IN THE SUPREME COURT OF FLORIDA

CHARLES GLOBE,

Appellant,

vs. **Case No. SC 02-39**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT, IN AND FOR
COLUMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Charles Globe, appeals from the judgment of conviction and sentence of death imposed by the Circuit Court of the Third Judicial Circuit, Columbia County, Florida, following a jury verdict finding him guilty of one count of murder in the first degree and recommending a death sentence. References to appellant will be to "Globe" or "Appellant," and references to appellee will be to "the State" or "Appellee." The record on appeal consists of thirty-five volumes. For the convenience of the Court, the State will cite to the record in a manner similar to that used by the Appellant, i.e., to the clerk's record on appeal as "R.," with the appropriate volume number and page citations as required by Fla. R. App. P. 9.210(b)(3).

STATEMENT OF THE CASE AND OF THE FACTS[1]

Trial Proceedings

Charles Globe, a/k/a K.D., a/k/a Thomas Duke Kidd, was charged by indictment in the Circuit Court of Columbia County, Florida, on August 17, 2000, with the first-degree murder of Elton Ard. Ard, a fellow inmate of the Department of Corrections at the Columbia Correctional Institution (hereinafter "CCI") (R. I-1), was murdered on July 3, 2000 (R. I-1). A co-defendant, Andrew D. Busby (hereinafter "Busby"), was also indicted for and convicted in a separate trial of the murder (R. I-1).[2] The jury found Globe guilty as charged on September 11, 2001 (R. V-840). The case then proceeded to the penalty phase (R. XXIX-845), where the jury subsequently recommended that Globe be sentenced to death, by a vote of 9 to 3 (R. XXIX-910-911).

Guilt phase:

Evidence adduced at the guilt phase of trial established the following:

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[1]Facts pertaining to the manner in which police obtained Appellant's statements will be discussed under Issue I, wherein Globe challenges the admissibility of the July statements. See infra, at 21-22, 23 n.4, 25.

[2]Busby also received a death sentence upon the jury's recommendation. State of Florida v. Andrew D. Busby, No. 00-897CF B. At present, briefs have not been filed in Busby's appeal before this Court, cause number SC02-1364.

Globe and his homosexual partner and fellow inmate, Busby (R. XXVI-631), decided two weeks before murdering Ard that they were going to kill someone (R. XXVI-634). Ard was one of seven potential victims (R. XXVI-631), targeted because he was harassing Busby (R. XXVI-631). Globe and Busby talked about killing Ard for days (R. XXVI-635-636). Using part of a linen sheet and broken ballpoint pens, Globe made two garrotes approximately two weeks prior to the murder, specifically to use to choke someone to death (R. XXVI-660-662). On the morning of July 3, 2000, at approximately 7:00 a.m., Globe slipped into the prison cell shared by Ard and Busby, after they had returned from breakfast (R. XXVI-636). After locking the cell door and putting something up to block the window, Globe grabbed Ard around the neck and they struggled (R. XXVI-637). Globe placed one of the garrotes around Ard's neck, but it broke as he and Busby were choking Ard (R. XXVI-662). Globe flushed the broken garrote down the toilet (R. XXVI-663). Ard pled for his life, offering to give Globe all of his money, a total of forty-five dollars (R. XXVI-638). Globe told Ard that he didn't want his money "but his fucking life" (R. XXVI-752). Globe beat Ard in the face, causing him to bleed (R. XXVI-639). After discovering that Ard was still alive, Globe tied the second garrote around Ard's neck (R. XXVI-663). Globe then lit a cigarette and watched Ard gasp for air six times before he finally died (R. XXVI-664). Afterwards, Globe removed the garrote from Ard's neck and

tied it around Ard's wrist, and put a cigarette in Ard's mouth and a lighter in his hand (R. XXVI-640, 642).

During a prisoner count at approximately 8:40 a.m., Correctional Officer Tonya Nix found Globe locked inside of Ard and Busby's cell (R. XXVI-574). At the time, Appellant and Busby were smoking cigarettes and Ard appeared to be dead (R. XXVI-575). Some marks were visible on Globe's face (R. XXVI-614). Nix had Globe and Busby removed from the cell, which was ordered secured until the Florida Department of Law Enforcement (hereinafter "FDLE") could arrive to begin their investigation (R. XXVI-575, 590). Linda Summerall, a nurse at CCI, found that Ard did not have a pulse or blood pressure and was not breathing (R. XXVI-587). The following day Dr. Matthew Areford performed an autopsy on Ard, determining that he had died from strangulation and that his death was the result of homicide (R. XXVI-554-555, 563). Dr. Areford further testified that Ard was involved in a scuffle shortly before he was strangled to death (R. XXVI-569-570).

Evidence recovered from the murder scene included photographs of writings on the prison wall and of fingerprints in blood (R. XXVI-596-600), the cigarette lighter found in Ard's hand and the cigarette placed in Ard's mouth (R. XXVI-602-605), the magic marker used to write on the wall (R. XXVI-608-609), and the wingtip piece from a pair of glasses (R. XXVI-611). Karen Smith, a crime laboratory analyst and forensic

document examiner with FDLE, testified that of the writings on the cell wall, Globe had written "Call FDLE" (R. XXVII-744-745) and "Remember Andy and K.D., 7-3-2000" (R. XXVII-745-746). Smith had no opinion, however, as to who had written "Don't forget to look on the door" (R. XXVII-745). In addition, the blood prints were not of value for identification purposes (R. XXVII-718-720).

The State also adduced evidence that included letters from Globe to Special Agents Don Ugliano and Jim Flournoy, admitting his involvement in Ard's murder (R. XXVI-690-693, 704) (respectively). Crime laboratory analyst Thelma Williams identified the prints on each of the three letters as belonging to Globe (R. XXVII-722-724), and crime analyst Smith identified the letters' handwriting as that of Appellant (R. XXVII-746-748).

After the State rested its case-in-chief, Appellant moved for a judgment of acquittal which the trial judge denied (R. XXVII-769-770).

Globe did not testify or present any evidence at the guilt-phase of his trial. During his closing argument, defense counsel admitted that Globe was involved in the murder but argued for a verdict of a lesser degree of murder (R. XXVIII-816-818). At the close of the evidence, instructions, and argument by counsel, the jury found Appellant guilty as charged (R. XXVIII-840).

Penalty phase:

During the penalty phase of the trial, the State relied principally upon the evidence adduced during the guilt phase. In addition, the State established that Globe had previously been convicted in 1983 in Illinois of two counts of sexual battery, one count of kidnapping, and one count of robbery, for a total sentence of three life sentences and thirty years (R. XXIX-852-853).

Globe presented testimony from three witnesses. First, depositional testimony from an inmate named Perkins was published for the jury (R. XXIX-854). Perkins testified that he knew Appellant from Union Correctional Institution (R. XXIX-855), and that he knew Busby from CCI (R. XXIX-856). Perkins further testified that Busby kept to himself and that Globe was very possessive over Busby (R. XXIX-856). According to Perkins, Ard did not bother anybody (R. XXIX-856), he never saw anybody giving Busby a hard time (R. XXIX-856), and he did not see Globe treat other inmates badly (R. XXIX-859).

Globe's second penalty phase witness, through a videotaped deposition, was William A. Wright, a volunteer with the Chaplaincy Office of Florida State Prison (R. XXIX-863). Wright, an ordained minister, testified that over the last year Globe had come to feel remorse for the victim's family (R. XXIX-864, 865). In addition, Appellant had helped another person through his Christian cartoon character (R.

XXIX-865-866).

