SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC01-172

J.B.PARKER,

Appellant,

- versus -

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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Preliminary Statement

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

Statement Of The Case and Facts

Parker was convicted of kidnaping, robbery with a firearm, and first-degree murder. In 1982, Parker and three other defendants, John Earl Bush, Alphonso Cave, and Terry Wayne Johnson, robbed a convenience store. Money was taken from the store and the female store clerk (the victim) was also taken from the store and placed in Bush's car. The victim was later found dead; she had been shot and stabbed. Death was caused by a gunshot wound to the back of the head. Bush's girlfriend testified that Parker had admitted to her that he shot the victim and that Bush had stabbed her. State v. Parker, 721 So.2d 1147 (Fla. 1998). Parker was sentenced to death for the first-degree murder conviction, following an eight-to-four jury recommendation. Id. This court affirmed the conviction and

sentence in Parker v. State, 476 So.2d 134 (Fla.1985).

Following the direct appeal, Parker filed 3.850 motions with the trial court, which were denied, and petitions for writs of habeas corpus with this Court. This court affirmed the trial court's denial of the 3.850 motions and denied the habeas petitions in Parker v. State, 542 So.2d 356 (Fla.1989), and Parker v. State, 550 So.2d 459 (Fla.1989). Parker filed a petition for writ of habeas corpus in federal district court, which was denied. On appeal, the Eleventh Circuit affirmed that denial of Parker's habeas petition in Parker v. Singletary, 974 F.2d 1562 (11th Cir. 1992).

Parker discovered that Michael Bryant had testified at Alphonso Cave’s 1993 re-sentencing that Cave was the shooter. Parker filed a 3.850 claiming a Brady violation. After an evidentiary hearing, the trial court granted a new penalty phase and this court affirmed the trial courts finding. Parker, 721 So. 2d at 1149. This appeal follows.

A new sentencing hearing was held in October 2000. On October 25, 2000, the jury recommended death by a vote of 11-1 (R. Vol. 6 p. 1161). On December 13, 2000, the trial court entered an order sentencing Parker to death. (R. Vol. 7 pp. 1328-1336).

In the instant case, Appellant filed a motion to suppress

the statement he made on May 7, 1982 (R. Vol. 3 p. 368-553). The state filed a motion to quash the motion to suppress (R. Vol.3 pp. 560-574). The record reflects that the state argued below that the motion to suppress was barred by the law of the case doctrine and lists ten places where the issue was ruled upon or could have been litigated(R. Vol. 17 p. 248). The state argued that Appellant was attempting to relitigate statements that were the subject of a motion to suppress filed at the original trial, 18 years ago (R. Vol. 17 p. 251). The state explained to the trial court, that all issues necessarily ruled upon by the Court as well as issues upon which an appeal could have been taken but was not, are barred from being litigated at the re-sentencing, under the doctrine of law of the case (R. Vol 17 p. 252). The state argued that while it is true that re-sentencing proceedings begin with a clean slate, that doctrine applies to issues that relate to sentencing proceedings, and is not a license to challenge every prior ruling on evidence made in the case (R. Vol. 17 p. 258). The state explained that when guilt phase admissibility issues have already been decided, or issues which could have been appealed but were not, then law of the case precludes litigation of the issue (R. Vol. 17 p. 259). In rebutting the state’s claim that law of the case precluded litigation of a motion to suppress the May 6th statement,

Appellant argues that the clean slate rule allows him to attempt to suppress his statement (R. Vol. 17 p. 266). Defense counsel conceded to the trial court that on direct appeal of the original proceedings, the admissibility of the May 7th statements was not raised (R. Vol. 17 p. 278). In this case, the trial court granted the state's motion to quash and found that since the conviction of guilt was not reversed, the "clean slate" rule does not require a re-litigation of the motion to suppress the May 7th statement (R. Vol. 5 p. 937). The state called Marilyn McDeavitt who testified that Francis was nervous about working on the night she was murdered (T. Vol. 25 p. 1524). McDeavitt identified Parker as a man who came into the store between 12 and 12:30.

Karen Pergolizzi, the manager of the Lil General Store in 1982, testified that when she went to the store when the police called her, she counted the money and determined that $134 was missing (T. Vol. 26 p. 1600).

In this case, Deputy Bargo testified that he initiated a stop of the four co-defendant's on the night of the murder because the rear tail light was flickering (T. Vol. 26 p. 1651-1653). Bargo testified that as he approached the car the driver exited the vehicle and gave him identification (T. Vol. 26 p. 1655). Bargo testified that Bush remained outside the vehicle

and he asked the other men for identification and none was given (T. Vol. 26 p. 1656). Bargo testified that the person in the front passenger seat identified himself as Mike Goodman, the person in the passenger rear gave the name Willie Jerome Brown and the person in the drivers rear said he was Alfonso King Brown (T. Vol. 26 p. 1657). Bargo testified that he was never able to identify anybody other than Bush as being in the vehicle (T. Vol. 26 p. 1663). Fifteen minutes after Bargo had completed the stop he was notified that the license plate was coming up as a car owned by Ellaruth Shaw Davidson (T. Vol 26 p. 1665). Bargo advised the dispatcher that he would make a second traffic stop (T. Vol. 26 p. 1665). Bargo effected a second stop and dispatch sent out backup (T. Vol. 26 p. 1667). The men were still sitting in the same positions (T. Vol. 26 p. 1667). Bargo then confirmed that the car was registered to John Earl Bush and told them they were free to leave (T. Vol. 26 p. 1669). Bargo testified that the car would not start and the person seated in the front passenger seat, Mike Goodman, got out of the car and helped Bush get the car started (T. Vol. 26 p. 1669, 1670).

On cross examination defense counsel attempted to impeach Deputy Bargo with a prior deposition (T. Vol. 26 p. 1674-1680). The record reflects that at the deposition, Bargo testified that Mike Goodman was sitting in the front passenger seat and that he

got out of the car to help Bush get the car started (T. Vol. 26 p. 1678, 1679). The state asked Bargo if he recalled the statement made at his deposition that Parker got out of the car and Bargo said he did not recall because he only knew the false names, he never knew any other names (T. Vol. 26 p. 1687). Deputy Bargo testified at this proceeding that the person who exited the car to help Bush was Michael Goodman (T. Vol. 26 p. 1687).

Georgeanne Williams testified on behalf of the state. Williams testified that at the time of the murder she was dating John Earl Bush (T. Vol. 27 p. 1753). Williams testified that after Bush was arrested she visited him in jail and that on one occasion she spoke with Parker about the crime (T. Vol. 27 p. 1759). Williams testified that Parker confessed to her that he shot Francis Slater (T. Vol. 27 p. 1759-1761).

Terry Wayne Johnson also testified on behalf of the state. Johnson testified that he was close with Parker while growing up because Johnson's sister had kids with Parker's brother (T. Vol. 28 p. 1903). Johnson testified that on the night Francis Slater was murdered, he was with Parker, Bush and Cave (T. Vol. 28 p. 1908). Johnson testified that they went to the Lil General Store twice on that night (T. Vol. 28 p. 1912). Johnson testified that when they went back to the store the second time,

Parker gave Cave the gun and when they came out of the store Cave held Francis at gun point and made her get in the car (T. Vol. 28 p. 1918). Johnson testified that they drove to western Martin county and Bush got out of the car first, then told Francis to get out (T. Vol. 28 p. 1924). Bush cut around the car and stabbed her. Cave had the gun at this time and Parker got out of the car, prior to shooting Francis, and told Cave to hand him the gun (T. Vol. 28 p. 1925). Johnson heard a shot but did not see who shot her (T. Vol. 28 p. 1925). Cave was in the car when Johnson heard the shot (T. Vol. 28 p. 1926). Johnson testified that they split the money they stole from the Lil General Store (T. Vol. 28 p. 1932). Johnson also testified that before Francis was shot Parker told Cave to hand him the gun (T. Vol. 28 p. 1925). Johnson said that after Francis was killed, Parker told Bush to throw the knife away and Bush threw it out the window (T. Vol. 28 p. 1928).

In this case, Parker called Audrey Rivers to testify. Parker attempted to introduce letters he wrote to Rivers to corroborate her testimony about his character. A review of the record reveals that when defense counsel attempted to introduce the letters the state objected arguing that the letters were self-serving and cumulative to Ms. Rivers testimony (T. Vol 31 p. 2354). The trial court sustained the states objection (T.

Vol. 31 p. 2355). Moreover, Rivers testified that Parker was likeable, good, and decent with a gentle spirit (T. Vol 31 pp. 2340-2347). She stated that Parker had worked very hard to educate himself, he was a "deeply spiritual person" who keeps her and her family in his prayers (R. Vol. 31 pp. 2350-2351). On cross-examination, when the state asked Rivers about the friendship she unequivocally stated that the personal correspondence between Parker and herself had no purpose from her standpoint, and that she was sure that on Parker's side it was simply sharing a friendship (R. Vol. 32 p. 2381).

Turning to the affidavits of friends and family that Parker attempted to introduce into evidence, the state would point out that Appellant has misconstrued the record. The trial court did not deny Appellant's motions to perpetuate testimony in it's order date July 18, 2000 (R. Vol. 5 p. 990). Rather a review of the trial courts order reveals that the court granted Appellant's motion to perpetuate the video testimony of Florence Dickerson and did not address Appellant's motions to perpetuate testimony via affidavits. Furthermore, during the penalty phase, defense counsel addressed the affidavits in question and stated that he had to make showings of unavailability (T. Vol. 29 p. 2032). The state agreed that the witnesses were unavailable (T. Vol. 29 p. 2034-2039, 2153). The state argued

that it was objecting to the admission of affidavits as hearsay because they had not had a fair opportunity to rebut the contents affidavits (T. Vol. 29 p. 2040, 2153).After hearing legal argument, the trial court specifically found the following:

> "At this time, when considering the cases that were handed up and the statute, and the particular, if you will, equities of the situation, the state's objection is sustained. I do feel that the provision of this statute which requires a fair opportunity to rebut is not met by the introduction of the affidavits."

(T. Vol. 30 p. 2176).

In this case, Parker called Richard Barlow to rebut the state's contention that it's reliance on Michael Bryant's testimony that Cave was the shooter at Cave's 1993 resentencing was a mistake.

During closing argument the prosecutor inadvertently misstated the testimony of Georgeanne Williams (T. Vol. 33 2688-2689). The prosecutor agreed that Georgeanne Williams did not testify that Bush told her that Parked Shot Francis Slater (T. Vol. 33 p. 2708). Moreover, the prosecutor told the court that if he did say that, then he inadvertently misspoke (T. Vol. 33 p. 2708). The trial court denied Appellant's motion for mistrial and allowed the state to correct any misstatements of

the facts (T. Vol. 33 p. 2708).

The record reflects that during the charge conference Appellant asked the trial court to instruct the jury that when circumstantial evidence is relied upon to determine that an aggravating circumstance applies, the evidence must not only be consistent with a finding that the aggravating circumstance applies, but must also be inconsistent with any reasonable hypothesis that negates an aggravating circumstance (T. Vol. 33 p. 2645). Defense counsel suggested to the court that the instruction be incorporated around the reasonable doubt instruction (T. Vol. 33 p. 2645). The state objected and the trial court sustained the objection and denied the instruction (T. Vol. 33 pp. 2645-2649). The trial court specifically found that the instruction would not add anything to the instructions required by law and might be confusing (T. Vol. 33 p. 2649).

Appellant was sentenced to death and this appeal follows.

Summary Of The Argument

Point I: The trial court properly quashed Appellant's motion to suppress and denied an evidentiary hearing. The admissibility if Parker's May 7, 1982 statement was never raised below and is barred under the doctrine of res judicata.

Point II: The trial court properly excluded letters Appellant wrote to Audrey Rivers as they were self-serving and the state did not have an opportunity to rebut the contents. The trial court properly excluded the affidavits Appellant sought to introduce as the state did not have a fair opportunity to rebut the contents. The trial court properly limited Richard Barlow's testimony as it was an attempt to bolster Michael Bryant's testimony with prior consistent statements.

Point III: The prosecutors misstatement during closing argument was harmless beyond a reasonable doubt.

Point IV: The trial court properly instructed the jury that Parker had been convicted of first degree murder.

Point V: There is competent substantial evidence in the record which supports the trial court's findings of the aggravating circumstances.

Point VI: The death penalty is proportional and the trial court properly considered the mitigating circumstances.

Point VII: The Felony Murder Aggravator is constitutional.

Point VIII: The trial court properly allowed the state to question Deputy Bargo about his deposition, as the testimony was not hearsay and was used to refresh Bargo's memory.

Point IX: Parker's sentence does not violate due process because the state did not rely on an inconsistent theory in this trial.

Point X: This court's order appointing Judge Geiger is proper.

Point XI: The death sentence does not violate Apprendi v. New Jersey, 530 U.S. 466 (2000).

Point XII: the delay between Parker's indictment and re-sentencing does not violate his Eight Amendment rights.

Point XIII: The trial court properly denied Parker's request for a special jury instruction.

Argument

POINT I

THE TRIAL COURT PROPERLY QUASHED PARKER'S MOTION TO SUPPRESS HIS MAY 7, 1982 STATEMENT (RESTATED).

Parker claims that the trial court improperly quashed his motion to suppress his May 7, 1982 statement. Appellant argues that quashing the motion and denying an evidentiary hearing led to the improper introduction of inadmissible evidence.

In this case, the trial court properly quashed Appellant's motion to suppress his May 7th statement and denied an evidentiary hearing. Appellant is barred from raising the admissibility of the May 7th statement under the doctrine of res judicata because while Appellant raised the issue at the original trial, the issue was never raised or addressed on direct appeal.

The standard of review is de novo. Under the de novo standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own determination of the legal issue. Under the de novo standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. The reason for de novo review of legal questions is obvious enough: appellate courts are in a better position than trial courts to resolve legal

questions because appellate courts are not encumbered by the "vital, but time-consuming, process of hearing evidence." Moreover, appellate courts see many legal issues repeatedly, giving them a greater familiarity with these issues. Additionally, appellate courts have the advantage of sitting in panels which allows the appellate judges to discuss issues with each other which the trial court must decide alone. Indeed, an appellate court's "principal mission" is to resolve questions of law and to refine, clarify, and develop legal doctrines. Elder v. Holloway, 984 F.2d 991 (9th Cir. 1993) (Kozinski, J., dissenting from the denial of a suggestion for rehearing en banc), adopted by Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994) (holding the issue is a question of law, not one of "legal facts," which is reviewed de novo on appeal).

Under the doctrine of res judicata, the first judgment is conclusive as to all matters which were or could have been determined. Gomez-Ortega v. Dorten, Inc., 670 So. 2d 1107 (Fla. 3d DCA 1996). The general principle behind the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable as well as every litigated issue. See Hesser v. Flick, 737 So.2d 610, 611 (Fla. 3d DCA 1999) citing Albrecht v. State, 444 So.2d

8, 11-12 (Fla.1984) (superseded by statute on other grounds as stated in Bowen v. Florida Dep't of Environmental Regulation, 448 So.2d 566 (Fla. 2d DCA 1984)). The doctrine of res judicata applies to the judgments or decrees of appellate courts. Hesser 737 So. 2d at 611. The doctrine of law of the case is closely allied to res judicata as it applies to questions that were actually considered and decided on a former appeal. Id.

In Farina v. State, 801 So. 2d 44, 50-51 (Fla. 2001), Farina attempted to suppress a recorded conversation between Farina and his brother in the back of a police car. Id. Farina filed a motion to suppress the recorded conversation claiming that the police had violated criminal procedure statutes and rules in obtaining the statement. Id. The state filed a motion to strike Farina's motion to suppress as the issues raised either were or could have been raised at the original trial. Id. After a hearing the trial court struck the motion to suppress as repetitive. Id. This court found the following:

> The alleged "new" grounds asserted in Anthony's resentencing motion to suppress, i.e., Jeffery was a juvenile who was transported with adults and the police departed from normal booking procedures, are in fact not new and could have been raised in the original motion to suppress. The other ground asserted, i.e., lack of authorization for the recording, was raised and rejected in the original trial motion. See Harvard v. State, 414 So.2d 1032, 1037

> (Fla.1982) (rejecting Appellant's attempt to seek review of issues in appeal after resentencing proceeding which could have been raised in first appeal). Thus, we find that the resentencing judge properly struck Anthony's motion to suppress.

Id. at 51.

Similarly, in the instant case, at the original trial in 1982 Appellant filed a motion to suppress all statements made to law enforcement. (R. Vol. 3 p. 560). At the original trial, the trial court found that the statements were free and voluntary. (R. Vol. 3 p. 560). On direct appeal Appellant only addressed the admissibility of the statement he made on May 5, 1982, and this court found the May 5th statement was properly admitted at trial. Parker v. State, 476 So. 2d 134 (Fla. 1985).

At the resentencing, Appellant filed a motion to suppress the statement he made on May 7, 1982 (R. Vol. 3 p. 368). The state filed a motion to quash the motion to suppress (R. Vol. 3 p. 560). At the hearing on the motion to quash, the state argued that Appellant's motion to suppress was barred by the law of the case doctrine. In the motion to quash and at the hearing, the state listed ten places where the issue was ruled upon or **could have been litigated** (emphasis added)(R. Vol. 17 p. 248). The state argued that Appellant was attempting to relitigate statements that were the subject of a motion to

suppress filed at the original trial, 18 years ago (R. Vol. 17 p. 251). The state explained to the trial court, that all issues necessarily ruled upon by the Court as well as issues upon which an appeal could have been taken but was not, are barred from being litigated at the re-sentencing, under the doctrine of law of the case (R. Vol 17 p. 252). The state argued that while it is true that re-sentencing proceedings begin with a clean slate, that doctrine applies to issues that relate to sentencing proceedings, and is not a license to challenge every prior ruling on evidence made in the case (R. Vol. 17 p. 258). The state explained that when guilt phase admissibility issues have already been decided, or issues which could have been appealed but were not, then law of the case precludes litigation of the issue (R. Vol. 17 p. 259). In rebutting the state's claim that law of the case precluded litigation of a motion to suppress the May 6th statement, Appellant argues that the clean slate rule allows him to attempt to suppress his statement (R. Vol. 17 p. 266). Defense counsel conceded to the trial court that on direct appeal of the original proceedings, the admissibility of the May 7th statements was not raised (R. Vol. 17 p. 278). In this case, the trial court granted the state's motion to quash and found that since the conviction of guilt was not reversed, the "clean

slate" rule does not require a re-litigation of the motion to suppress the May 7th statement (R. Vol. 5 p. 937).

Notably, in Parker v. Singletary, 974 F. 2d 1562 (11th Cir 1992), Parker argued that the May 7th statement was taken in violation of his 6th amendment right to counsel. The 11th circuit found that Parker failed to raise the issue in any form on direct appeal and was procedurally barred from raising the issue in federal court. Id. at 1582, F.N. 72.

Therefore, Appellant's motion to suppress the May 7th statement is barred by the doctrine of res judicata. In this case, the trial court properly found that the May 5th statement was admissible and this ruling was affirmed on appeal. See Parker v. State, 476 So. 2d 134 (Fla. 1985). Further, here as in Farina, while Parker argued at the original trial that the May 7th statement was inadmissible, he failed to raise the issue on direct appeal. Therefore, since the admissibility of the May 7th statement could have been raised on direct appeal, but was not, the issue is barred from being raised now. Hence, the trial court properly struck Appellant's motion to suppress because it was not a new issue and could have been raised on direct appeal. Farina, 801 So. 2d 44. The death sentence should be affirmed.

POINT II

THE TRIAL COURT DID NOT IMPROPERLY EXCLUDE EVIDENCE. (RESTATED)

Appellant claims that the trial court improperly excluded evidence that he sought to introduce in support of mitigation, namely, letters he wrote to Audrey Rivers, affidavits of relatives who were unavailable, and testimony from Richard Barlow. The trial court did not abuse it's discretion when it excluded the hearsay evidence as the state did not have a fair opportunity to rebut the content of the material and the letters were self-serving.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion"). When a defendant seeks to introduce his out-of-court exculpatory statement for the truth of the matter stated, it is inadmissible hearsay. Lott v. State, 695 So.2d 1239 (Fla.1997).

Under the abuse of discretion standard of review, the

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

Hearsay evidence may be admissible in a penalty-phase proceeding if there is an opportunity to rebut. Lawrence v. State, 691 So.2d 1068 (Fla.1997), Rodriguez v. State, 753 So. 2d 29 (Fla 2000). The rule that a defendant must have an opportunity to fairly rebut hearsay evidence for it to be admissible in the penalty phase of a capital murder prosecution applies to the state as well. Blackwood v. State, 777 So.2d 399 (Fla. 2000).

A. Testimony of Audrey Rivers

Appellant argues that the trial court improperly excluded the letters Appellant wrote to Audrey Rivers. Appellant claims that her testimony was presented to establish non-statutory mitigation of his character, namely, that he had developed a positive outlook and sought to educate himself while in prison. Appellant asserts that he did not want to introduce the letters to prove the truth of the matter asserted, but rather, to illustrate Rivers testimony and provide a factual basis for her conclusions. Furthermore, Appellant claims that these letters would rebut the state's contention that the friendship was contrived. Appellant claims that since the state had the opportunity to cross examine Audrey Rivers, it had a fair opportunity to rebut the contents of the letters.

Appellant's claims are meritless. His argument that the state had a fair opportunity to rebut the contents of the letters is wrong because the letters were written by Parker, not Rivers. In essence, the letters afforded Parker the opportunity to testify without being cross examined. Hence, it is clear that since Parker did not testify, the state did not have a fair opportunity to rebut the contents of the letters that he wrote to Rivers. Furthermore, the contents of the letters are inadmissible self-serving hearsay. In Griffin v. State, 639

So.2d 966(Fla. 1994), this court found that in the penalty phase of a capital trial, the judge acted within his discretion, by precluding Griffin from eliciting hearsay testimony from witnesses to the effect that Griffin had made self-serving statements that he was sorry for murdering the victim. This court further found that although remorse is a proper statutory mitigating circumstance, the defendant's right to introduce hearsay testimony at the sentencing phase is not unlimited.

Moreover, in Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997), Mendoza claimed that the trial court erroneously excluded an application for political asylum which defense counsel attempted to introduce through his mother, who testified during the penalty phase. Mendoza argued that the application should have been admitted to corroborate his mother's testimony about his childhood. Id. This court stated that while it has recognized that hearsay evidence may be admissible in a penalty-phase proceeding if there is an opportunity to rebut it, in Mendoza’s case the asylum application could not be admitted because there was no opportunity to rebut it. Id. This court reasoned that the preparer of the application was not identified and the record showed that the document was merely a self-serving statement filed in the public records. Id. This court further found that even if the document had been admitted,

it would have been cumulative to the testimony of Appellant's mother concerning his childhood. Id.

A review of the record in this case reveals that defense counsel attempted to introduce the letters during direct examination of Rivers. The state objected arguing that the letters were self-serving and cumulative to Ms. Rivers testimony (T. Vol 31 p. 2354). The trial court sustained the states objection (T. Vol. 31 p. 2355). Rivers testified that Parker was likeable, good, and decent with a gentle spirit (T. Vol 31 pp. 2340-2347). She stated that Parker had worked very hard to educate himself, and that he was a "deeply spiritual person" who kept her and her family in his prayers (R. Vol 31 pp. 2350-2351). On cross-examination, when the state asked Rivers about the friendship, she stated that the relationship was not contrived (R. Vol. 32 p. 2381).

Hence, here, as in Griffin and Mendoza, the letters constitute self-serving statements which were designed to evoke sympathy from the jury and were cumulative to Rivers testimony. Moreover, Rivers testified that the friendship was not contrived. In this case, the trial court did not abuse its discretion when it found the letters to be inadmissible hearsay.

Alternatively, any error in failing to admit the letters was harmless. The focus of a harmless error analysis "is on the

effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.

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

Id.

Appellant argues that the letters were being introduced to show that he had developed a positive outlook and sought to educate himself while in prison. However, Rivers specifically testified that Parker had worked hard to educate himself and that he was a deeply spiritual person (T. Vol. 31 pp. 2350-2351). Hence, since the letters were merely cumulative to Rivers testimony, it is apparent that any error is harmless beyond a reasonable doubt. The death sentence should be affirmed.

B. Introduction of Affidavits to Perpetuate Testimony

Appellant claims that the trial court denied him the ability

to perpetuate testimony and present evidence of mitigation. Appellant takes issue with the fact that the trial court did not allow him to introduce as evidence the affidavits of Elmira Parker, Douglas Smith, Katie Lee Parker, Rosie Lee Parker, Gloria Marshall, and Martha Rahming. Appellant claims that the state did not argue that it did not have a fair opportunity to rebut the evidence. Appellant also claims that the trial court failed to address whether the state had a fair opportunity to rebut the statements and if it had done so, then the affidavits would have been admissible.

Primarily, the state would point out that Appellant has misrepresented the record. Appellant claims that he filed a motion to perpetuate testimony. However, a review of the record indicates that while he filed numerous motions to perpetuate testimony, only one involved a person , Rosie Lee Parker, whose affidavit he sought to introduce (R. Vol. 5 p. 961-962). Furthermore, the trial court did not deny Appellant's motions to perpetuate testimony in its order dated July 18, 2000, rather it granted appellant's motion to perpetuate the testimony of Florence Dickerson. (R. Vol. 5 p. 990). The record reflects that the state stipulated to perpetuate a deposition of Rosie Lee Parker (T. Vol. 29 p. 2035). There is no evidence in the record that Parker ever attempted to perpetuate Rosie Lee Parker's

testimony by deposition. Parker is now complaining that the trial court improperly denied his request to present her testimony by an affidavit which he is attempting to use as perpetuated testimony. However, under the rule an affidavit is not perpetuated testimony. Fla. R. Crim. P. 3.190(j). There is nothing in this record to support Parker's claim that the trial court denied his motions to perpetuate testimony, hence this argument is barred as the issues were not raised below.

Parker's claim that the trial court erroneously denied his request to present mitigation evidence through affidavits of persons who were unavailable is meritless. Appellant claims that the state did not argue that it did not have a fair opportunity to rebut the affidavits, and argues that the trial court did not address whether the state had a fair opportunity to rebut the affidavits. In Donaldson v. State, 722 So.2d 177, 186 (Fla. 1998), Donaldson contended that the trial court erred during the sentencing hearing by admitting the deposition transcript of co-felon Ruben Cisneros, who did not testify at the guilt or penalty phase of the trial and who, during the deposition, admitted to lying about the events in this case. This court found that depositions taken for pre-trial discovery purposes are inadmissible in criminal proceedings as substantive evidence. Id., See Also State v. Green, 667 So.2d 756, 760-761

(Fla.1995).

In the instant case, the record reflects that during the penalty phase, defense counsel attempted to introduce the affidavits of Elmira Parker, Douglas Smith, Katie Lee Parker, Rosie Lee Parker, Gloria Marshall and Martha Rahming. Defense counsel addressed the affidavits in question and stated that he had to make showings of unavailability (T. Vol. 29 p. 2032). The State agreed that Elmira Parker, Douglas Smith, Katie Lee Parker, Rosie Lee Parker, Martha Rahming, Gloria Marshall, Curtis Lee were unavailable (T. Vol. 29 p. 2034-2039, 2153). The state argued that the affidavits were hearsay and that it did not have a fair opportunity to rebut the testimony or cross examine the witnesses (T. Vol. 29 p. 2040, 2153). The state informed the court that the affidavits in question were prepared in relation to post-conviction proceedings and the state had no opportunity to rebut the contents of the affidavits (T. Vol. 29 p. 2159). Below, appellant never rebutted the state's contention that it did not have a fair opportunity to rebut the contents of the affidavits, he simply argued that they were probative to his case in mitigation and claimed that the prejudice does not outweigh the probative value. After hearing legal argument, the trial court specifically found the following:

> "At this time, when considering the cases that were handed up and the statute, and the particular, if you will, equities of the situation, the state's objection is sustained. I do feel that the provision of this statute which requires a fair opportunity to rebut is not met by the introduction of the affidavits."

(T. Vol. 30 p. 2176).

Hence, it is apparent from the record that the trial court did consider whether the state had a fair opportunity to rebut and properly found that the affidavits were inadmissible.

Appellant's claim that the state had a fair opportunity to rebut the affidavits is not supported by the record in this case. The state was not afforded the opportunity to cross-examine these witnesses. At Appellant's original sentencing, Elmira Parker and Douglas Smith both testified, however, appellant has not sought to introduce that testimony, rather he seeks to admit affidavits to which the state had no opportunity to cross examine the witnesses regarding the contents. The other affidavits are witnesses who never testified at any proceeding or deposition and the state was not afforded the opportunity to rebut the contents of those affidavits. Hence, it is apparent from this record that the state did not have an opportunity to rebut the contents of the affidavits.

Furthermore, Appellant has made a conclusory claim that

mitigation was not presented without these affidavits, yet he fails to detail what mitigation was not presented. Duest v. Dugger, 555 So.2d 849, 852 (Fla.1990) (merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived).

Hence, it is clear that there has been no abuse of discretion and the death sentence should be affirmed.

C. Testimony of Richard Barlow

Appellant first claims that the trial court improperly limited Barlow's testimony, excluding evidence that would have established the basis for his conclusions and countered the state's claim that reliance on Michael Bryant's testimony at Cave's 1993 re-sentencing was a mistake. Appellant claims that statements made by Michael Bryant to Richard Barlow were not hearsay because they were not being presented for the truth of the matter asserted but rather to show that the statements made to Barlow were consistent with prior statements that Bryant had made.

First, any claim that the substance of what Michael Bryant told Barlow would establish the basis for Barlow's conclusions regarding the 1993 re-sentencing of Cave was not raised below and is not preserved. In order to be preserved for appellate

review, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of the presentation if it is to be considered preserved. See Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of the presentation if it is to be considered preserved."); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)([I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception or motion below."); §924.051 Fla. Stat.(Supp. 1996)("An appeal may not be taken from a judgment or order unless a prejudicial error is alleged and is properly preserved..."). The State contends that this court cannot address the merits of Appellant's argument because the issue is not properly before this court.

Second, appellant's claim that Bryant's testimony was not hearsay is meritless. It is clear that appellant was attempting to bolster the credibility of Michael Bryant by introducing prior consistent statements. The trial court has wide discretion concerning the admissibility of evidence, and a ruling on admissibility will not be disturbed unless there has been an abuse of

discretion. Jent v. State, 408 So. 2d 1024, 1029 (Fla. 1981); Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The abuse of discretion standard is one of the most difficult for an Appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

Furthermore, it is well established that prior consistent statements are generally not admissible to bolster a witness's testimony at trial. See Bradley v. State, 787 So.2d 732 (Fla. 2001); Chandler v. State, 702 So.2d 186, 197 (Fla.1997). In order to be admissible, prior consistent statements, like any

other hearsay statements, must qualify under a hearsay exception. Id.

In this case, the record reflects that Barlow was called as a witness by Parker. Barlow testified that to prove that Cave was the triggerman at Cave's 1993 resentencing, he relied on Michael Bryant's testimony (T. Vol. 29 p. 2048). Barlow stated that he had found a report written by Art Jackson that showed that Michael Bryant had told Jackson that he overheard a conversation between Cave and Bush where Cave admitted being the shooter (T. Vol. 29 p. 2051). Barlow testified that he had no reason to believe that Bryant was not credible (T. Vol. 29 pp. 2054-2055). Whereupon the following testimony occurred:

> Mr. Lamos: what did Bryant tell you he had heard.
>
> Mr. Barlow: Bryant told me-
>
> Mr. Mirman: Judge I'm going to object to the hearsay at this time. We're going to read Mr. Bryant's testimony. I believe that will cover this issue. And I ask if we read Mr. Bryant's testimony I be able to cross examine this witness first before we go into that to avoid confusion on that issue.
>
> The Court: Well, at this time the objection is sustained. We can take this further out of the presence of the jury.
>
> Mr. Lamos: May I just-it won't take but a second if we can do it sidebar and your honor might consider otherwise. Your Honor, we are-for Your Honor to understand-I assume

the prosecutor's objection is that this is hearsay?

Mr. Mirman; Yes.

Mr. Lamos: This is not being offered to prove the truth of the matter asserted, **this is being offered to prove that the statements made at trial and the statements made to Mr. Barlow are consistent**. It is not being offered to prove the truth of the matter asserted but that they are statements and identical forms so that he could assess the credibility of Bryant. So we're not offering to prove the truth of what they assert. **We're offering to show that they are consistent with other statements that were admitted by Bryant**.

The Court: Is the State going to concede the objection?

Mr. Colton: No.

Mr. Mirman: No.

The Court: I'm going to stand on the earlier ruling. And this is based upon-primarily based upon reading the statute as far as opportunity to rebut and also because the actual statement itself, the trial testimony is going to be placed before the Jury.

Mr. Lamos: Okay. Just so we don't have to come back up here, at this point in time I would proffer into the record that Mr. Barlow would testify that Bryant told him that Cave was the actual Shooter and that **it is being offered to prove it was consistent with what Bryant also told Art Jackson. That is the basis for our objection.**

The Court: Thank you. Same Ruling.

(emphasis added)(T. Vol. 29 pp. 2055-2058).

In this case, Appellant was attempting to bolster Bryant's testimony with prior consistent statements. Hence, it is clear from the record that the trial court did not abuse its discretion when it sustained the state's hearsay objection as the record reflects that Appellant was merely trying to introduce prior consistent statements, to which no hearsay exception applied.

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

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

Id.

In this case, any testimony by Barlow regarding what Bryant told him was cumulative to Bryant's testimony, which was read to the jury. Specifically, Bryant testified that he heard Bush and

Cave talking about the murder and he heard Bush say that Cave shot Francis in the back of the head (T. Vol. 29 p. 2133). Bryant also testified that the morning after he overheard the conversation Cave told him not to tell anybody and then beat him up (T. Vol. 30 p. 2134). Moreover, Barlow testified that he relied on Bryant's statements and he believed that Bryant was credible (T. Vol. 29 pp. 2054-2055). Hence, at best, the testimony is cumulative to Michael Bryant's testimony. There is no reasonable possibility that the error affected the verdict.

Thirdly, Appellant's claim that the trial court should have allowed Barlow to testify about his consideration of the Bryant testimony in conjunction with the medical examiner evidence is meritless. At trial, Appellant sought to introduce the actual thought processes of Barlow to rebut the state's contention that the use of the Bryant testimony at Cave's 1993 re-sentencing was a mistake. However, the trial court found that while it was proper for Appellant to argue that the state had previously taken inconsistent positions with respect to co-defendants, Appellant could not introduce evidence of the professional thought process of Barlow(T. Vol. 29 p. 2074). Again, Appellant was attempting to bolster Bryant's credibility by asking Barlow if he had considered the medical examiner's testimony in assessing Bryant's testimony. The trial court had

previously ruled that Bryant's credibility was not an issue.

Hence, the trial court did not abuse its discretion in excluding testimony intended to bolster the credibility of Bryant. The death sentence should be affirmed.

POINT III

THE PROSECUTORS MISTAKEN INTRODUCTION OF BUSH'S INADMISSIBLE STATEMENT WAS HARMLESS BEYOND A REASONABLE DOUBT. (RESTATED)

Parker claims that his Sixth Amendment right to confront the witnesses against him was violated when the prosecutor improperly argued that Bush had told Georgeanne Williams that he stabbed the victim and Parker shot her. Parker also argues that the curative instruction was inadequate to remedy the Sixth Amendment violation.

Contrary to Parker's claim, his right to confrontation was not violated. In this case, the state did not present any evidence of statements that Bush made implicating Parker as the shooter. Moreover, any error was harmless because the prosecutor corrected his misstatement. However, should this court find that the prosecutor's misstatement violated Parker's right to confrontation, any error was harmless beyond a reasonable doubt.

In this case, Parker asked for a mistrial below. A trial court's ruling on a motion for mistrial is subject to an abuse

of discretion standard of review. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997) (noting that a ruling on a motion for mistrial is within the trial court's discretion); United States v. Puentes, 50 F.3d 1567, 1577 (11th Cir. 1995) (stating that a district court's ruling on a motion for a mistrial is reviewed for abuse of discretion); United States. v. Honer, 225 F.3d 549, 555 (5th Cir. 2000) (reviewing the denial of a motion for mistrial for abuse of discretion).

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

unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

In this case, the record reveals that the prosecutor, during closing argument, inadvertently misstated the testimony of Georgeanne Williams (T. Vol. 33 2688-2689). The prosecutor agreed that Georgeanne Williams did not testify that Bush told her that Parker shot Francis Slater (T. Vol. 33 p. 2708). Moreover, the prosecutor told the court that if he did say that, then he inadvertently misspoke (T. Vol. 33 p. 2708). The trial court denied Appellant's motion for mistrial and allowed the state to correct any misstatements of the facts. The prosecutor stated the following:

> Ladies and Gentlemen, what Counsel just brought to the attention of the Judge is that at some time during my argument, that apparently he picked up that **I said that Georgeanne Williams testified that John Earl Bush told her that Parker did the shooting. That's not evidence in this case. That's not evidence at all.** I don't recall saying that, but I don't doubt it if that's what he said that I did. **That is not evidence and it's not something you should consider because that wasn't said. Our contention is that it was Parker who admitted to Georgeanne Williams that he did the shooting**. She did talk to Bush and then she

> went to Parker because she wanted to know from Parker what had happened and Parker told her that he shot Frannie Slater, John Earl Bush stabbed her. **If I said anything other than that I didn't intend to and certainly wouldn't want you to consider what's not evidence in this case.** So let's move on.

(Emphasis added)(T. Vol. 34 pp. 2714-2714).

Hence, it is clear from the record that the prosecutor did not intend to mislead the jury. In the instant case, the record reflects that Georgeanne Williams did not testify about the content of her conversations with Bush. There was no evidence before the jury that Bush stated that Parker was the shooter. This issue centers on a misstatement by the prosecutor during closing arguments, it is not a case where the state sought to introduce Bush's statements to Williams. Therefore, Parkers Sixth Amendment right to confrontation was not violated because the state never presented any evidence that Bush had made statements implicating Parker. Moreover, any error is harmless beyond a reasonable doubt because the error was cured when the prosecutor told the jury that Bush's statements were not evidence and the jury was told not to consider it as such.

Furthermore, Appellant cites to <u>Bruton v. United States</u>, 391 U.S. 123 (1968), arguing that cautionary instructions cannot be relied upon to cure a deprivation of the right to confrontation

(I.B. 57). However, a mere finding of a violation of the Bruton rule against admission of co-defendant's confession in the course of a trial does not automatically require reversal of ensuing criminal conviction. Schneble v. Florida, 405 U.S. 427 (1972). Reversal will not be required where properly admitted evidence of guilt is so overwhelming and the prejudicial effects of the co-defendant's admission is so insignificant by comparison that it is clear beyond a reasonable doubt that improper use of the co-defendant's admission was harmless error. Id. In determining whether improper admission of a co-defendant's confession was prejudicial error a determination must be made of the probable impact of the confession on the minds of an average jury. Id. at 1060. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.

Should this court find that Parker's right to confrontation was violated, any error with respect to the prosecutor's misstatement regarding the facts was harmless beyond a reasonable doubt. The record reflects that Georgeanne Williams testified that Parker told her that he shot Francis Slater. Williams testified that on May 8, 1982 she went to visit Bush in

the county jail (T. Vol. 27 p. 1759). Williams testified that she spoke with Parker that day also (T. Vol. 27 p. 1760). Williams asked Parker what happened and he asked her if Bush had told her (T. Vol. 27 p. 1760). Williams told Parker that Bush did not tell her and again asked Parker what happened(T. Vol. 27 p. 1760). Williams testified that Parker told her that Bush Stabbed Francis and he (Parker) shot her (T. Vol. 27 p. 1760). Williams stated that Parker told her that if she told anybody it would be her word against his (T. Vol. 27 p. 1761). Parker also told Williams that it would all be blamed on Bush because he had a record (T. Vol. 27 p. 1761). Georgeanne Williams never testified about what Bush told her. Rather, Williams specifically testified that Parker confessed to her that he shot Francis Slater. Moreover, any statement that Bush may have made was cumulative to Williams' testimony that Parker was the shooter. It is clear, based on the overwhelming evidence presented, that there is no reasonable probability that the prosecutors misstatement affected the jury's verdict. Hence, any error is harmless beyond a reasonable doubt. The death sentence should be affirmed.

POINT IV

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT PARKER HAD BEEN CONVICTED OF THE FIRST DEGREE MURDER OF FRANCIS JULIA SLATER.

(RESTATED)

Appellant claims that the trial court's isolated comment to the venire that Appellant had been convicted of the unlawful and premeditated death of a human being, entitled him to a mistrial. In this case, it is not clear from the record that this claim is preserved. Furthermore, after a complete review of the record in it's proper context, it is apparent that the trial court properly instructed the jury that Appellant was convicted of first degree murder without specifying that it was under a theory of premeditated or felony murder.

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997) (noting that a ruling on a motion for mistrial is within the trial court's discretion); United States v. Puentes, 50 F.3d 1567, 1577 (11th Cir. 1995) (stating that a district court's ruling on a motion for a mistrial is reviewed for abuse of discretion); United States. v. Honer, 225 F.3d 549, 555 (5th Cir. 2000) (reviewing the denial of a motion for mistrial for abuse of discretion).

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

In the instant case, Appellant misconstrues the record. When taken in it's proper context, it is clear that the trial court properly instructed the jury that Appellant had been convicted of first degree murder. During voir dire, the following occurred while the trial court was instructing the jury:

> The Court: This is a case, and I'm going to

read from the original charge, where Mr. Parker has been charged and as I indicated found guilty of the crime of first degree murder and he has been convicted of the unlawful and premeditated death of a human being by killing and murdering Francis Julia Slater, a human being on or about April 27, 1982 in Martin County, Florida.

Mr. Lamos: Excuse me, Your Honor, I think I need to make a record on that point.

The Court: Counsel, come up. let me ask, did I misstate what the original charge was?

Mr. Lamos: Misstated that he was convicted of premeditated murder. There is not an interrogatory form.

The Court: I was just looking at the indictment and the indictment says premeditated.

Mr. Lamos: Accordingly, I need to suggest to your honor that error has occurred and move for a mistrial and strike this panel.

The Court: Well at this point the motion–

Mr. Lamos: Would your honor like to clarify with them–

The Court: Sure

Mr. Lamos:–as a misstatement?

The Court: I was not the original trial judge, so let me just go back since this was a case where the indictment does say premeditated.

Mr. Lamos: I understand. There was not an interrogatory verdict form.

The Court: Let me just ask, the State's

theory was in the alternative, premeditated or felony murder?

Mr. Colton: Correct.

The Court: In the course of a robbery. So I am going to correct that.

Mr. Colton: While we're here, are you also going to tell them he was found guilty of kidnapping and robbery, because he was.

Mr. Mirman: That's going to be evidence.

Mr. Lamos: It's going to come in.

The Court: I can but I don't know that that's so important at this point because the reason they're here is to impose a sentence for first degree murder. But that's something that's going to come in and y'all can certainly cover that.

Mr. Colton: But our commenting on it doesn't make it matter of fact.

The Court: The jury's going to know that.

Mr. Lamos: I understand. The nature of the original charges.

The Court: I'll just mention that.

Mr. Lamos: With this issue of premeditation, it is important to me.

Mr. Colton: We don't have any problem clarifying he was charged with that and it can be proved.

The Court: He was convicted as charged in the other two counts.

Mr. Lamos: Also, Your Honor, there was no finding of premeditation one way or the

> other.
>
> Mr. Colton: Well, wait a minute, I would hate to leave it at that.
>
> The Court: Here's what I'm going to say. I'm going to say the case was submitted to the jury under two theories, premeditated murder and felony murder, and he was found guilty of first degree murder and leave it at that because I think that's accurate.
>
> Mr. Colton: We can go into that more.
>
> Mr. Lamos: Your Honor, would you mind telling them that the statement about premeditation, while the jury convicting him of first degree murder there was not a specific finding of felony murder or premeditation either way?
>
> The Court: What I'm going to do, just as I was stating, the State had two theories and that he was found guilty of first degree murder.
>
> Mr. Lamos: I have to stand on my objection.
>
> The Court: Okay, and that's noted and overruled with the caveat that I'm going to explain further.
>
> (T. Vol 19 pp. 437-440)

The trial court then properly instructed the jury of the following:

> Members of the potential jury. In this case I have read to you what the indictment, the original indictment stated. At the trial at which Mr. Parker was convicted, the State had two theories of first degree murder, one is premeditated murder, and the other is felony murder during the course of a robbery

> or kidnapping and **Mr. Parker was convicted of first degree murder** after that case was submitted to him—or submitted to the jury and the lawyers may want to talk with you a little bit further about some of this that I have mentioned here. (emphasis added)(T. Vol. 19 p. 441).

Primarily, the state would point out that the issue is not preserved. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also: Sapp v. State, 411 So. 2d 363, 364 (Fla. 4th DCA 1982). In this case, it is not clear from the record that Parker was asking for a mistrial. While Parker objected to the trial court's instruction, he also asked the judge to clarify with the jury what he meant. The trial court clarified the instruction and Parker stated that he stood on his objection. From the record in this case, it is not clear what the objection was and what remedy Parker was asking for.

Moreover, when the record is placed in the proper context, it is clear that the trial court corrected any error and properly instructed the jury that Appellant had been convicted of first degree murder. Prior to deliberation, the trial court instructed the jury of the following:

> Ladies and Gentlemen of the Jury, it is now your duty to advise the court what punishment should be imposed upon the Defendant for **his crime of first degree murder**.

(Emphasis added)(T. Vol. 32 p. 2809).

Hence, any error was cured when the trial judge immediately corrected his misstatement and then properly instructed the jury at the close of the evidence. See Burns v. State, 609 So.2d 600 (Fla. 1992).

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

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

Id.

Given the facts of the instant case, there is no reasonable probability that the error affected the verdict. Not

only did the judge immediately cure any error, the trial court properly instructed the jury with respect to their deliberations and instructed the jury prior to deliberations that it was their duty to advise the Court as to what punishment should be imposed for the crime of first degree murder (T. Vol. 33 pp. 2808-2809). Hence, since it is apparent that the jury was properly instructed that Parker was convicted of first degree murder, there is no reasonable probability that the error affected the verdict. The death sentence should be affirmed.

POINT V

THE RECORD SUPPORTS THE AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL COURT. (RESTATED).

Appellant claims that the evidence does not support the aggravating factors of Heinous, Atrocious or Cruel ("HAC"), Cold Calculated and Premeditated ("CCP"), Avoid Arrest, and Pecuniary Gain, found by the trial court.

This court will find after a review of the record that each aggravating circumstance is supported by substantial, competent evidence and the right rule of law was applied by the trial court. Hence the death sentence should be affirmed.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in

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

For purposes of clarity, the state will address each aggravating circumstance in turn.

A. Heinous Atrocious or Cruel

Appellant attacks the trial court's finding that the instant murder was heinous, atrocious, or cruel("HAC"), claiming that the record does not support this aggravator. As a result, Appellant seeks to have the aggravator stricken, thus, undermining the trial court's sentencing decision. This Court should reject Appellant's claim, and instead find the HAC aggravator is supported by the evidence.

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

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

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

In this case the trial court made the following finding:

> **4. Florida Statute Section 921.141(5)(h): The capital felony was especially heinous, atrocious, or cruel**. The victim suffered fear, emotional strain, and terror during the events leading up to the actual killing. The victim, an eighteen year old girl, was afraid to work on the night of her abduction. She experienced great fear and terror during the robbery and during the thirteen mile, twenty minute ride to her death. She was frightened and was asking what the defendant's were going to do to her, in effect begging that her life not be taken. Hair from the victim, consistent with being ripped from her head, was found

> inside Bush's car. The victim's bladder was completely voided while she was alive, prior to being shot. While she was alive she suffered and excruciatingly painful stab wound to her abdomen from a filleting type of fishing knife. The evidence clearly established that the stab wound was inflicted while she struggled. A defensive injury received during a struggle was found on her hand. The killing was not sudden and unexpected. The killing was especially heinous, atrocious, or cruel and this aggravating factor is given great weight. (R. Vol. 7 p. 1330).

Here there is competent substantial evidence to support the trial court's findings. Terry Wayne Johnson testified that once Francis Slater was in the car after she was led out of the store she asked what they were going to do to her and she was frightened (T. Vol. 28 p. 1919). Dr. Keith Wright testified that he was the medical examiner in Martin County in 1982 and conducted the autopsy in 1982 (T. Vol. 26 p. 1694). Dr. Wright testified that the stab wound was painful and that Francis Slater had a defensive wound on her finger (T. Vol. 26 pp. 1695, 1699, 1710, 1711, 1713). Dr. Wright also testified that Francis Slater's bladder was empty and that she had urinated while she was alive (T. Vol. 26 p. 1709-1710). Marilyn McDeavitt testified that Francis was nervous about working that night (T. Vol. 25 p. 1524). Thomas Madigan, the crime scene investigator testified that it was approximately 13 miles from the store to

the location of the body (T. Vol. 26 p. 1611). Dan Nippes, the chief criminalist of the regional crime lab in Fort Pierce testified that the victims hair that was found in Bush's car was prematurely removed from Francis scalp.(T. Vol. 28 p. 1891).

Similarly, in Cave v. State, 727 So.2d 227 (Fla. 1998), this court found that the heinous, atrocious or cruel (HAC) aggravating factor against a capital murder defendant was supported by the evidence that: the defendant personally removed the victim from the convenience store at gun point: placed her in the back seat of the car in which he and a co-defendant were seated, heard her pleas for her life during the eighteen minute ride to an isolated area; removed her from the car and turned her over to accomplices who stabbed and then shot her; and the victim's panties were wet with urine.

Furthermore, in Preston v. State, 607 So.2d 404, 409-410 (Fla. 1992), this court found that Preston forced the victim to drive to a remote location, made her walk at knifepoint through a dark field, forced her to disrobe, and then inflicted a wound certain to be fatal, finding that the victim suffered great fear and terror during the events leading up to her murder. See also Swafford v. State, 533 So. 2d 270, 277 (Fla. 1998)(finding that "HAC" can be supported by evidence of actions of the offender preceding the actual killing, including forcible abduction,

transportation away from possible sources of assistance and detection), Routly v. State, 440 So.2d 1257, 1265(Fla. 1983) (finding that "HAC" was supported by facts that victim must have known that the defendant had only one reason for binding, gagging and kidnapping him, that the victim was driven to an isolated area, forcibly removed from the trunk and shot to death without the slightest mercy). Pooler v. State, 704 So.2d 1375, 1378 (Fla. 1997)(finding "HAC" where victim's fear was such that it caused her to vomit).

Therefore, it is clear that this court has upheld the "HAC" aggravating circumstance in cases factually similar to the instant case. Hence, based on the evidence in this case, it is apparent that the trial court's findings are supported by competent substantial evidence.

Appellant also makes a conclusory assertion that the trial court improperly allowed Nippes to testify outside his area of expertise with respect to the testimony that the hair follicle was prematurely removed from the scalp. Appellant cites to a case wherein this court found that Nippes was not qualified to testify about the PCR DNA methodology. See Murray v. State 692 So. 2d 157 (Fla. 1997). However, this court's analysis in Murray is wholly irrelevant to this case where the science is hair comparison not DNA. Appellant's sole purpose in citing to

Murray is to discredit Nippes' expertise in a completely unrelated case.

Determination of witness's qualifications to express expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent clear showing of error. Terry v. State, 668 So.2d 954 (Fla. 1996). A trial court has broad discretion in determining the range of subjects on which an expert witness can testify, and, absent a clear showing of error, the court's ruling on such matters will be upheld. Holland v. State 773 So.2d 1065,(Fla. 2000).

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

In this case, it is apparent from the record that the trial court did not abuse its discretion when it found that Nippes was qualified to render an opinion that the hair was forcibly removed from Francis' scalp.

The record reflects that, Nippes testified that he had training and experience in the area of hair comparison and detailed his experience and training (T. Vol. 27 p. 1879).

Nippes testified that he has a Master's degree in forensic chemistry and a significant part of the degree is the examination of microscopic evidence including hairs. He also testified that he has studied, as it relates to hairs, at the Georgetown University Institute of Advanced Analytical Chemistry. Nippes attended Emory University School of Medicine, and the FBI Academy, the only schools available and I have been to all of them. Nippes stated that he has been attending courses on serology and trace evidence for 30 years, post graduate school (T. Vol. 27 p. 1879). Appellant then conceded that he had no objection to Nippes testifying to fiber and hair comparison (T. Vol. 27 p. 1880). When the state asked Nippes to explain that the hair was prematurely removed, Appellant objected that this was outside Nippes expertise and that whether or a not a hair was forcibly removed is different from hair comparison (T. Vol. 28 p 1890). The trial court found that testimony regarding the bulbous root of the hair is well within the broad category of hair comparison (T. Vol. 28 p. 1890). Nippes went on to explain that when there is a bulbous root on the hair you can say that the hair was prematurely removed (T. Vol. 28 p. 1892). Hence, it is apparent from the record that Nippes was qualified to testify about the hair follicle and the testimony was not outside his expertise and the death sentence

should be affirmed.

B. Cold Calculated and Premeditated

Appellant claims that the evidence does not support the trial court's findings in support of the CCP aggravator. However, after a complete review of the record it is clear that the trial court's findings are supported.

In defining the cold, calculated, and premeditated aggravator, this Court has held that:

> in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson, 604 So.2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers, 511 So.2d at 533; and that the defendant exhibited heightened premeditation (premeditated), *Id.*; and that the defendant had no pretense of moral or legal justification. Banda v. State, 536 So.2d 221, 224-25 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989). Jackson v. State, 648 So.2d 85, 89 (Fla. 1994).

The murder in this case falls squarely within that definition. There is substantial, competent evidence supporting the CCP aggravator here. The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage. Appellant had a careful plan or

prearranged design to murder Francis and exhibited heightened premeditation.

In this case, the trial court made the following findings regarding CCP;

> **5. 921.141(5)(i): The capital felony was a homocide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.**
> The defendant carefully "cased" out the store two to three hours before the robbery. Upon returning to the store, Parker entered the store with Cave and Bush, all three actively participating in the robbery. None of the three defendants took steps to conceal their identity. Although the victim could have been secured in the store, the defendant's took her out to the car. There was no discussion among the defendants as to what they would do with her, her fate was a foregone conclusion. At the scene of the killing, Parker initiated her murder by reaching over and demanding the gun from Cave, stating, "hand me the gun". Parker later admitted to actually shooting the victim in the head. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification and is given great weight. (R. Vol. 7 p. 1331).

In the instant case, Georgeanne Williams testified that Parker told her that he shot the victim (T Vol. 27 p. 1759). Dr. Wright, the medical examiner testified that Francis was shot from a distance of 2-3 feet away and the gunshot wound was on the bottom of the skull to the back of her head (T. Vol. 26 pp.

1696, 1703, 1704). Terry Wayne Johnson testified that the defendants went to the Lil General Store twice on the night Francis was murdered (T Vol. 28 p. 1912). Johnson testified that the first time they went to the store all four men went inside (T. Vol. 28 p. 1913). The men left the store and went to the beach (T. Vol. 28 p. 1914). On the way back from the beach they went to the Lil General Store again and, Cave, Parker and Bush went in (T. Vol. 28 p. 1916) Parker gave Cave the gun to take into the store (T. Vol. 28 p. 1917). Cave brought the girl out of the store at gunpoint and put her in the car (T. Vol. 28 p. 1918). Johnson testified that they drove out to western Martin County (T. Vol. 28 p. 1922). When they stopped the car, Bush told Francis to get out of the car and he got out as well (T. Vol. 28 p. 1924). Parker also got out of the car and asked Cave to hand him the gun (T. Vol. 28 p. 1925). Johnson testified that he heard a shot but did not see who shot Francis (T. Vol. 28 p. 1925). Parker testified that Cave was in the car when he heard the shot (T. Vol. 28 p. 1926).

Similarly, in Cave v. State, 727 So.2d 227 (Fla. 1998), this court found that the "CCP" aggravating circumstance was supported by the record where there was no moral or legal justification for killing, the general plan of the defendant and his associates was to find a convenience store to rob, Cave held

the gun during the robbery and chose to lead the victim out of the store at gunpoint, Cave kept the victim in the back seat of the car for the long ride to the murder scene, and where the defendant took the victim from the car and turned her over to accomplices who then knifed and shot her. See also Ferrell v. State, 686 So.2d 1324, 1330 (Fla. 1996)(finding "CCP" where facts reflect that Ferrell and the other defendants obtained a gun and a getaway vehicle in advance, took the victim to a remote area where there would be no witnesses, and shot the victim execution-style), Hartley v. State, 686 So.2d 1316 (Fla. 1996)(finding CCP supported by facts that Hartley obtained a gun and a getaway vehicle in advance, he did not act out of frenzy, panic, or rage, he forced the victim to drive to a remote area where there would be no witnesses, and shot the victim execution style).

Therefore, it is apparent that this court has upheld the "CCP" aggravating circumstance in similar cases. Hence, after a complete review of the record it is clear that the evidence supports the trial court finding of CCP. The death sentence should be affirmed.

C. Avoid Arrest

Appellant argues that the record does not support the trial court's finding of the Avoid Arrest aggravator. After a

complete review of the record it is clear that the trial court's findings are supported by the record.

Although this aggravator is typically applied to the murder of law enforcement personnel, it has also been applied to the murder of a witness to a crime. Additionally, it applies to the elimination of a potential witness to an antecedent crime and it is not necessary that an arrest be imminent at the time of the murder. Foster v. State, 778 So. 2d 906, 918 (Fla. 2000), citing Consalvo v. State, 697 So.2d 805, 819 (Fla.1996)(a motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating circumstance; and it is not necessary that an arrest be imminent at the time of the murder). In Fotopoulos v. State, 608 So.2d 784 (Fla. 1992), this Court found the "avoid arrest" aggravator based on the circumstantial evidence showing that the dominant reason why the victim was killed was because of his knowledge of the defendant's alleged involvement in counterfeiting activities. See also Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993) (finding that defendant's motive was to eliminate victim as a witness to defendant's prior robbery of her); Hodges v. State, 595 So. 2d 929, 934 (Fla. 1992) (finding that defendant's motive was to eliminate victim as a witness to defendant's prior indecent exposure to her); Swafford v. State, 533 So.2d 270, 276

(Fla. 1988)(approving “avoid arrest” aggravator on the basis of circumstantial evidence); Cave v. State, 476 So.2d 180 (Fla. 1985); Routly v. State, 440 So.2d 1257 (Fla. 1983).

Similarly, here, there is competent, substantial evidence demonstrating that Appellant’s sole or dominant motive for murdering the victim was to eliminate her as a witness.

In the instant case, the trial court found the following;

> **2. Florida Statute Section 921.141 (5)(e): The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.** The evidence establishes that the purpose of the abduction and killing was clearly to eliminate the only witness to the robbery. This was the sole or dominant motive in killing the victim. The evidence also establishes that the defendant had been seen twice while he was in the Lil General, once alone, when he was “casing” the store, and the later with Bush and Cave during the robbery itself. Both times the defendant made no effort to conceal his identity. There were places in the Lil General Store where the victim could have been locked up by the defendants in order to prevent her from calling the police, but they elected to remove her from the store. Immediately prior to the victim being shot Parker reached over to Alphonso Cave and commanded “Hand me the gun”. The defendant then took the gun from the sight of the killing Parker advised Bush regarding disposing of the knife used to stab the victim. There was discussion in the car regarding killing Deputy Bargo who stopped them after the murder of the victim. This aggravating factor of a capital felony which was committed for the purpose of avoiding or

> preventing a lawful arrest is given great weight because of defendant's significant participation. (R. Vol. 7 p. 1329-1330).

In this case, Marilyn MacDeavitt testified that she went to work with Francis because Francis was nervous about going to work that night (T. Vol. 25 p. 1524). Macdeavitt stayed in the store with Francis until about 12:45 AM, and testified that while she was there Parker came into the store, walked around but didn't buy anything. Terry Wayne Johnson testified that the four men went to the Lil General Store twice on the night Francis was murdered (T. Vol. 28 p. 1913). Johnson also testified that before Francis was shot Parker told Cave to hand him the gun (T. Vol. 28 p. 1925). After Francis was killed, Parker told Bush to throw the knife away and Bush threw it out the window (T. Vol. 28 p. 1928). David Powers testified that Parker told him that when the four defendants realized that a deputy was following them, they discussed killing him (T. Vol. 28 p. 1987). Hence, it is clear that the record supports the trial court's finding the avoid arrest aggravating circumstance.

Furthermore, in Preston v. State, 607 So.2d 404 (Fla. 1992), this court found that the evidence established aggravating factor that alleged capital murder of convenience store night clerk was committed for the purpose of avoiding

arrest where the the only reasonable inference was that the defendant kidnapped the clerk from the store and transported her to a remote location in order to eliminate the sole witness. See Also Cave v. State, 727 So. 2d 227, 229(finding avoid arrest aggravator supported by evidence that victim was kidnapped from store and taken thirteen miles to a rural area and killed after robbery), Swafford v. State, 533 So. 2d 270 (Fla. 1988)(finding avoid arrest aggravator where defendant robbed gas station then took attendant to remote area where he raped and shot her).

Therefore, it is clear that this court has found the avoid arrest aggravating circumstance in cases similar to the instant case. Furthermore, it is clear that the aggravator is supported by competent substantial evidence. The death sentence should be affirmed.

D. Pecuniary Gain

Appellant claims that the record does not support the trial court's finding that the murder was committed for pecuniary gain.

In the instant case, after a complete review of the record, it is clear that the record supports the trial court's findings.

In this case, the trial court found the following;

3. Florida Statute Section 921.141(5)(f):

> **The capital felony was committed for pecuniary gain.** The evidence in this case clearly established that the motivation for this crime was financial gain. The defendant murdered and eighteen year old girl in order to gain one hundred and thirty-four dollars. This aggravating factor is given great weight. (T. Vol. 7 p. 1330)

In this case, Terry Wayne Johnson testified that after they robbed the store, they forced Francis Slater (at gunpoint)into the car with them and she was subsequently stabbed by Bush and then shot (T. Vol. 28 p. 1924). Johnson also testified that $134 was taken in the robbery and after the murder, they went to Cave's rooming house and split the money (T. Vol. 28 p. 1932). Karen Pergolizzi, the manager of the Lil General Store testified that when she went to the store when she was called by the police, she counted the money and determined that $134 was missing (T. Vol. 26 p. 1600). Hence, it is clear that the record supports the trial court's findings.

This Court has upheld this aggravating factor in numerous cases like this one where the murder follows a robbery. E.g., Preston v. State, 607 So.2d 404 (Fla.), cert. denied, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1992); Engle v. State, 510 So.2d 881 (Fla. 1987), cert. denied, 485 U.S. 924 (1988); Copeland v. State, 457 So.2d 1012, 1019 (Fla. 1984) ("[T]he murder was the culmination of a course of events that began when Appellant went

into a store, robbed the clerk at gunpoint, and abducted her from the store."), habeas granted on other grounds, 565 So.2d 1348 (Fla. 1990); Card v. State, 453 So.2d 17, 24 (Fla. 1984) ("[T]he murder was the culmination of a series of interrelated events stemming from the act of taking money from the Western Union office."), cert. denied, 469 U.S. 989 (1984).

Appellant has cited to Chaky v. State, 651 So. 2d 1169 (Fla. 1995) however, this case is factually distinguishable from the instant case. In Chaky, this court found that there was insufficient evidence to surmise that Chaky had killed his wife to obtain life insurance policies. There, this court found that the only evidence presented to support this aggravating circumstance was that Chaky, as a matter of course through his employment with the University of Florida, maintained two life insurance policies on his wife, totaling $185,000, and that he had increased this life insurance on a regular basis since his initial employment date with the university in 1985. Chaky, 651 So. 2d at 1171. This is clearly inapplicable to the instant case where Parker cased out the store, stole $134.00, took the clerk with him and his co-defendants when they left and shot her in a remote location. Hence, the death sentence should be affirmed.

POINT VI

THE TRIAL COURT PROPERLY ADDRESSED THE STATUTORY MITIGATORS AND THE DEATH PENALTY IS PROPORTIONAL.(RESTATED)

Appellant argues that the trial court improperly rejected the statutory mitigators. Moreover, while not addressed by Appellant, the State submits that Appellant's sentence of death is proportional. Appellant's claims are meritless.

This Court in Campbell v. State, 571 So. 2d 415 (Fla. 1990), established relevant standards of review for mitigating circumstances: 1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court, 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. See also Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigating circumstance exists and the weight to be given to that mitigator are matters within the discretion of the sentencing court); Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding that, though a court must consider all the mitigating circumstances, it may assign "little or no" weight to a mitigator); Mansfield v.

State, 758 So. 2d 636 (Fla. 2000) (explaining that the trial court may reject a claim that a mitigating circumstance has been proven provided that the record contains competent substantial evidence to support the rejection).

In this case, the trial court found the following with respect to the statutory mitigators:

> 1. **The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.** On the night of the killing the defendant had consumed both alcohol and marijuana. Any mental or emotional disturbance resulting was not "extreme". Defendant was not actually under the influence of any extreme mental or emotional disturbance and this circumstance is given no weight as a mitigator.
>
> 2. **The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.** Defendant "staked out" the store, handed the gun to a codefendant prior to the robbery, actually entered the store during the robbery, demanded the gun from the codefendant prior to the victims killing and later actually stated that he shot the victim. Defendant was not a minor participant and this circumstance is given no weight as a mitigator.
>
> 3. **The defendant acted under extreme duress or under the substantial domination of another person. Defendant possessed the only gun involved in the three crimes both prior to the robbery, and at the time of the murder.** Defendant was not under extreme duress or substantial domination of another person and this circumstance is given no

> weight as a mitigator.
>
> 4. **The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law was substantially impaired.** Defendant's actions were taken with an apparent clear understanding of what he was doing. The killing was motivated by an intent to avoid detection by eliminating a witness. The capacity of defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law does not appear to have been substantially impaired and this circumstance is given no weight as a mitigator.

(R. Vol. 7 p. 1331-1332)

Hence, it is apparent that in this case, pursuant to Campbell and Trease, the trial court properly evaluated and assigned weight to the mitigation presented.

Moreover, the death sentence is proportional. The trial court found the existence of five (5) aggravating factors in this case and applied great weight to all five (5) of them: (1) felony- murder; (2) avoid arrest; (3) pecuniary gain; (4) HAC and (5) CCP (R. Vol. 17 pp. 1328-1330). The trial court found one statutory mitigating factor, that Appellant was nineteen at the time he committed the crime, but afforded the mitigator very little weight (R. Vol. 17 p. 1332). The trial court gave moderate weight to two (2) non-statutory mitigators:

(1) that Appellant cooperated with law enforcement

(2) that Appellant left school to help support his family, was a hardworker and supported his family, was a good and loving son and brother, was never mean or violent as a child or young adult, assisted his teenage girlfriend in learning to read and learning to drive

The trial court gave little or very little weight to eleven (11) other non-statutory mitigators:

(1) Parker was abused or deprived childhood, experienced childhood hunger, raised in poverty, raised without a father figure, and lack of supervision at home

(2) Non-statutory mitigation of followership

(3) while on death row, Parker works hard to educate himself the best he could under the circumstances, keeps a good outlook, tries to make a good life for himself and be a friend to those that he can, has been supportive of his family members, has avoided provocation, has avoided being led, has developed inner strength and good judgment, has gain respect from others because of the way he has managed, and has come within forty-eight hours of execution

(4) Non-statutory mitigation that defendant does well in a structured environment

(5) appropriate trial behavior

(6) defendant established a friendship with Audrey Rivers and was a generous, caring , and giving person

(7) Parker was under the influence of alcohol during the commission of the crime

(8) Parker liked school, practiced and participated in sports, eager for help, and responsive to encouragement to believe in himself and his abilities.

(9) Parker had learning disabilities, was a slow learner, was ridiculed in school, and had low self-esteem.

(10) when he got into scuffles in school it was because more aggressive boys easily influenced him, teachers opine that he was essentially a good youngster who did what he was told to do, and had peacemaker qualities

(11) Non-statutory mitigation of inconsistent evidence and position by the state during trials arising out of the same facts and lapse of time between guilt and resentencing phases

(R. Vol. 17 pp. 1332-1336).

As this Court has repeatedly held, the weighing process is not a numbers game. Rather, when determining whether a death sentence is appropriate, careful consideration should be given to the totality of the circumstances and the weight of the aggravating and mitigating circumstances. Floyd v. State, 569 So.2d 1225, 1233 (Fla. 1990).

In this case, Terry Wayne Johnson, one of the co-defendant's testified that they went to the store twice on the night Francis was murdered. Johnson testified that the second time they went to the store, Parker, Bush and Cave went into the store, and Cave had the gun. The men robbed the store of $134.00 and then Cave forced Francis into the car at gunpoint. They drove out into western Martin County, which was about 13 miles from the store. Johnson testified that when they stopped the car Bush ordered Francis out of the car and he stabbed her. Johnson testified that Parker told Cave to hand him (Parker) the

gun and Johnson heard a shot. Georgeanne Williams testified that Parker confessed to her that he shot Francis. (T. Vol. 28 pp. 1903-1928).

It is well-established that this Court's function is not to reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991); cert. denied, 116 L.Ed.2d 102 (1992); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). The purpose of proportionality review is to consider the totality of the circumstances in a homicide case and compare it with other capital cases. Urbin v. State, 714 So.2d 411 (Fla.1998); Terry v. State, 668 So.2d 954 (Fla.1996). Given the facts of the instant homicide, the aggravating circumstances established by the State, the inconsequential mitigation presented by the defense, and the fact that Appellant has not challenged the trial court's assignment of weight to the mitigating evidence, the sentence imposed is reasonable. Furthermore, a review of other death penalty cases establishes that the sentence here is proportional.

A death sentence was imposed on Parker's co-defendants, Bush and Cave. Bush has been executed. In Bush v. State, 682 So. 2d 85 (Fla. 1996), this court ruled that Bush's sentence was not disproportionate, finding that Bush played a predominant

role in this crime. Id. This court further found;

> That the four assailants drove in Bush's car, and Bush admitted that they intended to rob the store. While Bush's stab wound was not fatal, he nevertheless inflicted a two-inch wound in the victim's stomach. Bush himself said it was Parker, not Cave, who administered the fatal shot. Id.

In Cave v. State, 727 So. 2d 227, 229 (Fla. 1998), this court found that while Cave was not the triggerman, he was in fact the ringleader. The trial court imposed a sentence of death based on the aggravating circumstances (felony murder, HAC, CCP, avoid arrest, pecuniary gain), one statutory mitigating circumstance(no significant prior criminal history), and several nonstatutory mitigating circumstances (the trial court gave little weight to most of the mitigators). Id.

Hence, it is clear that Parkers sentence is proportional to the sentences imposed on his co-defendants.

The state also relies on Alston v. State, 723 So. 2d 148-152 (Fla. 1998) in support of proportionality. In Alston, the victim was abducted, held at gunpoint by Alston and his co-defendant, and forced to drive his car to a remote, wooded location, approximately twenty miles from where he was abducted. Id. Alston and his co-defendant stole the victim’s watch and wallet. Id. Alston confessed that he shot the victim twice in the back of the head. Id. The trial court imposed the death

penalty and found five (5) aggravators: prior violent felony, felony murder, avoid arrest, HAC, and CCP, and no statutory mitigators. The trial court found the following non-statutory mitigators:(1) Appellant had a horribly deprived and violent childhood; (2) Appellant cooperated with law enforcement; (3) Appellant has low intelligence and mental age (little weight); (4) Appellant has a bipolar disorder (little weight); and (5) Appellant has the ability to get along with people and treat them with respect (no weight). Id. The trial court imposed consecutive life sentences on the armed robbery and armed kidnapping counts and, after weighing the relevant factors, concurred with the jury's recommendation of death for the murder conviction. Id.

Furthermore, in Card v. State, 25 Fla. L. Weekly S25 (Oct. 11, 2001), the facts show that Card abducted Janis Franklin from the Panama City Western Union Office, stole $1,100, drove the victim to a wooded area and cut her throat. Card was sentenced to death and the trial court found five aggravating factors: (1) the murder was committed while the defendant was engaged in the commission of a kidnapping; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, or cruel ("HAC"); and (5) the

murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification ("CCP"). The trial court found no statutory mitigating factors, but did find seven nonstatutory mitigators: (1) Card's upbringing was "harsh and brutal" and his family background included an abusive stepfather (some weight); (2) Card has a good prison record (slight weight); (3) Card is a practicing Catholic and made efforts for other inmates to obtain religious services (some weight); (4) Card was abused as a child (some weight); (5) Card served in the Army National Guard and received an honorable discharge (some weight); (6) Card has artistic ability (little weight); and (7) Card has corresponded with school children to deter them from being involved in crime (some weight). See also Lott v. State, 695 So. 2d 1239 (Fla. 1997)(affirming death penalty with six (6) aggravators, prior violent felony, felony murder, avoid arrest, pecuniary gain, HAC, CCP, and six (6) mitigators); Wike v. State 698 So. 2d 817 (Fla. 1997) (affirming death sentence with four (4) aggravators, prior violent felony, avoid arrest, HAC, CCP, and eight (8) nonstatutory mitigators). Hence, it is clear that Parkers death sentence is proportional.

POINT VII

THE FELONY MURDER AGGRAVATOR IS

CONSTITUTIONAL ON IT'S FACE AND AS APPLIED. (RESTATED)

Appellant claims that the felony murder aggravating circumstance is unconstitutional. Both this Court and the federal courts have repeatedly rejected claims that the "felony-murder" aggravator is unconstitutional because it constitutes an "automatic" aggravating factor. See Banks v. State, 700 So.2d 363, 367 (Fla. 1997); Mills v. State, 476 So.2d 172, 178 (1985) (concluding that the legislature's determination that a first-degree murder committed in the course of another dangerous felony was an aggravated capital felony was a reasonable determination); Lowenfeld v. Phelps, 484 U.S. 231 (1988); Blystone v. Pennsylvania, 494 U.S. 299 (1990); Johnson v. Dugger,932 F.2d 1360 (11th Cir. 1991).

Relying upon the Wyoming and Tennessee state supreme courts, Appellant raises essentially the same argument, which should be rejected. Even if Appellant's argument is read as based upon the constitutional guarantees of the Eighth and Fourteenth Amendments, this Court has already rejected those arguments in Clark v. State, 443 So.2d 973 (1983), cert. denied, 104 S.Ct. 2400, 467 U.S. 1210, 81 L.Ed.2d 356 ("felony-murder" aggravator comports fully with the constitutional requirements of equal protection and due process as well as the prohibition

against cruel and unusual punishment).

POINT VIII

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO ASK DEPUTY BARGO IF HE RECALLED A STATEMENT THAT WAS MADE AT HIS DEPOSITION. (RESTATED).

Appellant claims that the trial court improperly permitted the state to rehabilitate Deputy Bargo with hearsay statements of unidentified parties who attended Bargo's deposition, thereby violating Appellant's Sixth Amendment right to confrontation. Appellant claims that these statements were admitted to show that Bargo was mistaken that Cave was in the front seat, and show that it was Parker who was in the front seat.

This claim is meritless as the single statement referred to by the state was not hearsay because it was not offered to prove the truth of the matter asserted, rather it was introduced to put Deputy Bargo's deposition testimony in it's proper context. Moreover, the state was properly attempting to refresh Deputy Bargo's recollection of his deposition. Furthermore, any error is harmless because Deputy Bargo has never been able to identify anybody in the car except for John Earl Bush.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that

discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

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

Hearsay is a statement, other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. § 90.801 Florida Statutes(2001), See also Foster v. State, 778 So. 2d 914 (Fla. 2000), State v. Baird, 572 So.2d 904, 907 (Fla.1990)(the alternative purpose for which the statement is offered must relate to a material issue in the case),
Williams v. State, 338 So.2d 251 (Fla. 3d DCA 1976) ("Merely because a statement would not be admissible for one purpose (i.e., its truth or falsity) does not mean it is not admissible for another).

In the instant case, the statement of an unidentified person at Bargo's deposition was not being offered by the state to prove the truth of the matter asserted, rather it was offered to put Bargos deposition testimony in context. In this case, Deputy Bargo testified that he initiated a stop of the four co-defendants on the night of the murder because the rear tail light was flickering (T. Vol. 26 p. 1651-1653). Bargo testified that as he approached the car the driver exited the vehicle and gave him identification (T. Vol. 26 p. 1655). Bargo testified that Bush remained outside the vehicle and he asked the other men for identification and none was given (T. Vol. 26 p. 1656). Bargo testified that the person in the front passenger seat identified himself as Mike Goodman, the person in the passenger

rear gave the name Willie Jerome Brown and the person in the driver's rear said he was Alfonso King Brown (T. Vol. 26 p. 1657). Bargo testified that he was never able to identify anybody other than Bush as being in the vehicle (T. Vol. 26 p. 1663).

Fifteen minutes after Bargo had completed the stop he was notified that the license plate came up as a car owned by Ellaruth Shaw Davidson (T. Vol 26 p. 1665). Bargo advised the dispatcher that he would make a second traffic stop (T. Vol. 26 p. 1665). Bargo effected a second stop and dispatch sent out backup (T. Vol. 26 p. 1667). The men were still sitting in the same positions (T. Vol. 26 p. 1667). Bargo then confirmed that the car was registered to John Earl Bush and told them they were free to leave (T. Vol. 26 p. 1669). Bargo testified that the car would not start and the person seated in the front passenger seat, Mike Goodman, got out of the car and helped Bush get the car started (T. Vol. 26 p. 1669, 1670).

On cross examination defense counsel attempted to impeach Deputy Bargo with a prior deposition (T. Vol. 26 p. 1674-1680). The record reflects that at the deposition, Bargo testified that Mike Goodman was sitting in the front passenger seat and that he got out of the car to help Bush get the car started (T. Vol. 26 p. 1678, 1679). The record reflects that defense counsel

attempted to impeach Bargo with the following;

> Question: Is this the same individual who got out of the car at the second stop?
>
> Answer: To adjust the battery cable?
> Yeah.
> Yes, Sir, it was.
>
> Okay. So that'd be Mr. Cave
> Answer: Yes.

(T. Vol. 26 p. 1680).

However, in this case, Deputy Bargo immediately stated that he had never been able to identify Mr. Cave (T. Vol. 26 p. 1680). On redirect, the state elicited that any impression from the deposition that Mr. Cave was helping Bush with the battery was incorrect (T. Vol. 26 p. 1681). The state attempted to question Bargo about something one of the lawyers may have said at his deposition (T. Vol. 26 p. 1680). Defense counsel objected arguing that the state was attempting to rehabilitate Bargo with a statement of an unknown person arguing that it violates Appellant's Sixth Amendment right to confrontation and that the testimony is hearsay (T. Vol. 26 p. 1683-1685). The state said it was only going to ask if Bargo recalled whether or not someone made a statement that it was Parker who got out of the car, in his presence, and if it was an accurate statement. The trial court overruled the objection as long as that it what the state was asking (T. Vol. 26 p. 1685). The judge found it

was a collateral matter when the witness is being asked whether he remembers someone saying that (T. Vol. 26 p. 1686). The state asked Bargo if he recalled the statement that Parker got out of the car and Bargo said he did not recall because he only knew the false names, he never knew any other names (T. Vol. 26 p. 1687). Deputy Bargo also testified that person who exited the car to help Bush was Michael Goodman (T. Vol. 26 p. 1687).

Hence, after a review of the record it is clear that the state was not offering the statement to prove the truth of the matter asserted, rather it was being offered to put the deposition testimony in the proper context. See Blackwood v. State, 777 So.2d 399 (Fla. 2000)(finding victim's comments to defendant were not used to prove the truth of the matter asserted but rather the effect such comments had on defendant)

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

In the instant case, Terry Wayne Johnson testified that he was seated in the back passenger side and told Deputy Bargo that his name was Michael Brown (T. Vol. 28 p. 1930). Johnson also testified that Parker was sitting in the front passenger seat

when Deputy Bargo stopped them (T. Vol 28 p. 1930). Hence, Bargo's testimony was corroborated by Johnson's testimony. Therefore, there is no reasonable probability that the error affected the verdict.

The death sentence should be affirmed.

POINT IX

PARKER'S SENTENCE DOES NOT VIOLATE DUE PROCESS. (RESTATED).

Appellant argues that his sentence violates due process because the state relied on inconsistent theories of evidence at the separate trials of Cave and Parker. However, Parker misplaces his reliance on a 1993 resentencing of Alphonso Cave which has been overturned and was then retried in 1996.

This claim is meritless. The focus in this case should not be on what the state argued in Cave's 1993 re-sentencing, rather the focus should be on what the state argued in 1996 since the 1993 re-sentencing was invalidated. Notably, this court affirmed the trial court's finding that although Cave was not the triggerman, he was a major participant in the murder. Cave. v. State, 727 So. 2d 227 (Fla. 1998).

It is clear that at Cave's 1996 re-sentencing the state did not argue that Cave was the shooter. Furthermore, in this case, the state presented Georgeanne Williams' testimony to prove that

Parker was the shooter. Therefore the claim that the state has relied on an inconsistent theory at Parker's re-sentencing is meritless. The death sentence should be affirmed.

POINT X

THE ORDER APPOINTING JUDGE GEIGER IS PROPER. (RESTATED).

Appellant argues that Judge Kanarek erroneously induced the appointment of Judge Geiger and that the order issued by this court appointing Judge Geiger is void. Appellant argues that once an order disqualifying a judge is entered the judge is prohibited from any further participation in the case. Appellant claims that after Judge Kanarek disqualified himself, he improperly polled the remaining judges in the circuit to determine who could sit on the case. Appellant claims that Judge Geiger assumed the case at the time of Judge Kanarek's polling of the judges, however, there is nothing in the record to support this conclusion (I.B. p 90). Notably, Appellant concedes that this Court assigned Judge Geiger to hear the case (I.B. p. 90).

The order entered by this Court is not void because Judge Kanarek as Chief Judge of the Nineteenth Judicial Circuit and pursuant to the Rules of Judicial Administration, properly informed this court that he disqualified himself and suggested

to this Court that Judge Geiger could hear the case.

Judicial Administration Rule 2.050(b)states the following:

> (b) Chief Judge
>
> (1) The chief judge shall be a circuit judge who possesses administrative ability.
> (2) **The chief judge shall exercise administrative supervision over all courts within the judicial circuit in the exercise of judicial powers and over the judges and officers of the courts. The chief judge shall be responsible to the chief justice of the supreme court.** The chief judge may enter and sign administrative orders, except as otherwise provided by this rule.
> (3) **The chief judge shall be the chief judicial officer of the circuit, shall maintain liaison in all judicial administrative matters with the chief justice of the supreme court, and shall develop an administrative plan for the efficient and proper administration of all courts within that circuit. The plan shall include an administrative organization capable of effecting the prompt disposition of cases; assignment of judges, other court officers, and executive assistants; control of dockets; regulation and use of courtrooms; and mandatory periodic review of the status of the inmates of the county jail.** The plan shall be compatible with the development of the capabilities of the judges in such a manner that each judge will be qualified to serve in any division, thereby creating a judicial pool from which judges may be assigned to various courts throughout the state. The administrative plan shall include a consideration of the statistical data developed by the case reporting system. Questions concerning the administration or management of the courts of the circuit shall be directed to the chief justice of the supreme court through

the state courts administrator. (emphasis added).

In this case, Judge Kanarek was the Chief Judge in the Nineteenth Judicial Circuit at the time of Parker's resentencing. Under the Florida Rules of Judicial Administration, as cited above, Judge Kanarek was required to inform the Chief judge of this court that he had been disqualified from hearing the case and that he had polled the judges in the Nineteenth Judicial Circuit and determined that Judge Geiger could hear the case. Hence, the order entered by this court assigning Judge Geiger to hear this case was proper pursuant to the rules.

Appellant also argues that Judge Kanarek had crossed jurisdictional lines by polling the judges in the Nineteenth Circuit because his authority rested only within the Fifth Judicial Circuit. However, this claim is meritless because, while venue was transferred to the Fifth Judicial Circuit, the Nineteenth Judicial Circuit was still the presiding circuit and Judge Kanarek was the Chief Judge in the Nineteenth Judicial Circuit. Under the Rules of Judicial Administration, Judge Kanarek properly exercised his duty and informed this court that he had disqualified himself from the case and Judge Geiger would be able to hear the case.

The Florida Rules of Judicial Administration, rule 2.180, states the following:

> (b) Presiding Judge. The presiding judge from the originating court shall accompany the change of venue case, unless the originating and receiving courts agree otherwise.
>
> (c) Reimbursement of Costs. As a general policy the county in which an action originated shall reimburse the county receiving the change of venue case for any ordinary expenditure and any extraordinary but reasonable and necessary expenditure that would not otherwise have been incurred by the receiving county.

Hence, in this case, it is clear that the Nineteenth Judicial Circuit is the presiding circuit, therefore, it was proper for Judge Kanarek, as the Chief Judge of the Nineteenth Judicial Circuit to inform this Court that he had disqualified himself from the case and Judge Geiger could hear the case.

Therefore, it is apparent that this court properly appointed Judge Geiger to hear the case. The death sentence should be affirmed.

POINT XI

THE DEATH SENTENCE DOES NOT VIOLATE APPRENDI V. NEW JERSEY 530 U.S. 466 (2000). (RESTATED)

Appellant argues that his death sentence violates Apprendi v. New Jersey, 520 U.S. 466 (2000).

Primarily, the state points out that this claim is not

preserved because it was not presented below. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also: Sapp v. State, 411 So. 2d 363, 364 (Fla. 4th DCA 1982). In this case, Parker failed to raise this issue below, therefore, it is not properly before this court.

Turning to the merits, this claim has been raised and rejected by this court. In Mills v. Moore, 786 So. 2d 532 (Fla. 2001) this court found that the rule announced by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000) requiring any fact increasing penalty for a crime beyond the prescribed statutory maximum to be submitted to jury and proved beyond reasonable doubt, does not apply to the state capital sentencing scheme. Furthermore, this court has found that Apprendi does not apply in a capital sentencing scheme because death is the statutory maximum sentence upon conviction for murder. Spencer v. State, SC. No. 00-1051, 2002 WL 534441 (Fla. April 11, 2002), Bottoson v. State, 27 Fla. L. Weekly s119 (Fla. Jan 31, 2002), King v. State, 808 So. 2d 1237 (Fla. 2002), Card v. State, 803 So. 2d 613 (Fla. 2001).

In Apprendi, the Supreme Court announced the general rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt". The Court specifically stated in the majority opinion that Apprendi does not apply to already challenged capital sentencing schemes that have been deemed constitutional. Florida's capital sentencing statute was upheld in Proffitt v. Florida, 428 U.S. 242 (1976). Hence, this claim is without merit.

POINT XII

> THE DELAY BETWEEN PARKER'S INDICTMENT AND RESENTENCING DOES NOT VIOLATE THE EIGHTH AMENDMENT. (RESTATED)

Appellant claims that the 18 year delay between his indictment and resentencing violates his Eight Amendment rights

This Court has addressed the constitutional challenges to the passage of time between conviction and sentencing. In Hitchcock, the Court opined:

> Finally, Hitchcock claims that the delay between his arrest (1976) and resentencing (1988) violates his right to a speedy trial and his due process rights and constitutes cruel and unusual punishment. He has, however, demonstrated no undue prejudice caused by the delay, and we find no merit to this claim.

Hitchcock, 578 So.2d at 693. See also, Hitchcock v. State, 673

So.2d 859, 863 (Fla. 1996)(rejecting argument that length of time between conviction and resentencing was a constitutional violation); Gore, 706 So.2d at 1336 (rejecting speedy trial challenge to reimposed death sentence).

Although recognizing a denial of certiorari is not an adjudication on the merits, Justice Thomas' concurrence in Knight v. Florida, 120 S.Ct. 459, 460 (1999) is enlightening. As opined:

> I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed....
>
> It is worth noting, in addition, that, in most cases raising this novel claim, the delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence.... In that sense, Justice BREYER is unmistakably correct when he notes that one cannot "justify lengthy delays [between conviction and sentence] by reference to [our] constitutional tradition." Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence. See Coleman v. Balkcom, 451 U.S. 949, 952, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981) (STEVENS, J., concurring in denial of certiorari) ("However critical one may be of … protracted post-trial procedures, it seems inevitable that there

> must be a significant period of incarceration on death row during the interval between sentencing and execution"). It is incongruous to arm capital defendants with an arsenal of "constitutional" claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed.

Knight, 120 S.Ct. at 460 (footnotes omitted). If this Court were to vacate a death sentence merely because of a delay caused by a defendant exercising his constitutional rights, it would be the convicted felon controlling the judicial process, not the courts.

However, Appellant misconstrues the trial court's finding. In its sentencing order, the trial court addressed Appellant's requested mitigator that the state presented inconsistent evidence and the lapse of time between guilt and penalty caused by the state's discovery violation (R. Vol. 7 pp. 1335-1336). However, the trial court found the following:

> The evidence shows that the state, in 1993, retried codefendant Alfonso Cave and produced evidence that Cave was the actual Shooter through the testimony of Michael Bryant. Bryant testified that he had overheard John Earl Bush say to Cave words to the effect "we wouldn't be here if you didn't pop her in the back of the head with a cap". Bryant had been listed as a witness against Cave in 1983 but was not called to testify at Cave's first trial. In Cave's third trial in 1996 the state did not call Bryant as a witness because the then prosecutor doubted his credibility, and the

> prosecutor did not argue that Cave was the shooter. The evidence also shows that defendant was first tried in 1983 and now again in 2000, the retrial being because of the state's admitted discovery violation. Inconsistent evidence and position by the state during the trials of codefendant Cave and defendant Parker and lapse of time between original and current trials caused by the state's discovery violation are proven, but given very little weight. (R. Vol. 7 p. 1336).

In this case, while trial court found that the delay was attributable to the state, there was no finding of undue prejudice and the defendant has failed to show any. Appellant claims that he was precluded from calling his mother and one of his sister's, however, Parker has failed to detail what they would have testified to and what if anything this testimony would have added to his case in mitigation. Furthermore, Parker has provided no explanation as to why he did not seek to introduce his mother's testimony from the previous trial, nor has he explained why he failed to perpetuate the deposition of Rosie Lee Parker, after the state stipulated to it. Hence, there has been no showing of undue prejudice. See Hitchcock, 578 So. 2d at 693. This claim is meritless.

Hence, since Parker has failed to assert any undue prejudice, this Court must find Appellant's constitutional rights have not been violated and affirm the death sentence.

POINT XIII

THE TRIAL COURT PROPERLY DENIED PARKERS REQUESTED SPECIAL JURY INSTRUCTION. (RESTATED).

Appellant claims that the trial court improperly denied his proposed jury instruction on circumstantial evidence because the evidence in the record is entirely sufficient to trigger the application of the proposed instruction.

In this case, the trial court did not abuse its discretion when it denied Appellant's specially requested jury instruction.

The standard of review is abuse of discretion. Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The abuse of discretion standard is one of the most difficult for an Appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view

adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

This court has repeatedly ruled that the standard jury instructions are sufficient and that a trial court is well within its discretion to deny a special instruction. See Kilgore v. State, 688 So.2d 895 (Fla.1996); Ferrell v. State, 653 So.2d 367, 370 (Fla.1995); Gamble v. State, 659 So.2d 242, 246 (Fla.1995), cert. denied, 516 U.S. 1122 (1996); Walls v. State, 641 So.2d 381, 389 (Fla.1994),cert. denied, 513 U.S. 1130(1995).

In the instant case, the trial court gave the standard jury instructions (T. Vol 34 pp. 2808-2820). Furthermore, the record reflects that Appellant asked the trial court to instruct the jury that when circumstantial evidence is relied upon to determine that an aggravating circumstance applies, the evidence must not only be consistent with a finding that the aggravating circumstance applies, but must also be inconsistent with any reasonable hypothesis that negates an aggravating circumstance (T. Vol. 33 p. 2645). Defense counsel suggested to the court that the instruction be incorporated around the reasonable doubt instruction (T. Vol. 33 p. 2645). The state objected and the trial court sustained the objection and denied the instruction (T. Vol. 33 pp. 2645-2649). The trial court specifically found

that the **instruction would not add anything to the instructions required by law and might be confusing** (T. Vol. 33 p. 2649). Hence, it is apparent that the trial court did not abuse its discretion when it denied Appellant's request for a special instruction. The death sentence should be affirmed.

Conclusion

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

Respectfully submitted,

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Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to, this ____ day of _____________, 2000.

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CERTIFICATE OF TYPE SIZE AND STYLE

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

____
Melanie A. Dale
Assistant Attorney General