SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC01-651

LUIS CABALLERO,

Appellant,

- versus -

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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Preliminary Statement

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

Statement Of The Case and Facts

Appellee accepts Appellant's statements of the case and facts for purposes of this appeal, subject to the additions, corrections, and/or clarifications in the Argument section.

Summary of the Argument

Point I: The prosecutors comment characterizing Caballero's confession as uncontradicted was a proper comment on the evidence and fair reply to defense counsel's closing argument.

Point II: The murder was committed in a cold, calculated and premeditated manner as is was the product of calm and cool reflection. Furthermore, the trial court did not improperly double the aggravating circumstances.

Point III: The trial court properly considered and rejected Caballero's age as a mitigating circumstance as there was no evidence to support the mitigator.

Point IV: The trial court properly reasoned that Caballero could introduce Brown's conviction of second degree murder and the life sentence he received, to prove that a death sentence would be disproportionate. Furthermore, the trial court properly found that if such evidence was introduced, the state could then admit Brown's confession to rebut the evidence.

Point V: This court can not conduct a true culpability analysis because Brown was convicted by a jury of second degree murder. The death sentence is proportionate.

Point VI: Florida's death penalty statute is constitutional.

POINT I

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT WERE NOT COMMENTS ON APPELLANT'S RIGHT TO REMAIN SILENT, NOR DID THE COMMENTS SHIFT THE BURDEN OF PROOF. (RESTATED)

Caballero argues that the trial court erred when it overruled his objections to the prosecutor's remarks during closing arguments. Caballero claims that the prosecutor impermissibly commented on his right to remain silent and improperly shifted the burden of proof when he argued that the evidence presented regarding Caballero's statements to law enforcement were "uncontradicted".

However, Caballero's claim that the prosecutor improperly commented on his right to remain silent was not preserved below. In this case, defense counsel never argued that the prosecutor improperly commented on Appellant's right to remain silent, rather she objected that the state was shifting the burden of proof (T. Vol. 21 p. 1446, 1462). 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, Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Hence, Appellant's claim is not properly before this court. Mitchell v. State, 771 So.

2d 596 (Fla. 3rd DCA 2000)(finding that Mitchell's claim that the prosecutor's argument amounted to comments on the fact that he did not testify at trial, was not preserved because no such objection was made below, rather, Mitchell objected that the comments shifted the burden of proof.)

Moreover, Appellant's claim is meritless as the prosecutor's argument was a proper comment on the evidence presented regarding Caballero's confession and the trial court properly denied his request for a mistrial. 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). Moreover, wide latitude is permitted in arguing to a jury. Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). It is within the judge's discretion to control the comments made to a jury, and we will not interfere unless an abuse of discretion is shown. Occhicone v. State, 570 So. 2d 902,

904 (Fla. 1990); Breedlove, 413 So. 2d at 8." Moore v. State, 701 So. 2d 545, 551 (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); Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). A defendant has the constitutional right to decline to testify against himself in a criminal proceeding, therefore, "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged". Rodriguez v. State, 753 So.2d 29, 37 (Fla.2000) (quoting State v. Marshall, 476 So.2d 150, 153 (Fla.1985). The "fairly susceptible" test is liberally applied, hence, a comment on the failure to contradict the evidence becomes an impermissible comment on the defendant's failure to testify where the evidence is uncontradicted on a point that only the defendant can contradict. Id. at 38. Further, in Rodriguez, this court recognized that it is not error to comment on the uncontradicted nature of the evidence, which was

permitted in White v. State, 377 So.2d 1149 (Fla.1979), however, a reference to the uncontroverted nature of evidence where only the defendant possesses the information to contradict the government evidence, as described in State v. Marshall, 476 So.2d 150 (Fla.1985), are impermissible arguments, which are fairly susceptible to interpretation as comment on the defendant's failure to testify. See Rodriguez, 753 So.2d at 38.

In the case at bar, the trial court did not abuse it's discretion because the prosecutor was properly commenting on the uncontradicted nature of the evidence as it was presented at trial and rebutting Caballero's claim that he did not want to kill Denise. Here, the argument is not fairly susceptible to being interpreted as a comment on Caballero's failure to testify at trial. Rather, the record reflects that during closing arguments, the prosecutor reviewed the multiple statements that Caballero made to the police and while reviewing how Denise was bound and her credit cards were taken, he states;

> "You can tell by what a man intends by what he does, not by **what he desires**. What does he do? According to the statement, uncontradicted, what does he do?"

(T. Vol. 21 pp. 1444-1446) (Emphasis added).

Furthermore, in this case, Caballero waived his *Miranda* rights and freely and voluntarily confessed to the crime (T. Vol. 19 p. 1083-1084, 1107). Additionally,

defense counsel Carpenter argued during closing that Caballero did not want to kill Denise (T. Vol. 21 p. 1413). Therefore, the prosecutor's comment was a fair reply to the argument that Caballero presented. Hence, the prosecutor's comment that Caballero's own confession was uncontradicted can not be fairly susceptible to being deemed a comment on his silence as it was a proper comment on the evidence that was before the jury, as well as a fair reply to the argument presented by Caballero during closing arguments..

Appellant relies on Rodriguez v. State, 753 So. 2d 29, 37 (Fla. 2000) and Marshall v. State, 476 So. 2d 153 (Fla. 1985), to support his claim that because the prosecutor commented on his confession, and neither Appellant nor his co-defendant's testified at trial, then the comments constitute an improper comment on his failure to testify. However, Appellant's reliance is misplaced as the facts in those cases are distinguishable from the instant case. In neither Rodriguez, nor Marshall did the defendants confess to the crimes. In Rodriguez, this court did not find that a prosecutor may not comment on the uncontradicted nature of the evidence as whole, rather it found that where the evidence is uncontradicted on a point that only the defendant can contradict then the comment is impermissible. Rodriguez, 753 So. 2d at 38. In this case, the prosecutor commented on Caballero's own statement, which was freely and voluntarily given to the police, hence, it can not be deemed a comment

on his right to remain silent as he waived that right. (T. Vol. 19 pp. 1083-1111). Moreover, Caballero was not the only defendant in this case, hence, he is not the only person who could contradict how the crime occurred. Further, as evidenced by points IV and V of this appeal, Appellant wanted to argue that Isaac Brown was equally culpable but did not want to enter Browns confession into evidence as it would have shown that Caballero was the more culpable defendant. Hence, there was no abuse of discretion as the prosecutor properly commented on the evidence as it was presented to the jury.

Finally, should this court find that the prosecutor's comment was error, any error was harmless. It is well settled that such erroneous comments do not require an automatic reversal. State v. DiGuilo, 491 So. 2d 1129, 1137 (Fla. 1986); Marshall, 476 So. 2d at 153. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." DiGuilio, 491 So. 2d at 1139. "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 the instant case, it is clear from the overwhelming evidence presented that any error was harmless beyond a reasonable doubt. Here, Caballero confessed that he and Brown decided to rob Denise the night before they murdered and robbed her (T. Vol. 19 p. 1113, 1116). Caballero confessed that they chose d Denise because she lived across the hall from him and it would be easy to abduct her (T. Vol. 19 p. 1115). When Denise was walking up the stairs, Appellant saw her coming and Brown grabbed her and dragged her into Appellant's apartment with her laundry basket (T. Vol. 19 p 1117-1120). They tied her up with towels and pantyhose from her laundry basket and gagged her (T. Vol 19 p. 1120-1121). Begging to be let go and Denise told them she would do anything they wanted and begged not to be hurt (T. Vol. 19 p. 1121). Denise gave Caballero information regarding her bank account and credit cards and told him that there was a box in her apartment with the pin numbers (T. Vol. 19 p. 1123-1124). Denise told Caballero to do what he had to do and begged him to let her go when he was finished (T. Vol 19 p. 1125). Caballero left with Denise's keys, went to her apartment to get the ATM information, then drove her car to various ATM locations to withdraw cash (T. Vol. 19 1125-1126). When Caballero returned to his apartment, Brown had retied Denise with a pillow case, a cord from an electric razor, pantyhose, and a dog leash (T. Vol. 19 p. 1125-1128). Caballero confessed that he

knew that Denise had to be killed and debated with Brown how they would kill her (T. Vol. 19 1130-1134). Initially, Appellant confessed that he watched while Brown killed Denise, however, after a break he confessed that he participated in strangling Denise. Caballero confessed that he was in front of Denise and Brown was behind her. Caballero covered the victims mouth to muffle her screams and pulled her head forward while Brown pulled back with a cord. The first cord broke, and a second one was used. Caballero also confessed that after they killed Denise he had sex with her and evidence showed that DNA found in the semen matched Caballero's. (T. Vol 20 p. 1178-1179, 1297-1308). Caballero also confessed that he used his body weight to hold Denise down while she was being killed (T. Vol 20 p. 1180-1187). It took between ten and twelve minutes to kill Denise and after she was dead Caballero and Brown left the apartment to get something to eat and figure out how to dispose of the body (T. Vol. 19 p. 1140-1142). Between 5:00 and 5:30 AM, Caballero and Brown wrapped Denise in a sheet and bedspread, bound her ankles, and also bound her with a heat rock cord and shoelaces (T. Vol. 19 p. 1142-1146). They put Denise's body in the trunk then transported her to Fort Lauderdale where they threw her body into a canal (T. Vol. 19 pp. 1148-1150). After they disposed of her body, they went to an ATM machine and withdrew another $400.00 using Denise's Visa card (T. Vol. 19 p. 1155-1158).

Moreover, Denise's gym card was found on the floor in Caballero's bedroom (T. Vol. 18 p. 872). Shoes were found with missing laces and the testimony established that Denise was bound with shoelaces (T. Vol. 18 pp. 872-895). Sandra Yonkman was qualified as a latent print expert and testified that Caballero's fingerprints were on Denise's gym card, in her car, and were found in her apartment (T. Vol. 20 pp. 1272-1276). Hence, in this case, based on Caballero's extensive confession coupled with the additional evidence presented, there is no possibility that any error affected the verdict in this case. The conviction and death sentence should be affirmed.

POINT II

THE CAPITAL FELONY WAS COMMITTED IN A COLD CALCULATED AND PREMEDITATED MANNER.(RESTATED)

First, appellant argues that the evidence is insufficient to support the trial court's finding of the cold, calculated, and premeditated aggravating circumstance ("CCP"). Second, appellant argues that the trial court improperly doubled the aggravators of CCP, heinous, atrocious, or cruel ("HAC"), and avoid arrest, because the trial court relied on the same facts to support each aggravator. These claims are meritless as the evidence supports the trial court's finding of "CCP" and the trial court did not improperly double the aggravators.

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).

Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. If there is any evidence to support those factual findings, the lower tribunal's findings will be affirmed. The equivalent federal fact standard of review is known as the clearly erroneous standard. When it comes to facts, trial courts have an institutional advantage. Trial courts can observe witnesses, hear their testimony, and see and touch the physical evidence. Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) (sitting as the trier of fact, the trial judge has the superior vantage point to see and hear the witnesses and judge their credibility.). An appellate court's review of questions of fact

is therefore very limited. Elder v. Holloway, 984 F.2d 991 (9th Cir. 1993) (Kozinski, J., dissenting from the denial of a suggestion for rehearing en banc), adopted by Elder v. Holloway, 510 U.S. 510, 516 (1994).

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 Denise and exhibited heightened premeditation.

In this case, the trial court made the following factual finding with respect to the

"CCP" aggravating circumstance;

> E. The capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In addition to the matters discussed above, while Ms. O'Neill remained tightly bound and unable to move, the defendant and Brown spent hours discussing and planning how they would kill her. The defendant had an extended period of time in which to reflect upon the actions in which he was going to participate. When the defendant and Brown decided it was time to do away with the victim, the actual killing was done in a calculated manner. They moved Ms. O'Neill from the bedroom to the livingroom, Brown got behind her, the defendant positioned himself in front, and together they worked to strangle her, disregarding her muffled cries. This Court is satisfied beyond a reasonable doubt that this murder was committed in a cold, calculated, and premeditated manner, and assigns great weight to this factor in determining the appropriate sentence.

(R. Vol 5, p. 919).

These findings are supported by the record in this case. Here, Caballero confessed to the crime. He admitted that on the night before the murder was committed he and Isaac Brown discussed robbing Denise. The following morning they decided that they would commit the crime. Caballero confessed that when Denise was walking up the stairs to her apartment Brown dragged her into their apartment. They chose Denise because she was an easy target. Caballero and Brown tied Denise up with cords, belts and shoelaces. Denise told them her credit card numbers and the

pin number to her ATM card and Caballero went to her apartment and took the cards. While Caballero went to various bank machines in the area and withdrew cash, Denise remained tied up in his apartment. Caballero admitted that Denise asked them to let her go **but he knew that they had to kill her**. After she was tied up for hours, Caballero pulled Denise's head forward while Brown tightened and pulled the cord around her neck until she died. (T. Vol. 19 p. 1123-1150, Vol. 20 p. 1178-1187)(emphasis added). See San Martin v. State, 705 So.2d 1337, 1349 (Fla. 1997)(finding that the evidence supports the trial court's finding that not only was the robbery carefully planned in advance, but there was also a plan for the victim to be killed). Therefore, based on the record in this case, it is clear that Caballero confessed that they planned the robbery of Denise and he knew that she was going to be killed. Hence, it is clear that the evidence supports the trial court finding of CCP. The death sentence should be affirmed.

Turning to Caballero's second claim, it is clear from the record that the trial court did not improperly double the aggravating factors of "CCP", "HAC", and avoid arrest. Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime. Provence v. State, 337 So. 2d 783, 786 (Fla.1976), Rose v. State, 787 So. 2d 786, 801 (Fla. 2001), Banks v. State, 700 So. 2d 363 (Fla. 1997). However, there is no reason why the facts in a given case may not support

multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other. Id. Hence, no improper doubling exists so long as independent facts support each aggravator. Morton v. State, 689 So. 2d 259, 265 (Fla. 1997).

In this case the trial court made the following factual findings with respect to the avoid arrest and "HAC" aggravating factors:

> B. the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest. The evidence established that:
>
> 1. The Defendant recognized from the very beginning of the criminal enterprise that the victim would be able to identify him.
>
> 2. Although he asserted in his statement that he "hoped" the plan would be to just drop her off somewhere after dark, he realized it would be necessary to kill Ms. O'Neill if they were to avoid arrest. The Defendant and Brown discussed and negotiated the details of the victim's impending death while she remained secured tightly with a "pillow case, a cord, a cord from the electric razor that was maybe about three and a half, four feet, pantyhose still on the wrist...dog leash tied around her ankles..."
>
> 3. It was never a question of whether Ms. O'Neill would be killed; it was simply a matter of how and when.
>
> This aggravating circumstance was proven to exist beyond a reasonable doubt and was afforded great weight in determining the appropriate sentence in this case.

(T. Vol. 5 pp. 916-17).

> D. The capital felony was especially heinous, atrocious, or cruel. This aggravating circumstance was proved beyond a reasonable doubt by the evidence that:
>
> 1. The victim, Denise Rose O'Neill, remained tied up for hours, certainly fearing that she would be killed. Her knowledge and fear of impending death was reflected in the Defendant's statement that she offered to "give (us) anything just not to hurt her... just leave her alone."
>
> 2. The Defendant described the difficulty they had in killing the victim. Brown took Ms. O'Neill from the bed and laid her down on her stomach while her ankles and wrists remained tied. She was blindfolded and gagged. Brown wrapped a cord around her neck from behind her, placed his knees on her back and exerted great force in his attempt to kill the victim.
>
> 3. Ms. O'Neill attempted to fight back and was "yelling in a muffled sound." The Defendant then used his body weight to hold her down while covering her mouth.
>
> 4. When the telephone cord they were using to strangle Ms. O'Neill broke, the Defendant continued to hold the victim so that Brown could grab the heat rock with the cord and place that around her neck.
>
> 5. While Brown pulled the cord around Ms. O'Neill's neck from behind, the Defendant pulled her head forward toward him. The Defendant kept one hand over the victims mouth because she was still yelling.
>
> 6. The Defendant estimated that it took between ten and twelve minutes of effort before ms. O'Neill stopped breathing. This young woman suffered unnecessary pain

> and torture at the hands of the Defendant.
>
> 7. Testimony of the medical examiner showed that the bruising on Ms. O'Neill's body was caused before her death, most likely from the ligatures found on her body when it was recovered. The medical examiner could not make a specific finding of cause of death, other than to testify that it was from either strangulation or drowning. (Testimony indicated that after strangulation, the victim was wrapped in a sheet, retied with ligatures, and transported to Broward County where she was dumped in a canal.) There can be no doubt, however, that this young woman suffered greatly during her last hours of life.
>
> This court is satisfied beyond and to the exclusion of any reasonable doubt that this murder was especially heinous, atrocious, or cruel, and significant weight was afforded this aggravator in determining the appropriate sentence in this case.

(T. Vol. 5, pp 917-919).

The record reveals that the trial court relied upon different aspects of the crimes in finding aggravation. Here, trial court properly focused on Caballeros intent finding that Caballero and Brown discussed the crime the night before and over a period of hours while they kept the victim tied up, planned how she would be killed and how they would dispose of the body. The. In evaluating the avoid arrest aggravator the trial court focused upon Caballero's motivation for killing Denise, finding that she his neighbor and it was obvious from the beginning of the crime that she would be able to identify him. Caballero confessed that he realized she would have to be killed.

Lastly, in evaluating the HAC aggravator, the trial court properly focused on the terror and fear the victim must have felt as she begged for her life, was tied up for hours, and then screamed for 10-12 minutes while she was being strangled. Unquestionably, different aspects for the crime were used in support of each aggravator.

This comports with this Court's analysis presented in Green v. State, 641 So. 2d 391 (Fla. 1994).

> Improper doubling occurs when aggravating factors refer to the same aspect of the crime. *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). If the sole purpose of the kidnaping had been to rob Flynn and Hallock, we would resolve this issue differently. The evidence, however, supports a finding of both aggravating circumstances. The purpose of the kidnaping clearly was not to rob Hallock and Flynn because they were robbed before they were kidnaped. Thus, the kidnaping had a broader purpose than to provide the opportunity for a robbery.

Green, 641 So. 2d at 395. Hence, this Court should conclude that there was no improper doubling of the CCP, avoid arrest, and HAC aggravators, and Caballero's death sentence should be affirmed.

POINT III

THE TRIAL COURT PROPERLY CONSIDERED AND REJECTED APPELLANT'S AGE AS A MITIGATING CIRCUMSTANCE (RESTATED).

In the instant case, Appellant argues that the trial court improperly refused to consider his age as a mitigator. Appellant also claims that in refusing to consider that he was twenty (20) at the time of the murder, the trial court improperly determined that it would not consider Caballero's age because he was able, by reason of his age or maturity level, to take responsibility for his actions.

Both of these claims are meritless. This claim has not been preserved for appeal because Caballero did not object 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, Steinhorst v. State, 412 So. 2d 332, 338 (1982). Hence, since appellant did not object the claim is not properly before this court.

Turning to the merits, it is clear from the record that the trial court properly considered and rejected Appellant's age at the time of the crime as a mitigating circumstance. Whether a defendant's age constitutes a mitigating factor is a matter within the trial court's discretion, depending on the circumstances of each individual

case. Scull v. State, 533 So. 2d 1137, 1143 (Fla.1988). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

Moreover, this Court has long held that the fact that a defendant is youthful, "without more, is not significant." Garcia v. State, 492 So.2d 360, 367 (Fla.1986). Therefore, if a defendant's age is to be accorded any significant weight as a mitigating factor, "it must be linked with some other characteristic of the defendant or the crime such as immaturity." Echols v. State, 484 So.2d 568, 575 (Fla.1985); see also Sims v. State, 681 So.2d 1112, 1117 (Fla.1996) (finding that "without more," defendant's age of twenty-four was not a statutory mitigator since no evidence showed that his

"mental, emotional, or intellectual age was lower than his chronological age").

In this case, the trial court in considering the mitigator of age made the following findings:

> 1. The age of the Defendant at the time of the crime. The Defendant was 20 years old at the time of the crime. The age of any Defendant who is over the age of 15 and therefore, subject to death penalty consideration can be relevant to the Defendant's mental and emotional maturity. Age may also be relevant in the consideration of the Defendant's ability to take responsibility for his acts and to appreciate the consequences of his actions. At the penalty phase hearing, the defense called Dr. Lee Buckstel who testified that a review of the defendant's school records reflected some delayed emotional development. However, when Dr. Buckstel attempted to administer the MMPI-2, he was unable to obtain valid results. He attributed this to the Defendant's over reporting a number of unusual complaints. Accordingly this witness could not testify as to the Defendant's age related emotional problems, if any, at a time relevant to these proceedings. Dr. Buckstel also administered the Wechsler Adult Intelligence Scale-Revised. The Defendant scored at the lowest end of the average range on the verbal score of this test. On the performance test he scored a little higher, but still in the low average range. The Defendant's overall IQ score was below average at the twelfth percentile. This testimony did not reasonably convince this court that the Defendant was unable to take responsibility for his acts and appreciate the consequences thereof at the time of the murder. Accordingly, the Defendant's age at the time of the crime will not be considered as a statutory mitigating circumstance.

(T. Vol. 5 p. 920).

It is apparent from the trial court's finding that there was no abuse of discretion. The trial court followed this court's mandate and reviewed the evidence presented and determined that Caballero had presented nothing to show that he had any age related emotional problems at the time of the crime. The trial court did more than consider his chronological age, it considered the evidence the defendant presented and rejected the mitigator. See Sims v. State, 681 So.2d 1112, 1117 (Fla.1996) (finding that "without more," defendant's age of twenty-four was not a statutory mitigator since no evidence showed that his "mental, emotional, or intellectual age was lower than his chronological age"); Lebron v. State, 799 So.2d 997, 999 (Fla. 2001) (finding that defendant's age of 24 was not a mitigator where defendant did not show that he was not acting at level consistent with his chronological age at time of murder or that his emotional or mental age was inconsistent with his chronological age).

Caballero's reliance on Mahn v. State, 714 so. 2d 391 (Fla. 1998) is misplaced. In Mahn, 714 So. 2d at 400, this Court found that Mahn had an extensive, ongoing, and unrebutted history of drug and alcohol abuse, coupled with lifelong mental and emotional instability. This court also found that Mahn's unrefuted, long-term substance abuse, chronic mental and emotional instability, and extreme passivity in the face of unremitting physical and mental abuse provided the essential link between his youthful age of twenty (20) and immaturity which should have been considered a

mitigating factor in this case. Id.

In this case, appellant makes a conclusory allegation that these same circumstances exist, yet fails to cite to anyplace in the record that would support this claim. Rather a review of the testimony presented at the penalty phase reveals that none of these characteristics exist. Jennifer Abdo testified that she had two children with Caballero and that the children love him and he is a good father. She stated that he was a follower but has a good relationship with his family. (T. Vol. 10 pp. 1555-1571). Socorro Caballero, the defendant's mother testified that he had severe ear nose and throat problems as a young child and was picked on in school because he attended special education classes (T. Vol. 10 pp. 1573-1581). Yvette Caballero, the defendant's sister testified that he was sick with ear problems as a child, he was a follower, and the kids at school picked on him because he was in special education classes (T. Vol. 11 pp. 1602-1608). Yvette also testified that they were never abused as children (T. Vol. 11 p. 1609). Hence, after a review of the testimony presented Caballero's case is clearly distinguishable from Mahn, as here there was no testimony regarding drug or alcohol abuse, no evidence of physical or mental abuse. Moreover, Appellant provides no evidence to provide a link between any problems he had in school and his age at the time the crime was committed. Hence, it is apparent that the trial court properly considered and rejected age as a mitigating circumstance. The

death sentence should be affirmed.

POINT IV

THE TRIAL COURT PROPERLY FOUND THAT IF APPELLANT ARGUED THAT ISAAC BROWN AN EQUALLY CULPABLE CO-DEFENDANT WAS ONLY CONVICTED OF SECOND DEGREE MURDER, THEN SUCH EVIDENCE WOULD OPEN THE DOOR TO THE STATE'S PRESENTATION OF ISAAC BROWN'S STATEMENT'S TO LAW ENFORCEMENT.

In the instant case, Appellant argued below that he wanted to introduce a certified copy of co-defendant Brown's conviction of second degree murder and the life sentence he received. The trial court granted Caballero's request and properly informed Caballero that such evidence would open the door for the State to introduce Brown's statements, implicating Caballero, to refute the claim that the sentences are disproportionate. Caballero claims that the trial court's reasoning is improper.

Primarily, Appellant has failed to properly preserve this claim for review. 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, 613 So. 2d at 446 *quoting* Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985). See, Steinhorst, 412 So. 2d at 338. In this case, Appellant raised the issue prior to the penalty phase, and the trial court found that the disproportionality argument would open the door for

the state to refute the claim by using Brown's statement's to law enforcement (T. Vol. 10, p. 1517). Defense counsel agreed and stated that he would wait and see what happens with the issue (T. Vol. 10 p. 1517). However, at penalty phase counsel never raised the argument, hence this claim was waived and is not properly before this Court.

Turning to the merits, the trial court properly found that Appellant's disproportionality argument would open the door for the introduction of Brown's statements. 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); Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

Under most circumstances it is error to admit the details of a non-testifying co-defendant's confession into evidence against the defendant. This is because admission of a co-defendant's statements is inadmissible hearsay and violates the Confrontation Clause of the Sixth Amendment to the United States Constitution. See Lee v. Illinois, 476 U.S. 530, 541 (1986); Bruton v. United States, 391 U.S. 123, 128, 88 S.Ct. 1620 (1968); Franqui v. State, 699 So.2d 1312, 1318 (Fla.1997). A co-defendant's statements are especially suspect because he has a strong motivation to implicate another, rendering these statements even less credible than ordinary hearsay. See Lee, 476 U.S. at 541; Farina v. State, 679 So.2d 1151, 1155 (Fla.1996).

In Ramirez v. State, 739 So.2d 568, 579 (Fla. 1999), this court reasoned:

> As an evidentiary principle, the concept of "opening the door" allows the admission of otherwise inadmissible testimony to "qualify, explain, or limit" testimony or evidence previously admitted. Tompkins v. State, 502 So.2d 415, 419 (Fla.1986); see Huff v. State, 495 So.2d 145, 150 (Fla.1986); Blair v. State, 406 So.2d 1103, 1106 (Fla.1981).
>
> The concept of "opening the door" is "based on considerations of fairness and the truth-seeking function of a trial." Bozeman v. State, 698 So.2d 629, 631 (Fla. 4th DCA 1997). For example, in McCrae v. State, 395 So.2d 1145, 1151 (Fla.1980), defense counsel through his

> questions on direct examination "tactfully attempted to mislead the jury into believing that [the defendant's] prior felony was inconsequential." This Court held that to negate the misleading impression given by defense counsel's question, the prosecutor was entitled to elicit the nature of the prior felony conviction on cross-examination. See id. at 1152. The Court found that the defendant's line of questioning could have deluded the jury into equating appellant's conviction of assault with intent to commit murder with his previous misdemeanors. Consequently, the state was entitled to interrogate [the defendant] regarding the nature of his prior felony in order to negate the delusive innuendoes of his counsel.

Id. at 1152.

This case fit squarely into this Court's reasoning. Here, defense counsel wanted to argue that based on the evidence presented in this case, Caballero and Brown were equally culpable. Defense counsel also wanted to admit a certified copy of Browns conviction for second degree murder and his life sentence, and argues that an equally culpable defendant who was convicted of a lesser crime only got a life sentence, so this jury should only recommend life for Caballero. Such an argument would do exactly what this court precluded in McCrae, Caballero wanted to mislead the jury that the same evidence existed in Brown which is not the case. Hence, pursuant to McCrae, the State could properly introduce Brown's confession, which was introduced at his trial, to negate Caballero's claim that he and Brown were convicted based on the same evidence. The prosecutor informed the trial court that Brown's

statements, that were used against him at his trial, put all responsibility for the murder on Caballero (T. Vol. 10 p. 1515). Furthermore, the defense established during cross examination of Deputy Bukata that while they were at the police station, Brown blamed him for the murder. Hence, the trial court properly found that if Caballero argued that Brown was equally or more culpable that Caballero, then such a claim would open the door for the state to rebut the argument with the evidence that was used to convict Brown.

Furthermore, Caballero claims that he was entitled to make the proportionality argument to the jury and the trial judge was required to consider such evidence in his sentencing order. In this case, below, the state agreed that Caballero could make the argument, however, in turn the State could have rebutted the claim. Caballero's argument that he and Brown were convicted on the same evidence is meritless as there is nothing in this record to support such a claim, and because different evidence was used to convict Brown of second degree murder, namely Brown's confession. It is also apparent from the trial court's order that it considered the fact that Caballero was an accomplice and his participation was relatively minor, and found that the mitigator had not been established (R.Vol. 5 p. 921).