Lastly, Appellant's mother, Ruth Globe, testified on his behalf (R. XXIX-867-875). According to Mrs. Globe, she had not seen her two other children or two step-children in fifteen to twenty years (R. XXIX-869), and only Appellant had not blamed her for their father's death (R. XXIX-871). Before she had moved and lost contact with Globe, he had stayed in contact with her (R. XXIX-871). Mrs. Globe had not provided Appellant with her new address when she moved to Delaware and did not take his address with her (R. XXIX-871-872). Regarding Appellant's childhood, Mrs. Globe testified that she had no problem with Appellant when he was young (R. XXIX-872). Mrs. Globe described the family's financial circumstances as not "very good" (R. XXIX-872). As a youngster, Globe ran away with his sister Diane in order to protect her (R. XXIX-874). Mrs. Globe testified that Globe's father used to tell Appellant, when he was between age ten and thirteen, that "he was dumb and stupid" and that "[h]e would never amount to anything" (R. XXIX-874-875). While Appellant worked with his father for a while when he reached high school age, Globe left home between age 15 and 16 after having an argument with his father (R. XXIX-873). Globe's father told him to leave if he wanted to go (R. XXIX-873). When Appellant attempted to return home, Globe's father told his mother to call the police (R. XXIX-873-874). Mrs. Globe still loves Appellant (R. XXIX-875).

The jury was instructed on the following aggravating circumstances: that Appellant had been previously convicted of a felony and was under a sentence of imprisonment; that Appellant had been previously convicted of a felony involving the use or threat of violence to some person; that the murder was especially heinous, atrocious, or cruel; and that the murder was committed in a cold, calculated and premeditated manner (R. XXIX-901-904). The jury was further instructed on the following statutory mitigating circumstances: the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance; and the victim was a participant in Appellant's conduct or consented to it (R. XXIX-904-905). After the close of the evidence, instructions, and arguments by counsel, on September 14, 2001, the jury recommended the death penalty by a vote of 9-3 (R. XI-2159; R. XXIX-910-911).

A Spencer[3] hearing was held on September 24, 2001, wherein Appellant presented the testimony of Dr. Elizabeth McMahon, a clinical psychologist (R. XXX-920-938). Dr. McMahon diagnosed Globe as having a "mixed personality disorder," primarily "schizoid, paranoid, certainly with some very strong antisocial traits . . . the underlying dynamics are those of a schizoid paranoid personality disorder." (R. XXX-

[3]Spencer v. State, 615 So.2d 688 (Fla. 1993).

926). Dr. McMahon testified that Globe was raised to believe that he was not wanted (R. XXX-929-930). According to Appellant's self-report to Dr. McMahon, Globe's father had beaten him once with a belt and his mother had struck his head into a wall twice, requiring hospitalization (R. XXX-932). Globe further reported that his mother sexually abused him when he misbehaved (R. XXX-932). Dr. McMahon also learned from Globe that he started drinking at age ten or eleven, was drinking regularly by the age of thirteen (R. XXX-934), and was using drugs regularly by late adolescence (R. XXX-934). On cross-examination, Dr. McMahon testified that Globe was of average IQ and was not psychotic (R. XXX-935). In addition, Dr. McMahon testified that Globe takes pleasure in inflicting pain upon others, that he knows the difference between right and wrong, and understood the nature and consequences of his actions (R. XXX-935-936). Appellant had the capacity to appreciate the criminality of his conduct as well as the ability to conform his behavior to the requirements of the law (R. XXX-936-937). Regarding statutory mitigating circumstances, Dr. McMahon testified that Globe was not acting under extreme mental or emotional disturbance or extreme duress when he murdered Ard; nor was he acting under substantial domination of another person at that time (R. XXX-936).

On October 11, 2001, the trial court ultimately followed the jury's recommendation and sentenced Appellant to death (R. XXX-962-963).

The trial court considered the following factors as possible mitigating evidence: (1) the murder was committed while Appellant was under the influence of extreme mental or emotional disturbance, found not to exist (R. XIII-2429; R. XXXI-952); (2) Globe was under extreme duress or under the substantial domination of another person, found not to exist (R. XIII-2429; R. XXXI-952); (3) Globe's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, found not to exist (R. XIII-2429; R. XXXI-952); (4) Appellant's relationship with his parents, given little weight (R. XXXI-954); Globe's mother was abusive[4] (R. XIII-24292430; R. XXXI-953-954); Globe was a good friend to other inmates, given slight weight (R. XIII-2430; R. XXXI-954); Globe met the criteria for antisocial personality disorder, given slight weight (R. XIII-2430-2431; R. XXXI-954); (5) that Appellant gave confessions and made statements to committing the murder, given slight weight (R. XIII-2431; R. XXXI-955); (6) Appellant's history of substance abuse, given slight weight (R. XIII-2431-2432; R. XXXI-955-956); (7) charitable deeds done by Globe for inmate Perkins, given slight

[4]The trial court assumed the existence of this mitigator, but found that its persuasiveness was substantially lessened by the circumstances that Globe knew the difference between right and wrong, understood the nature and consequences of his actions, understood the criminality of his conduct, and had the capacity to conform his conduct to the requirements of the law (R XXXI-953).

weight (R. XIII-2432; R. XXXI-956); (8) Appellant's mother's love for him, given slight weight (R. XIII-2432; R. XXXI-956); (9) Globe's remorsefulness, found not to exist (R. XIII-2432; R. XXXI-956); (10) Globe's appropriate conduct throughout the trial, given little weight (R. XIII-2432; R. XXXI-056-957); (11) Globe's religious devotion, found not to exist (R. XIII-2432; R. XXXI-957); (12) that Globe was helpful to others, given slight weight (R. XIII-2433; R. XXXI-957-958); (13) Appellant's capacity to form relationships, given slight weight (R. XIII-2433; R. XXXI-958); (14) that Appellant currently has the HIV virus and a back problem, found not to exist (R. XIII-2433; R. XXXI-958); and (15) Globe did not have a positive role model as a child, was berated and as a teenager was unwanted, given slight weight (R. XIII-2433; R. XXXI-959).

As was submitted to the jury, the trial court found each of the four statutory aggravating circumstances: (1) that Globe was previously convicted of a felony and was under a sentence of imprisonment, given great weight (R. XIII-2424-2425, 2434; R. XXXI-946, 959-960); (2) that Globe was previously convicted of a felony involving the use or threat of violence to some person, given great weight (R. XIII-2425, 2434; R. XXXI-946, 960-961); (3) that the murder was especially heinous, atrocious, and cruel, given the greatest possible weight (R. XIII-2425-2426, 2434-2435; R. XXXI-946-948, 961); and (4) that the murder was committed in a cold, calculated, and

premeditated manner without any pretense of moral or legal justification, given great weight (R. XIII-2427-2428, 2435; R. XXXI-948-951, 961).

The trial court found that each statutory aggravating circumstance, standing alone, was sufficient to outweigh any and all mitigating evidence (R. XXXI-960, 961, 962).

Direct Appeal

Globe filed his notice of appeal on October 11, 2001 (R. XIII-2440), and now raises the following eight issues on direct appeal:

(1) "Mr. Globe was convicted of premeditated first-degree murder and sentenced to death on the basis of illegally and unconstitutionally obtained statements," Initial Brief of Appellant (hereinafter "App.Br."), at 21;

(2) "The admission of codefendant Busby's statements violated Mr. Globe's confrontation rights and the fifth, sixth and eighth amendments," App.Br. at 55;

(3) "Mr. Globe's jury was misled by comments and penalty phase instructions which violated Caldwell v. Mississippi, 472 U.S. 320 (1985), and Ring v. Arizona, 122 S.CT. 2428 (2002)," App.Br. at 59;

(4) "Florida's capital sentencing procedure deprived Mr. Globe of his sixth amendment rights to notice and to a jury trial and of his right to due process," App.Br.

at 63;

(5) "The trial court's sentencing order violates the eighth and fourteenth amendments," App.Br. at 78;

(6) "The trial court erred in giving the principal instruction," App.Br. at 83;

(7) "The death sentence imposed in this case is disproportionate," App.Br. at 86; and

(8) "The trial court erred both legally and factually in its evaluation of mitigating factors by applying improper legal standards and by failing to explain its weighing process," App.Br. at 90.

SUMMARY OF THE ARGUMENT

I.

Appellant's request to remain silent did not create a per se prohibition precluding further questioning by the authorities. The fact that approximately seven hours elapsed before Appellant was again asked if he wished to make a statement established that his invocation of his right to remain silent was scrupulously honored and the July 3, 2000 statement was properly admitted.

Appellant's statement given on July 7, 2002 was also properly admitted. Because the earlier statement was not illegally obtained, admission of the latter was not unconstitutional. Further, Appellant was properly advised of his Miranda rights and his waiver was knowing, intelligent, and voluntary. Finally, the statement was not taken in violation of Appellant's right to a first appearance or his right to counsel under Florida law: Appellant was not under arrest when he made the second statement and had not invoked his right to counsel.

Finally, even if admission of these statements constituted error, in light of the substantial evidence of Appellant's guilt, any such error was harmless beyond a reasonable doubt.

II.

Bruton v. United States, 391 U.S. 123 (1968) does not prohibit the admission of a co-defendant's out-of-court statements that the defendant has adopted as his own. Here, while participating in a joint confession, Appellant adopted any statements made by his co-defendant when he supplemented answers or acquiesced through silence. Admission of those statements did not violate Globe's Confrontation Clause rights.

III.

Appellant failed to raise his Sixth Amendment challenge to the jury's penalty phase verdict before the trial court. That claim is, therefore, procedurally barred. In any event, Ring did not create the new constitutional right that Globe relies for relief. In addition, the penalty phase jury instructions in Appellant's case did not violate Caldwell v. Mississippi, 472 U.S. 320 (1985), as there is no showing that they improperly described the role assigned to the jury under state law.

IV.

Appellant failed to preserve his Sixth Amendment penalty phase jury sentencing claims raised for the first time on appeal. Even if Globe's claims are reviewable, the

United States Supreme Court did not overrule the extensive line of cases upholding Florida's death penalty scheme. Moreover, the jury did find at least one aggravating circumstance. Nor did Ring hold that the jury's vote must be unanimous, that the aggravating factor(s) must be charged in an indictment, that Florida death penalty statutes improperly shifts the burden of proof, or violates Caldwell v. Mississippi, 472 U.S. 320 (1985). Finally, Appellant's death sentence does not violate Ring, as Appellant was convicted of a prior violent felony.

V.

Appellant failed to preserve his claim challenging the weight to be applied to the evidence in aggravation and mitigation, having failed to raise the issue before the lower court. In any event, the trial court did not abuse its discretion in determining the weight of aggravating and mitigating factors. Nor did the trial court impose a mandatory death sentence, but instead, through careful consideration of all of the evidence presented, determined the existence of aggravating and mitigating factors and the weight to be applied each, gave great weight to the jury's recommendation, and therefrom imposed the death sentence. In addition, the trial court properly considered the nonexistence of the statutory mitigating factors relating to mental condition when determining the weight of the nonstatutory mental mitigating circumstances.

VI.

Having failed to proffer a legal objection to the trial court giving the instruction on principals, Appellant did not preserve the issue for appeal. Even if the claim is reviewable, Appellant did not rebut the presumption of correctness of the trial court's charging decision. Moreover, direct evidence supported submission of the instruction. And because Globe actually murdered the victim, any error would be deemed harmless.

VII.

The sentence of death imposed in this case is proportionate to others approved by this Court. The record supports the finding of the four aggravating factors submitted and the trial court appropriately considered and weighed the minimal mitigating factors presented.

VIII.

Appellant failed to preserve his claims challenging the sufficiency of the sentencing order and the procedure whereby the trial court determined the weight to be applied to the evidence in mitigation, having failed to raise such claims before the lower court. In any event, the trial court's order complied with the mandate of

Campbell v. State, 571 So.2d 415 (Fla. 1990). The trial court also did not abuse its discretion in determining the weight of the mitigating factors and properly considered the nonexistence of the statutory mitigating factors relating to mental condition when determining the weight of the nonstatutory mental mitigating circumstances.

ARGUMENTS

I.

ADMISSION OF GLOBE'S STATEMENTS, ON JULY 3, 2000 AND JULY 7, 2000, DID NOT VIOLATE EITHER THE FIFTH OR SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Globe appeals from the admission of his statements made on July 3, 2000 and July 7, 2000. Globe filed a motion to suppress the July 3rd statement (R. X-1821), which was denied following a suppression hearing[5] (R. XI-2100), and at trial objected to the admission of the July statements (R. XXVI-627-628, 657-658) (respectively).

"A trial court's ruling on a motion to suppress is presumed correct." Chavez v. State, 832 So.2d 730, 751 (Fla. 2002); Nelson v. State, ___ So.2d ___, 27 Fla. L. Weekly S797, S798 (Fla. Oct. 3, 2002) (quoting Connor v. State, 803 So.2d 598, 608 (Fla. 2001), cert. denied, 535 U.S. 1103 (2002)).

A. Admissibility of the Statements

1. July 3, 2000 Statement[6]

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[5]The suppression hearing covered the admissibility of both the July 3rd and July 7th statements (see R. XXV-501-504).

[6]Appellant mistakenly refers to the July 3rd statement as having been made on "SEPTEMBER 3, 2000 . . . ." App.Br. at 27.

Citing Edwards v. Arizona, 451 U.S. 477, 482 (1981), Appellant argues that "[o]nce a suspect invokes his *right to silence*, no further police interrogation may occur unless the suspect initiates further communication with the police." App.Br. at 27 (emphasis added). In effect, Globe urges this Court to adopt "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation . . . .," Michigan v. Mosley, 423 U.S. 96, 102 (1975), a proposition which the United States Supreme Court expressly rejected in Mosley:

> [that extreme] would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.

Id. at 102-103. While Appellant cites the rule that an invocation of the right to remain silent does not give rise to a per se proscription barring further questioning, his argument that a six-hour[7] delay was apparently insufficient and his reliance upon

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[7]At the suppression hearing Appellant failed to establish at what time Special Agent Gootee attempted to interview him (compare R. XXV-473-475). Nor did Globe present Special Agent Gootee's testimony at trial. The record does indicate that between approximately 8:40 and 9:00 a.m. the morning of July 3, Correctional Officer Nix was doing morning count and that Globe was then removed from Ard's cell (R. XXVI-574), and that the taped statement actually began later that day at 7:32 p.m. (see R. XXVI-629). Globe did aver in his motion to suppress that "[a]t approximately 12

Edwards demonstrates a fundamental misunderstanding. In Edwards, the United States Supreme Court made clear that the rule that further questioning is only permissible if the suspect initiates further communication with authorities was applicable solely to the invocation of *the right to counsel*:

> [T]he Court has strongly indicated that additional safeguards are necessary when the accused *asks for counsel*; and we now hold that when an accused has invoked his *right to have counsel present* during custodial interrogation, a valid waiver *of that right* cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.[ ] We further hold that an accused, such as Edwards, having expressed his desire to deal with the police *only through counsel*, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-485 (internal footnote omitted; emphasis added). As the Supreme Court has subsequently observed, "as *Mosley* made clear, a suspect's decision to cut off questioning, *unlike his request for counsel*, does not raise the presumption that he is unable to proceed without a lawyer's advice." Arizona v. Roberson, 486 U.S. 675, 683 (1988) (emphasis added).

The facts surrounding Globe's July 3, 2000 statement are as follows:

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noon Globe was questioned by FDLE agent William Gotee [sic]." (R. X-1821). At the least then, there was a seven-hour delay between the invocation of his right to remain silent with Agent Gootee and the renewed request by Agent Ugliano to interview Globe.

After Correctional Officer Nix found Globe locked inside of Ard and Busby's cell on the morning of July 3rd and FDLE was contacted (R. XXVI-574), Special Agent William Gootee responded to CCI (R. XXV-473). Agent Gootee first advised Appellant of his Miranda rights, and then asked Appellant whether he wanted to talk. Globe said "[n]ot at this time." (R. XXV-474). At no time did Appellant request a lawyer (R. XXV-474). Agent Gootee terminated his conversation with Globe and advised Special Agent Ugliano of his communication with Appellant (R. XXV-474-475, 476).

Approximately seven hours[8] later Agent Ugliano, while standing in a hallway, heard Globe say something to the effect that "That guy, that asshole, doesn't need to be here." (R. XXV-477). Globe had just finished being photographed, and Busby was inside the Inspector's Office talking to his father on the phone (R. XXV-477). Agent Ugliano responded to Globe by asking "why," to which Appellant stated that "The whole place is just screwed up. It is all messed up." (R. XXV-477). At that time, Agent Ugliano asked Globe if he was willing to make a statement (R. XXV-477). Globe answered affirmatively, if he could be with Busby (R. XXV-477). Agent Ugliano further testified that

[8]See supra, 20 n.7.

> [a]t that time Andrew Busby came out of the room. He was crying. Charles [Globe] asked to go speak to him. He was allowed to at which time Charles said: Andy, I am going to tell them what happened. You can -- you want to be in there with me? Andrew said yes. We took a tape recorded statement from him.

(R. XXV-477). Globe and Busby then made a recorded statement admitting to planning a murder and actually killing Ard (R. XXVI-625-653).

As the record establishes, all questioning of Globe was terminated upon his invocation of his right to remain silent. It was not until approximately seven hours[9] later that he was again asked whether he wished to make a statement. Thus notwithstanding Appellant's characterization that "the FDLE agents did not honor [his] invocation of his right to remain silent at all," App.Br. at 28, under Mosley the authorities "scrupulously honored" Appellant's request. Kelly v. Lynaugh, 862 F.2d 1126, 1130-1131 (5th Cir. 1988) (seven to twelve-hour delays between assertions of right to remain silent and renewed questioning with new advisement of Miranda rights deemed to have scrupulously honored right to remain silent), cert. denied, 492 U.S. 925 (1989); compare Spradley v. State, 442 So.2d 1039, 1043 (Fla. 2nd DCA 1983) (accused's rights not scrupulously honored where police resumed questioning forty-five minutes after invocation of right to remain silent). Accordingly, the July 3rd

[9]See supra, at 20 n.7.

statement was properly admitted into evidence.

2. July 7, 2000 Statement[10]

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[10]Appellant mistakenly refers to the July 7, 2000 statement as "THE SEPTEMBER 7, 2000 STATEMENT . . . ." App.Br. at 30.

Unlike having been questioned on July 7, 2000, on September 7, 2000, while sitting outside the judge's chambers, Appellant spontaneously said to Special Agent Ugliano that "'It's stupid to have to go through all this bullshit. I know I am going to get the needle for killing him. I just don't give a shit. That's just the way it is. I just don't give a shit. You know what I am saying?'" (R. XXVI-694-695). Both men were present for Globe's arraignment (R. XXVI-694). Agent Ugliano testified that he did not say anything to Appellant to elicit a statement or information from him (R. XXVI-694), and testified during cross-examination that he was at the courthouse for the arraignment to help the prosecutor and to "see if Mr. Globe or Mr. Busby would make a statement." (R. XXVI-697).

Globe does not assert on appeal that his September 7th statement was improperly admitted. Nor would there be any merit to such a claim. Agent Ugliano did nothing to elicit any information from Globe. Presence alone is insufficient to give rise to a Miranda violation. Rather, "Miranda warnings are not required outside the context of an inherently coercive custodial *interrogation*." Holland v. State, 773 So.2d 1065, 1073 (Fla. 2000) (emphasis added), cert. denied, 534 U.S. 834 (2001). That is, "'[t]he presence of *both* a custodial setting and official interrogation is required to trigger the *Miranda* right to counsel prophylactic.... [A]bsent one or the other, *Miranda* is not implicated.' *Alston*, 34 F.3d at 1243 (citing *Miranda*, 384 U.S. at 477- 78, 86 S.Ct. 1602)." Lukehart v. State, 776 So.2d 906, 918 (Fla. 2000) (emphasis in original), cert. denied, 533 U.S. 934 (2001). And while "'interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response . . . . ," Rhode Island v. Innis, 446 U.S. 291, 301 (1980), the record here establishes that Special Agent Ugliano was merely in Appellant's presence.

Globe also contests the admissibility of his July 7th statement, on the basis that it "was the fruit of the illegally obtained September 3, 2000[11] statement," App.Br. at 30, "was not made voluntarily, intelligently or knowingly," App.Br. at 34, and "was taken in violation of Rule 3.130, Fla. R. Crim. P., and in violation of Mr. Globe's right to counsel." App.Br. at 36-37.

Inspector Jack Schenck, a senior inspector with the Florida Department of Corrections, Office of the Inspector General, who had interviewed Appellant during the July 3rd statement (R. XXV-485; R. XXVI-624-625), also interviewed Appellant on July 7th (R. XXV-487; R. XXVI-655). Agent Ugliano was also involved in both interviews (R. XXV-477, 478; R. XXVI-655). The July 7th statement was made at Florida State Prison (R. XXV-488). Inspector Schenck advised Globe of his Miranda rights (R. XXV-488; R. XXVI-656), which Appellant waived (R. XXV-488; R. XXVI-

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Notwithstanding the fact that Special Agent Ugliano was present for the arraignment to see if either Appellant or his co-defendant would make a statement in addition to assisting the prosecutor, Globe made no showing that the authorities should have known that it was reasonably likely that his presence alone would elicit an incriminating response from Globe. Accord State v. Moore, 747 N.E.2d 281, 283 (Ohio App. 1 Dist. 2000); Jordan v. Commonwealth, 222 S.E.2d 573, 577 (Va. 1976); cf. In Interest of J.C., 591 So.2d 315, 316 (Fla. 4th DCA 1991) (police presence in principal's office did not constitute custodial interrogation) (quoting In re Drolshagen, 310 S.E.2d 927 (S.C. 1984)); Griffin v. State, 339 So.2d 550, 553-554 (Miss. 1976) (mere presence of police in investigatory context did not require Miranda warnings).

[11]Once again, Appellant mistakenly refers to the July 3rd statement as the September 3rd statement. No statement, however, was given by Globe on that date.

656). Globe thereupon discussed how he had planned to commit a murder and his actual killing of Ard (R. XXVI-659-667).

First, because the statement taken on July 3rd did not violate Appellant's Miranda rights, see supra, at 19-23, the July 7th statement is not inadmissible as the fruit of the poisonous tree. Johnson v. State, 660 So.2d 648, 659-660 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996). Furthermore, because Globe's subsequent statement was given following new Miranda warnings and was knowing and voluntary, see infra, at 26-28, any infirmity with the first statement did not taint the latter statement. See State v. Polanco, 658 So.2d 1123, 1126 (Fla. 3rd DCA 1995); State v. Hostzclaw, 351 So.2d 1033, 1036 (Fla. App. 1976).

Second, Appellant argues that the July 7th statement was not knowing, intelligent, and voluntary. According to Globe, he

> never explicitly waived his rights. Agent Ugliano simply rattled off the standard Miranda warning and did not stop after reading each right to ask if Mr. Globe understood that right (R26. 659). Then, Ugliano simply asked, "Do you understand your rights," to which Mr. Globe replied, "Sure" (R26. 659). When Ugliano asked, "With your rights in mind, would you like to answer questions and make a statement at this time," Mr. Globe's response was "[i]naudible" (R26. 659).

App.Br. at 35.

"[A] determination of the issues of both the voluntariness of a confession and a knowing and intelligent waiver of Miranda rights requires an examination of the

totality of the circumstances." Lukehart, 776 So.2d at 917 (citing Jennings v. State, 718 So.2d 144, 150 (Fla. 1998), cert. denied, 527 U.S. 1042 (1999)). The State carries a heavy burden to establish, by a preponderance of the evidence, that the waiver is knowing, intelligent, and voluntary. Ramirez v. State, 739 So.2d 568, 575 (Fla. 1999).

> Whether the rights were validly waived must be ascertained from two separate inquiries:
>
> > First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id.

Appellant cites no authority for his apparent belief that the police must, between advising a suspect of each right, ascertain that the person understands the individually read right. To the contrary, there is no requirement that precludes the authorities from determining that an accused understands his or her Miranda rights after being advised of those rights collectively. See Sliney v. State, 699 So.2d 662, 668 (Fla. 1997) (advising defendant of Miranda rights in the same form as in the instant case), cert.

denied, 522 U.S. 1129 (1998). Nor must that waiver be explicit. North Carolina v. Butler, 441 U.S. 369, 373 (1979) ("[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated"). Here, the fact that Appellant did not refuse to answer questions after being advised of and acknowledging that he understood his rights, but instead having answered the questions posed to him, establishes that he did in fact elect to "with your rights in mind . . . answer questions and make a statement at this time." (R. XXVI-659).

Review of the record further reflects that Appellant's decision to speak to Inspector Schenck and Agent Ugliano on July 7th was a deliberate choice and with knowledge of the rights being given up and the consequences thereof. The other circumstances cited by Globe, that he was not taken before a judge between July 3rd and July 7th, that Agent Ugliano questioned Appellant about the murder and did not talk to him about "other issues," and that at the arraignment Agent Ugliano told Appellant he could not talk to him because he had an attorney, App.Br. at 36, does not somehow render the valid waiver involuntary. The trial court did not err in admitting the statement.

Finally, Appellant contends that the July 7th statement was taken in violation of

his right to a first appearance[12] and his right to counsel under the Florida Constitution. The gist of Globe's argument is that because he was in custody on July 3rd, he was entitled to be brought before a judge within twenty-four hours. See App.Br. at 37.

Appellant argues that his "restraint had all the features of an arrest, and Rule 3.130 should have been followed." App.Br. at 37. While Appellant was transferred to Florida State Prison because of the murder, the transfer was for security reasons (see R. XXV-495) and Globe was in custody pursuant to a lawful conviction completely unrelated to the murder for which he was under investigation.

Even if Rule 3.130 were deemed to apply to the circumstances of this case, Globe is not entitled to relief in any event. Chavez, 832 So.2d at 753 ("[W]here, as here, a defendant has been sufficiently advised of his rights, a confession that would otherwise be admissible is not subject to suppression merely because the defendant was deprived of a prompt first appearance."); Keen v. State, 504 So.2d 396, 399-400 (Fla. 1987) (absent a showing that delay in being afforded first appearance induced otherwise voluntary confession, it is not subject to suppression), disapproved on other grounds, Owen v. State, 596 So.2d 985, 990 (Fla.1992). A first appearance "serves

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[12]Rule 3.130 of the Florida Rules of Criminal Procedure provides in pertinent part that "every *arrested* person shall be taken before a judicial officer, either in person or by electronic audiovisual device in the discretion of the court, within 24 hours of *arrest*." Fla. R. Crim. P. 3.130(a) (emphasis added).

as a venue for informing the defendant of certain rights, and provides for a determination of the conditions for the defendant's release." Chavez, 832 So.2d at 752. Here, Globe was no stranger to the criminal justice system, and would not have been subject to release because he was presently serving a sentence upon an unrelated conviction. And significantly, as discussed supra, at 25-28, Globe's waiver of his rights was knowing, intelligent, and voluntary.

Nor does Appellant's reliance upon Anderson v. State, 420 So.2d 574, 576 (Fla. 1982), App.Br. at 38-39, compel a different result. As this Court distinguished Anderson in Keen, it is similarly distinguishable here:

> *Anderson* is clearly distinguishable as there the evidence presented to this Court showed that Anderson had been indicted prior to being taken into custody by Florida law enforcement officials who drove Anderson by car for four days from Minnesota back to Florida. The deputies were aware that Anderson had no counsel in Minnesota and that he desired appointed counsel once returned to Florida. Holding that Anderson's statement should have been suppressed, we found "significant" the fact that the statement at issue came "far after" Anderson should have been brought before a judicial officer "with the attendant advice of rights and appointment of counsel." *Id.* at 576. We also found that the record failed to show a valid waiver. *Id.* . . .

Keen, 504 So.2d at 400-401. In contrast to the facts in Anderson, Globe was not under indictment nor had he expressed any desire to speak with counsel when the authorities spoke with him four days after the murder, and has previously discussed, supra, at 25-28, his waiver of rights was valid.

Turning to Appellant's contention that he was entitled to counsel pursuant to Article I, Section 9 of the Florida Constitution, App.Br. at 39, even assuming his right to counsel had attached, he is not entitled to relief. The right to counsel must be invoked. Smith v. State, 699 So.2d 629, 638-639 (Fla. 1997), cert. denied, 523 U.S. 1008 (1998). As previously observed, at no time did Globe assert his right to counsel or otherwise request to have counsel present (R. XXV-488; R. XXVI-656).

B. Harmless Error

Lastly, even if the Court were to determine that admission of both July statements was error, Appellant would, nonetheless, not be entitled to relief. "The erroneous admission of statements obtained in violation of Miranda rights is subject to harmless error analysis. . . . Error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not affect the verdict." Mansfield v. State, 758 So.2d 636, 644 (Fla. 2000) (internal citation and quotation marks omitted), cert. denied, 532 U.S. 998 (2001).

Here, Appellant admitted during closing argument that he killed Ard (R. XXVIII-816-818). Indeed, Appellant was found locked in the murder victim's cell with his co-defendant (R. XXVI-574). The State charged Appellant as a principal (R. XXVIII-828; see also R. XI-2119). The device used in the murder had only one purpose, to

strangle someone to death. Appellant had fresh marks on his face when he was found in Ard's cell (R. XXVI-614), and Ard was involved in a scuffle shortly before he was strangled to death (R. XXVI-569-570). In addition, the State properly presented Appellant's implicit admission that he made on September 7, 2000. See supra, at 24-25 n.10. Letters and graffiti identified as having been written by Appellant further implicated him in the murder (R. XXVI-690-693, 704; R. XXVII-744-748).

For the foregoing reasons, Issue I should be denied.

II.

ADMISSION OF GLOBE'S CO-DEFENDANT'S STATEMENTS, AS "ADOPTIVE ADMISSIONS" BY APPELLANT, DID NOT GIVE RISE TO A CONFRONTATION CLAUSE VIOLATION.

Globe contends that admission of statements that were made by Busby when he and Appellant were interviewed together by authorities following the murder violates Bruton v. United States, 391 U.S. 123 (1968).[13] App.Br. at 56.

The statements of which Appellant complains were admitted into evidence through an audiotape of a joint interview of Globe and Busby by authorities (R. XXVI-629-653). Appellant and Busby were interviewed together at their request (R. XXVI-625).

At the conclusion of the guilt phase of trial, the jury was instructed as follows concerning the statements:

> Certain out-of-court statements allegedly made by Andrew Busby have been introduced into evidence at this trial. You should use great caution in considering the out-of-court statements of a person who claims to have helped the defendant commit a crime. This is particularly true when this out-of-court statement seeks to shift the blame from the person making the statements to the defendant. *You may consider such statements as evidence against the defendant if and only if you find beyond a reasonable doubt that the defendant agreed with the statements or otherwise adopted the statements as his own.*

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[13]Appellant challenges the July 3rd joint statement under Miranda and Mosley in Issue I, see App.Br. at 27-30, which Respondent addresses supra, at 19-23.

(R. XXVIII-832) (emphasis added).[14]

While Globe states that "Bruton forbids the introduction of a nontestifying codefendant's confession *which is not directly admissible against the defendant*.," App.Br. at 56 (citing Cruz v. New York, 481 U.S. 186, 193 (1987) (emphasis added), he fails to address the fact -- and what defeats his Bruton claim -- that the statements were directly admissible against Globe as "adoptive admissions."

Section 90.803(18)(b) of the Florida Statutes expressly creates a hearsay exception for "[a] statement that is offered against a party and is: [a] statement of which the party has manifested an adoption or belief in its truth." In Nelson v. State, 748 So.2d 237 (Fla. 1999), cert. denied, 528 U.S. 1123 (2000), this Court addressed the admissibility of statements against a defendant originally made by a third-person:

> In *Privett v. State*, 417 So.2d 805 (Fla. 5th DCA 1982), the Fifth District Court of Appeal established the criteria for admissions by silence:
>
> > If a party is silent, when he ought to have denied a statement that was made in his presence and that he was aware of, a presumption of acquiescence arises. Not all statements made in the presence of a party require denial. The hearsay statement can only be admitted when it can be shown that

[14]Defense counsel agreed to the court giving the instruction but expressly did not waive his objection to admission of the statement (R. XXVII-772). Accordingly, the State does not dispute that the admissibility of the statement was preserved for appellate review.

> in the context in which the statement was made it was so accusatory in nature that the defendant's silence may be inferred to have been assent to its truth. *Daughtery v. State,* 269 So.2d 426 (Fla. 1st DCA 1972). To determine whether the person's silence does constitute an admission, the circumstances and the nature of the statement must be considered to see if it would be expected that the person would protest if the statement were untrue. *Tresvant v. State,* 396 So.2d 733 (Fla. 3d DCA), *review denied,* 408 So.2d 1096 (Fla.1981).

Several factors should be present to show that an acquiescence did in fact occur. These factors include the following:

1. The statement must have been heard by the party claimed to have acquiesced.

2. The statement must have been understood by him.

3. The subject matter of the statement is within the knowledge of the person.

4. There were no physical or emotional impediments to the person responding.

5. The personal make-up of the speaker or his relationship to the party or event are not such as to make it unreasonable to expect a denial.

6. The statement itself must be such as would, if untrue, call for a denial under the circumstances.

The essential inquiry thus becomes whether a reasonable person would have denied the statements under the circumstances. McCormick, *Evidence,* §§ 270 (2d ed.1972). Florida has incorporated this rule into its Evidence Code as section 90.803(18)(b), Florida Statutes (1981), which provides:

> The provision of section 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> (18) Admissions--A statement that is offered against a party and is:
>
> (b) a statement of which he has manifested his adoption or belief in its truth.
>
> *Id.* at 806-07; *see generally* Charles W. Ehrhardt, *Florida Evidence* §§ 803.18b (1997 ed.).

Id. at 242-243.

In the instant case, Globe adopted the statements made by Globe during the joint confession, evidenced by Appellant's participation in and contribution to the joint confession (see R. XXVI-629-653 (transcription of audiotape played for the jury)). For example, Appellant first answered when asked what circumstances led to Ard's death (R. XXVI-631), and discussed his reasoning for targeting potential victims (R. XXVI-646-647, 648). And while it is not apparent from the transcription who described how the murder was committed, Globe himself could have given the statements. And if Busby was then speaking, at no time did Globe disavow his involvement in the killing or object to the statements (R. XXVI-637-640). In addition, when Busby identified Appellant as having written "Call FDLE" and "Remember Andy and K.D., 7-3-2000," Globe voiced no objection (R. XXVI-640-641). Nor did Appellant deny or object to any other statements made by Busby, but instead

supplemented his answers (R. XXVI-644-645). Finally, throughout the statement, where it is not apparent who was speaking, Appellant did not deny what was said, even assuming that Busby was speaking (R. XXVI-643, 648).

Notwithstanding Appellant's broad application of Bruton, the United States Supreme Court did not absolutely preclude the admission of a co-defendant's out-of-court hearsay statements. See Bruton, 391 U.S. at 129 n.3 ("There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause."). Unlike the facts presented in Cruz, 481 U.S. at 191-192, wherein the Supreme Court held a Bruton violation occurred upon the admission of a co-defendant's out-of-court statement although it "interlocked" with the defendant's own confession, the statements at issue in this case are attributable to Appellant himself.

Turning to the confrontation issue, subsequent to Bruton the Supreme Court held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. 56, 66 (1980). The adoptive admission exception, recognized in Florida and designated as § 90.803(18)(b) under the Florida Statutes, is firmly established. See, e.g., United States v. Beckham, 968 F.2d 47, 51-52 (D.C. Cir. 1992) (applying Fed. R. Evid.

801(d)(2)(B), which is comparable to the Florida rule in material part); Berrisford v. Wood, 826 F.2d 747, 751 (8th Cir.1987) (applying Minn. R. Evid. 801(d)(2)(B), which is the same as its federal counterpart), cert. denied, 484 U.S. 1016 (1988); State v. Betts, 33 P.3d 575 (Kan. 2001) (applying applicable state hearsay exception that is comparable to the Florida rule); Commonwealth v. Silanskas, 746 N.E.2d 445, 461 (Mass. 2001) (same); State v. Marshall, 335 N.W.2d 612, 655 (Wis. 1983) (same).

Moreover, because Globe adopted the statements as his own, the credibility of the third person is not at issue, and the Confrontation Clause is not implicated. Nelson, 748 So.2d at 243; see also Dutton v. Evans, 400 U.S. 74, 98 (1970) (Harlan, J., concurring) ("[A] confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, *absent some circumstance indicating authorization or adoption*.") (emphasis added); Sparf v. United States, 156 U.S. 51, 56 (1895) ("The deciarations [sic] of Hansen after the killing, as detailed by Green and Larsen, were also admissible in evidence against Sparf, because they appear to have been made in his presence, and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.").

Based upon the foregoing discussion, Issue II is without merit and should be denied.

III.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AT THE PENALTY PHASE OF TRIAL.

Under Issue III, Appellant contends that his death sentence is unconstitutional on two bases: first, under Eighth Amendment because the jury was improperly instructed that "its decision was only 'advisory' or a 'recommendation' and not told that its findings and verdict were the final decision," App.Br. at 62, contrary to Caldwell v. Mississippi, 472 U.S. 320 (1985); and secondly, under the Sixth Amendment "because it does not allow the jury to reach a verdict with respect to an 'aggravating fact [which] is an element of the aggravated crime' punishable by death," contrary to Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002). App.Br. at 61.

Review of the trial court record reflects that Globe did not express any opposition to the death penalty jury instructions at the instruction conference (R. XXIX-846), failed to raise an objection when the court read the initial penalty phase instructions to the jury at the beginning of the penalty phase of trial (R. XXIX-849-850), and then, before the court gave the jury its final instructions, limited his challenge to the Caldwell issue:

> MR. PAYNE: Judge, one matter, if I may, talking about jury instructions. We would object. The jury instructions continually tell the jury to give an advisory sentence. I understand the Florida Supreme Court does not see the issue as I see it. But I would request that the

court at least tell the jury, when he mention that, that the court will be given greater extraordinary weight to their advisory sentence.

MR. DEKLE: You are asking the judge to instruct them that he will give their advisory sentence great weight?

MR. PAYNE: (Nodding head affirmatively.) Actually not to mention anything about the advisory sentence. I know what his ruling is going to be.

THE COURT: I will make that ruling. I will follow the law as it currently exists. As to the issue of great weight, state wish to be heard? In the instructions it did say that I will give great weight.

MR. DEKLE: I don't think it uses the term "great weight."

MR. PAYNE: I don't think -- I apologize for bringing this up now. It slipped my mind earlier.

MR. DEKLE: My feeling is that the Supreme Court is very, very careful on the issue that the defense attorney has brought up and they have drafted the instructions and the instructions have survived the appellate attack. I think the instructions ought to be given as the Supreme Court mandated in the rules. I think -- I don't think that change ought to be made to the instruction.

THE COURT: As a matter of law, the court must give great weight to the recommendation of the jury. And I will review the Supreme Court instructions. If I say great weight, it would not be harmful error; but we will see.

MR. DEKLE: Well –

THE COURT: I am not going to say it, Mr. Dekle.

MR. PAYNE: You are denying that request?

THE COURT: Both of the motions to say it earlier and say it then. We will follow the law as it currently exists. Any other motions by the defendant?

MR. PAYNE: Not at this time.

* * * * *

(R. XXIX-876-878). Following closing arguments by the parties, the trial court instructed the jury as mandated by the Florida Standard Jury Instructions (R. XXIX-901-908). When asked if either party had "any additions or corrections to the instructions as given by the court," Appellant relied upon his previous objections (R. XXIX-908-909).

Regarding his Sixth Amendment claim, Appellant fails to acknowledge that he did not present his contention to the trial court that "[a] 'recommendation' made by persons who believe they are only making a 'recommendation' is not a 'verdict' under the Sixth Amendment." App.Br. at 62. And while Globe cites Ring v. Arizona, 536 U.S. 584 (2002) in support of this new argument, Ring involved the application of Apprendi v. New Jersey, 530 U.S. 466 (2000). The United States Supreme Court decided Apprendi on June 26, 2000; Globe's trial did not begin until September, 2001 (R. XXII-45). Having failed to raise his Sixth Amendment claim in a timely manner, it is now barred and the Court should deny relief on that basis. See McGregor v. State, 789 So.2d 976, 977 (Fla. 2001) (Apprendi claim procedurally barred for failure

to raise in trial court); Barnes v. State, 794 So.2d 590, 591 (Fla. 2001) (Apprendi error not preserved for appellate review).

Moreover, Appellant's attempt to create a constitutional right beyond that enumerated in Ring is unavailing, as the only issue before the United States Supreme Court in Ring was "whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee,[ ] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.[ ]" Ring, 122 S.Ct. at 2437 (internal footnotes omitted). Ring did not overrule United States Supreme Court precedent holding that jury sentencing is not constitutionally required. See Proffitt v. Florida, 428 U.S. 242, 252 (1976). Rather, Ring simply held that "capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment," id., 122 S.Ct. at 2432; see also id. at 2437 n.4 ("Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.").

Further, any contention that the jury did not find an aggravating circumstance before recommending that death be imposed ignores the language and operation of Florida's penalty phase jury instructions -- e.g., "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one

of life imprisonment without the possibility of parole. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." (R. XXIX-904). In other words, before a Florida jury can find that the aggravating circumstances are outweighed by the mitigating circumstances, the jury must have found that there existed at least one aggravating circumstance and that it justified the death penalty. Accord Bottoson v. Moore, 833 So.2d 693, 702 (Fla. 2002) (Quince, J., specially concurring). A jury is presumed to following the Court's instructions. Zafiro v. United States, 506 U.S. 534, 540-541 (1993).

Regarding Appellant's preserved claim, this Court has repeatedly held that the Florida Standard Jury Instructions are in compliance with Caldwell. See, e.g., Floyd v. State, ___ So.2d ___, 27 Fla. L. Weekly S697, S703 (Fla. 2002) (citing cases); Brown v. State, 721 So.2d 274, 283 (Fla. 1998) (citing cases), cert. denied, 526 U.S. 1102 (1999); Burns v. State, 699 So.2d 646, 654 (Fla. 1997) (citing cases), cert. denied, 522 U.S. 1121 (1998). "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury under local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). Here, as this Court has held, and notwithstanding Globe's conclusory assertion to the contrary, the instructions properly informed the jury of its role under Florida law, and

thus any claim of a Caldwell violation is without merit. See Romano v. Oklahoma, 512 U.S. 1, 9 (1994) ("The infirmity identified in Caldwell is simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process."). Moreover, in properly instructing the jury regarding its advisory role, at no time was the jury's sense of responsibility diminished in respect to its role in respect to its consideration of the aggravating circumstances. To the contrary, the jury was instructed that its advisory sentence "must be based on" whether it found certain aggravating circumstances, any mitigating circumstances, and whether the aggravators outweighed the mitigation evidence (R. XXIX-901-907).

Appellant has failed to establish that he is entitled to relief under Issue III and thus it should be denied accordingly.

IV.

APPELLANT IS NOT ENTITLED TO RELIEF UNDER RING v. ARIZONA, 536 U.S. 584 (2002).

Citing Ring v. Arizona, 536 U.S. 584 (2002), Appellant contends that "[s]ince Arizona's capital scheme is unconstitutional, so is Florida's." App.Br. at 63. Specifically, Globe argues that his "death sentence is invalid because a Florida's jury's role in capital sentencing does not satisfy the Sixth Amendment," App. Br. at 63, his "death sentence is invalid because the proceedings before his jury did not satisfy the Sixth Amendment," App.Br. at 69, his "death sentence is invalid because the elements of the offense necessary to establish capital murder were not charged in the indictment," App.Br. at 70, and that "Bottoson v. Moore and King v. Moore support Mr. Globe's request for relief," App.Br. at 73.

As with Issue III, at no time before the trial court did Globe raise the claims now argued to this Court under Issue IV. "For an issue to be preserved for appeal, however, 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, 448 (Fla. 1993) (quoting Tillman v. State, 471 So.2d 32, 35 (Fla. 1985)). Appellant fails to acknowledge his procedural default, and thus makes no showing that he could not have raised these

claims before the trial court. Ring extended the requirement that a jury make certain findings, as set forth in Apprendi, to death penalty cases. Apprendi was decided June 26, 2000, well before Globe's September, 2001 trial. Although Apprendi expressly stated its holding did not apply to death penalty cases, id. at 496-497, numerous capital defendants in Florida relied upon Apprendi, albeit unsuccessfully, in seeking invalidation of their sentences prior to issuance of Ring: See, e.g., Looney v. State, 803 So.2d 656, 675 (Fla. 2001) (arguing that Apprendi required an unanimous jury verdict at the penalty phase), cert. denied, 122 S.Ct. 2678 (2002); Hertz v. State, 803 So.2d 629, 648 (Fla. 2001) (same), cert. denied, 122 S.Ct. 2673 (2002); Card v. State, 803 So.2d 613, 628 n.13 (Fla. 2001) (same; advisory role as referenced in jury instructions violated Caldwell), cert. denied, 122 S.Ct. 2673 (2002); Brown v. State, 800 So.2d 223, 224-225 (Fla. 2001) (arguing that life was the maximum sentence and that Apprendi thus applied, and that the aggravators had to be charged in the indictment and found beyond a reasonable doubt by an unanimous jury); Mann v. Moore, 794 So.2d 595, 599 (Fla. 2001) (same; decided before appellant's trial), cert. denied, 122 S.Ct. 2669 (2002); Mills v. Moore, 786 So.2d 532, 537-538 (Fla.) (same), cert. denied, 532 U.S. 1015 (2001). Having failed to raise his Sixth Amendment claims in a timely manner, each is now barred and the Court should deny relief on that basis. See McGregor, 789 So.2d at 977 (Apprendi claim procedurally barred for failure to

raise in trial court); Barnes, 794 So.2d at 591 (Apprendi error not preserved for appellate review).

Even if Globe's claims are reviewable, he ignores the fact that the United States Supreme Court did not, in Ring or otherwise, overrule its extensive precedent upholding the validity of Florida's death penalty statutory scheme. That 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 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)). Accordingly, Globes' reliance upon Ring must be considered in respect to its narrow holding -- i.e., that a judge cannot, sitting alone, find the aggravating circumstance necessary for imposition of the death penalty, id. 122 S.Ct. at 2443, and in light of those cases upholding Florida's death penalty.

As discussed, supra, at 28-29, the jury did make the finding of at least one aggravating circumstance. Otherwise it would be nonsensical to talk about the jury's recommendation for death, which was based upon its determination under the instructions that "sufficient aggravating circumstances do exist" and that the mitigating circumstances did not outweigh the aggravating circumstances. Moreover, a finding of an aggravating circumstance had to be beyond a reasonable doubt (R. XXIX-905). Further, neither Ring nor Apprendi require that the jury set forth its findings in writing.

As the United States Supreme Court stated in Jones v. United States, 526 U.S. 227 (1999), "[i]n *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor has been proved." Jones, 526 U.S. at 250-251.

To the extent that Appellant claims that his sentence is unconstitutional because the jury's vote need not be unanimous, App.Br. at 67-68, or that the aggravating factors were not charged in the indictment, App.Br. at 73, his reliance upon Ring is misplaced. The unanimity issue was not raised in Ring, and the presentment issue was expressly not addressed therein. Id., 122 S.Ct. at 2437. This Court has previously rejected each of these contentions. See, e.g., Alvord v. State, 322 So.2d 533, 536 (Fla. 1975) ("It is not necessary in the sentencing phase of a criminal case that the jury's verdict be unanimous where the legislature provides otherwise."), cert. denied, 428 U.S. 923 (1976); Looney, 803 So.2d at 675 (rejecting claim that Apprendi required an unanimous jury verdict at the penalty phase); Banks v. State, ___ So.2d ___, 28 Fla. L. Weekly S253, S254 (Fla. Mar. 20, 2003) (rejecting argument that Apprendi, in light of Ring, requires that aggravating circumstances be charged in the indictment). Appellant fails to present any new basis for reconsideration of those decisions.

Globe also argues, citing In re Winship, 397 U.S. 358 (1970) and Mullaney v.

Wilbur, 421 U.S. 684, 698 (1975), that, because the jury was instructed that it had to find whether mitigating circumstances exist that outweigh the aggravating circumstances, that this "violated due process and the right to a jury trial because it relieves the State of its burden to prove beyond a reasonable doubt the element of capital first-degree murder that 'sufficient aggravating circumstances' exist which outweigh mitigating circumstances." App.Br. at 70. Once again, Ring did not address this issue, and neither case cited by Appellant pertains to the penalty phase of a first-degree murder trial. Moreover, this Court has repeatedly rejected that argument. See, e.g., Asay v. Moore, 828 So.2d 985, 993 (Fla. 2002) (citing cases); Sweet v. Moore, 822 So.2d 1269, 1274 (Fla. 2002) (citing cases).

Regarding Globe's Caldwell claim, as discussed supra, at 29-30, it is without merit.

Finally, but most significantly, Globe fails to acknowledge that, due to the existence of his "prior violent felony conviction" aggravating factor, even if Ring applies, the judge was authorized to impose the death penalty. See Bottoson, 833 So.2d at 718-719; 722-723 (J. Shaw, concurring; J. Pariente, concurring). It is undisputed that Globe's judge properly found the existence of the prior conviction factor, and therefore no additional jury findings were required with regard to Appellant's eligibility to receive the death penalty. Almendarez-Torres v. United States,

523 U.S. 224, 243 (1998) (prior conviction properly used by judge alone to enhance defendant's statutorily authorized punishment).

Based upon the foregoing, Issue IV is without merit and should be denied.

V.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN WEIGHING THE AGGRAVATING AND MITIGATING FACTORS.

Citing the portion of the trial court's sentencing order stating that without the death penalty there is no deterrence because Globe was currently serving three life sentences, Appellant contends that such language "constituted nonstatutory aggravation and a mandatory death sentence" in violation of the Eighth and Fourteenth Amendment. App.Br. at 78, 79. Though couched in constitutional language, Globe challenges the weight the trial court afforded to the aggravating and mitigating circumstances. Having failed to raise this issue before the trial court, the claim was not preserved for appellate review and is, accordingly, procedurally barred. Cf. Ray v. State, 755 So.2d 604, 611 (Fla. 2000) (defendant failed to raise his challenge to the sentencing order at the time of trial); Johnson v. Singletary, 695 So.2d 263, 266 (Fla. 1996) (allegation of inadequate sentencing order not preserved for review thus precluding appellate consideration).

Even if Appellant's claim is reviewable, he is not entitled to relief. "[T]he weight to be accorded an aggravator is within the discretion of the trial court and will be affirmed if based on competent substantial evidence." Sexton v. State, 775 So.2d 923, 934 (Fla. 2000). The trial court only abuses its discretion "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, 1057 n.2 (Fla. 2000) (internal quotation marks and citation omitted). A review of the sentencing order demonstrates that the trial court complied with the dictates of Florida law in consideration of aggravating circumstances:

> **A. EXISTENCE OF AGGRAVATING CIRCUMSTANCES**
>
> 1. The crime for which you, CHARLES A. GLOBE, are to be sentenced was committed while you had been previously convicted of a felony and were under sentence of imprisonment.
>
>   a. You have been convicted of two counts of Sexual Battery, one count Kidnapping, and one count Robbery and you were serving three life sentences plus a thirty year sentence.
>
>   b. This aggravating circumstance was established beyond a reasonable doubt.
>
> 2. You, CHARLES A. GLOBE, have been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.
>
>   a. You have been convicted of two counts Sexual Battery, one count Kidnapping, and two counts Robbery.
>
>   b. This aggravating circumstance was established beyond a reasonable doubt.

3. The crime for which you, CHARLES A. GLOBE, are to be sentenced was especially heinous, atrocious, or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous of the victim.

   a. The victim pleaded with you to stop, offering you $45.00.

   b. You replied, "I don't want your money, punk, I want your fucking life."

   c. You taunted your victim.

   d. The victim did not die immediately.

   e. The victim suffered.

   f. You enjoyed killing the victim.

   g. By the testimony of the Defense psychologist, you derived a sexual pleasure from inflicting a torturous death on the victim.

   h. From the medical examiner's testimony, and the photographic evidence of the scratch marks on the neck, the victim attempted to release the strictures around his neck in an effort to breathe, however he was unsuccessful in his attempt and died due to strangulation.

   i. By your admission, the victim struggled in an attempt

to save himself.

j. By your admission, you sought to allay the victim's fears by lulling him into a false sense of security before attacking him.

k. Your taped statements indicated that you enjoyed the victim's suffering in that you laughed while describing the attack.

l. The activity to which you admitted, either in taped or written statement was:

i. Extremely wicked, and

ii. Shockingly evil, and

iii. Outrageously wicked and evil.

m. The activity to which you admitted, either in taped or written statement was:

i. Designed to inflict a high degree of pain with utter indifference to the suffering of the victim, and

ii. