SUPREME COURT OF FLORIDA

LUIS CABALLERO
Appellant,

vs.

STATE OF FLORIDA
Appellee.

CASE NO: SC01-651

Lower Tribunal No: 95-15295CF10C

INITIAL BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Appellant/Defendant, LUIS CABALLERO, certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. Honorable Susan Lebow
   (Seventeenth Judicial Circuit, trial judge)

2. Celia Terenzio, Esq.
   (Sr. Assistant Attorney General, counsel for the Plaintiff/Appellee)

3. Charles Morton, Esq.
   (Assistant State Attorney, Seventeenth Judicial Circuit)

4. Deborah Carpenter, Esq.
   (Special Public Defender, trial counsel)

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7. Luis Caballero
   (Defendant/Appellant)

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STATEMENT OF THE CASE

Appellant Luis Caballero, together with co-defendants Isaac Brown and Robert Messer, was charged by indictment No. 95-15295CF10C filed on September 7, 1995, with murder in the first degree, kidnapping, robbery, burglary, and sexual battery. After a trial before the Honorable Susan Lebow Appellant was found guilty of murder in the first degree, kidnapping, robbery and burglary as charged, on February 22, 2000. (T. 1507-1508). The trial court granted a directed verdict as to the sexual battery count. (T. 1378).

Thereafter, penalty phase proceedings were held and on March 28, 2000, the jury recommended a sentence of death by a vote of eight to four. (T. 1803). After holding a Spencer hearing as required by law, the trial court sentenced Appellant on February 15, 2001 to death on the first degree murder count, to life imprisonment on the kidnapping count, and to two fifteen year prison terms on the robbery and burglary counts, all to run consecutively. (R. 944-955).

This appeal was timely filed. (R. 960).

The parties are designated as they appear in this Court. Appellant is Luis Caballero, the defendant below and Appellee is the State of Florida, plaintiff below. All references are to the record on appeal and transcripts of the proceedings below

and are designated “R.” and “T.,” respectively followed by the appropriate page number(s).

The co-defendants below, Isaac Brown and Robert Messer, were tried separately. Neither co-defendant was convicted of first degree murder and so neither co-defendant has a companion or related case before this Court.

STATEMENT OF FACTS

GUILT PHASE

West Palm Beach Police Department Detective Gary Noel testified that he began the investigation of the apparent disappearance of the victim in this case, Denise Rose O'Neill, on July 14, 1995, when he spoke with John Spotto, the manager of Charley's Crab in Palm Beach where Ms. O'Neill was employed. Mr. Spotto lodged the first missing person's complaint regarding Ms. O'Neill. (T. 915-917). Detective Noel went to the victim's apartment on Saturday July 15, and had a photographer take pictures of the apartment. He saw messages on Ms. O'Neill's machine and, although her car was missing, he saw no obvious signs of foul play in the apartment itself. (T. 918-921). Later Detective Noel called the early alert center for CitiBank and indicated he wanted to know about activity on the victim's credit card. (T. 922). Detective Noel received information that the credit card was being used. He let the credit card company know to keep the card active so that the police would be able to continue to track the movements of anyone using the card. At a later time they enlisted the aid of the United States Secret Service in tracking activity on the credit card. (T. 925-926).

About noon on July 15, 1995, a patrol sergeant found the victim's car in an apartment complex across the street from the victim's apartment complex. The car,

a Chevy Cavalier, was impounded, processed and photographed. (T. 925-928, 931-932). Several items were found in the trunk including a box of shoes from the Capezio Factory Outlet charged on the victim's account on July 13, 1995. (T. 932-935). Detective Noel also found a receipt in the victim's apartment for dinner in Palm Beach on the night of July 12, 1995, which had been charged to the victim's Visa account. (T. 937-938).

At about the same time on July 15, 1995, Broward Sheriff's Office Detective Stewart Mosher got involved in investigating the death of a person later identified as the victim in this case, Denise Rose O'Neill, by responding to the C-14 canal located on the northern edge of Tamarac (T 858-860). Detective Mosher took photographs of the canal and surrounding area near the Sawgrass Expressway. He also photographed the victim's body in the canal and during the preliminary post-mortem examination conducted along the canal bank. (T. 860-863). The photographs of the body taken after removal from the canal showed that the victim's hands and feet were bound and the victim's body was wrapped in what appeared to be a pink sheet. The bindings included electrical cords, shoelaces and a pink and purple dog leash. Also, the victim's clothing appeared to have been cut in several sections along the right hand side in the crotch area (T. 863-864).

A teletype was sent, and was received by the West Palm Beach Police Department which informed all the police departments in the area that a body had been found in Broward County. As a result of the teletype Detective Noel spoke to Detective O'Neil of the Broward Sheriff's Office, because the description in the teletype matched the description of Ms. O'Neill. (T. 939-940). Detective Noel agreed to meet with Broward detectives at the Broward County Medical Examiner's Office the next day. That day, July 16, 1995, Detective Noel and Detective Frasier from West Palm Beach met Detective O'Neil and Detective Bukata at the medical examiner's office. Using dental records of the victim's, Dr. Steve Rifkin of the Broward Medical Examiners Office positively identified the Broward County body as Denise Rose O'Neill. (T. 940-943, 1068-1069).

On July 15, the West Palm Beach Police had issued a press release and released the victim's photograph to newspapers and television stations in the area. (T. 944-945). After the identification of Ms. O'Neill as the victim, the police started canvassing her apartment complex, Clear Lake Colony. (T. 945). Also, as a result of various leads they received, detectives were sent to a Circle K store about five minutes away from the apartment complex and to an Albertson's about ten minutes from the apartment complex (T. 955), as well as to an ATM located inside the Palm Beach Mall

about five minutes away from the apartment complex. The Secret Service followed up at an X-tra in the Miami area. In the meantime, the Palm Beach and Broward detectives talked to neighbors and the apartment complex management. (T. 957-958). Detective Noel later watched all the news broadcasts and noticed that Appellant Luis Caballero, the victim's neighbor, was interviewed on different tv stations. (T. 945-946). Detective Noel saw the Defendant's television interviews on the following Monday morning. (T. 952).

In canvassing the area of the victim's apartment complex, detectives were especially looking for information about anyone who kept any reptiles or snakes. This was because the ligatures binding the victim included heat rocks, simulated rocks with attached electrical cords which are used to help cold blooded animals digest their food. (T. 1069-1070). During the canvass, Detective O'Neil saw Appellant and Rochelle Nolan. Appellant approached Detective O'Neil and indicated that he had not been spoken to by the police. (T. 959-960, 1070-1071). Appellant stated that he just knew the victim in passing as a neighbor from across the hall. He opined that she was "snotty." Appellant added that he was an unemployed car detailer. He told Detective O'Neil that he had never detailed the victim's car and had not been inside it. He described the car as a white Chevrolet and said he had last seen the victim in regular

clothes, as opposed to her work uniform. (T. 1070-1071). Appellant also told Detective O'Neil that he and Ms. Nolan had been boyfriend/girlfriend for about five years and had been living in the apartment, but that because of recent problems Ms. Nolan had recently been staying with her family in Plantation. (T. 1076). Appellant also said that he owned a couple of snakes and a dog, a chow. Appellant kept the snakes in an aquarium. (T. 1077-1078).

On Monday, July 17, 1995, Broward Sheriff's Office Crime Scene Detective Terry Gattis photographed Ms. O'Neill's 1992 Chevrolet Cavalier, processed it for fingerprints and looked for evidence. (T. 973, 981-982). Detective Gattis recovered various personal items of the victim, some handwritten business cards and business correspondence for credit cards with the victim's name. (T. 981). Detective Gattis processed for fingerprints numerous items including soda bottles, a brown box, a Liz Claiborne bag, a woman's Reebok shoe bag, a Capezio shoe bag, a tennis racket, the rearview mirror, a pair of sunglasses, a clothes basket, an umbrella, tennis ball and camera in the trunk, a Swap Shop advertisement and an Albertson's advertisement. Thereafter, on Wednesday, July 19, 1995, Detective Gattis went to the victim's apartment building and collected from apartment 17 a total of 66 latent fingerprint lifts. The latent fingerprints were turned over to latent examiner Sandra Yonkman. (T. 984).

Broward Sheriff's Office homicide detective Glenn Bukata assumed the role of lead investigator in the O'Neill case on July 15, 1995. He went to the area where Ms. O'Neill's body was found and attended the autopsy. (T. 985-989). At the autopsy, Detective Bukata saw ligatures on the outside of the pink sheet in which the body had been found. These were heat rocks, electrical cords at the end of which were rocks containing a heating device used to warm reptiles. Other ligatures were a brown woven belt and black shoelaces around the victim's ankles, and also a purple and pink dog leash around the victim's wrists, which were bound in front of her. The victim was wearing a dark blue bathing suit which had been pulled down just below her breasts. The bottom of the bathing suit had been pulled up and the crotch area had been cut out. (T. 991).

Detective Bukata first focused on Appellant as a suspect after seeing Appellant on the television interviews that Detective Noel showed him. (T. 993-996). Detective Bukata heard Appellant say in those video tapes that he, Appellant, used to say hello to the victim, that he was concerned and that he had no idea what happened to her. (T. 996). During a canvass at the apartment building Detective Bukata knocked on Appellant's apartment door, which was across from the victim's, and heard a dog

bark. He also obtained the lease for Appellant's apartment and had a comparison made between Appellant's fingerprints and latents taken from the victim's apartment. (T. 996-998).

On July 19, Detective O'Neil and Detective Bukata were at the apartment complex and were admitted into Appellant's apartment by Ms. Nolan. Once inside they saw two aquariums and a black dog. Appellant then returned to the apartment complex, spoke to the detectives, and was asked to accompany the detectives to Broward County. (T. 1080-1082).

Isaac Brown, Appellant's co-defendant, was also there and was asked to come back to Broward as well. (T. 961-963, 1000-1001). After the hour long ride to the Broward Sheriff's Office during which there was no conversation, at about 6:25 p.m. Detective Bukata advised Appellant of his Miranda rights. (T. 1001-1002, ,1004-1005, 1080-1082). After reading Appellant his Miranda rights, Detective Bukata went up to West Palm Beach so that he would be present during the search of Appellant's apartment.

After Detective Bukata read Appellant his Miranda rights around 6:25 p.m., Detective O'Neil went and interviewed Ms. Nolan for about an hour. (T. 1083-1086). After that, and beginning at about 8:38 p.m., Detective O'Neil and his sergeant

interviewed Appellant for about an hour. Appellant told Detective O'Neil that he had been unemployed, that his car had been repossessed and his telephone disconnected. He said that he hardly knew the victim and described her as "snotty," and not friendly. (T. 1087). Appellant said that he was behind in his rent but that he had paid the July rent, and that after Rochelle left he had a friend come and stay with him to help pay expenses. (T. 1087-1088). As to the victim, Appellant said he had never been inside her car and that he had not seen her since the previous Tuesday. He said that he had heard that a security guard at the complex named Philip had been known to go inside women's apartments at the complex and rape them. (T. 1090).

Appellant also said that Rochelle had gone to Plantation on the Monday before the incident because of ongoing problems. (T. 1088-1090). The friend who moved in with Appellant was Isaac Brown. Appellant also mentioned a friend named Rob who had been in his apartment around that time. Appellant had met Rob at the car dealership he used to work for and Rob had introduced Appellant to Brown. Rob turned out to be the co-defendant Robert Messer. (T. 1088-1090). This interview went from 8:38 thru 8:58 p.m. and was not recorded. At 9:15 p.m. the interview resumed and concluded at 9:55p.m. and was not tape recorded. (T. 1092-1093). Detective O'Neil would not tell Appellant what the evidence was, but told the Appellant to think

about the evidence the police had at the scene and in the victim's car. (T. 1095-1097). After another break from about 9:45 to 10:10 p.m. the questioning went on, unrecorded, until about 12:15 a.m. (T. 1098-1099). During this statement Detective O'Neil told Appellant about the property recovered from Appellant's apartment. He kept telling Appellant to tell the truth and told Appellant that he, Detective O'Neil, did not believe that he wanted the murder to happen. At about 10:45 p.m., Appellant told Detective O'Neil that he would tell what happened but wanted the sergeant to leave the interview room. The sergeant left. (T. 1101-1102).

Appellant then said how he was with Brown inside his apartment when Brown saw the victim walking upstairs to her apartment, grabbed her, brought her into Appellant's apartment and tied her up. Appellant said that he went into the victim's apartment and located some "cards" including a bank card. Appellant recounted how he went to the West Palm Beach Mall to withdraw $300.00 and then to an Albertson's ATM and withdrew $400.00 on her cards. When he returned he found the victim had been tied up with more ligatures. During the course of the evening Brown and Appellant discussed how the victim was going to be killed. Appellant added how Brown needed $2000.00 to buy an Astro van and that Brown was desperate for money. Appellant blamed Brown for the murder. (T. 1102-1103).

After speaking until about 12:15 a.m., another break was taken. Thereafter, the tape recorded statement began for an hour and twenty minutes, at which Detective Bukata was also present. (T. 1104-1106).

During this tape recorded statement, Appellant, acknowledged that his Miranda rights were read earlier, that he voluntarily came down from West Palm Beach and that he had been treated fairly and was making the statement of his own free will, without coercion. He then went on to state the following: Appellant lived in his apartment for four months with his fiancé Rochelle Nolan. She was currently living at her mother's house. Appellant had been unemployed for one month and had last worked at Moran Auto Plaza as an auto detailer for a month. Before that he worked as a warehouseman and sometime detailer. Ms. Nolan was not employed. His rent was $515.00 a month for his one bedroom apartment. He had no conversation with the victim because she did not respond when he said hello. She was very quiet. He had never been inside her car, a white Chevrolet Cavalier. He also did not know where she worked. (T. 1106-1113).

The incident occurred on a Thursday. The night before, Appellant said, Isaac was planning to rob the victim. Appellant described Isaac as a black male, about 6 feet tall and about 180-195 pounds and 20 years old. Nolan had known Isaac for two

months and described him as a pretty good friend. (T. 1113-1114). According to Appellant, Isaac wanted to rob the victim because he needed $2,000.00 to buy an Astro van. Isaac had been at Appellant's residence about three times in the previous two months, and picked the victim because she lived next door to the Appellant and lived by herself. (T. 1115-1116).

Appellant said he was just joking about robbing the victim, but Isaac was serious. Appellant felt queasy, but Isaac reassured him. The original idea was to get into the victim's apartment. Appellant did not want it to occur in his home and was just going to be the lookout. (T. 1115-1117). Appellant was surprised when he turned around and saw Brown on the floor struggling with the victim. Isaac told Appellant that he had heard the victim coming up the stairs. The victim was carrying a laundry basket and was wearing white shorts and a white t-shirt with a bathing suit on underneath and brown shoes. (T. 1118-1119). Brown had the victim on her stomach. Appellant got hysterical. They tied her up. Isaac covered her mouth and they tied her legs with a towel. Her hands were tied with pantyhose and Brown gagged her with a towel or rag. The victim asked to be left alone and that she would give them anything as long as she was not hurt. Appellant told her that nothing would happen to her and that she should do what Isaac said. The victim cooperated. (T. 1120-1121).

The victim gave information about her credit cards and bank accounts, including that she had a $3,000.00 dollar limit on her Visa card. She said there was a brown box in her apartment and it had a pin number written down in it. She also said that her checking account had $500.00, and she told Appellant to do what he had to do and come back and let her go. Appellant left to get cash using the credit card. He took her car. The keys had been in a little pouch in the laundry basket (T. 1123-1124). Appellant went to the Palm Beach Lakes Mall on Palm Beach Lakes Boulevard and went to the ATM near the food court. He got to the mall at about 4:45 p.m., the victim having been taken into his apartment between 4:00 and 4:30. Appellant took out $300 using the Visa card, then went to Albertson's located on Okeechobee Boulevard and Military Trail. He used the same card to take out another $400.00. He left the victim's car at the Palm Beach Lakes Mall and took a cab back home. When he returned Appellant found that Isaac had the victim tied up. She was sitting up with her ankles tied and with her wrists tied in front of her. She was tied up with a pillow case, the cord from an electric razor, pantyhose and the dog leash around her ankles. The leash was neon pink, blue and yellow and made out of nylon. The pillow case was white with blue, pink and white stripes. The victim was gagged. Her shoes were off but the rest of her clothes were on. (T. 1125-1128). It was now nearing 7:00 p.m.

Brown told Appellant that the victim had put up a fight and had scratched Brown when he let her use the bathroom. By the time of the Appellant's return, the victim was very quiet and cooperative. Brown told her that they decided to wait until night and that they would then take her somewhere and drop her off. Appellant tried not to think about what would happen. He was troubled because he knew that the victim was going to be killed. (T. 1129-1131). They waited until about 8:30 or 9:00. Brown started talking about how she would be killed. Brown asked Appellant to do it. They debated who would kill her and Brown said he wanted Appellant to kill her. Brown put his hands on a heat rock cord. The heat rock helps snakes digest their food. Appellant had two snakes in different aquariums. He described the heat rocks as one burgundy and one tan with two and a half foot cords. (T. 1130-1134).

Around 8:30 or 8:45 Appellant said he was too scared. Brown said he would do it if Appellant gave Brown more of the victim's money. Brown put on rubber gloves and grabbed the victim. Brown wanted to do it. (T. 1134). The discussion about killing the victim had not been in her presence. It had occurred in the kitchen while she was in the bedroom. (T. 1135). Brown put the victim on the floor with her feet and hands tied in front of her. She was gagged and blindfolded. Brown put the heat rock rope around her neck from behind, and used a lot of force on the victim.

After about two minutes during which the victim fought, Isaac crossed his hands and wrapped the cord more around his fist. The victim squirmed. Appellant thought the whole process took ten to twelve minutes. (T. 1135-1138).

When it appeared the victim was dead, Appellant and Brown left to get something to eat at the Taco Bell, but Appellant couldn't eat. A friend named John from the apartment complex took them to the mall to get the victim's car. (T. 1140-1142).

Appellant and Brown tried to figure out how to get the victim to the car and they decided to put her in the car and take her as far from the apartment complex as possible. They decided to take her away around 5:00 or 5:30 a.m. They wrapped the victim up in a pink sheet and bedspread, tied her ankles, used a heat rock to wrap around the blanket or bedspread and also used shoelaces from the Reeboks. Appellant did not remember if the dog leash was still on her but they did use two heat rocks, one on her feet and one on her upper body. The shoelace was around her legs. Appellant also did not remember the belt. Appellant carried the victim down to the car by carrying her over his shoulder. (T. 1142-1146).

They put the victim in the trunk. Appellant drove and Brown sat in the front passenger seat. They drove to the Sawgrass Expressway in Broward and pulled over

on the west side of the Sawgrass Expressway toward the Everglades. There was a canal on the other side of a gate. Isaac Brown dragged the body underneath the gate and put it in the water while Appellant looked out for cars. (T. 1148-1150). Appellant did notice that the crotch of the victim's bathing suit had been cut after he returned from going to get the car and that one of her breasts was exposed and the bathing suit bottom pulled up. Appellant did not ask Isaac about the bathing suit being cut or pulled down. When Appellant left the victim's shirt was on but it was off when he got back. He added that no one sexually assaulted her or burned her legs with cigarettes and that she was gagged the whole time. (T. 1152-1155).

Appellant and Brown drove off and went to an Xtra Supermarket to withdraw another $400.00 using the victim's Visa card. They then went to an IHOP, ate breakfast and divided the money. Isaac got about $700.00 and Appellant had perhaps $400.00-$450.00. They then went to the Swap Shop. Appellant gave Isaac the credit card and did not use it again. Appellant bought a couple of t- shirts at the Swap Shop and they left around 10:30 or 11:00 a.m. (T. 1155-1158).

They started driving home but were very tired so they pulled over at a Taco Bell off Hypoluxo Road and slept for an hour or so. On the way home they went to a reptile store to get snake food. Appellant saw Isaac at a laundromat, dumping the

victim's clothes from a laundry basket. The laundry basket had included the victim's purse. Isaac disposed of her property. Appellant paid rent with his part of the money and had to get some more money from Isaac. (T. 1158-1160). Appellant then remembered the scratch on Isaac's right hand. He indicated that he believed the victim was dead when her body was disposed of. (T. 1159-1163). Appellant added that Isaac did not say that he had sexually assaulted the victim, but that Isaac had suggested it because Isaac had said that while he was alone with the victim he had pulled her shorts up. Appellant told Isaac not to molest her. Appellant also said that Isaac used the orange scissors to cut the crotch area of the victim's bathing suit. Further, Isaac disposed of the victim's credit cards. When they got back to the apartment complex both of them went into the victim's apartment. Appellant told Isaac not to take the victim's stereo. Isaac wiped down her apartment to try to remove fingerprints. Appellant said that he only touched the brown box containing credit cards and some photographs and that the box had been left in the victim's car. He also saw a tennis racket in the car, along with a box of shoes. Appellant parked the car across the street from his apartment complex. (T. 1164-1168).

At the end of the taped statement Appellant said "I feel sick to my stomach. I never expected it to happen. I keep having bad dreams about it. It should never have

happened. I feel a great deal of remorse." This statement ended at 2:17 a.m. (T. 1169). Later, Detective O'Neil told Appellant that he did not believe he was telling the whole truth and that specifically that Detective O'Neil thought Appellant took part in killing the victim and had sex with her. Appellant said that he would tell the truth. (T. 1178-1179). Appellant went on to say that he was in front of the victim at the time of the killing while Brown was in back of the victim. Appellant pulled the victim's head forward while Brown pulled back. The first cord broke. Another cord was obtained. Afterward Appellant put the victim on her back and removed the ligature from around her ankles. He then took off her shorts, cut her bathing suit and had sex with her for about five minutes and ejaculated inside her. This thirty minute talk was not recorded. Detective O'Neil then got a tape recorder and a shorter tape recorded statement was taken starting at 6:07 a.m. (T. 1178). After again indicating that he was giving a voluntary statement, Appellant repeated how Brown placed the cord around the victim's neck. Appellant said he would give Isaac more of the money. Isaac had put gloves on and struggled with the victim. Appellant stated that he used his body weight to hold her down and held her head. The victim had a sock in her mouth to gag her. Isaac was behind her and choking her with the telephone cord from the kitchen until it broke. Then Brown grabbed the heat rock cord and put it around her neck. He

pulled one way while Appellant pulled her head the other. (T. 1181-1184). Afterwards, believing the victim to be dead, Appellant had sex with her. He cut the crotch out of her bathing suit and cut some of the ropes off her legs. (T. 1184). He added that the victim urinated on him and he cut her bonds and pulled her shorts off and cut the crotch of her bathing suit with the orange handled scissors and cleaned her vagina with a cloth before having intercourse with the victim on her back. Appellant ejaculated after having intercourse for about five minutes. (T. 1186).

As noted earlier, lead Detective Bukata was not present during this statement because he had gone to Appellant's apartment to be present at the search. (T. 1005-1006).

Appellant's apartment was on the third floor near the victim's apartment. Detective Mosher from Palm Beach County was at the apartment with BSO Sergeant Larry Rogers and Deputy Bukata. Mosher took photographs, measurements, and did a crime scene sketch which was later used by BSO to make a computerized design of the apartment. (T. 866-868). Among other items Detective Mosher photographed was an aquarium containing a large snake which was on top of a cardboard box. Beneath the box was found a Bally's Scandinavian Health Club Card. (T. 871-873). In the bedroom closet were located black Reebok tennis shoes without laces. (T. 874).

Noticing reddish brown stains on the floor in the area of the box, Detective Mosher removed some of the carpeting for later testing. Preliminary tests showed blood on the carpet but not enough was found to permit identification. (T. 873, 874-879).

Detective Mosher processed the scene for fingerprints. He processed the living room area, coffee table and horizontal surfaces surrounding an entertainment center and telephones, doorjambs, the door leading to sliding glass doors, bedroom, bathroom and kitchen doorframes and areas leading to and from the apartment. Detective Mosher lifted 26 latent print impressions from these areas and two from the Bally card. The latent fingerprints were submitted to Sandra Yonkman of the latent identification section in the BSO crime lab. (T. 889). Other items processed by Detective Mosher were an orange colored pair of scissors found in the bathroom, a number of magazines located in the bedroom, two packs of cigarettes, rubbing alcohol bottles and a rubber cork screw. (T. 896). Detective Mosher also processed and collected items from the victim's apartment, including surfaces within the dining area, the kitchen, the master bedroom, the dresser and the dresser drawers. Again, latent fingerprints were submitted to Sandra Yonkman. (T. 897-898).

Upon his return from the search of Appellant's apartment, Detective Bukata interviewed Isaac Brown and then, along with Detective O'Neil interviewed the

Appellant. Ultimately, as noted above, a recorded statement was taken from Appellant by Detective Bukata and Detective O'Neil. (T. 1005-1006).

When Detective Bukata asked Appellant to come back to Broward on July 15, 1995, he did not tell Appellant that Appellant was a suspect. (T. 1029). Also, when Detective Bukata first saw the co-defendant Brown, he did not know who Brown was. Later, he found that Brown was living with Appellant in the apartment several days to a week prior to the incident. (T. 1029-1031). Detective Bukata testified that Appellant indicated to Detective Bukata that he had gone through twelfth grade. Detective Bukata actually wrote on the rights waiver form that Appellant had only gone through the tenth grade. Detective Bukata conceded that the twelfth grade testimony was a mistake on his part. (T. 1034-1036). The actual administration of the Miranda rights to Appellant was not taped. Bukata conceded that he did not speak to Appellant on tape until 12:57 a.m. This tape recorded statement went from 12:57 a.m. through 2:17 a.m., an hour and 27minutes. (T. 1051). During this taped statement, Appellant said that it was Brown who grabbed the victim from the hallway and dragged her into Appellant's apartment. (T. 1048-1051). Detective Bukata spoke to Brown from about 10:00 p.m. to midnight, and then, along with Detective O'Neil, spoke to Appellant for about an hour and then an hour and a quarter on tape. He then spoke to Brown til

about four and then took a taped statement from Brown. (T. 1014-1016). Detective Bukata started Brown's taped statement at 4:10 a.m. Detective Bukata told Brown that Appellant blamed him and Brown went on to blame Appellant. (T. 1053). Subsequently Detective O'Neil took the second taped statement from Appellant while Detective Bukata did paperwork. This statement began at 6:07 a.m. and lasted for 8 minutes. (T. 1053-1055). Brown denied killing the victim but did say he took a telephone cord and wrapped it around the victim's neck. (T. 1056)

As a result of their statements both Appellant and Brown were arrested that night. Subsequently, because Appellant had told the Detectives that he and Brown had gone to an IHOP at Commercial Boulevard and State Road 7 after discarding the victim's body, Detective Bukata obtained a meal ticket from the IHOP indicating that at 6:46 a.m. on July 14, 1995, a waitress named Susan Atkins had served three diners. (T. 1016-1018). Ultimately the fingerprints of another individual, Robert Messer, the other co-defendant, were submitted to the latent fingerprint section. Messer's fingerprints were found in the victim's car and Messer was arrested as well. (T. 1021). Other investigative activities of Detective Bukata were that he obtained paperwork from the leasing agent for Appellant's apartment and found that Appellant paid $525.00 by a money order on July 15, 1995. This corresponded to two stubs found in

Appellant's apartment. (T. 1021-1025). Also, after a Secret Service agent provided Detective Bukata with the victim's credit card transactions, Bukata asked Detective Mosher to process an ATM machine located on State Road 7 and Oakland Park Boulevard in Lauderdale Lakes and at an X-tra Supermarket. (T. 1026-1027).

In the early morning hours of July 20, 1995 Detective Mosher went to the Broward Sheriff's Office Public Safety Building on Broward Boulevard to photograph Appellant and the co-defendant Isaac Brown (T. 898, 901). Among other things, the photograph showed the top of Brown's right hand and some sort of an injury on Appellant's upper right arm. (T. 902). From August 15, 1995 through August 25, 1995 Detective Mosher received various items regarding this case, primarily from Detective Bukata, for purposes of fingerprint processing and photographing (T. 903). Detective Mosher collected evidence but did not analyze it. (T. 909).

West Palm Beach Police Officer David Atherton went to the locations appellant described looking for the victim's credit cards. He found a portion of a blue Visa card in a parking lot in the area of some businesses on the south side of Okeechobee Boulevard. (T. 1223-1225).

Dr. Lisa Flannagan, an assistant medical examiner in Broward County, testified that she observed the autopsy of the victim Ms. O'Neill which was performed by Dr.

Gorris. (T. 1229-1231). Dr. Flannagan described the various ligatures binding the victim including ligatures around her wrist and ankles on the outside of the sheet. A brown electrical cord was attached to a heat rock and a black shoelace and a braided belt were around the ankles. The hands were tied in front by a leash, and a second ligature cord with an attached heat rock was around the body. Also, the crotch area of the bathing suit had been cut. Although there was a lot of decomposition from the body being in water, there was some bruising from the ligatures. (T. 1231-1232, 1234-1237).

Dr. Flannagan's finding was that the cause of death was asphyxia, i.e., death from lack of oxygen, and that the manner of death was a homicide. (T. 1233-1234). Because of the decomposition of the face, neck and chest, Dr. Flannagan was unable to tell if there were any bruises on the victim's neck. There was no obvious trauma to any bodily organs. (T. 1239-1240).

Dr. Flannagan could not say whether Appellant was strangled or if she actually died from drowning. (T. 1241-1242, 1250). This was so because in view of the decomposition she could not discern hemorrhages in the eyes that one usually sees in strangling cases. There was some fluid seen in the lungs, something usually seen in drowning deaths. However, when there is asphyxiation, fluid also tends to get in the

lungs. (T. 1242-1244). Accordingly, Dr. Flannagan could not say with any degree of medical certainty that the cause of death was anything other than asphyxia. (T. 1245, 1250).

BSO latent fingerprint examiner Sandra Yonkman testified that she compared various individuals fingerprints to packs of latent fingerprint cards supplied by Detectives Gattis and Mosher and investigator Jack McCall of the West Palm Beach Police Department. (T. 1252, 1256-1257).

Of the sixty-three latents provided by Detective Gattis from the victim's car, Ms. Yonkman found 36 fingerprints of value. (T. 1257, 1265). Ms. Yonkman matched six latent fingerprint cards from Isaac Brown to items in the vehicle and from the rearview mirror. Seventeen latent cards matched the Appellant. These were from inside the vehicle, outside the vehicle and inside the trunk, including on the shopping bags. (T. 1268-1269). Investigator McCall processed the outside of the victim's white Cavalier. There were three usable cards. One of the cards matched Appellant and one matched Brown. (T. 1269-1270). Six latent fingerprints, of which three were of value, were lifted from the ATM machine on July 18, 1995. Ms. Yonkman was unable to match any of these latent fingerprint cards to either Appellant or Brown. (T. 1270-1271).

Of twenty-six latent fingerprint cards from Appellant's apartment, three were identified as Appellant's, one as Robert Messer's, and three as Rochelle Nolan's, but there was no match to Brown. There were a total of thirteen of value. (T. 1271). Messer's fingerprints were found on the sliding glass door as were Ms. Nolan's. Appellant's came from the sliding glass door and from the front door jamb. Regarding latents lifted by Detective Mosher on July 20, Appellant's latent fingerprint was found on the Bally card. Ten latents from the victim's apartment were submitted. Four were of value. One was identified as Appellant's from the dresser and one from the doorjamb. (T. 1273).

Subsequently additional latent fingerprints were submitted by Detective Mosher from items from the victim's apartment. Appellant's fingerprints were found on the Visa pin sheet and either on the Liz Claiborne bag in the trunk or on an Albertson's advertisement found in the vehicle. (T. 1276-1277).

Kevin Noppinger of the Broward Sheriff's Office crime laboratory DNA Section testified as an expert, over defense objection, that he received evidence from Detectives Suchomel, Mosher and Bukata in this case. Detective Suchomel gave Mr. Noppinger the victim's sexual assault kit which included vaginal, oral and anal swabs. The swabs were labeled as coming from an "unknown" person. (T. 1284-1285). Mr.

Noppinger found semen on the vaginal swab, enough to make a DNA comparison. (T. 1297). He received samples for comparison from Appellant, Isaac Brown, Robert Messer and Rochelle Nolan, and concluded that the semen must have come from Appellant. (T. 1306-1308).

PENALTY PHASE

Prior to the beginning of the penalty phase, the defense advised the trial court that it intended to call a records custodian from the Broward Clerk of Court to testify that the co-defendant Isaac Brown was convicted of second degree murder and therefore not eligible for the death penalty, for the purpose of arguing the disparity of sentence as a mitigating factor before the jury. (T.1513-1514). Upon objection by the State, the court below ruled that such a disproportionality argument would "open the door" for the State to introduce the co-defendant's hearsay statements implicating Appellant. (T.1515-1517). Based on the court's ruling, the defense did not call its witness or make the disparity argument to the jury during the penalty phase.

The defense did introduce testimony at the penalty phase which established that Appellant was a good, interested and loving father to his sons and family. (T.1556,1563,1566-1569,1587,1593,1606) and that he was always a non-aggressive follower, subject to domination by his friends. (T.1557,1562,1571-1573,1579-

1580,1589-1591,1604-1605,1607).

In addition, the testimony of Dr. Lee Bukstel, a psychologist and of the Appellant's family members established that Appellant suffered from physical, emotional and language disorders, along with academic skill, developmental and learning problems that resulted in borderline to low average intelligence and poor overall functioning. (T.1617-1619,1625,1631,1636). Appellant had a learning disability and was in special education classes in school until he dropped out at 16. (T.1559,1562,1563,1576,1579,1581,1604,1606,1617). In addition, Appellant suffered a significant hearing loss as a child as well as sustaining at least two head injuries as a child. (T.1575-1578,1604,1618-1619,1633). All of these factors combined with Appellant's repeated, excessive use of alcohol resulted in significant mental deficiencies, according to Dr. Bukstel. (T.1625-1635).

At the penalty phase the State introduced victim impact evidence in the form of photos, letters and a prepared statement. (T.1531-1542). In addition the State called its psychologist, Dr. Trudy Block Garfield who opined that Appellant had no significant psychological problem, although she never interviewed him. (T.1730-1731,1735-1737).

At the conclusion of the penalty phase evidence, the court instructed the jury on

the statutory aggravating circumstances that the crime was committed while Appellant was engaged in the commission of a robbery and kidnaping, that the crime was committed for financial gain, and to avoid or prevent a lawful arrest. The jury was also instructed as to the heinous, atrocious and cruel aggravator and the cold, calculated and premeditated aggravator, all over defense objection. (T.1668-1671,1792-1798). In addition the court instructed the jury that if it was reasonably convinced of these facts it could consider in mitigation that the Appellant had no significant history of prior criminal activity, that Appellant suffered from a mental disturbance, that Appellant acted under extreme duress or substantial domination of another, that Appellant was an accomplice whose participation was relatively minor, and any other aspect of the crime or the Appellant's character. (T.1672-1678,1795-1802).

After deliberating for three hours the jury recommended that Appellant be sentenced to death by an eight to four vote. (T.1803). After a *Spencer* hearing the court below determined that five strong aggravators were proved and to be given great weight, and that all the mitigators advanced were either not established or to be given little weight. (T.1840-1847,1847-1850). In its written sentencing order, the trial court excluded the financial gain aggravating circumstances from its consideration in view of the finding regarding the robbery. (R. 917). Finding that the aggravators

outweighed the mitigators, the court sentenced Appellant to death. (T.1851).

SUMMARY OF ARGUMENT
GUILT PHASE
POINT I

Appellant's motion for mistrial during the Prosecutor's closing argument should have been granted. The prosecutor's comments clearly referred to Appellant's failure to testify about events involving no other witnesses in the case. Further, the prosecutor's remarks impermissibly suggested to the jury that Appellant, as opposed to the State, had the burden of proof.

PENALTY PHASE
POINT II

The trial court erred in its sentencing order finding and giving great weight to the statutory aggravating circumstance that the murder in this case was cold, calculated and premeditated (CCP). The court partially relied on facts not established in the instant record concerning the length of discussions between Appellant and his primary co-defendant. Thus, the heightened premeditation requirement of this aggravating circumstance was not established. Further, it was improper for the trial court to rely on the remaining facts because this constitutes unconstitutional doubling of other aggravating circumstances found by the court.

POINT III

The trial court improperly failed to consider Appellant's age as a statutory mitigating circumstance. Appellant offered substantial evidence of his immaturity, serious psychological problems, limited intellect and follower type personality. Thus the trial court should have considered this evidence and found that this statutory mitigating circumstance was proven.

POINT IV

Appellant sought to establish the crucial nonstatutory mitigating circumstance that his primary co-defendant was convicted at a separate trial of murder in the second degree and was sentenced to life imprisonment. The trial court prevented this evidence from being established by agreeing with the prosecutor that, if Appellant offered proof of this conviction, the jury would be permitted to hear the non-testifying co-defendant's hearsay statement. This ruling was clearly erroneous, because, on these facts, Appellant would not have had a meaningful opportunity to cross examine the co-defendant.

POINT V

Appellant's death sentence is disproportionate in two respects: A) on these facts, where the State relied almost exclusively on Appellant's custodial statements to establish the statutory aggravating circumstances found by the trial court, those

same facts clearly indicate that the primary co-defendant was at least as culpable, if not more culpable than Appellant. Therefore, the trial court should have considered and given substantial weight to that co-defendant's lesser conviction and sentence. B) In view of the compelling evidence establishing a variety of statutory and nonstatutory mitigating circumstances, both those considered and not considered by the court below, Appellant's sentence is not proportionate when compared to other death sentences upheld by this Court.

POINT VI

Appellant's death sentence should be vacated. Florida's capital sentencing structure is violative of constitutional principles established by the United States Supreme Court setting forth that a jury needs to find aggravating circumstances beyond a reasonable doubt. Despite this Court's precedents, this Court is, therefore, respectfully requested to revisit and reverse those holdings.

GUILT PHASE

POINT I

THE PROSECUTOR'S IMPROPER COMMENTS DURING CLOSING ARGUMENT CONCERNING APPELLANT'S RIGHT TO REMAIN SILENT DEPRIVED APPELLANT OF A FAIR TRIAL.

In the course of his remarks in closing argument, the prosecutor referred to his interpretation of Appellant's intent to participate in the crimes charged, by stating as

follows:

> Now, in his first statement to the police he tells the police that Ms. O'Neal was brought into the apartment. As much as you want to try to put something on Brown, here's the telling statement, you'll here him say this, after she was targeted, because she was close, the plan was made, the original idea was to put, to get her in her apartment and then act, he was acting as a lookout. It worked out where she was pulled into his apartment. All right, tell about what plan, thinking when a plan, pretend by what he does, by what he desires, about what he does when he says in that statement, what's the first thing that he does, he says, we tie her up. Not Isaac Brown alone, while I sit watching hysterically as some portions of his statement where I submit to you, again, to minimize his conduct in this particular case just like he started off with the TV cameras, just like he did with the police. Now, at this point he doesn't just say, and Isaac Brown was doing this and I was sitting back hysterical and I didn't believe this was going to happen, he says we tie her up together. They do initially, they find her, according to his statements. Now that's, we are principals. Now remember the old statement? Knew what's going to happen, knew she was going to get robbed, though maybe it would be in her apartment not his, participated – he participated in tying her up to accomplish this type of forcing used. Now he's assisting and he's tying her up with what? The clothes that are in her basket. Clothes in her basket. Stuffing her mouth with socks, using panty hose, various things that initial – tie up, where he's assisting and helping and then immediately talks about actively participating. What is she doing? She's talking about where her, valuables are, her credit cards, anything else she's doing that, according to his statements, within twenty minutes. Now it's not just Isaac Brown who's getting this information. Who else is getting this information? Mr. Caballaro. 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?

MS. CARPENTER: I object to that statement by Mr. Morton. I think it shifts the burden, he keeps referring to uncontradicted –

MR. MORTON: Nothing in this evidence, Judge, is contradicting this evidence.

MS. CARPENTER: Reserve the motion.

THE COURT: Motion's – objection's overruled, the jurors will use their recollection of the testimony and evidence in this case.

Subsequently, defense counsel amplified on her objection to the prosecutor's remarks by stating that those remarks had the effect of shifting the burden of proof from the State to the Defendant. However, the defense motion for mistrial was denied. (T. 1462).

The trial court erred by overruling defense counsel's objections to the prosecutor's remarks. These were impermissible comments on Appellant's constitutional right to remain silent where the Appellant did not testify and no other witnesses who were present at the time of the crimes testified. The prosecutor's comments also improperly shifted the burden of proof from the State to the Defendant.

Appellant, like any criminal defendant, had the constitutional right not to testify against himself in a criminal proceeding. *Rodriguez v. State*, 753 So.2d 29, 37 (Fla.

2000); *U.S. Const. amend. V.; art. I, section 9, Fla. Const.* Thus "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." *State v. Marshall*, 476 So.2d 153 (Fla. 1985). The "fairly susceptible" test is a "very liberal rule." *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla. 1986), see also Rule 3.250, Florida Rules of Criminal Procedure which prohibits a prosecuting attorney from commenting on the Defendant's failure to testify.

Moreover, since the prosecutor was directly commenting on Appellant's out of court statements about the crime, and neither Appellant nor any other participant in the crimes testified at trial, the prosecutor's improper comments on Appellant's failure to present evidence to refute the prosecutor's comments tended to convey to the jury that Appellant had the burden of proving his innocence. *Jackson v. State,* 522 So. 2d 802, 807 (Fla. 1988).

This Court has recognized exceptions to this rule, e.g., when a defendant assumes some burden of proof by advancing an affirmative defense or relying on facts that could be elicited from a witness who is not equally available to the State. See *Jackson v. State,* 575 So.2d 181, 188 (Fla. 1991). That is not the case here.

Rather, like the remarks found impermissible in *State v. Marshall, supra,* the

prosecutor's remarks are clearly susceptible to being interpreted as a comment on Appellant's failure to testify, and also to impermissibly suggest a burden on Appellant to prove his innocence. *Rodriguez v. State*, *supra*, 753 So.2d at 37-39.

PENALTY PHASE
POINT II

THE TRIAL COURT ERRED IN FINDING BEYOND A REASONABLE DOUBT THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

To establish the cold, calculated and premeditated aggravating circumstance (CCP), the State must show that the murder was (1) the product of a careful planned or prearranged design; (2) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (3) the result of heightened premeditation; and (4) committed with no pretense of moral or legal justification. *Jackson v. State* 704 So.2d 500, 504 (Fla. 1997). Here, in addition to referring to matters discussed in its findings in support of (1) the contemporaneous kidnapping and robbery convictions aggravator; (2) the heinous, atrocious or cruel (HAC) aggravator and (3) avoidance of arrest aggravator, the trial court specifically supported its CCP finding on the following facts:

> [W]hile 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 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 into the living room, 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 the State proved that this murder was committed in a cold, calculated and premeditated manner, and assigns great weight to this factor in determining the appropriate sentence in this case. (R. 919)

This Court has held that the sufficiency of the facts found by the trial court in support of the aggravating circumstance is controlled by the holding in *Almeida v. State*, 748 So.2d 922 (Fla. 1999), where it was stated:

> A trial court's ruling on an aggravated circumstance will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record. Competent substantial evidence is tantamount to legally sufficient evidence, and we assess the record evidence for its sufficiency only, not its weight. Id. at 932 (citation omitted).

Here, however, the trial court's finding as to this particular aggravating circumstance is lacking in sufficient evidentiary support in several respects. For one thing, to support a CCP finding, the evidence must prove beyond any reasonable doubt that the murder was calculated; i.e., committed pursuant to ". . . a careful plan or prearranged design to kill. . .," *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987). This is why this particular aggravating factor is reserved especially for execution, contract murders or

witness elimination killings, *Hansbrough v. State,* 509 So. 2d 1081, 1086 (Fla. 1987) or other carefully planned homicides. Here, although there is no question but that the robbery was planned ahead of time, and, the ultimate act of killing was intentional, an intentional killing during the commission of another felony, in this case robbery/kidnapping does not necessarily qualify for the CCP circumstance, *Maxwell v. State,* 443 So. 2d 967 (Fla. 1983).

The planning for the robbery in this case, as proven by the principal State evidence in this case, Appellant's tape recorded statements, shows that the only real planning was Appellant looking out the window as a lookout, while Brown wound up listening for the victim's footsteps as she came up the stairs. At that point Brown grabbed her, and, contrary to the prior plan to take the victim into her apartment, dragged the victim into Appellant's apartment. It is fairly obvious that no great advance planning was made for the kidnapping and binding of the victim in that the items used as ligatures were not items bought or procured for this purpose, but were items lying around Appellant's apartment, including the heat rocks, the dog leash and shoe laces. The planning, such as it was, did not show the reflection and careful planning required by Florida law. See *Rogers v. State, supra*, 511 So. 2d at 533, requiring a "careful plan or prearranged design to kill."

Moreover, the trial court made a factually erroneous finding that "the Defendant and Brown spent hours discussing and planning how they would kill her." (R. 919). It is true that the victim was tied up for several hours, a factor relied on by the trial court in its HAC aggravator finding. (R. 917). It is also true that, in his lengthy tape recorded statement, Appellant said he and Brown, while in the kitchen, discussed killing the victim, who was in the bedroom. (T. 1132-1135). However, there is no evidence in this record as to how long the conversation was. There was evidence that both Appellant and Brown told the victim she would be let go, and none that she was told, ahead of time, that she would be killed. (T. 1121-1122, 1130).

After the killing, Appellant's statement reflected that he and Brown decided to wait for many hours before disposing of the victim's body far away from the scene of the crime. (R. 1142-1144). Again, a significant number of hours elapsed from the beginning of the kidnapping/robbery through the eventual trip to Broward County to dispose of the body. However, there is no evidence to rebut Appellant's assertion in his tape recorded statement that the victim had been dead for many hours. More importantly, as noted above, Appellant never stated that he and Brown had any lengthy conversations about anything; rather, that they "debated" at one point over who would kill the victim before Brown agreed to do it. (T. 1133).

The trial court CCP finding is also deficient in that there was insufficient proof of the "heightened premeditation" requirement. This requirement can be satisfied by proof that the murder had been intended from the beginning of the criminal episode. *Hill v. State,* 515 So.2d 176 (Fla. 1987). The fact that the State proved a premeditated murder for purposes of guilt is not enough to support the heightened premeditation requirement. This Court has required great deliberation and reflection. See *Walls v. State*, 641 So.2d 381, 388 (Fla. 1994). Without more, the actual manner of death in and of itself does not establish the heightened premeditation requirement for the CCP factor. Here the court relied on the same facts to support the CCP finding as it did in its HAC finding, i.e., the binding and eventual strangulation of the victim. However, smothering a victim, even with evidence that the process took some minutes, does not alone qualify a murder for this aggravating factor. *Capehart v. State*, 583 So.2d 1009(Fla. 1991).

Seen in this light, the trial court's finding of the CCP factor constitutes an unconstitutional doubling of aggravators. Doubling of aggravators involves reliance on the same essential feature or aspect of the crime to support more than one aggravator, and is improper. *Banks v. State*, 700 So.2d 363, 367 (Fla. 1997).

The trial court's CCP finding is also inappropriate because the remaining facts

relied upon in support of the CCP finding duplicated those in the aggravator found by the Court that the crime was committed for the purpose of avoiding or preventing a lawful arrest. Those facts as found by the court were that Appellant and Brown discussed killing the victim, Appellant was the neighbor of the victim who knew him, and that Appellant and Brown discussed killing her while she was securely bound for a period of time. (R. 916-917). As noted above, Appellant's statement does indicate that there was some discussion regarding the killing which culminated in Brown actually beginning the killing, and also that a few hours did elapse between the original kidnapping and binding of the victim and the murder itself. However, and, most significantly, there is no evidentiary support in this record for the trial court's finding that the Appellant and Brown ". . . spent hours discussing and planning how they would kill [the victim]" (R. 919).

Thus, it would also be an unconstitutional doubling of aggravating factors to use this evidence as a basis for the CCP factor as well. *State v. Banks, supra.*, 700 So.2d at 367.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO CONSIDER THE DEFENDANT'S AGE AS A MITIGATING CIRCUMSTANCE

From the very outset of this case, the State and defense queried the prospective

jurors as to their feelings about imposing the death penalty in light of the Appellant's youth. The State repeatedly referred to the Appellant as a young person (R.500-501, 514), and got assurances from prospective jurors that they could consider the death penalty even in view of his youth. Clearly, both sides made the Appellant's age an issue and repeatedly addressed that issue to the jury. Nevertheless, the trial court in its' sentencing order refused to even consider the Appellant's youth as a mitigating circumstance.

This was error. Further, in refusing to consider the Appellant's age as a mitigating factor, the trial court applied the incorrect legal standard. The court below determined that it would not *consider* the Appellant's young age as a mitigator because "Defendant was not unable by reason of his age or maturity level to take responsibility for his actions".(T.1847-49, R. 920).

However, this Court has never held that a trial court may not even consider age as a mitigator unless it also finds that a defendant's actual or mental age makes it impossible for the defendant to take responsibility for his or her actions. While this Court has held that the fact that a defendant is youthful, without more, is not significant as a mitigating factor if it is not linked with some other characteristic of the defendant or the crime, such as maturity, *Garcia v. State*, 492 So.2d 360,367(Fla. 1986); *Sims*

v. State, 681 So.2d 1112,1117(Fla. 1996), where, as here, the defendant's youth is coupled with lifelong passivity and with learning, psychological and physical disorders, this Court has held that it is an abuse of discretion for the trial court to refuse to consider the defendant's age as a mitigating factor. *Mahn v. State,* 714 So.2d 391,400(Fla. 1998); *Campbell v. State,* 679 So.2d 720(Fla. 1996). In the instant case, as in *Mahn*, the evidence reasonably established that the Appellant throughout his life suffered from physical problems and learning disabilities which caused him to be a follower, subject to control by his friends, and immature. Coupled with the fact that Appellant had just turned 21 at the time of this crime, this mitigating factor was reasonably established and the trial court erred in refusing to even consider the Appellant's young age as a mitigating circumstance.

Since the trial court employed the incorrect legal standard and failed to even consider the existence of this mitigating factor which was reasonably established by the evidence, the sentence of death must be vacated. See *State v. Donaldson,* 722 So. 2d 177, 188 (Fla. 1998).

POINT IV

THE TRIAL COURT ERRED IN RULING THAT ADMISSION OF TESTIMONY AS TO THE CODEFENDANT'S CONVICTION OF SECOND DEGREE MURDER AND LIFE SENTENCE WOULD "OPEN THE DOOR" TO ADMISSION OF THE CODEFENDANT'S HEARSAY CONFESSION

TO THIS CRIME MINIMIZING HIS PARTICIPATION AND INCULPATING DEFENDANT AS THE RINGLEADER

In colloquy prior to the penalty phase, trial counsel advised the court that he intended to introduce evidence, through a records custodian, of the codefendant Isaac Brown's conviction of second degree murder and life sentence after his separate trial on these charges. The State objected and argued that such testimony would "open the door" to permit the State to introduce the codefendant Brown's hearsay confession implicating the Appellant as the most culpable participant in these crimes, while also minimizing his own culpability. The trial court agreed, ruling that, if Appellant presented that evidence to the jury to support a proportionality argument, the State would be permitted to introduce the entire hearsay statement of the codefendant to convince the jury here that Brown's jury heard different facts than this jury heard. (R.1513-1517, 1822)

The trial court was wrong, and its' ruling effectively deprived Appellant of his right to introduce important evidence in support of a legitimate mitigation argument. Appellant sought only to introduce proof of the codefendant's conviction and sentence so that the jury could consider his proportionality argument. Appellant was absolutely entitled to make that argument to the jury. Cf., *Hitchcock v. State,* 578 So.2d 685(Fla.1990), *cert. denied* 502 U.S. 912, *rehearing granted, vacated on other*

grounds 505 U.S. 1215, *rehearing denied* 505 U.S. 1244, *on remand* 614 So.2d 483; *Herring v. State*, 446 So.2d 1049(Fla.1984), *cert. denied* 469 U.S. 989, *denial of post conviction relief remanded* 580 So.2d 135. Correspondingly, if Appellant had been permitted to introduce this admissible, relevant and important evidence, that would have given the State the absolute right to *argue* to this jury that they may not have heard the same facts at trial as the codefendant Brown's jury may have heard.

However, the mere testimony of a records custodian as to the codefendant's conviction and sentence would not give the State the unfettered right to introduce highly prejudicial hearsay which Appellant would have absolutely no ability whatsoever to rebut. As this Court noted in *Rodriguez v. State*, 753 So.2d 29,43-44(Fla.2000), it is uncontroverted that the Constitutional right of confrontation applies at all phases of a capital trial, and that in a penalty proceeding under F.S. Section 921.141, "the linchpin of admissibility is whether the defendant has a 'fair opportunity to rebut any hearsay statements.'" Of course, it is the most basic principle that a non-testifying codefendant's statement inculpating a defendant is inadmissible hearsay, *Bruton v. United States*, 391 U.S., 123 (1968), because the codefendant is unavailable for cross examination.

Here, too, the codefendant was not being offered by the State as a witness to

rebut a defense proportionality argument based on the different conviction and sentence, subject to cross examination. Instead, the State sought to have an out-of-court statement placing the blame squarely on Appellant, made by a co-felon with substantial motivation to lie or exaggerate, placed before this jury, while denying Appellant any opportunity to challenge the witness or the statement through the crucible of cross examination. This Court has repeatedly held that the State may not introduce these hearsay statements in the penalty phase because there is no opportunity for the defendant to rebut the hearsay. *Rodriguez, supra; Donaldson v. State, Supra*,722 So.2d 177 at 186; *Engle v. State,* 438 So.2d 803, 813-14 (Fla.1983); see also, *Garcia v. State,* 27 Fla. L. Weekly S335 (Fla. April 26, 2002).

In view of how clearly this Court has stated the law that out-of-court statements of a co-defendant are not admissible in penalty phases, it was clear error for the court below to rule that such a statement would be admissible here if Appellant "opened the door" by introducing the records of the co-defendant's conviction and sentence. The evidentiary concept of "opening the door" is that it allows a party to admit otherwise inadmissible evidence in order to explain other admitted evidence, to ensure fairness. *Rodriguez v. State,* 753 So.2d at 42. In the instant case, even if it could be argued that a door would be opened by the evidence of the records custodian proffered by

Appellant, it would not open so far as to allow the introduction of the most prejudicial, inherently unreliable hearsay that Appellant could not possibly rebut. The trial court's erroneous ruling that the hearsay statement would come in was highly prejudicial for it absolutely precluded Appellant from introducing admissible, important evidence that may have resulted in a life recommendation. Appellant here raised credible mitigation evidence to this jury, which resulted in a non-unanimous recommendation of death by a vote of eight to four. We cannot know if this jury would have recommended life if Appellant had not been improperly prevented from presenting admissible evidence and argument to the jury by reason of the trial court's erroneous ruling *in limine* as to the admissibility of the hearsay statement of the codefendant. Appellant was entitled to have a sentencing phase jury that was given a full opportunity to consider all admissible evidence in mitigation. The trial court's ruling deprived Appellant of that right.

Further, the trial court failed to consider this nonstatutory mitigating evidence in its sentencing order. A trial court is required to consider and weigh in its' sentencing order all mitigating evidence offered by a defendant, both statutory and mitigatory, appearing anywhere in the record. *Ellis v. State*, 622 So.2d 991 (Fla. 1993). Therefore, Appellant is entitled to have the death sentence vacated and is

entitled to a new, fair sentencing hearing.

POINT V

THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE

A. APPELLANT'S DEATH SENTENCE IS IMPERMISSIBLY DISPARATE FROM THE LIFE SENTENCE RECEIVED BY HIS CO-DEFENDANT FOR THE LATTER'S CONVICTION OF SECOND DEGREE MURDER.

During the penalty phase Appellant sought to introduce evidence of the co-defendant Isaac Brown's conviction of second degree murder in this case. Appellant felt constrained not to offer proof of Brown's conviction in front of the jury because of the trial court's ruling that it would grant the State's request to play Brown's tape recorded statement in front of the jury. Despite Appellant's written request to the trial court to consider that the fact of Brown's conviction of second degree murder on essentially the same evidence that was presented in Appellant's case would be disproportionate, (R. 912), the sentencing order in this case does not mention Brown's conviction of the lesser crime. Therefore, Brown's lesser conviction was evidently not considered by the trial court.

The record in this case does reflect that Appellant initially indicated in his lengthy tape recorded statement that Brown, acting alone, killed the victim. However in subsequent briefer oral and tape recorded statements, Appellant acknowledged that

he assisted Brown in the killing. The sole evidence introduced by the State dealing with the relative culpability of Appellant and Brown, Appellant's statements, otherwise consistently maintained that Brown was the individual who grabbed the victim from the hallway in her apartment building, dragged her into Appellant's home, bound her on several occasions and ultimately actually began to strangle the victim.

Assuming, *arguendo*, that the trial court was correct in rejecting Appellant's claim that he qualified for the mitigating factor that he was an accomplice to a capital felony committed by another person and that his participation was relatively minor, (R. 921), the evidence in this case certainly justifies the conclusion that Brown was equally as culpable, if not significantly more culpable, than Appellant.

"When a co-defendant is equally as culpable or more culpable, the disparate treatment of the co-defendant may render the defendant's punishment disproportionate." *Sexton v. State*, 775 So. 2d 923, 935 (Fla. 2000); *White v. State*, 27 Fla. L. Weekly S291, 294 (Fla. April 4, 2002). "A trial court's determination concerning the relative culpability of the co-perpetrators in a first degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence." *Puccio v. State*, 701 So.2d 858, 860 (Fla. 1997); *White, Id.* In *White*, this Court noted that the trial court carefully considered and rejected White's

argument that a co-defendant was equally culpable for the murder in question. *Id*. By contrast, the trial court in this case merely ruled that, regarding the claim that Appellant was the accomplice in a capital felony committed by another person and his participation was relatively minor, "[t]his mitigator was not established." (R. 921). It is true that the trial court did, in its discussion of the aggravating factors find that Appellant was an active participation in the crimes committed. (R. 915 - 918). However, no fair reading of the facts in this case, which were nearly exclusively based upon Appellant's statements, can in any way establish that Appellant was more responsible and culpable than Brown.

It has happened that this Court has rejected claims of disparate sentencing where co-defendants pled to second degree murder and received lesser sentences then capitally sentenced appellants. See e.g., *Howell v. State,* 707 So.2d 674, 682-683 (Fla. 1998); *Cardona v. State*, 641 So.2d 361, 365 (Fla. 1994); *Cook v. State*, 581 So.2d 141, 143 (Fla. 1991); *Hayes v. State*, 581 So.2d 127 (Fla. 1991); *Brown v. State*, 473 So. 2d 1268 (Fla. 1985).

However, this case is distinguishable from those cases because the trial court in the instant case made no finding that Appellant was equally or more culpable than the co-defendant Brown and no such finding would have been justified on the facts

adduced at this trial. Accordingly the disparate conviction and sentence of Brown renders Appellant's punishment disproportionate. C.f., *Puccio v. State, supra; White v. State, supra*. Appellant's death sentence is disproportionate when compared to other capital cases where a co-defendant received a life sentence.

B. THE DEATH SENTENCE IN THIS CASE IS A DISPROPORTIONATE PENALTY RELATIVE TO OTHER CAPITAL CASES.

The death penalty is reserved for only the most aggravated and least mitigated first degree murders. *Urbin v. State*, 714 So.2d 411, 416 (Fla. 1998); *State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973). Notwithstanding the trial court's finding of four statutory aggravating factors in the case, and even if this Court does not reject the cold calculated and premeditated (CCP) aggravating factor as urged by Appellant (see Point II above), in view of all of the facts and circumstances of this case, the trial court erred by imposing a death sentence in this case. The trial court gave insufficient weight or failed to find the existence of the statutory and nonstatutory mitigators argued by Appellant. In view of the number and strength of the many mitigating factors established by the evidence in this case, death is simply not appropriate.

As set forth in Point III above, the trial court erred in refusing to consider Appellant's age as a statutory mitigating circumstance. The trial court did find the statutory mitigators that Appellant had no significant history of prior criminal activity

and that the crime was committed while Appellant was under the influence of extreme mental or emotional disturbance. However the trial court gave these factors little and some weight respectively. (R. 920-921). The trial court also gave some weight to the statutory mitigator of other aspects of Appellant's character or record or other circumstances of the offense by finding and affording some weight to the evidence that Appellant suffered from a partial hearing loss and learning disabilities. (R. 921-922). Nonstatutory mitigating circumstances found by the court were that Appellant had never been violent to his former girlfriend, the mother of his two children and that his children loved their father. The court gave this factor little weight. The fact that Appellant was always a loving son and brother was afforded little weight by the court. In addition, some weight was given to the evidence presented by Appellant that while in jail he had successfully completed substance abuse, anger management and parenting programs (R. 922). As noted in Points III and V above, the jury never heard, and the trial court never considered in its sentencing order, that the co-defendant Isaac Brown, who was at least as culpable, if not significantly more culpable, than Appellant, was convicted of murder in the second degree and given a lesser sentence then Appellant. Significantly, the jury vote to recommend the death sentence to the trial court was 8 to 4. Had the jury been properly apprised of Brown's

conviction of the lesser offense of second degree murder, a life recommendation was a distinct and real likelihood.

The fact that several aggravating circumstances were found by the trial court should not, in and of itself be determinative of this Court's decision regarding the death penalty. In *Morrison v. State*, 27 Fla. Weekly S253, 260-61 (Fla. March 21, 2002), this Court recently affirmed a death sentence where the trial court found four aggravating circumstances. While the trial court found several nonstatutory mitigating circumstances, including Morrison's low intellectual ability and good family relations and substance abuse, Morrison presented no evidence of any statutory mitigating factors. By contrast, in this case, Appellant presented evidence of , and the trial court found no less than three statutory mitigating factors, along with the nonstatutory mitigators. Further, as noted above, the trial court here failed to consider both Appellant's age and the co-defendant Brown's conviction of murder in the second degree and life sentence.

The significant mitigation offered in this case distinguishes this case from other recent cases where this Court has upheld death sentences imposed after evaluation of multiple aggravating circumstances. In *Hurst v. State*, 27 Fla. L. Weekly S341 (Fla. April 18, 2002), the trial court found the HAC, murder committed during a robbery

and avoidance of arrest aggravating circumstances, which were given great weight, as they were in this case. The *Hurst* trial court also considered, but gave no great weight to, the statutory mitigators of impaired capacity to appreciate criminality or conform conduct to legal requirements, no prior criminal history and the defendant's age, and to nonstatutory mitigating circumstances analogous to those found in the instant case. Significantly, however, there was no issue in *Hurst* involving an equally, if not more culpable co-defendant, and the jury's death recommendation was by a vote of eleven to one. *Hurst*, 27 Fla. L. Weekly at 344-45.

The *Hurst* opinion cited another recent death penalty case *Jeffries v. State*, 797 So.2d 573 (Fla. 2001). *Jeffries* involved the HAC and during the commission of a robbery aggravating circumstances. The trial court in *Jeffries* found six mitigating circumstances, none given great weight, including the statutory mitigator that the defendant's capacity to appreciate the criminality of his conduct was impaired. Interestingly, the jury vote in *Jeffries* was also eleven to one for death, but a co-defendant, who was equally culpable, had pled guilty and was sentenced to twenty years. This is dramatically different from Appellant's case where the jury never learned, and the trial court never considered, that the at least equally culpable co-defendant Brown was convicted of second degree murder by another jury.

Appellant maintains that, despite the statutory aggravating circumstances found by the trial court, the court erred in imposing a death sentence in this case because of the substantial mitigating factors both found by the trial court and those which the trial court should have, but failed to, consider. Death sentences have been found to be disproportionate in situations similar to Appellant's where immature, mentally impaired defendants with no limited criminal histories had death sentences vacated. See, e.g., *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1996); *Snipes v. State*, 733 So.2d 1000, 1007-1008 (Fla. 1999); *Johnson v. State*, 720 So.2d 232, 238-239 (Fla. 1998); *Hawk v. State*, 718 So. 2d 159, 163 (Fla. 1998); *Robertson v. State*, 699 So.2d 1343, 1247 (Fla. 1997) cert. denied, 522 U.S. 1136 (1998).

Similarly, this Court should set aside the death sentence here. Despite aggravating circumstances, Appellant presented substantial mitigating evidence. This case is far from one of the least mitigated situations before this Court. *Urbin v. State*, *supra*. 714 So.2d at 416-417.

Notwithstanding the aggravating factors found by the trial court, in view of the very substantial amount of mitigating circumstances in this case, both those found by the trial court and those which the evidence established and therefore should have been found by the trial court, this Court should either set aside the death sentence or in the

alternative, remand the case to the trial court for a new penalty phase so that a jury can evaluate, and the trial court consider those matters neither heard nor considered nor given sufficient weight.

POINT VI

FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL

Florida's capital sentencing scheme is unconstitutional because it deprives the accused of due process of law, of the right to be free from cruel and/or unusual punishment, and fails to require that all findings necessary to sustain a sentence of death be found by the sentencing jury, on proper notice to the defendant. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the United States Supreme Court held that a defendant is entitled to have every fact that may aggravate a sentence found by a jury beyond a reasonable doubt. A necessary corollary of this is that the defendant, under even minimal notions of due process of law, is entitled to notice as to the facts and the aggravating circumstances which the state intends to rely on to aggravate the sentence. In addition, a constitutional sentencing scheme would require that the jurors make findings as to the facts submitted for their consideration, so their findings are reviewable. That is, if a jury must find facts in aggravation, even minimal concepts of due process of law require that a jury recommending a death

sentence agree on some aggravating factor. Further, Appellant submits that the present sentencing scheme is unconstitutional because it places the decision as to whether a sentence should be aggravated not in the hands of the jury, as the Supreme Court said was required in *Apprendi,* but in the hands of the trial court.

Appellant is aware of this Court's rulings in *Mills v. Moore,* 786 So.2d 532, 537-538) (Fla.) *cert. denied,* 532 U.S. 101(2001); *Mann v. Moore,* 794 So.2d 595 (Fla. 2001); and *Hurst v. State, supra*., 27 Fla. L. Weekly at 345; that *Apprendi* does not apply to Florida's capital sentencing scheme. However, this Court is respectfully requested to revisit those rulings and to find, consistent with *Apprendi*, that only a jury may constitutionally make a death eligibility determination beyond a reasonable doubt.

CONCLUSION

For the reasons set forth in Point I, above, Appellant's convictions should be reversed and the matter remanded for a new trial. Also, for the reasons set forth in Points II-VI, the death sentence should be reversed, or, in the alternative, this case should be remanded for a new penalty phase hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been

furnished by mail to Celia Terenzio, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401 this _____ day of May 2002.

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210(a)(2), Appellant hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

_____
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