Moreover, the trial court was not required to consider Browns conviction and sentence as mitigating. In Kight v. State, 784 So. 2d 396, 401 (Fla. 2001), this court

stated that where defendant's are not convicted of the same offense, their sentences cannot be disparate. Hence, Brown's conviction for second degree murder and life sentence are simply not a mitigating circumstance and the trial judge was not required to consider it as such. Moreover, based on the prosecutor's representation regarding Brown's confession and Deputy Bukata's testimony, this record does not support Caballero's claim that he and Brown were equally culpable. Therefore, the death sentence should be affirmed.

POINT V

THE DEATH SENTENCE IS PROPORTIONATE.

A. THE DEATH SENTENCE CABALLERO RECEIVED IS PROPORTIONATE TO THE LIFE SENTENCE ISAAC BROWN RECEIVED FRO HIS SECOND DEGREE MURDER CONVICTION.

Appellant argues that since Brown was equally or more culpable than himself, and since Brown received a life sentence after being convicted of second degree murder, the imposition of the death sentence in this case is disproportionate. Appellant's claim is meritless as Caballero was convicted of first degree murder, and is therefore more culpable than Brown.

This Court has an independent obligation to review each case where a sentence of death is imposed to determine whether death is the appropriate punishment. See Morton v. State, 789 So.2d 324, 335 (Fla.2001). "The death penalty is reserved for

'the most aggravated and unmitigated of most serious crimes.' " Clark v. State, 609 So.2d 513, 516 (Fla.1992) (*quoting* State v. Dixon, 283 So.2d 1, 7 (Fla.1973)). In deciding whether death is a proportionate penalty, this Court must consider the totality of the circumstances of the case and compare the case with other capital cases. See Urbin v. State, 714 So.2d 411, 417 (Fla.1998). However, in cases where more than one defendant was involved in the commission of the crime, this Court performs an additional analysis of relative culpability. Underlying our relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment. See Ray v. State, 755 So.2d 604, 611 (Fla.2000); Jennings v. State, 718 So.2d 144, 153 (Fla.1998) ("While the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, disparate treatment of co-defendants is permissible in situations where a particular defendant is more culpable.").

Recently, in Shere v. Moore, 27 Fla. L. Weekly s752 (Sept. 12, 2002), this court found that it could not conduct a true relative culpability analysis because Shere's co-defendant was convicted of second-degree murder. See Steinhorst v. Singletary, 638 So.2d 33 (Fla.1994) (because Hughes, the co-defendant, was convicted of second-degree murder, his sentence of life imprisonment was not relevant to a claim of disparate sentencing). A conviction of first-degree murder requires a finding by

either a jury or the judge that the defendant committed a murder with premeditation or during the course of a felony enumerated in section 782.04(1)(a)2, Florida Statutes (1987).

In Shere, 27, Fla. L. Weekly at s755 , this court reasoned;

> [t]hat a conviction of second-degree murder means the defendant did not form the necessary intent to commit first-degree murder and did not commit the murder during the perpetration or attempt to perpetrate drug trafficking, arson, sexual battery, robbery, burglary, kidnaping, escape, aggravated child abuse, aggravated abuse of the elderly or disabled, aircraft piracy, carjacking, home invasion robbery, aggravated stalking, murder of another human, or unlawful throwing, placing or discharging of a destructive device or bomb. Because Shere's co-defendant was convicted of second-degree murder, his relative culpability for this murder has already been determined to be less than Shere's culpability.

See Larzelere v. State, 676 So.2d 394, 407 (Fla.1996) (finding a sentence of death proportional where the co-defendant was acquitted, noting "that Jason's acquittal is irrelevant to this proportionality review because, as a matter of law, he was exonerated of any culpability.") .

> Only in situations where the defendant's blameworthiness for the murder reaches the first-degree level do we proceed to the next step in determining if the circumstances warrant the punishment of death. Therefore, once a co-defendant's culpability has been determined by a jury verdict or a judge's finding of guilt we should abide by that decision, and only when the co-defendant has been found guilty of

> the same degree of murder should the relative culpability aspect of proportionality come into play. Moreover, the co-defendant should not only be convicted of the same crime but should also be otherwise eligible to receive a death sentence, i.e., be of the requisite age and not mentally retarded.

Shere, 27 Fla. L. Weekly at s755.

Hence, because it is the crime for which the defendant is convicted that determines his or her culpability, in this case that decision was made by the trier of fact when Caballero was convicted of First Degree murder. Moreover, Brown was convicted of Second Degree murder and nothing in this record shows that they were equally culpable.[1] Therefore, since Caballero's death sentence can not be disproportionate to Brown's sentence, his death sentence must be affirmed

B. THE DEATH SENTENCE IN THIS CASE IS PROPORTIONATE RELATIVE TO OTHER CAPITAL CASES.

Caballero argues that the death sentence in this case is disproportionate in light of all the arguments he has made in his initial brief and due to the number and strength of the mitigating circumstances.. This claim is meritless as Caballero's death sentence is proportionate.

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[1]In the instant case there is nothing in the record to support Caballero's argument that he and Brown were equally culpable. Rather, the prosecutor in this case and Deputy Bukata confirm the fact that Brown implicated Caballero as the killer and Brown was never implicated in the crime until after Caballero confessed (T. Vol. 10 p. 1515, T. Vol. 18 p. 1053, 1059).

In this case the trial court found five (5) aggravating circumstances: (1) during the commission of a felony, robbery and kidnaping, (2) avoid arrest, (3) pecuniary gain, (4) CCP, and (5) HAC ; Three (3) statutory mitigators, and three (3) non-statutory mitigators which were all given minimal weight. The trial judge considered and weighed the aggravating and mitigating circumstances and found that the aggravating circumstances in this case far outweigh the mitigating circumstances. The trial court found that each aggravating circumstance standing alone would outweigh the mitigating circumstances. (R. Vol. 5 p. 914-924).

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

> It is axiomatic that the death penalty is reserved for only the most aggravated and the least mitigated of first-degree murders. See Urbin v. State, 714 So.2d 411, 416 (Fla.1998); State v. Dixon, 283 So.2d 1, 7 (Fla.1973). As such, in reviewing a sentence of death, this Court must consider the particular circumstances of the instant case in comparison to other capital cases and then decide if death is the appropriate penalty in light of those other decisions. See Urbin, 714 So.2d at 416; Hunter v. State, 660 So.2d

> 244, 254 (Fla.1995); Woods v. State, 733 So.2d 980, 990 (Fla.1999); Almeida v. State, 748 So.2d 922, 933 (Fla.1999) (stating that proportionality review is "two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders.").

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

In the case at bar, the record reflects that Caballero and his accomplice decided to abduct Denise on the evening prior to the murder, made final plans on the morning of the crimes, and as she was walking up the stairs headed toward her apartment, they dragged her into Caballero's apartment, and bound her (T. Vol. 20 p. 1106-1117). Denise begged to be released unharmed and told Caballero that she would give them whatever they wanted (T. Vol. 20 p. 1116). Denise remained in the apartment over a period of several hours (T. Vol. 20 1127-1135). Caballero forced her to give him her bank and credit cards, she gave them all of her bank information, and she gave Caballero the keys to her apartment so that he could retrieve the pin numbers to her credit cards. Caballero left his apartment and went to various location where he withdrew cash from Denise's accounts (T. Vol. 20 1120-1127). Upon return to his apartment, he and Brown discussed how and when they would murder Denise and dispose of her body. After being bound for hours, Caballero and Brown went into Caballero's bedroom where they murdered Denise (T. Vol. 21 1179). While Denise

was on the floor, Caballero confessed that Brown held a cord around her neck and he pulled her head forward and covered her mouth to muffle her screams (T. Vol. 21 p. 1180-1187). The first cord broke and they obtained the heat rock cord and continued to strangle Denise. Caballero said that it too k between ten and twelve minutes to kill her (T. Vol. 21 p. 1183). After they killed Denise, Caballero and Brown went out to get something to eat and decide how to dispose of the body. They ultimately bound Denise in a sheet and tied cords around her legs and body. They transported her body to Fort Lauderdale and disposed of it in a canal, where she was ultimately discovered (T. Vol. 21 pp. 1185-1187).

This Court has upheld the death sentence in cases similar to this one. In Hildwin v. State, 727 So. 2d 193 (Fla. 1998), this Court upheld the death sentence where the trial court found four (4) aggravators (pecuniary gain, HAC, prior violent felony, and committed while under a sentence of imprisonment), two (2) statutory mitigators, and five (5) non-statutory mitigators. In Hildwin, the evidence showed that Hildwin strangled the victim with a ligature and it took the victim several minutes to lose consciousness. Hildwin stole her money and her car, and stashed the victims body in the trunk of her car which he abandoned in dense woods. Id. See also Reese v. State, 768 So.2d 1057 (Fla.2000) (upholding death sentence where victim was strangled to death; court found following aggravators: HAC, CCP and during the

course of a sexual battery; trial court did not find any statutory mitigators and gave minimal weight to non-statutory mitigator (no significant criminal history)); Brown v. State, 721 So.2d 274 (Fla.1998) (affirming death penalty where evidence established four aggravators including prior violent felony, murder committed during robbery and for pecuniary gain (merged), HAC, and CCP, balanced against two non-statutory mitigators of an abusive family background and drug and alcohol abuse); Hauser v. State, 701 So.2d 329 (Fla.1997) (death sentence proportionate where victim was strangled and trial court found three aggravators of HAC, CCP, and pecuniary gain, balanced against one statutory mitigator and four non-statutory mitigators). Hence, the death sentence is proportionate and should be affirmed.

POINT VI

FLORIDA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONAL (RESTATED).

Appellant argues that his death sentence violates Apprendi v. New Jersey, 520 U.S. 466 (2000). 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, 27 Fla. L. Weekly s323 (Fla. April 11, 2002); Bottoson v. State, 824 So. 2d 115 (Fla. 2002); King v. State, 808 So. 2d 1237 (Fla. 2002); Card v. State, 803 So. 2d 613 (Fla. 2001). Florida's capital sentencing statute was upheld in Proffitt v. Florida, 428 U.S. 242 (1976).

As a preliminary matter, Appellant's claim is not properly preserved for appellate review. 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, 613 So. 2d at 446, *quoting* Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also Steinhorst v. State, 412 So. 2d at 338. In the instant case, Appellant never argued below that his sentence must be decided by the jury, nor did he argue that the trial judge could not make the necessary findings to support the imposition of the death sentence. Therefore, this claim is not properly before this court.

Moreover, the recent decision of the U.S. Supreme Court in Ring v. Arizona, 122 S. Ct. 2445 (2002) is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is only

entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Caballero's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring in this case. The United States Supreme Court recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi is not retroactive). Every federal circuit that has addressed the issue has found that Apprendi is not retroactive. See, e.g., McCoy v. United States, 266 F.3d

1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of Apprendi has, likewise, determined that the decision is not retroactive. Whisler v. State, 36 P.3d 290 (Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury). Caballero's argument that Ring presents a case of fundamental significance is not persuasive. The fact that the question accepted for review in Ring presented potential far-reaching implications does not mean that the ultimate opinion issued meets the Witt standard of fundamental significance. Since, as will be seen, Ring has little or no impact on capital sentencing in Florida, it is not a case of fundamental significance. Clearly, Ring does not demonstrate that any "obvious injustice" occurred on the facts of this case.

Furthermore, Ring does not apply to Florida's death penalty scheme. The Arizona statute at issue in Ring is different from Florida's death sentencing statute:

> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum penalty he could have received was life imprisonment.

Ring v. Arizona, 122 S.Ct. at 2437. Under Arizona law, the determination of death

eligibility takes place during the penalty phase proceedings, and requires that an aggravating factor exists. This Court has previously recognized that the statutory maximum for first degree murder in Florida is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 27 Fla. L. Weekly S585 (Fla. May 23, 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38.

Moreover, contrary to Appellant's claim, Ring does not require jury sentencing in capital cases, rather it involves only the requirement that the jury find the defendant death-eligible. Id. at n.4. A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. Notably, the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989). It quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been]

suggested that jury sentencing is constitutionally required."). Ring, 122 S. Ct. 2445 at n.4. In Florida, any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

Even in the wake of Ring, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. Ring is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. Ring, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation or to the ultimate life-or-death decision which may continue to be made by the judge); Ring, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, *i.e.*, one aggravator, at either the guilt or penalty phase. Tuilaepa v. California, 512 U.S. 967, 972

(1994)(observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). So, once a jury has found one aggravator, the constitution is satisfied, the judge may do the rest. We know this is true because the Court in Apprendi held, and reaffirmed in Ring, that a prior violent felony aggravator satisfied the Sixth Amendment; therefore, no further jury consideration is necessary once a qualifying aggravator is found.

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in Ring which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so." Ring, 122 S.Ct. 2445 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. Caballero unfairly criticizes state law for requiring judicial participation in capital sentencing, but does not identify how judicial findings after a jury recommendation can interfere with the right to a jury trial. Any suggestion that

Ring has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis.

The jury's role in Florida's sentencing process is also significant. Section 921.141, Florida Statutes, states:

> **(1) Separate proceedings on issue of penalty.**--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. ...
>
> **(2) Advisory sentence by the jury.**--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death. The jury's role is

so vital to the sentencing process that the jury has been characterized as a "co-sentencer" in Florida. Espinosa v. Florida, 509 U.S. 1079 (1992).

Furthermore, to the extent that Caballero claims the death penalty statute is unconstitutional for failing to require juror unanimity, or the charging of the aggravating factors in the indictment, or special jury verdicts, Ring provides no support for his claims. These issues are expressly not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); Cox v. State, 27 Fla. L. Weekly S505, n.17 (Fla. May 23, 2002) (noting that prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)).

As this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." Mills, 786 So. 2d at 537. The United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive

of Caballero's claims.

In addition, Ring affirms the distinction between "sentencing factors" and "elements" of an offense recognized in prior case law. See Ring 122 S.Ct. 2445; Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002). Caballero's argument, suggesting that the jury role in Florida's capital sentencing process is insufficient, improperly assumes the jury recommendation itself to be a jury vote as to the existence of aggravating factors. However, the jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors. When the jury recommends death, it necessarily finds an aggravating factor to exist beyond a reasonable doubt and satisfies the Sixth Amendment as construed in Ring. To the extent that Ring suggests that capital murder may have an additional "element" that must be found by a jury to authorize the imposition of the death penalty, that "element" would be the existence of any aggravating factor, and would not be the determination that the aggravating factors outweighed any mitigating factors established. Caballero asserts that the jury must determine death to be the appropriate sentence, but nothing in Ring supports Caballero's speculation that the ultimate sentencing determination is an additional "element" which must be proven beyond a reasonable doubt.

Moreover, to the extent that Caballero claims that Ring requires that the

aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based upon an invalid comparison of federal cases, which have wholly different procedural requirements, to Florida's capital sentencing scheme. Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. Apprendi, 530 U.S. at 477, n.3 (2000); Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). This distinction, standing alone, is dispositive of the indictment claim, at least as far as Caballero relies on federal cases. For example, in United States v. Allen, 247 F.3d 741, 764 (8th Cir. 2001), the Court of Appeals based its decision that the statutory aggravating factors under the Federal Death Penalty Act do not have to be contained in the indictment exclusively on Walton v. Arizona, which, of course, Ring overruled. It is hardly surprising that the United States Supreme Court remanded Allen for reconsideration in light of Ring.

The United States Supreme Court elaborated on Apprendi in Harris v. United States, which was released on the same day as Ring. In Harris, the Court described the holding in Apprendi in the following way:

> Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.

Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002). In light of that plain statement by the United States Supreme Court, which speaks volumes in the interpretation of Ring, there is no basis for relief of any sort.

Therefore, Ring has no effect on prior decisions upholding Florida's capital sentencing scheme. However, should there be any question about the correctness of this conclusion, Florida juries routinely "authorize" the imposition of the death penalty by recommending that a death sentence be imposed, as in the instant case.

Additionally, the requirements of Apprendi and Ring were met in this case. Apprendi requires a jury rather than a judge make the determination of certain facts and that those facts be proven beyond a reasonable doubt rather than by the preponderance standard. Both requirements were met. The jury recommended a death sentence and the aggravators were proven beyond a reasonable doubt. Caballero cannot present a valid Apprendi challenge to Florida's death penalty statutes. Caballero had a jury at sentencing. The jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a reasonable doubt. Caballero's jury then recommended a death sentence by an 8 to 4 vote. A capital defendant who has had a jury recommend death simply cannot claim that his right to a jury trial was violated. There can be no violation of the right to a jury trial under

these facts. Thus, the death penalty imposed in this case does not violate Apprendi.

Moreover, not only did Caballero have a jury that recommended death but one of the aggravators that the judge relied on was found by the jury in the guilt phase. In this case, the trial court found the felony murder aggravating circumstance (R. Vol. 5 p. 915)). At the guilt phase, the jury found Caballero guilty of kidnaping, robbery and first degree murder (R. Vol. 5 p. 815-816). The judge's finding of the felony murder aggravator is exempted from the holding in Apprendi because it can be implied from the verdict that the jury found the felony murder aggravator beyond a reasonable doubt prior to the penalty phase. Ring at n.7 (declining to address Arizona's argument that the implied jury findings render any error harmless). Therefore, since the jury found one aggravator at the guilt phase the death sentence should be affirmed.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this honorable Court to **AFFIRM** Appellant's conviction and death sentence.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief," has been furnished by U.S. mail, postage prepaid, to: Lewis A. Fishman, 8211 West Broward Blvd. Suit 420, Plantation, Fl 33324, this _____ day of _____ 2002.

_____
Melanie A. Dale

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 14 point Times New Roman.

_____
Melanie Ann Dale