremper noted some depression when appellant was sixteen (R3138). Dee suggested possible schizophrenia (R3141) and believed he was brain damaged (R3143).

His performance IQ of 79 would place him in the 12th percentile, borderline functioning (3145). Appellant told Dee he was sodomized twice while incarcerated at Lancaster Correctional Facility (R3148-49). Dee thought he suffered an extreme mental or emotional disturbance (R3153) and because of his impulsivity his ability to plan alternate activities was impaired and that he had difficulty in conforming his conduct to the requirements of law (R3157). On cross-examination, he acknowledged that his IQ testing could have varied widely because of the depression he had when taking the test; he is even depressed now (R3161). Dee only gave neuropsychological tests, no CAT scan or MRI or medical type tests (R3161-62). In school after the third grade, Nelson was not held back. In the last grade he attended-grade nine, he scored one A, two B's and two C's. There were no D's or F's (R3163-64). He was not kicked out of school for flunking out (R3165). He made a choice to stop going to school. There was nothing in the birth records of any consequence; there was no indication by the doctor of signs of fetal alcohol syndrome and Dr. Dee was not suggesting appellant had fetal alcohol syndrome. There was no history of head injury on the medical records he reviewed (R3166-67). Nelson did not specifically say he was introduced to sex by his sister Judy and Dr. Dee did not ask Judy about the incident (R3168). After two visits to the Marge Brewster Center, Ms. Eiland terminated the counseling sessions. He did not talk to Ms. Eiland (R3172). Dee

did not have jail medical records prior to June 1998; he did not have medical records from the incarceration in the state prison system, nor did he talk to people there (R3174). Dr. Kremper's evaluation in 1992 noted signs of depression (R3177). Appellant told Dee that when he was aged seven to ten a childhood friend died and sometime after that he began to have auditory hallucinations. Dee did not obtain documentation when the friend died (R3178-79). Dee did not talk to his aunt Lelia or any other family members (R3179). Dee was not able to talk to anyone or find records that would document the auditory hallucinations at an early age. He did not review the prison records, only jail records (R3181). He had no source of information about the voices other than from the defendant himself. Nelson told him he was seeing things but did not mention hearing any voices on the day he killed Ms. Brace (R3182). Appellant was sketchy on the murder and gave few details. Dee did not review with him the statements he gave to police (R3183). Dee was not aware of whether or not an investigation was done concerning the sexual incident in prison (R3186). Dee could not pinpoint when the brain damage occurred (R3187). As to the emotional disturbance, Dr. Dee opined that appellant was abused, neglected in childhood sometimes relatively severely (R3189). Specifically, the neglect was the lack of supervision (R3190). Dee had nothing to indicate neglect except for what the defendant told him (R3192). Dee didn't know whether the emotional disturbance had

any causal relationship to the murder. Appellant knew right from wrong-he was not suffering any delusion (R3195). Dee did not see the significance of the killing taking place in a remote area away from where people would be (3196). Nelson told Dee about someone helping get the car unstuck and he was scared he would be found out that he had Ms. Brace in the trunk (R3197). Dee thought appellant was impulsive and when asked what was impulsive about the circumstances of the killing, Dee found the question difficult to answer "because I don't know the details of everything he did of course". And that was because "He didn't give me a lot of information about it" (R3199). Nelson did not relate any activity showing impulsivity after entering the Brace residence (R3200). If he made the decision to rape and to kill Brace, his ability to control himself and stop would be diminished. Again Nelson did not tell Dee what was going on in his mind when he was going through these different actions (R3201). He didn't talk about choking the victim, or returning to the car for the fire extinguisher, and again for the tire iron (R3202). Nelson denied sexually assaulting her (and Dee knows there is evidence to the contrary) (R3203).

Appellant chose not to testify in penalty phase (R25, 3214) just as he chose not to testify in the guilt phase (R21, 2328-31). The jury recommended death by a vote of nine to three (R26,3349-52). The trial court found the presence of six statutory

aggravating factors[1] and some mitigation and agreed that death was appropriate (R7, 1073-82).[2]

[1] (1) Felony probation, (2) during burglary, sexual battery and kidnapping, (3) HAC, (4) avoid arrest, (5) CCP, (6) victim's vulnerability due to age.

[2] The record reflects that defense counsel objected to any pre-sentence investigative report (R23, 2833), and the trial court confirmed at the Spencer hearing such defense objection (R6, 940). There, defense counsel repeatedly objected to consideration of facts in a PSI about Nelson's four prior residential burglaries (R6, 945, 995)("It would be inappropriate for the Court to consider the PSI files and look at the circumstances of those offenses and highly prejudicial. And that's not part of the Court's responsibility" R 945). Also, prior to the beginning of the penalty phase, the defense waived the mitigating factor of no significant history of prior criminal activity (R24, 2871).

SUMMARY OF THE ARGUMENT

ISSUE I. The lower court did not err in denying appellant's motion to suppress; there was no abuse of discretion in the court's allowing evidence of Nelson's admissions into evidence. The testimony at the suppression hearing demonstrates that appellant's statements were voluntary and not coerced and appellant's assertion of deception and tiredness is meritless.

ISSUE II. Appellant's complaint about the instruction pertaining to the avoid arrest aggravator has not been preserved for appellate review by objection in the lower court. The trial court's finding of the presence of this aggravator is overwhelmingly supported not only by circumstantial evidence but also by appellant's admission to law enforcement officers.

ISSUE III. The trial court currently found the applicability of the cold, calculated and premeditation factor, and appellant did not object to the constitutional validity of the instruction. Nelson decided to kill the victim upon fearing she could identify him after his burglary and sexual battery. He kidnapped her, transported her in the trunk of her vehicle and initially planned to kill her at a spot where the vehicle became stuck in the sand. After assistance in extricating the vehicle, he drove to a more remote location where he strangled her, forced fire extinguisher material into her mouth and lungs, then rammed a tire iron into her mouth and neck.

ISSUE IV. The trial court properly considered and weighed all the mitigating evidence proffered to it. The court gave due consideration and weight to the mitigation found to exist and properly explained its reasons for rejection of some proffered mitigation, either because it was inconsistent with the facts of the case or the testimony of other witnesses.

ISSUE V. The sentence of death imposed in the instant case is proportionate to others approved by this Court. The record supports the finding of six aggravating factors including HAC and CCP and the trial court appropriately considered and weighed the minimal mitigating factors presented. See Hall v. State, 614 So. 2d 473 (Fla. 1993).

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS AND EVIDENCE.

A trial court's ruling on a motion to suppress is presumptively correct. Medina v. State, 466 So. 2d 1046 (Fla. 1985); Dennis Escobar v. State, 699 So. 2d 984, 987 (Fla. 1997); Douglas Escobar v. State, 699 So. 2d 988, 993-994 (Fla. 1997). The state satisfied the burden of demonstrating that appellant's statement was voluntarily made by a preponderance of the evidence. Jorgenson v. State, 714 So. 2d 423, 426 (Fla. 1998). This Court has also stated that when the evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing party. Johnson v. State, 660 So. 2d 637, 642 (Fla. 1995); Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994). In the instant case appellant offered no contrary testimony to that offered by state witnesses Robinson, Burke and Lethridge. A trial judge's ruling on the admissibility of evidence will not be disturbed on appeal absent an abuse of discretion. Alston v. State, 723 So. 2d 148, 156 (Fla. 1998).

(A) The Motion to Suppress Hearing

(1) Detective John Wayne Robinson testified that when he became involved in the case, the seventy-eight year old victim was reported missing and that appellant Nelson had been found asleep in

her vehicle in the Avon Park Lake area (R3, 458). Deputy Pope found Nelson in the car at about 6:20 p.m. on Monday, November 17, 1997 (R459). Robinson was called out about 10:30 or 11:00 that night (R459). He arrived at the Judy Bolton residence at 17B East Adams Street about 12:30 a.m. on November 18th and met with Nelson who agreed to go to the police station for questioning about the Brace vehicle (R459-63). Appellant was not secured, handcuffed or restrained (R465). At the station he was given Miranda warnings and signed a rights form; he did not appear to have difficulty in understanding the form or what was said (R466). Detective Burke joined him at the station (R467). Nelson said he was able to read and write and had a GED (R468). Nelson was interviewed in tape from 1:30 to 3:07 a.m. (R471). Essentially, appellant explained that he and his family knew Ms. Brace for a number of years and she had loaned him the car on Sunday, November 16th (R473). He claimed that after visiting his girlfriend, he got tired and stopped the car and fell asleep. He had gone to work Monday morning at 7:00 a.m. and left early at 11:00 a.m. (R474). Nelson claimed he visited someone named Johnson in Avon Park Lakes while he had the car in his possession. Appellant maintained that he did not go inside and had never been inside Brace's residence (R475). Nelson was soft spoken and kept his hands around his face and it was difficult to understand him at times. He would grin every now and then (R476). Several breaks were taken in the interview and he

appeared to be cooperative in trying to answer the questions. Robinson didn't believe what he said and told him so; the information didn't match what the officers had, and there were discrepancies in his account (R477). After the interview, Robinson briefed his superior, Chief Mercurio (R478). He and Mercurio went back to speak with Nelson (it was not taped) for about a half hour. Appellant raised his voice and said he didn't know Brace's location (R480-81). At 4:30 a.m., Robinson, Burke and Nelson left the police department so Nelson could show them where Johnson resided at Avon Parks Lake (R483). Nelson pointed out a residence at 4:45 a.m. The officers just ran the tags on the vehicles in the yard (R484). They were then going to drive Nelson back to his sister's house and Mercurio radioed and requested they return to the police department; Nelson agreed to return with them (R486). They arrived at 5:05 a.m. and Burke stayed with appellant in the conference room. The authorities decided there was enough evidence to arrest appellant who was on probation/parole for theft of the vehicle (R486-88). Robinson spoke briefly to appellant at 5:45 and 6:00 a.m. (R488-90). Nelson told him he lied about the job he said he had, admitted the car he was sleeping in was stolen - that he had stolen the car. He gave an oral statement to Robinson and Mercurio from about 6:00 to 7:00 a.m. (R490-91). Appellant then claimed that several black males in the victim's car at Hal McRae Boulevard told him he could use the car and he took the car and went to

Sebring (R492). He claimed that on his return to Avon Park, one Duane Hill pointed out the residence of Ms. Brace (R494). When Mercurio said to him "you know where she is", appellant nodded his head in agreement but did not respond verbally; he didn't seem as confident and started to cry. Mercurio didn't press it (R495). Mercurio advised Nelson he was being arrested for automobile related charges at about 7:00 a.m. (R4, 496).

Before the patrol vehicle came to drive Nelson to the county jail, Robinson asked for his help to find Brace. Nelson agreed to take a polygraph test and Robinson told him they'd contact him later after he got some rest (R499). Nelson left the police department at 8:20 a.m. Robinson next contacted him about twelve hours later at 8:55 p.m. In the interim, the officers learned appellant's latent prints were found in the bathroom area (R499-500); the victim's panties were rolled up among the sheets or blankets, the phone cord appeared forced from the socket, a tire iron had dirt on it, a fire extinguisher had possibly been set off and witnesses had observed the vehicle in the Frostproof area of Polk County stuck in an orange grove (and reported hearing a thud in the trunk and a black male was with the car)(R501). Additionally, neighbors saw or heard the car leave in the early morning hours (R502).

Robinson met with FDLE Agent Porter to do the polygraph. Porter had talked to FDLE analysts processing the crime scene

(R502-03). Appellant indicated he was still willing to take a polygraph and Robinson told him he had some new information. Appellant was given Miranda rights again, and indicated he had gotten some rest and had been fed (R505-507). Nelson drank some coffee and spent about an hour and a half with Agent Porter (R508). Robinson did not expect Nelson to pass the polygraph. Robinson and Burke decided to put some things on the marker board in the conference room and that Robinson would take the lead in the next interview (R511). Robinson made two columns - the known evidence on the left and favorable items to Nelson on the right (R512-13). Robinson had been told of DNA evidence (victim's underwear, appellant admitted smoking a brand of cigarettes similar to ones located)(R515). Porter told Robinson that Nelson was being deceptive, especially relating to the location of Ms. Brace at about 10:50 p.m. (R516). Appellant told Robinson that Porter mentioned he hadn't passed. When Robinson asked if he had told the truth, appellant didn't respond (R516). Nelson said he didn't pass questions on Brace's whereabouts and when Robinson asked if in fact he knew where she was at, appellant had a blank stare on his face; he said he was mad at not passing the polygraph. Nelson again said he didn't know where she was at (R517-18). He denied being in Polk County on Monday and Robinson told him of the witness who had seen and conversed with him (R518-519). Nelson slouched over, his mouth was in his hands but they couldn't understand him (R519). Robinson

told him he wanted his help in finding her because the family was worried. Nelson wanted to take a break, Robinson uncovered the list on the marker board. Appellant looked at it and said, "It's over isn't it" and Robinson answered, "Yes, Mike, it's over" (R521). Robinson told him they were going to solve the case and encouraged him to tell the truth. Nelson nodded his head in agreement a couple of times (R522). Robinson asked who he loved and appellant answered his sister Judy. Robinson asked if she were missing how would he feel if the person who knew wouldn't tell police the truth and Nelson agreed he would be mad. Robinson added that if the victim was dead, help them find her for a proper burial. He started crying and had tears in his eyes (R523-524). Robinson told him to relax and left to go to the restroom for a minute or two. Then Detective Burke opened the door and reported "he's going to show us where she is" (R525-526). While emotional, Nelson confirmed he'd show the location (R526). It took a half hour to drive there (R528). Nelson pointed out an orange grove area and said the body was not buried (R529). Nelson used a water tank as a landmark; he didn't want to go himself into the grove (R530). They stayed twenty minutes after discovering the body and returned to the sheriff's office for a subsequent interview. The body was found about 12:30 a.m. on November 19th (R531). Robinson asked if he'd give another taped statement and Nelson advised he would tell the truth (R533). The taped statement occurred from

2:10 to 2:40 a.m. (R534). [This is the statement sought to be suppressed by the defense, after the polygraph] (R534). Nelson spoke quietly and appeared to mumble somewhat (R535). He showed little emotion (R536). It never appeared Nelson was under the influence of alcohol or drugs (R537). Nelson did not appear disoriented or have any type of mental problem, nor did he indicate that he didn't want to talk or answer any questions. He did not express a desire to talk to an attorney; he was allowed to have a break when he requested (R538). There were no threats or promises (R539).

(2) Avon Park police detective Daniel Burke learned that relatives had reported an elderly female was missing and her vehicle had been located (R4, 616). He was told that Micah Nelson had been contacted in the vehicle earlier that afternoon. He participated in the interview of appellant (R617). Nelson seemed calm, polite, cooperative and quiet (R618). Detective Robinson introduced him to Nelson. He was present when Nelson was read his rights and signed the waiver (R619-620). The first interview - during which there were several breaks - lasted from 1:30 a.m. to 3:07 a.m. (R621). When the recorded conversation came to an end appellant was offered coffee or soda and use of the bathroom. Captain Mercurio had a conversation with Nelson but Burke was not present (R622). Afterwards he and Robinson and appellant drove to a particular location and appellant pointed out a particular

residence to Robinson to verify information provided by appellant (R623). They were then prepared to take Nelson back to his residence. Nelson indicated he didn't mind returning to the police station. After their return, a determination was made to charge appellant with burglary and auto theft (R624-625). Nelson was taken into custody to be transported to the county jail about 7:30 or 8:00 a.m. Burke went home, returned at 6:00 p.m. and saw Nelson about 9:00 p.m., since appellant indicated a willingness to take a polygraph (R626-27). Nelson indicated he had a chance to get rest and food and again read and signed a waiver of rights form (R628). The principal issue to be polygraphed was Mrs. Brace's whereabouts in light of his discrepancies (R629). Burke was aware before the polygraph that the crime lab had recovered positive latent prints of Nelson from the victim's bathroom and there was some information the car had been stuck in a grove (R630). Appellant was willing to take the polygraph; he was lucid and cooperative - he wanted to get this straightened out (R631). He looked rested. While agent Porter conducted the polygraph, he and Detective Robinson discussed approaches to find out the whereabouts of Brace. It was obvious appellant had not been honest and wasn't going to pass the polygraph, they knew portions of evidence recovered from the scene as well as his discrepancies and decided to write them on a blackboard (R632-633). Unsurprisingly, Agent Porter reported that Nelson had shown deception on the test (R634). Appellant was

brought into the 10 x 20 feet conference room and seemed irritated that Porter told him he did not pass the polygraph. They questioned him further to try and figure out what was correct. They confronted him with the list on the map of the evidence they had (R635-36). The list included his lies about possession of the vehicle, his personal knowledge of the victim, the presence of his prints in the residence. Nelson stared at the board and said "It's over, isn't it?" Robinson replied, "Yeah, Mike, it's over" (R637). Robinson stepped outside and Nelson mentioned to Burke "Do you know the road that runs from Frostproof to Ft. Meade?" and nodded that that's where she was and his willingness to take them there (R638).

They had emphasized to him the importance of locating Virginia Brace. Robinson had mentioned how would you feel if something happened to a loved one and Nelson agreed he'd want to find out (R639). After the polygraph, appellant seemed more sad, a little more emotional, not angry or upset. Burke told Robinson, and Nelson confirmed he would take them to where she was (R641). Nelson directed them to the site; there were several vehicles involved (R642). Nelson told them she's down there indicating one of the rows of orange groves and the body was discovered (R643). They returned to the sheriff's office and appellant agreed to give a statement which was taped (R645-46). That statement ran from 2:10 to 2:57 a.m. There were no threats or coercion (R647). Nelson seemed somewhat relieved. He never indicated that he didn't

want to answer questions or that he wanted an attorney and he understood what was said to him. Nelson did not appear to be under the influence of alcohol or drugs (R648-49). No promises or inducements were made (R650). Burke stated that DNA analysis had not yet been done (R658). Burke explained they had received information about women's underwear found on Ms. Brace's bed and Porter had expressed a belief it was a sex crime - they believed there was a high probability DNA evidence would be recovered. They knew FDLE had collected bedding and underwear (R669-70). Semen was subsequently found (R674). Appellant was offered breaks during the interview and did not fall asleep during the interview (R674).

(3) Highlands County Sheriff's Office Detective Timothy Lethridge set up the conference room for Detectives Robinson and Burke to speak to appellant in the conference room. Since Nelson was incarcerated in the county jail at this time - the evening hours of November 18, 1997 - Lethbridge's job was to maintain custody of him and to facilitate the Avon Park Police Department (R V, 682). The witness was aware that Agent Porter of FDLE was going to conduct a polygraph examination. Afterwards Detectives Robinson and Burke were with appellant in the detective bureau conference room. Lethbridge was not present but stationed outside the door. The detectives were inside for about an hour. There were three breaks in which he got coffee or water for appellant and twice Nelson used the restroom (R683-684). Appellant did <u>not</u> complain

that he was so tired he needed to get some sleep; Nelson was very calm and quiet (R685).

The trial court denied appellant's motion to suppress, finding that the police interrogation was lawful and "cannot be characterized as so coercive to yield an involuntary confession" and that the statements made after the polygraph examination and all subsequent evidence were admissible (R5, 731-733).

(B) Legal Analysis

There was no coercion in the instant case. The trial court's finding in the order denying motion to suppress is fully supported by the testimony of Detectives Robinson, Burke, and Lethridge:

> "Mr. Nelson asserts that the statements and evidence obtained from him after the polygraph examination were the products of a coerced confession. He urges the Court to suppress these statements and evidence. For the reasons specified above, the Court finds that the police interrogation was lawful and cannot be characterized as so coercive to yield an involuntary confession. Further, the Court finds that the defendant's statements made after the polygraph examination and all subsequent evidence is admissible. (R5, 732-733)

Appellant first complains of an improper "Christian burial" technique. The lower court ruled:

> "The defendant urges the Court that the police utilized the improper "Christian burial" technique to coerce the defendant into confessing his involvement in the crime and to locate the victim's body. The Court finds that the detectives reference to finding the victim's body is insufficient to make an otherwise voluntary statement inadmissible

> under Hudson v. State, 538 So. 2d 829 (Fla. 1989) and Alston v. State, 723 So. 2d 148 (Fla. 1998)" (R732)

In Hudson, supra, this Court affirmed the denial of a suppression motion, noting that police had read Hudson his rights at least twice and Hudson indicated that he understood them before waiving them. The only promise made to him was that he would be taken away from the body's location as soon as possible and the Court disagreed that police overreaching or coercive police conduct rendered Hudson's confession involuntary. 538 So. 2d at 830. Similarly in Alston, supra, this Court rejected a defense argument that a detective's reference to closure for the mother and to defendant's daughter was improper:

> "I felt Mrs. Coon needed closure because her son was still missing, and I expressed the things about his daughter. I said "you have a daughter. The fact if somebody has taken your daughter and you don't see her again, you don't get any closure, so I think it's important from Mrs. Coon's aspect if you can take us to his body, that would give her some closure to her son's death." 723 So. 2d at 155.

Unlike the instant case the defendant in Alston testified at the suppression hearing as to threats and promises. The Court found no error in the trial court's ruling that the statements were freely and voluntarily given to police after a knowing and voluntary waiver of Miranda rights. The same result should obtain in the instant case.

With respect to appellant's complaint about the mention of DNA

on a blackboard, the lower court found:

> While the defendant was taking the polygraph exam, the interviewing police officers planned their investigation strategy towards the defendant. On a blackboard in the interview room, they wrote two columns, Pros and Cons. Listed under the Pros were the words and items in the defendant's favor and the Cons listed those words and evidence unfavorable to the defendant. Among the cons "DNA evidence" was listed. At the time, the police did not have any DNA evidence against the defendant. What the police did know is that the defendant's fingerprints were found inside the victim's home. The defense argues that the police used deceptive and coercive tactics by placing "DNA evidence" on the board. The defendant maintains that this is similar to *State v. Cayward*, 552 So. 2d 971 (Fla. 2nd DCA 1989). In that case, the police manufactured false reports showing the defendant's culpability in order to elicit a confession. In the instant case, the police did not fabricate any documents, and the DNA evidence writing was not emphasized at the interview. The police did tell the defendant they had his fingerprint inside the victim's home, and this was the truth. The court finds that the writing of DNA evidence on the blackboard does not rise to a level that shocks the conscience and jeopardizes the constitutional rights of the defendant. (R732)

It is not clear whether appellant is challenging this finding. Even if the mention of DNA on the blackboard could be characterized as deceptive, the officers knew material had been collected for appropriate DNA testing but the analysis had not yet been done,[3] this Court has repeatedly indicated that police misrepresentation alone does not render a confession involuntary. *See* Dennis Escobar

[3] Subsequently, DNA evidence obtained from the scene of the crime at the residence has implicated Nelson.

v. State, 699 So. 2d 984, 987 (Fla. 1997) (citing Frazier v. Cupp, 394 U.S. 732 (1969)); Douglas Escobar v. State, 699 So. 2d 988, 994 (Fla. 1997) (no abuse of discretion in finding from the totality of the evidence that confession was voluntary despite detectives deluding him before he gave his statements by falsely stating that they had obtained physical evidence and by failing to inform him that he could be sentenced to death). E. Johnson v. State, 660 So. 2d 637, 642 (Fla. 1995) (rejecting argument that confession should be suppressed because he confessed only after police told him he had failed the polygraph he had consented to receive).

Next, with regard to appellant's tiredness, the lower court found:

> Lastly, the defendant contends that the police did not afford him breaks when he was tired. The defendant was initially interrogated from late November 17 until around 8:30 a.m. November 18. At that time, the suspended the interrogation until that night at 9 p.m. The latter interrogation lasted the majority of the night. The same detectives interviewed the defendant throughout the whole process. Detective Lethridge testified that the defendant was given three breaks during the latter period. The court finds that the defendant endured the same interview conditions as the inquiring detectives and that he was afforded several breaks. During these breaks the defendant was offered coffee or cold drinks and allowed to use the restroom. This interview period was not unreasonable.

In Johnson v. State, supra, this Court found that the defendant's confession was not legally the result of coercion,

deception or the violation of constitutional rights. The Court concluded:

> This confession is not undermined, as counsel contends, by Johnson's statement to police that he was tired. While such statements were made, they did not indicate in themselves a desire to reassert waived rights. Indeed, Johnson showed every indication of wishing to complete the interrogation. As such, there was no violation of rights on this basis. Nor do we believe police improperly preyed on Johnson's conscience by telling him he suffered from a serious sexual disorder and needed help. The records establishes no basis for believing police coerced Johnson or made undue promises to him. We certainly cannot agree with Johnson's analogizing the challenged statements to the so-called "Christian burial technique." Using sincerely held religious beliefs against a detainee is quite a distinct issue from a simple non-coercive plea for a defendant to be candid.
>
> Except in those narrow areas already established in law, police are not forbidden to appeal to the consciences of individuals. Any other conclusion would come perilously close to saying that the very act of trying to obtain a confession violates the rights of those who otherwise have waived their rights. *Miranda* creates a sufficient protection for the accused by outlining the rights they may assert or waive. After waiver, those rights may be reasserted at any time. Because Johnson chose to waive his rights and because there is no basis to establish police misconduct, we find no error. By the same token, there is no violation of the right to counsel. *Traylor v. State*, 596 So. 2d 957 (Fla. 1992). (Id. at 643) (emphasis supplied)

See also Walker v. State, 707 So. 2d 300, 311 (Fla. 1997) (listing a half dozen interrogation techniques which the trial court rejected as impermissibly coercive).

A brief summary of the testimony is appropriate here relating to the tiredness prong. First, appellant initially agreed to accompany the officers to the police station in the early morning hours of November 18, 1997 and he gave a taped interview from 1:30 to 3:07 a.m. (R3, 471; R4 621). Defense counsel below informed the Court that no challenge was being made to suppress that statement. The defense sought to suppress only the statements made after the polygraph session the evening of November 18 and early morning hours of November 19 (R3, 534; R5, 675; R21, 2360). Secondly, after that first interview had ended and after appellant was placed under arrest at about 7 a.m. for the automobile related offenses (R 4, 496), Nelson agreed to take a polygraph test and Robinson told him they'd contact him later after he got some rest (R499). Nelson left the police department and was taken to the county jail at about 8:20 a.m. Robinson next saw Nelson about twelve hours later at about 9 p.m. (R500). Nelson at that time indicated he was still willing to take the polygraph, and was again given Miranda rights. Nelson indicated that he had been fed and gotten some rest (R505-507). And as the testimony makes clear, thereafter, he was given breaks, coffee and soft drinks. His last taped statement occurred from 2:10 to 3:00 a.m. after Nelson accompanied officers to the site where he killed and left Brace's body (R534, R647). Appellant did not complain that he was so tired that he needed to get some sleep (R685). He was offered breaks during the interview and did

not fall asleep during the interview (R674).

Appellant's claim is totally without merit. This Court should affirm the trial court's order denying the motion to suppress. No abuse of discretion has been shown and there is no legal basis requiring the suppression of his statements or any evidence.

ISSUE II

WHETHER THE LOWER COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THAT APPELLANT KILLED THE VICTIM TO AVOID A LAWFUL ARREST.

The standard of review of the trial court's finding of an aggravating circumstance as stated in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), is not to re-weigh the evidence to determine whether the state proved each aggravating circumstance beyond a reasonable doubt since that is the trial court's job but rather 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. See also Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997); Bonifay v. State, 680 So. 2d 413, 417 (Fla. 1996); Orme v. State, 677 So. 2d 258, 262 (Fla. 1996).

The trial court in its sentencing order found along with five other aggravating factors that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.[4] The order recites:

> 3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.
>
> It has been long held "that in order to establish this aggravator, where the victim is

[4] Appellant does not challenge as aggravators the under sentence of imprisonment and on felony probation, during the commission of or flight after sexual battery, burglary or kidnapping, especially HAC, and victim was particularly vulnerable due to advanced age or disability (R7, R1073-76).

not in law enforcement, the state must show that the sole, or dominant, motive for the murder was the elimination of the witness." Perry v. State, 522 So. 2d 817, 820 (Fla. 1988). However, this aggravator may be proven by circumstantial evidence.

The Supreme Court has upheld this aggravating factor in cases similar to this one where the victim is abducted from the scene of the initial crime and transported to a different location where she is killed. Gore v. State, 706 So. 2d 1328, 1334 (Fla. 1997); Preston v. State, 607 So. 2d 404, 408 (Fla. 1992); Swafford v. State, 533 So. 2d 270 (Fla. 1988); Cave v. State, 467 So. 2d 180, 188 (Fla. 1985); Martin v. State, 420 So. 2d 583 (Fla. 1982).

> There are a number of factors that indicate this was the Defendant's sole motive:
> (1) The Defendant in his confession to the police said he killed the victim because he was afraid that Virginia Brace could identify him, "because she saw his face."
> (2) Once he removed her from her home and placed her in the trunk of her car, she was no longer a threat to his escape.
> (3) The Defendant placed the victim in the trunk of her car and drove her around over six hours. Thus he had ample opportunity to release the victim or simply leave her in the trunk. See Alston v. State, 723 So. 2d 148, 160 (Fla. 1998).
> (4) The victim was abducted from her home and transported to an isolated area where she was killed.

Therefore, the only reasonable inference to be drawn from the facts of this case is the Defendant kidnapped Virginia Brace and took her to a remote area in order to eliminate the

sole witness to this crime.

This aggravating factor was proven beyond a reasonable doubt and is given great weight.
(Vol. 7, R1074)

(A) <u>The Jury Instruction:</u>

As to the jury instruction regarding the avoid arrest aggravator (Appellant's Brief, PP 58-59), appellee submits that this claim must be deemed procedurally barred for the failure to assert below that the instruction was constitutionally inadequate for the failure to give greater definition. The record reflects that the only objection below to an instruction on this aggravator related to its evidentiary sufficiency:

> "We think basically the evidence doesn't make that the primary motive, so we disagree with that aggravating factor being given." (R24, 2880)

The jurisprudence is well settled that <u>Espinosa</u> - type challenges to the constitutional validity of a jury instruction must be preserved by objection to the instruction and/or presentation of a correct alternative instruction.[5] See e.g. <u>Jackson v. State</u>, 648 So. 2d 85 (Fla. 1994); <u>Hodges v. State</u>, 619 So. 2d 272 (Fla. 1993).

(B) <u>The Court's Finding of the Avoid Arrest Aggravator</u>:

Appellant argues that this factor is inappropriate by selectively pointing to an admission to law enforcement that he was mad at the world and "just lost it". Such a summary is incomplete.

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[5] The current argument was not presented either in any of the defense proposed penalty phase instructions. (R6 869-880)

As the prosecutor summarized at the Spencer hearing on February 8, 2000 (R6, 958-957), the instant case is comparable to Willacy v. State, 696 So. 2d 693 (Fla. 1997) where during a burglary the homeowner was bound and gagged and then killed when in no position to offer further resistance. The only remaining threat was to identify the perpetrator and this Court upheld the avoid arrest aggravator. In this case Ms. Brace upon being attacked was no real threat to prevent appellant's leaving the scene. Nelson had accomplished his sexual battery - she could not prevent him from leaving - appellant did not take her wallet or money. The only reason to take her away from the scene of the crime would be to prevent her from reporting the incident which could lead to his return to prison.

This Court has held that the avoid arrest aggravator can be established by circumstantial evidence. For example in Hall v. State, 614 So. 2d 473, 477 (Fla. 1993) the Court cited a number of cases in support of the proposition:

> "Circumstantial evidence can be used to prove this aggravator, and we have uniformly upheld finding this aggravator when the victim is transported to another location and then killed."

See also, Knight v. State, 746 So. 2d 423 (Fla. 1998)(evidence supported conclusion that the defendant executed victims in remote location to avoid arrest after kidnapping and robbing them); Young v. State, 579 So. 2d 721 (Fla 1991)(avoid arrest factor approved

where defendant knew he would be arrested when police arrived, victim died trying to keep the defendant from fleeing); Jones v. State, 748 So. 2d 1012 (Fla. 1999)(aggravator proper where victim transported to another location and then killed and there was no other reason to kill the victim other than to eliminate a witness); Alston v. State, 723 So. 2d 148 (Fla. 1998).

While circumstantial evidence alone may suffice to demonstrate that the sole or dominant motive to kill was to avoid arrest, in the instant case we have more - the defendant's own admissions to law enforcement officers. According to Detective Robinson, Nelson explained that he killed the victim because he was scared she would call the police, that she would be able to identify him to the police (R22, 2604). See also, state Exhibit 72 - taped statement of appellant at R21, 2461 - 2497. When the victim started screaming a second time, appellant explained:

> "Okay. And you were saying you didn't want to leave because of what reason?
>
> (Inaudible) she would call the police.
>
> So you were worried about her calling the police if you left?
>
> Yes." (R21, 2469)
>
> * * * *
>
> "So you felt like she could identify you then? Huh?
>
> Yes.
>
> Was it dark in the room when you went in

there?

Yes.

Okay. Well, how do you feel she got a look at your face and could identify you?

(Inaudible)

That's when you took her out there though, right. So prior to that could she identify you?

Yes.

Any how is that if it was dark?

From the bathroom light (Inaudible)."
(R21, 2482)

Appellant again is selective in the use of the record, suggesting that perhaps appellant did not have an intent to kill but only to render her unconscious. An examination of the whole record must be considered. Nelson admitted to Robinson that he took the victim from the residence because he was scared of her calling the police and also that she kept looking at him (Vol. 22, R2599). The decision to kill was made not at the site where Brace's body was found as appellant hints but before that, certainly at the spot where the vehicle was stuck in the sand and he needed the assistance of Weir and Morgan to be extricated. Robinson testified Nelson stated that it was his intention at that time to kill her but he was stuck in the sand (Vol. 22, R2606). See also, Exhibit 72 taped statement at Vol. 21, R2484:

"Okay. Well, that's what I'm--that was prior to going to the orange grove?

That's when I was riding around.

Now, where was this at when you got stuck in the dirt?

Frostproof (Inaudible)

Were you going to kill here there?

Yes.

Huh?

Yes, but I got stuck.

But, you got stuck. Where was that in Frostproof, what area? Do you know?

(Inaudible)

Was it close to where the body was at tonight when we went there?

No.

It wasn't close to that?

(Inaudible)" (Vol. 21, R2484)
(emphasis supplied)

Appellant acknowledged that the person helping him with the car mentioned hearing a noise in the trunk. It was victim Ms. Brace banging on the trunk but he told the man it was a dog (Vol. 21, R2486). Afterwards, he drove to the orange grove where he killed her. Further confirmation of appellant's design can be found in the testimony of Steven Weir who pulled Brace's vehicle that appellant was driving out of the sand. When Weir heard the noise in the trunk and asked what it was, appellant responded that it was a dog, then went to the front of the car, turned on some

music and "cranked it up" (Vol. 19, R2095). Contrary to appellant's suggestion this was not a momentary accidental killing when appellant only intended to leave the victim alive but secluded.

Nor is appellant aided in the attempt to defeat the applicability of this aggravator by consideration of Dr. Dee's testimony (whom the trial court did not credit). Dr. Dee admitted that appellant did not talk to him about what was going on in his mind at the time he was going through these different actions, did not talk about what was going on in his mind when he got the fire extinguisher or tire iron from the car or choked her (Vol. 25, R3201-02). Appellant told Dr. Dee very little about killing Brace, he had done something but didn't know why (R3101). Appellant chose not to testify in the penalty phase (R3214). Counsel for appellant hypothesizes that Nelson may have responded to a command auditory hallucination to kill the victim but Dr. Dee did not so testify nor did appellant mention this either in his initial lies to the police or his final admissions. In fact, Dee stated that appellant did not mention hearing voices on the day of the killing (R3182).

Appellant asserts that the victim did not know appellant and it was unlikely she could identify him; appellant's thought and fears were to the contrary because the bathroom light was on (and appellant was there). He argues that his failure to dispose of the victim's car negates an intent to avoid arrest. It does not. He

probably was tired and fell asleep from his activity as he initially told officers. His entire conduct demonstrates the intent to avoid arrest - removal from the house so that her screams would not draw attention of police and neighbors, taking the victim to various secluded sites for eliminating her as a witness to the burglary and sexual battery of her and disposing of the body in an isolated orange grove screams for a finding of the avoid arrest aggravator.

Appellant's claim is meritless; the Court should approve the trial court's finding.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The standard of review of the trial court's finding of an aggravating circumstance as stated in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), is not to re-weigh the evidence to determine whether the state proved each aggravating circumstance beyond a reasonable doubt since that is the trial court's job but rather 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. See also Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997); Bonifay v. State, 680 So. 2d 413, 417 (Fla. 1996); Orme v. State, 677 So. 2d 258, 262 (Fla. 1996).

In its sentencing order, the trial court found the presence of the CCP aggravator:

> 5. The murder was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification.
>
> The Defendant removed the victim from her home in Highlands County and placed her in the trunk of her car. He had every intention of killing her when they left her house. He then drove her to a remote orange grove in Polk County. Sochor v. State, 619 So. 2d 285 (Fla. 1993). The Defendant got stuck in the soft sand in this orange grove and had to be pulled out by a grove worker. He told the police in his confession that had he not gotten stuck in

> the grove, he would have killed her at that location. The Defendant further demonstrated his heightened premeditation when he drove to another orange grove and parked on the clay road. He then drug or walked the victim 175 feet into the grove and killed her. Stano v. State, 460 So. 2d 890, 892 (Fla. 1984), Sochor v. State, 619 So. 2d 285 (Fla. 1993).
>
> Finally, the Defendant made two trips back to the car to obtain weapons to kill Virginia Brace. Willacy v. State, 696 So. 2d 693 (Fla. 1997).
>
> This aggravator was proven beyond a reasonable doubt and given great weight. (R7, R1074-1075)

A trial court's ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the Court applied the right rule of law and its ruling is supported by competent substantial evidence in the record. Ford v. State, _So. 2d_, 26 Fla. L. Weekly S602 (2001); Willacy v. State, 686 So. 2d 693 (Fla. 1997).

To establish that a murder is CCP, the state must show that the murder was (1) the product of a careful plan or prearranged design; (2) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit or rage; (3) the result of heightened premeditation; and (4) committed with no pretense of moral or legal justification. Rodriguez v. State, 753 So. 2d 29, 46 (Fla. 2000); Jackson v. State, 704 So. 2d 500, 504 (Fla. 1997).

(1) The Calculation Element

The record shows that over a period of six to ten hours the

defendant drove around and took the necessary steps to transport Virginia Brace to a remote location to kill her after taking her from her residence and confining her to the trunk of her vehicle. While appellant may not have made the decision to kill initially at the beginning of his series of crimes against Ms. Brace, the decision to do so called for considerable calculation as to how and where it should be done. *See* Knight v. State, 746 So. 2d 423, 426 (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); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991) (while the murder of Fleming may have began as a caprice, it clearly escalated into a highly planned, calculated and prearranged effort to commit the crime).

Indeed, according to Nelson's admission to authorities he intended to kill the victim at the site where the car became stuck in the sand. Obviously that plan had to be abandoned or substituted since he needed to have the assistance of Kenneth Dwayne Morgan and Steven Weir to help free the vehicle stuck in the sand before locating the more secluded, isolated spot where he did kill her. Morgan and Weir described Nelson as calm and acting nervous (Vol. 19, R2084, 2095). Appellant wouldn't look Weir in the eye and he did not smell of alcohol or appear to be impaired (R2102).

Appellant's reliance on Dr. Dee on this score is unavailing. Nelson did not talk to Dr. Dee about what was going on in his mind at the time he was going through these different actions (R26, 3202). He didn't talk about what he thought when he went back to the car to get the fire extinguisher and tire iron (R3202). Dr. Dee couldn't get the details appellant provided in the statement to police and Dr. Dee did not review that statement with him (R25, 3101).[6]

(2) <u>The Coldness Element</u> (product of cool and calm reflection and not prompted by emotional frenzy, panic or fit of rage)

Appellant admitted to law enforcement officers that he was going to kill the victim at the site where the car became stuck in the dirt (R22, 2606; R21 2484). Nelson's behavior at the site where he needed help to extricate the vehicle is instructive. When Weir heard Ms. Brace pounding from inside the trunk and asked what

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[6]Appellant's comparison of the instant case to <u>Douglas v. State</u>, 575 So. 2d 165 (Fla. 1991) is particularly inappropriate and odious. That case was a jury override with the attendant consequences of <u>Tedder v. State</u>, 322 So. 2d 908 (Fla. 1975) and CCP was rejected by this Court because of the "passion evidenced in this case, the relationship between the parties and the circumstances leading up to the murder". Id at 167. The case involved an emotional triangle between Douglas, the victim and the victim's wife. The victim's wife and Douglas were involved in a domestic relationship for about a year prior to her marriage to victim Atkins. Douglas forced the Atkinses to perform various sex acts at gunpoint, then hit the victim on the head with a rifle and shot him in the head. Quite unlike <u>Douglas</u>, appellant did <u>not</u> have a previous romantic relationship with victim Brace and he had several hours to contemplate where and how to kill her, abandoning his initial selected site because the car got stuck in the sand. Nelson had no prior relationship with victim Brace, although he initially lied to law enforcement officers claiming she was a friend who loaned him the car.

the noise was, appellant answered that it was a dog, then proceeded to turn the car radio up (R19, 2095). Then he immediately drove off when the car was freed. When at last he drove to the orange grove where the body would be discovered - stymied after the initial plan to kill her where the car got stuck - he dragged her 175 feet from the road and when his initial attempt at strangulation failed Nelson returned twice to the vehicle for the fire extinguisher to discharge into her mouth and the tire iron used finally to impale her. *See* Zack v. State, 753 So. 2d 9, 21 (Fla. 2000)(noting that the lengthy and drawn out nature of the crime clearly indicates the defendant carefully contemplated his actions prior to the fatal incident, citing Fennie v. State, 648 So. 23d 95, 99 (Fla. 1994); evidence of Zack's deliberate cruelty in using his attack upon victim Smith to obtain a knife establishes this aggravator beyond a reasonable doubt and justifies rejection of his "impulse" argument to the contrary); Suggs v. State, 644 So. 2d 64 (Fla. 1994) (CCP factor approved when victim taken to a secluded area and repeatedly stabbed); Jennings v. State, 718 So. 2d 144 (Fla 1998) (Court found all elements of CCP present; murders carried out with ruthless efficiency in conjunction with a robbery. Methodic succession of events supports conclusion they were not carried out in an emotional, frenzy, panic or fit of rage).

Appellant's argument to refute the state's argument on the cold element, *i.e.* it wasn't an act prompted by emotional frenzy,

panic or a fit of rage seems to be a total reliance on Dr. Dee who apparently accepted fully Nelson's self serving and non-specific comments. Dr. Dee did not examine the defendant closely on his thought processes at the time of the crime and appellant did not volunteer much about what happened after leaving the house. Dr. Dee's assertion of impulsivity simply does not square with the evidence of appellant's calmness throughout the ordeal, especially the incident with Weir in removing the car as Brace pounded from inside the trunk.

(3) The Heightened Premeditation Element

The heightened premeditation is shown here not only in the length of time that elapsed from the point appellant removed her from the safety of her home to the spot where she was killed (six to ten hours), but also in the ability of Nelson to alter his plan as he went along in order to kill her to avoid her reporting his crimes to police. *See* Farina v. State, 26 Fla. L. Weekly S529 (Fla. 2001) (heightened premeditation may be inferred from the circumstances of the killing, but requires proof of premeditation over and above what is required for unaggravated first degree murder citing Wall v. State, 641 So. 2d 381 at 388 (Fla. 1994); victims were rounded up and confined to a small area where they would be easier to control and victims did not offer resistance); Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998)(defendant had entire day to reflect on the plan to kill); Raleigh v. State, 705

So. 2d 1324 (Fla. 1997)(ample time to reflect, opportunity to abandon the plan but instead doubled back and went to trailer a second time - no doubt he had prearranged plan to go to trailer and kill him); Ford v. State, 26 Fla. L. Weekly S602 (Fla. 2001) (CCP approved where defendant injected himself into victims' fishing outing, led them to a secluded spot where they were unlikely to be disturbed or seen; victims were shot execution-style, neither victim was threatening defendant at the time they were shot and defendant assaulted the victims with three different weapons: gun, axe, and knife; and crime scene was devoid of evidence of a frenzied attack); Connor v. State, 26 Fla. L. Weekly S579 (Fla. 2001) (trial court CCP finding approved where victim taken from her home and hidden while defendant contemplated his decision to murder her; the type of murder chosen was noiseless, but not instantaneous. He coldly and calculatingly hid the child and when questioned by a detective, he was calm, cool and collected; his responses were thoughtful and enigmatic); Alston v. State, 723 So. 2d 148, 161-162 (Fla. 1998) (we have previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder, citing Jackson v. State 704 So. 2d 500, 505 (Fla. 1997)); Brown v. State, 721 So. 2d 274, 279 (Fla 1998)(heightened premeditation may be inferred from the circumstances of the killing; the pre-designed plan to

kill must be formed well before the commission of the murder itself; this is not a robbery gone awry. Defendant carried a weapon into the victim's apartment and waited until victim went to bed before further discussing the plan to kill the victim. Without provocation he searched through the victim's kitchen before attacking the victim as he lay in bed. Court found sufficient time for CCP).

Nor is there any impermissible doubling up by the trial court's finding of the presence of both the avoid arrest and CCP aggravating factors. In Banks v. State, 700 So. 2d 363, 367 (Fla. 1997), this Court explained:

> Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime. *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976). However, there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other, as in murder committed during a burglary or robbery and murder for pecuniary gain, or murder committed to avoid arrest and murder committed to hinder law enforcement. *Echols v. State*, 484 So. 2d 568, 575 (Fla. 1985); *see, e.g., Davis v. State*, 604 So. 2d 794, 798 (Fla. 1992) (improper doubling where murder was found to be both committed during the course of a burglary and for pecuniary gain where purpose of burglary was pecuniary gain). The two aggravators at issue here are not merely restatements of one another.

Accord, Robinson v. State, 707 So. 2d 688, 690 n. 2 (Fla. 1998).

As to CCP and avoid arrest this Court has recognized that there is no pro se prohibition against finding that both aggravators are present. In Morton v. State, 689 So. 2d 259, 265 (Fla. 1997), overruled in part on other grounds Rodriguez v. State, 753 So. 2d 29 (Fla. 2000), the Court reasoned:

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

Similarly, there is no improper doubling in the instant case. As in Stein and Morton the avoid arrest aggravator focuses on the motivation for the crime - here as he told police Nelson was afraid Brace could identify him because she saw his face. And as the lower court noted this finding has been approved where the victim is abducted from the scene of the initial crime and transported to a different location where she is killed. Gore v. State, 706 So.

2d 1328, 1334 (Fla. 1997); Preston v. State, 607 So. 2d 404, 408 (Fla. 1992); Cave v. State, 467 So. 2d 180, 188 (Fla. 1985); Martin v. State, 420 So. 2d 583 (Fla. 1982); see also Hall v. State, 614 So. 2d 473, 477-478 (Fla. 1993). The CCP factor in contrast, focuses on the manner in which the crime was executed - here the heightened premeditation and thinking about where and when to kill Mrs. Brace.

In Farina v. State, _So. 2d_, 26 Fla. L. Weekly S527, 529 (Fla. 2001), this Court upheld both the CCP and avoid arrest aggravators. The CCP factor was upheld where the evidence showed that the Taco Bell employees were rounded up and confined to a small area where they would be easier to control, there was a discussion showing an intent to carry out plan to kill and the victims offered no resistance. As to the avoid arrest aggravator, the Court citing Preston v. State, 607 So. 2d at 409 acknowledged that direct evidence of the offender's thought processes was not required and circumstantial evidence from which the motive for the murder may be inferred was sufficient. In the instant case, of course, we have Nelson's admission to the authorities that his motive was to kill Ms. Brace because he feared she could identify him.

The Court in Farina noted that it has looked to factors such as whether the victims knew and could identify the killer, whether the defendant used gloves, wore a mask or made incriminating

statements about witness elimination, whether the victims offered resistance and whether the victims were confined or were in a position to pose a threat to the defendant. As in Farina supra, and Jennings v. State, 718 So. 2d 144 (Fla. 1998), in this case Nelson stated his motive to police to eliminate her as a witness, the victim was in no position to offer resistance (she was even confined to the trunk of her car for several hours until appellant decided the best location to kill her to avoid detection).

Appellant's claim of improper doubling is meritless.[7]

[7] Even if the CCP aggravator were stricken, the presence of the other five aggravating factors overwhelmingly support the imposition of sentence of death; any error on the CCP finding is harmless.

ISSUE IV

WHETHER THE LOWER COURT ERRED BY ALLEGEDLY FAILING TO CONSIDER AND WEIGH MITIGATING CIRCUMSTANCES.

Appellant next argues that the lower court erroneously failed to consider and give appropriate weight to mitigating circumstances presented below. The lower court's sentencing findings explained that it was rejecting proffered statutory mitigating factors of age and the two mental health factors; the court also considered some 21 non-statutory factors, explained the weight given to each it found and the reasons for rejecting others. The trial court's order recites as to the statutory mental mitigators:

> "2. The Defendant was under extreme mental or emotional disturbance at the time of the offense.
>
> The defense argues that this was established by the uncontroverted testimony of Henry L. Dee, Ph.D., a clinical psychologist. He testified the Defendant suffered from depression, a component of which is anger. Dr. Dee further testified that Defendant's natural mother was an alcoholic and he had a sexual relationship with his sister. However, his testimony conflicts with family members and the Defendant's girlfriend who testified he was acting normal on the evening of the murder. Additionally, there is no indication in Defendant's school records to suggest any mental health problems. Prior to seeing Dr. Dee in the jail, the Defendant had no history of mental illness.
>
> He saw a mental health counselor two times after the incident with his sister. The history of this Defendant suggest that his depression (which was diagnosed after incarceration) may have begun after his arrest and incarceration.

The Court is not reasonably convinced that this mitigating circumstance exist, therefore it is not proven.

3. Capacity to appreciate the criminality of his acts and to conform to the requirements of law.

Again, the defense contends that this mitigator was proven by the uncontroverted testimony of Dr. Dee. Dr. Dee testified that the Defendant has organic brain damage that resulted in an impulsive disorder. Therefore, he cannot appreciate the criminality of his acts. Yet, the Defendant's actions on the night and morning of the murder indicate otherwise. He removed his victim from her house and drove her to an orange grove where he intended to kill her. However, he became stuck in the grove, which temporarily prevented the offense. Steve Weir, the heavy equipment operator who pulled him out of the grove, testified when he hooked a chain to the rear of the car, he heard a thumping sound coming from inside the trunk. He asked the Defendant what was in the trunk of the car and was told a dog. Weir said the Defendant then turned the radio up real loud. Finally, Weir said as soon as he unhooked the chain, the Defendant drove off in a hurry, without even saying thanks. He drove to a different orange grove and this time parked on a clay road. He then drug or walked the victim 175 feet into the grove and killed her. This indicates that his capacity to appreciate the criminality of his act was not substantially impaired. He knew that his conduct was criminal and he took logical steps to conceal his actions from others. Preston v. State, 607 So. 2d 404, 411 (Fla. 1992). Additionally, the Court questions the theory of Dr. Dee that the Defendant has organic brain damage. The doctor bases his theory on one subjective test. He testified that the Defendant's IQ was seventy-nine, which was borderline low to average. He also said his memory quotient was forty-eight and it should be closer to the IQ number. Therefore, Dr. Dee concluded brain

> damage which resulted in an impulse disorder.
>
> The Florida Supreme Court recently stated that "we have recognized that a trial judge may reject expert opinion testimony even if that testimony is unrefuted." Jackson v. State, 25 Fla. L. Weekly C53 (Fla. 2000). "The decision as to whether a particular mitigating circumstance is proven lies with the judge..." Sochor v. State, 619 So. 2d 285, 291 (Fla. 1993).
>
> It appears to the Court that organic brain damage is becoming a popular argument in capital cases. Additionally, Dr. Dee admits that he had no objective evidence or medical test such as CAT scan, a brain wave test, etc., that would show brain damage. Finally, there was no testimony concerning the history of the Defendant, other than Dr. Dee's speculation concerning his mother's alcoholism, to indicate brain damage. Further, I question whether this testimony meets the Freye [sic] standard.
>
> The Court is not reasonably convinced that his mitigating circumstance exist, therefore it is not proven." (R7, 1076-77)

In Walls v. State, 641 So. 2d 381, 390-391 (Fla. 1994), this Court explained:

> "In Florida as in many states, a distinction exists between factual evidence or testimony, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. E.g., Brannen v. State, 94 Fla. 656, 114 So. 429 (1927). This rule applies equally to the penalty phase of a capital trial. Hardwick, 521 So. 2d at 1076.
>
> Opinion testimony, on the other hand is not subject to the same rule. Brannen. Certain kinds of opinion testimony clearly are admissible - and especially qualified expert opinion testimony - but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at

> hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve. See Hardwick, 521 So. 2d at 1076. We cannot conclude that the evidence here was anything more than debatable. Accordingly, this Court may not revisit the judge and jury's determination on appeal."

In footnote 8 of Walls, the Court noted that reasonable persons could conclude that the facts of the murder were inconsistent with the presence of the two mental mitigators. The psychiatrist said he could not testify as to Walls' state of mind at the time of the murder, and on the whole the facts were consistent with the conclusion that any impairment Walls suffered was non-statutory in nature, and in any event, was of far slighter weight than the aggravating factors found to exist. Id. at 391. See also Wuornos v. State, 644, So. 2d 1000, 1010 (Fla. 1994)(even uncontroverted opinion testimony can be rejected and especially where it is hard to square with the evidence at hand); Farr v. State, 656 So. 2d 448, 450 (Fla. 1995); Johnson v. State, 660 So. 2d 648, 663 (Fla. 1995); Wuornos v. State, 676 So. 2d 972, 975 (Fla. 1996); Knight v. State, 721 So. 2d 287, 299 (Fla. 1998)(citing Gudinas v. State, 693 So. 2d 953, 957 affirming trial court's rejection of statutory mitigator where the expert's opinion was "too heavily based upon unsupported facts"); Knight v. State, 746 So. 2d 423, 436 (Fla. 1998).

Appellant argues that the lower court's rejection of the

extreme mental and emotional disturbance mitigator was erroneous. The trial court chose to credit the testimony of friends and family members that appellant was acting normal and there was nothing out of the ordinary (R19, 2128, 2131-32, 2141; R25, 3031). Even Dr. Dee admitted that the depression he observed when appellant was incarcerated would be normal for someone facing a first degree murder charge (R25, 3131-3132). The trial court was entitled to credit the testimony of relatives on appellant's normal, ordinary behavior. Walls, supra; Wuornos, supra. Moreover, while rejecting Dr. Dee's testimony in part, the trial court did consider, find and give weight to appellant's depression and attempted suicide in jail as non-statutory mitigating factors (R7, 1079, Paragraph 6; R7, 1080 Paragraph 13; R7, 1081, Paragraph 20):

> 6. Any mental illness of the Defendant may have been controlled by medication.
>
> The defense relies on Dr. Dee's evaluation and testimony. Dr. Dee was of the opinion the Defendant had brain damage. He did not suggest medication would cure or alter that condition. He testified that the Defendant had impulse disorder as a result of his brain damage. The Court has rejected this theory. However, even if his theory is correct, Dr. Dee did not suggest any medication which would correct this problem. Dr. Dee did say that the Defendant had been suffering from depression since he had been in jail and that he had attempted suicide. He was prescribed medication for his depression. Finally, he testified that the Defendant heard voices and was given medication for that condition.
>
> The Court is reasonably convinced this

> mitigating circumstance exist and it is given little weight. (R1079)(emphasis supplied)
>
> 13. The Defendant suffered from depression as a result of his conduct and attempted suicide in the jail.
>
> There was expert testimony that the Defendant suffers from depression since being incarcerated and is on medication. It is also true that the Defendant attempted suicide in the jail. However, there was no expert testimony suggesting that his depression and suicide attempt were related to his conduct as opposed to the fact that he is charged with murder and is incarcerated. This mitigating factor was proven and given little weight.
>
> 20. Defendant has never received treatment for his mental or emotional problems.
>
> The defense offers no argument concerning this mitigator. However, the record reveals Defendant has received treatment since being incarcerated. He is currently on anti-depressive medication. The court finds this mitigator was proven and the Court gives it little weight. (R1081)[8]

Thus, unlike other cases in which this Court remanded for further proceedings, here the trial court considered and found mitigating evidence albeit as non-statutory mitigation rather than as appellant would have desired under a statutory mitigating category.

Appellant also complains about the Court's reference to the

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[8] Obviously the trial court did consider and give weight to the testimony of Dr. Dee and Dr. Ashby to find the depression medication factor. Dr. Ashby testified before commencement of trial that he was treating Nelson for a mood disorder and providing Imipramine for depression (R15, 1443). Any contention that the court ignored or refused to consider expert testimony is erroneous.

paucity of school records. Dee acknowledged that while Nelson had been held back in earlier grades, he was not held back after third grade. In his last year, grade nine, he scored one A, two B's and two C's. He had no D's or F's and he neither flunked out nor was he kicked out of school (R25, 3163-64). Dr. Dee reviewed records of his birth and records from the public health department and nothing of consequence was noted. He found nothing in the medical records or the history he took from him indicating any type of head injury (R25, 3166-67). While Dr. Dee opined about Nelson's depression, records characterized him diagnostically as adjustment disorder with depressed mood (R25, 3137).

The lower court correctly declined to find extreme mental and emotional disturbance. Significantly, appellee notes that Dr. Dee opined that the cause of the severe emotional disturbance was his "abuse", i.e. that he felt he didn't belong anywhere. Dee described the neglect as a lack of supervision (R3189-90). Dee's impression of this was not confirmed by talking to anybody other than the Defendant (R3191). The only indication of neglect is what appellant told him (R3192). While appellant may have given such self-serving reports to Dee, that was contradicted by the testimony of defense witnesses Lelia Eiland who treated appellant as one of her own children (R2997-3002), John Eiland who testified there was a lot of supervision by the older brothers (R3033), Calvin Fogle who described the family as tight, you could go and talk to each

other about problems and no one was left stranded (R3076-82), and Judy Bolton who testified that she and appellant were given the same type of love as the other children (R3105). Since the basis for his opinion on extreme disturbance was belied by testimony of other witnesses, the lower court could reject it. Walls, supra. Wuornos, supra.

Moreover, even if the trial court had erred on this point, any such error would be harmless in light of the substantial overwhelming nature of the aggravating circumstances present. See Morton v. State, 789 So. 2d 324, 331 (Fla. 2001)(five aggravators present as to one victim, three aggravators present as to a second victim, including HAC and CCP - and judge weighed related mitigating evidence); Wuornos v. State, 644 So. 2d 1000, 1011 (Fla. 1994)(trial court's failure to find and weigh defendant's alcoholism, difficult childhood, and some degree of non-statutory impaired capacity and mental disturbances was harmless error given the aggravating circumstances in the record); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991)(trial court's failure to find and weigh defendant's abusive childhood, alcoholism and extensive history of hospitalization for mental disorders including schizophrenia constituted harmless error in light of the six aggravating factors found).

Appellant next complains that the lower court erred in finding the impaired capacity to appreciate the criminality and to conform

to the requirements of law mitigator. F.S. 921.141(b)(f). Dr. Dee admitted that appellant knew what he was doing was wrong - he wasn't suffering a delusion that he should kill to save mankind (R25, 3195). Dr. Dee did not appreciate as a significant fact that appellant removed this elderly, vulnerable victim to a very remote area away from where people would be (R25, 3196). Appellee submits that a reasonable jury and judge could attach great significance to that fact. Dr. Dee thought Nelson was impulsive because he suddenly entered the victim's residence, but could point to no activity in the subsequent hours showing impulsivity (R25, 3199). Dee opined that the ability to control himself would be diminished (R3201), yet the facts show that appellant did not act in a frenzied or impulsive manner on his decision to murder the victim; rather after several hours elapsed following the kidnapping and after leaving the originally intended murder site where Weir and Morgan aided in the car rescue, he killed Brace. Dr. Dee's testimony on this point was useless given that appellant did not tell him his mental processes throughout the episode (R3201-03). We know that Nelson was <u>not</u> completely forthright with Dr. Dee since he continued to deny the sexual assault despite the presence of contrary evidence (R3203). Appellant here does not challenge the sexual battery conviction.

Contrary to appellant's insinuation, the trial court did not improperly believe that the test of sanity was identical to the one

applied to this mitigator. The Court findings relied on this Court's decision in Preston v. State, 607 So. 2d 404, 411 (Fla. 1992), for the proposition that taking steps to avoid detection indicates that the capacity to appreciate the criminality of his conduct was not substantially impaired. See also Ponticelli v. State, 593 So. 2d 483, 490 (Fla. 1991)(testimony of ability to differentiate right from wrong is clearly relevant to a determination of defendant's sanity and also relevant in determining whether the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired).

Dr. Dee testified as to appellant's report of hearing voices that Nelson said they began after a childhood friend died when he was between seven and ten years old. Dr. Dee could not relate it to that particular event and Dee did not speak to any family members to confirm the incident; nor was he able to talk to anyone or find any records that would document that auditory hallucinations began at an early age (R25, 3178-81). He had no source of information about the voices other than from the defendant himself. Appellant did not tell him that he was hearing voices on the day he killed Brace, only seeing things (R25, 3182).

The trial court did question Dr. Dee's conclusion about brain damage. Dr. Dee stated on cross-examination that his initial IQ testing was very low (that was a few weeks after the suicide

attempt when Nelson was depressed), but testing some months later yielded the higher result consistent with what he'd scored with Dr. Kremper and the school system (R3161). He did not perform any CAT scan, MRI or medical type test - no radiographs, only neuropsychological tests (R3162). He was getting good grades in school in his last year (1 A, 2 B's, 2 C's)(R3164). Although Dr. Dee did mention appellant's mother's alcoholism, there was nothing in the birth records of any consequence and he was not suggesting any fetal alcohol syndrome (R3166). There was no indication of any head injury (R3167). Dr. Dee did not know when the brain damage occurred and suspected it was from birth; his conclusion was based on the differential between the mental quotient and IQ and performance on tests (R3187-88).

Appellant's criticism of the trial court's rejection of Dr. Dee's conclusion concerning organic brain damage is not well-placed. The trial court correctly noted that Dee's supposition was not supported or corroborated by such objective evidence or medical testing as a CAT scan, brain wave (electroencephalograms) or MRI. Dr. Dee indicated that no such supportive or testing had been done, and there was no indication in the records of any head injury and Dr. Dee was not suggesting fetal alcohol syndrome from the mother's alcoholism. Nelson should not be permitted to assert for the first time on appeal any new, additional factual material not presented to the judge and jury below - and not subjected either to cross-

examination or contrary rebuttal testimony - as he has attempted by attaching the appendix to his brief. That appendix should be stricken.[9] It is axiomatic that reviewing courts will not consider factual matters not presented to nor considered by the lower court in the record being reviewed. See generally Altchiler v. State, Dept. of Professional Regulation, Division of Professions, Board of Dentistry, 442 So. 2d 349 (Fla. 1 DCA 1983); Mann v. State Road Dept., 223 So. 2d 383 (Fla. 1 DCA 1969); Thornber v. City of Ft. Walton Beach, 534 So. 2d 754 (Fla. 1 DCA 1988); Rosenberg v. Rosenberg, 511 So. 2d 593 (Fla. 3 DCA 1987).

Obviously if appellant had some organic, structural defect in the brain, it is not unreasonable to believe that a CAT scan, MRI or EEG might reveal it. Similarly a PET scan might be available to show improper functioning of the brain. That appellant offered no such objective evidence of organic brain damage to corroborate Dee's view justified the lower court in rejecting the contention which remained unsupported by objective medical data.[10] c.f. Ferguson v. State, 789 So. 2d 306, 313 (Fla. 2001)(CAT scan, MRI and EEG provided some indications of organic brain damage); Davis v. State, 742 So. 2d 233, 237 (Fla. 1999)(rejecting request for PET

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[9] This Court recently struck similar improper attachments to a brief in its order of March 27, 2001 in Vining v. State, Fla. Case No. SC99-67.

[10] As appellee reads the lower court's findings, the lower court's dicta about the Frye standard related to Dr. Dee's speculation about the mother's alcoholism being indicative of brain damage.

scan as procedurally barred and noting that defendant had CT scan and electroencephalogram which indicated no abnormalities); Sexton v. State, 775 So 2d 923, 936-937 (Fla. 2000)(trial court found extreme mental or emotional disturbance after PET scan and MRI exam, which still did not obviate CCP aggravator); Sireci v. State, 587 So. 2d 450, 455 (Fla. 1991)(trial court could reject statutory mental mitigator because of conflicting evidence where state radiologist opined CAT scan and MRI indicated only mild brain injury).

Even assuming arguendo that the lower court erred in failing to find this mitigator, such error would be harmless error in light of the fact of the presence of substantial aggravators and the court's consideration (as indicated in his order) of all the mitigation that was presented. Morton v. State, 789 So. 2d 324, 331 (Fla. 2001); Wuornos v. State, 644 So. 2d 1000, 1011 (Fla. 1994); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991).

Age -

The lower court properly and without abusing its discretion declined to find appellant's age as mitigating - he was one week away from his twenty-second birthday, had dropped out of high school after completing the ninth grade, spent a year in the Job Corps in Kentucky, served time in prison and was living on his own (R7, 1076). While he did not own a car, he had a job with Elberta Crate and Box Company until he stopped going to work there (his

last day was November 7)(R18, 1942-1943). He could come and go as he pleased, sometimes staying with Lelia Eiland, sometimes with Judy Bolton and sometimes with Reagis Ishmael (R25, 3013-14, 3106-07). In light of his purposive conduct, the Court could properly decide not to accord Nelson's age as a mitigator. See e.g. Foster v. State, 778 So. 2d 906 (Fla. 2000)(age of 18 properly rejected as mitigator where defendant was leader of criminal group); Kearse v. State, 770 So. 2d 1119, 1133 (Fla. 2000)(this Court has held that the trial judge is in the best position to judge a non-minor defendant's emotional and maturity level, and this Court will not second-guess the judge's decision to accept age in mitigation but assign it only slight weight); Merck v. State, 664 So. 2d 939, 942 (Fla. 1995)(trial court may find or decline to find age as a mitigating factor in respect to a defendant who is 19); Gudinas v. State, 693 So. 2d 953 (Fla. 1997)(no error in rejecting age 20 as a mitigator where no evidence he was unable to take responsibility for his acts).

Non-Statutory Mitigation -

As to non-statutory mitigation factors the court explained its findings and analysis (R7, 1077-81). (1) As to impulsivity and impaired ability to exercise good judgment, the Court was not reasonably convinced it was proven as the evidence showed the defendant's conduct was deliberate and calculating (removal from the home, driving to an isolated area for several hours with the

victim in the trunk, and using multiple weapons in completing the intentional killing). (2) There was little in the record to indicate remorse, it was not proven, and appellant's depression could have been caused by other factors, such as arrest and incarceration. (3) As to the assertion Nelson did not plan to commit the offense in advance, the evidence showed defendant acted in a cold and calculated manner in removing the victim from her home, driving sixteen miles to an isolated area and brutally murdering her. (4) Appellant's appropriate courtroom conduct and behavior was found and given very little weight. (5) The Court found and gave very little weight to defendant's capability of forming loving relationships with family members and friends. (6) The Court found and gave little weight to the fact that appellant's illness may be controlled by medication. (7) The Court found and gave very little weight to the unlikelihood Nelson would be a danger to others while serving a life sentence in prison. (8) The Court found and gave moderate weight to his not resisting arrest, cooperation with police (after initially denying involvement in her disappearance) and showing the authorities where the body was located. (9) The Court found and gave moderate weight to the fact that appellant never knew his father and lost his mother at a young age. Nelson's aunt took him and his sister in and raised him "as if he were her son." (10) The Court was not reasonably convinced that appellant had a troubled and neglected childhood since several

relatives testified there was lots of love in the family, that he was not treated differently than other children in the family, and he returned to his extended family when released from prison. (11) The Court gave little weight to Nelson being a victim of inappropriate sexual conduct as a child and there was counseling for the incident. (12) The Court previously discussed and rejected, due to conflicting evidence, organic brain damage. (13) The Court found and gave little weight to appellant's depression and suicide attempt in jail since it was unclear that it was related to his conduct as opposed to the fact of the pending charges and incarceration (see e.g. R25, 3131 noting appellant's depression about what could happen to him, which would be normal in these circumstances). (14) The Court found and gave little weight to appellant's diminished educational experience. (15) The Court found and gave some weight to appellant's sexual assault while in prison although Dr. Dee's testimony on the subject was quite limited and the long term effect on the defendant uncertain. (16) The Court found and gave some weight to appellant's limited intelligence - IQ of 79 although it appears he was an average student in school. (17) The Court found and gave little weight to the fact of no prior violent felony convictions. (18) The Court found and gave some weight to the fact that the circumstances of the homicide are unlikely to recur in prison (same as paragraph 7, supra). (19) The Court did not find as proven that appellant has

accepted responsibility for his actions, aside from the previously considered cooperation with police. Appellant argues here that he did not testify or deny having committed the crime. Appellee notes that he also plead not guilty and went to trial and has denied to all that he committed a sexual battery on Virginia Brace. (20) The Court found and gave little weight to appellant's treatment for mental or emotional problems. (21) The Court found and gave little weight to appellant's willingness to plead guilty for life sentences, as the state's case was strong and involved multiple serious aggravators.

As previously noted, the determination of whether mitigation has been established and the weight given to each mitigating factor rests within the discretion of the trial court. See Robinson v. State, 761 So. 2d 269, 276 (Fla. 1999); San Martin v. State, 705 So. 2d 1337, 1348 (Fla. 1997); Chandler v. State, 702 So. 2d 186, 201 (Fla. 1997); Blackwood v. State, 777 So. 2d 399, 409 (Fla. 2000); Bowles v. State, __So. 2d__, 26 Fla. L. Weekly S659, 662 (Fla. 2001).

A trial court may reject a claim that a mitigating circumstances has been proven, provided the record contains competent, substantial evidence to support the rejection. Franqui v. State, __So. 2d__, 26 Fla. L. Weekly S695 (Fla. 2001); Mansfield v. State, 758 So. 2d 636, 646 (Fla. 2000); Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995).

The record reflects the trial court gave due consideration to the proposed twenty-one non-statutory mitigation factions suggested by appellant. Nelson's recitation here merely amounts to his disagreement with the trial court as to the appropriate weight that should be given to those found or unhappiness that the evidence did not adequately demonstrate a finding that they were mitigating under the facts of this case, or otherwise did not exist in light of conflicts in the evidence. See Ford v. State, __So. 2d__, 26 Fla. L. Weekly S602, 605 (Fla. 2001); Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000). This Court should decline appellant's invitation to engage in re-weighing; there is no abuse of discretion. Alston v. State, 723 So. 2d 148, 162 (Fla. 1998); Foster v. State, 679 So. 2d 747 (Fla. 1996); Bonifay v. State, 680 So. 2d 413, 416 (Fla. 1996).

ISSUE V

WHETHER THE SENTENCE OF DEATH IS DISPROPORTIONATE.

Appellee has previously discussed the trial court's findings with respect to the avoid arrest aggravator (ISSUE II) and the CCP aggravator (ISSUE III), supra. In addition, the trial court found four other aggravators for a total of six:

> 1. The Defendant was previously convicted of a felony and under a sentence of imprisonment and was on felony probation, or controlled release, at the time of the murder.
>
> On May 23, 1995 the Defendant was sentenced to a term of three and one half years in Florida state prison, to be followed by five years of probation. These sentences were for four (4) separate burglaries of a dwelling. The Defendant was released early from prison on October 24, 1997 and began serving his felony probation. The State introduced certified copies of the Judgments and Sentences, and his probation officer testified at trial. Just twenty-four (24) days after being released from prison the Defendant broke into the home of Virginia Brace after she had retired for the evening. He then raped her in her own bed, kidnapped her and drove her to an isolated area where she was killed. Thus, rather than utilizing his freedom to become a productive law-abiding citizen, the Defendant, instead, committed this senseless murder. The Defense stipulates that this aggravating factor was proven beyond all reasonable doubt.
>
> This aggravating factor has been proven beyond all reasonable doubt and is given great weight.
>
> 2. The crime for which the Defendant is to be sentenced was committed while the

Defendant was engaged in the commission of, or flight after, committing a sexual battery, burglary or kidnapping.

The evidence was overwhelming that the Defendant entered the occupied dwelling of Virginia Brace and committed sexual battery within her home. The Defendant removed Mrs. Brace from her home, placed her in the trunk of her car and held her captive for more than six hours before he killed her in an orange grove in an isolated part of Polk County. The Defendant's fingerprints were found inside the residence. His semen was recovered from the bed and from the victim. Her fingerprints were located inside the trunk lid and he was found by police in possession of her car. Finally, the Defendant gave a detailed confession. The defense stipulated that the state proved this aggravating factor beyond a reasonable doubt. See Bedford v. State, 589 So. 2d 245 (Fla. 1991); Sochor v. State, 619 So. 2d 285 (Fla. 1993); Schwab v. State, 636 So. 2d 3 (Fla. 1994).

This aggravating factor has been proven beyond all reasonable doubt and is given great weight.

* * * *

4. The murder was especially heinous, atrocious or cruel.

If the murder was a conscienceless or pitiless crime and unnecessarily torturous to the victim, then this factor is established. In this case, Virginia Brace, a 78-year-old widow, who lived alone, was raped, removed from her home, placed in the trunk of her car and driven around for more than six hours. One witness testified that there was a strong order [sic] of urine coming from the trunk of the vehicle. Mrs. Brace was removed from the car at a remote orange grove, 16 miles from her home. The autopsy photos revealed that she had ground-in dirt on her back and bruises on her ankles. This would lead one to believe

she was drug on her back 175 feet into the grove. Photos also revealed bruises to the face and the Defendant said he struck her several times in the face. According to the medical examiner she had two broken ribs on one side and one broken rib on the other. In his confession the Defendant said he then strangled his victim, but "she wouldn't pass out." The Defendant went back to the car and returned with a fire extinguisher. He forced the nozzle into her mouth and discharged it several times. We know that Mrs. Brace was still alive and suffering tremendous pain because, according to the medical examiner's testimony she had particles from the extinguisher in her lungs and bronchial tubes. Although the victim no doubt was having extreme difficulty breathing, she remained alive and conscious. The Defendant, once again, returned to the car and retrieved a tire iron. In her weakened and desperate condition, and according to his confession, Virginia Brace tried to fight off her attacker. However, she was unable to stop the Defendant from forcing the pointed end of the tire iron into her mouth where he shoved it with such force that it exited the back of her neck and into the ground. The Defendant said in his taped confession "she gave me one last look, like a gasp for air and I pushed it down her mouth."

Undoubtably, [sic] the victim suffered great fear and terror during the events leading up to her death. Henyard v. State, 689 So. 2d 239 (Fla. 1996). Fear and emotional strain may be considered as contributing to heinous, atrocious or cruel. Preston v. State, 607 So. 2d 404, 409 (Fla. 1992). Undoubtably, Ms. Brace was well aware of her impending demise. Farinas v. State, 569 So. 2d 425 (Fla. 1990).

Although we do not know exactly how long it took the Defendant to kill Virginia Brace, it is obvious that this was not an instantaneous or painless type of death. Geralds v. State, 674 So. 2d 96, 101 (Fla. 1996). The defense contends that there is no evidence of a planned torture or that the

Defendant enjoyed or took pleasure in the suffering of his victim. However, this aggravator only applies in torturous murders that evince extreme and outrageous depravity as exemplified either by a desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering. Thus, the intention of the killer to inflict pain on the victim is not necessarily an element of this aggravator. Guzman v. State, 721 So. 2d 1155, 1158 (Fla. 1998). Here the Court specifically finds that the Defendant's actions evidence an utter indifference to the suffering of the victim. Furthermore, "our case law establishes...that strangulation creates a prima facie case for this aggravator factor and the Defendant's mental condition figures into the equation solely as a mitigating factor that may, or may not outweigh the total case for aggravation," Orme v. State, 677 So. 2d 258, 262 (Fla. 1996).

In this case the Defendant went well beyond mere strangulation. It is impossible for this Court to contemplate another crime that would be more heinous, atrocious or cruel than the death of Virginia Brace.

This aggravating factor has been proven beyond a reasonable doubt and is given great weight.

* * * *

6. The victim was particularly vulnerable due to advanced age or disability.

The victim, Virginia Brace, was seventy-eight years old, was approximately 5'2" and weighed 121 pounds. Relatives testified she wore eye glasses and hearing aids in each ear. She was removed from her home without her glasses or her hearing aids. The victim was no match for the Defendant who was one week away from his twenty-second (22nd) birthday.

This aggravating factor was proven beyond a reasonable doubt. However, this Court is aware of the fact that no case law exists in Florida on this aggravator to provide

guidance.

> Therefore, the court gives this aggravating factor little weight.
>
> (R7, 1073-76)

Appellant does not challenge the correctness of these findings. The trial court gave great weight to all the aggravators except the last one, since the court could find no case law to provide guidance on victim vulnerability.

This Court recently stated in Robinson v. State, 761 So. 2d 269 (Fla. 1999):

> Upon review, we find that death is the appropriate penalty in this case. In reaching this conclusion, we are mindful that this Court must consider the particular circumstances of the instant case in comparison with other capital cases and then decide if death is the appropriate penalty. *See Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997)(citing *Terry v. State*, 688 So. 2d 954, 965 (Fla. 1996), *cert. denied*, 118 S.Ct. 1079 (1998)); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988). Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. *Terry*, 668 So. 2d at 965. Following these established principles, it appears the death sentence imposed here is not a disproportionate penalty compared to other cases.9 (footnote omitted) *See Spencer v. State*, 691 So. 2d 1062 (Fla. 1996); *Foster v. State*, 654 So. 2d 112 (Fla. 1995).
>
> (Id. at 277-278)

In performing its proportionality review function the Court must "consider the totality of the circumstances in a case and ... compare it with other capital cases." Nelson v. State, 748 So. 2d 237, 246 (Fla. 1999). Proportionality review requires a discrete

analysis of the facts entailing a qualitative review by the Court of the underlying basis for each aggravator and mitigator, rather than a quantitative analysis. Urbin v. State, 714 So. 2d 411 (Fla. 1998); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). It is not a comparison between the number of aggravating and mitigating circumstances. The Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if death penalty is appropriate.

Moreover, proportionality review function is "not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge." Holland v. State, 773 So. 2d 1065, 1078 (Fla. 2000); Bates v. State, 750 So. 2d 6 (Fla. 1999); Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000).

While it is true that proportionality review is not a quantitative analysis, it is also true that it is difficult to find a case with six valid aggravating factors that this Court has determined that the capital sentence imposed fails to satisfy the proportionality requirement, especially where the jury has overwhelmingly recommended a sentence of death. At the sentencing hearing on March 17, 2000, the trial court acknowledged that the weighing of aggravating against mitigating circumstances was not "a simple math equation" but rather a deliberate process in which the Court reviewed the nature and quality of each of the aggravators versus each of the mitigators. The Court concluded that the

aggravators far outweighed mitigators and indeed:

> "The heinous, atrocious or cruel aggravator, coupled with any other aggravator, outweighs the mitigators in this case... The defendant in this case acted with utter indifference to her [Virginia Brace] suffering. This was a consciousless, pitiless act that sets this crime a part from other capital cases."
>
> (Vol. 7, R1055)

In general, appellant's argument consists of a litany urging that this Court should give little weight to the aggravators found by the trial court and great weight to the mitigators that were found or which were rejected in the lower court's analysis. The state repeats that proportionality analysis is not an exercise in re-weighing the aggravating and mitigating factors, "that is the function of the trial judge". Bates v. State, 750 So. 2d 6, 12 (Fla. 1999); Robinson v. State, 761 So. 2d 269, 276-277 (Fla. 1999)(the fact that Robinson disagree with the trial court's conclusion does not warrant reversal); Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000)("nor does this Court conduct a re-weighing of the aggravating and mitigating circumstances. Absent demonstratable legal error, we accept those aggravating factors and mitigating factors found by the trial court as the basis for our proportionality review").

As noted, at sentencing the lower court commented on the great weight to be given the HAC factor. This Court in the past has acknowledged that the HAC aggravator belongs at the apex in the pyramid of capital aggravating jurisprudence. *See* Maxwell v.

State, 603 So. 2d 490, 493 (Fla. 1992)("...the present case involves only two aggravating factors. These do not include the more serious factors of heinous, atrocious or cruel, or cold, calculated premeditation")(emphasis supplied); *see also* Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999)("we also note that neither the heinous, atrocious or cruel nor the cold, calculated and premeditated aggravators are present in this case. These, of course, are two of the most serious aggravators set out in the statutory, sentencing scheme, and while their absence is not controlling, it is also not without some relevance to a proportionality analysis")(emphasis supplied); Card v. State, __So. 2d, 26 Fla. L. Weekly S670, 672 (Fla. 2001). Additionally, present was the felony probation aggravator - the instant crime occurred twenty-four days after Nelson's release from prison - which appellant stipulated to; the during commission of a felony aggravator involving burglary, sexual battery and kidnapping, the avoid arrest aggravator and vulnerable victim aggravator.

The lower court gave appropriate consideration to some two dozen statutory and non-statutory mitigators and explained the bases for accepting or rejecting them and describing the weight afforded (Vol. 7, R1076-81).

The instant case is similar factually and in the wealth of aggravation present to Hall v. State, 614 So. 2d 473 (Fla. 1993)(involved seven aggravators including HAC, CCP, avoid arrest

and during a kidnapping and sexual battery which greatly outweighed whatever abuse and mental mitigation suggested). See also, Chandler v. State, 534 So. 2d 701 (Fla. 1988)(finding death penalty proportionate where HAC and CCP present where an elderly couple suffered great fear and terror after being subdued and abducted from their home and beaten to death).

Other recent cases finding death proportionate include Evans v. State, __So. 2d__, 26 Fla. L. Weekly S675 (Fla. 2001)(five aggravators present including HAC and CCP, statutory mitigators included extreme mental and emotional disturbance and may have been unable to appreciate the criminality of his act or conform his conduct to the requirements of law and forty-two mon-statutory mitigators); Gary Bowles v. State, __So. 2d__, 26 Fla. L. Weekly S659 (Fla. 2001)(trial court found five aggravators including HAC and CCP and rejected two statutory mental mitigators but found some non-statutory mitigators); Overton v. State, __So. 2d__, 26 Fla. L. Weekly S592 (Fla. 2001)(strangulation death, five aggravators including HAC and CCP, no statutory mitigators but some non-statutory mitigation); Connor v. State, __So. 2d__, 26 Fla. L. Weekly S579 (Fla. 2001)(trial court found five aggravators including HAC and CCP, one of which was stricken [avoid arrest] and four non-statutory mitigators including mental illness as the time of crime); Farina v. State, __So. 2d__, 26 Fla. L. Weekly S527 (Fla. 2001)(five aggravators including HAC and CCP and three

statutory mitigators); Bryant v. State, __So. 2d__, 26 Fla. L. Weekly S218 (Fla. 2001)(three aggravators found and court rejected defense argument that he did not have intent to kill when he entered the store and that the shooting was impulsive), Card v. State, __So. 2d__, 26 Fla. L. Weekly S670 (Fla. 2001)(five aggravators including HAC, CCP, avoid arrest and during a kidnapping and seven non-statutory mitigators). Even the presence of mental mitigators does not render a death sentence disproportionate. See Sexton v. State, 775 So. 2d 923, 936-7 (Fla. 2000); Spencer v. State, 691 So. 2d 1062, 1065 (Fla. 1996); Heath v. State, 648 So. 2d 660, 666 (Fla. 1994); Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984); Booker v. State, 773 So. 2d 1079, 1092-93 (Fla. 2000); Robinson v. State, 761 So. 2d 269 (Fla. 1999).

Even if the Court were to hold that the trial court should have found a mental mitigator as suggested by Dr. Dee, that error would be harmless in light of the overwhelming aggravation. See Wickham v. State, 593 So. 2d 191, 194 (Fla. 1992)(finding harmless the failure to find as mitigation abusive childhood, alcoholism, extensive history of hospitalization for mental disorders including schizophrenia); Lawrence v. State, 691 So. 2d 1068, 1076 (Fla. 1997)(if trial court failed to consider history of substance abuse mitigator, the error would be harmless since it would not offset the three aggravators properly found); Morton v. State, 789 So. 2d 324, 26 Fla. L. Weekly S429 (Fla. 2001)(failure to find or mention

anti-social personality disorder was harmless in light of the substantial aggravation presented in the case); Wuornos v. State, 644 So. 2d 1000, 1011 (Fla. 1994)(holding trial court's failure to find and weigh defendant's alcoholism, difficult childhood and some degree of non-statutory impaired capacity and mental disturbance to be harmless error given the aggravating circumstances in the record); Singleton v. State, 783 So. 2d 970, 977 (Fla. 2001)(holding trial court's error in failing to address non-statutory mitigation was harmless because the mitigators would not out weigh the aggravators in the case).

Appellant does not cite any decision of this Court which found a similar crime with six valid aggravators present to be disproportionate. Instead, he argues that minimal weight should be given to them. Nelson argues that the avoid arrest aggravator was only applied to law enforcement officer-victims until 1978; if so, appellee submits that twenty-three years is sufficient time for society and criminal defendants to adjust to its present scope. Nelson mentions that all but one of the six aggravators arose from this incident—this is really an indictment of the legislature's choice of focusing on the circumstances of the capital homicide incident in 921.141 (5)(c)-(m). Obviously, appellate counsel would not be silent if HAC, CCP, avoid arrest or other such aggravators were to be applied to an incident other than the capital felony being prosecuted. He repeats his prior arguments that CCP and

avoid arrest should be stricken, claims that Nelson had already been punished for the burglaries that gave rise to the felony probation aggravator (appellee notes this murder occurred almost immediately {twenty-four days} after his release from prison), and urges that the sexual battery, kidnapping and burglary can be discounted since "not all felony murders require the death penalty" (appellee notes that not every finding of the (5)(d) aggravator includes the commission of all three separate felonies). Nelson amazingly asserts that this was an especially offensive murder, but that "Otherwise, there was little aggravation." (Brief, P.97). After noting the belief that the lower court erred in rejecting Dr. Dee's testimony concerning mental mitigation, he offers the explanation that the jury 9-3 death recommendation was perhaps racially motivated (a gratuitous insult to judge and jury below), that the jury heard favorable victim impact evidence about the good qualities of Virginia Brace, but "they heard only about the defendant's problems" (Brief, P. 100). It is not true, of course–the appellant offered testimony of some good qualities and indeed the law requires judge and jury to consider anything of a mitigating nature submitted by the defendant. Appellant criticizes the trial court's rejection of remorse. The lower court's order appropriately recites:

> "2. Defendant was remorseful for his conduct-
>
> The Court recognizes that genuine remorse is a mitigating factor. However,

> in the present case there is little in the record to indicate remorse. The Defendant did cooperate with the police and helped them locate the body. That is addressed in a separate mitigator. During his interview with the police, the Defendant showed little to no emotion. He was, however, reluctant to accompany the officer to the body and remained in the car. After his arrest, Dr. Dee diagnosed the Defendant with depression. However, the Court finds his depression could just as easily have been caused by his arrest and incarceration for first degree murder.
>
> The Court is not reasonably convinced that this mitigating circumstance exist, therefore it is not proven." (R7, 1078)
>
> * * *
>
> " 8. The Defendant did not resist arrest, cooperated with the police and showed the authorities where the body was located.
>
> Cooperation with law enforcement is a mitigating factor. Here the Defendant initially denied any involvement in the disappearance of Virginia Brace, but later confessed and took the police to her body.
>
> This mitigator has been shown and is given moderate weight." (R7, 1079)

Obviously the lower court gave the proper consideration to Nelson's alleged remorse. The instant case is not comparable for proportionality purposes to Larkins v. State, 739 So. 2d 90 (Fla. 1999) which had only two aggravators (and did not include HAC or CCP) and there was significant mitigation found by the trial court. Similarly, in Santos v. State, 629 So. 2d 838 (Fla. 1994) the state had conceded CCP was inapplicable leaving only one weak aggravator

of other felonies committed during the murder transaction. The state further conceded the presence of the two statutory mental mitigators (unlike the instant case where Dr. Dee's conclusions do not fit the known facts of the crime). The instant case is also unlike Snipes v. State, 733 So. 2d 1000 (Fla. 1999), a case involving only two aggravators and the mitigation included sexual abuse for years as a child, abuse of drugs and alcohol beginning at a young age, and the crime was arranged by older individuals and Snipes was easily led by older persons.

Finally, appellant's reliance on Tison v. Arizona, 481 U.S. 137 (1987) and Enmund v. Florida, 458 U.S. 782 (1981) is completely unavailing, as those cases are inapposite. Appellant and appellant alone committed these crimes and murdered Ms. Brace. He had no colleagues or accomplices whom he can assert had greater culpability than himself.

This Court should conclude that the virtually unchallengeable presence of these six strong aggravators mandates a finding that the death penalty is proportionate, despite what was proffered as mitigating by the defense.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence of the lower 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 by U.S. Regular Mail to James Marion Moorman, Public Defender, Tenth Judicial Circuit and A. Anne Owens, Assistant Public Defender, Public Defender's Office, P.O. Box 9000-Drawer PD, Bartow, FL 33831, this _____ day of November, 2001.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR APPELLEE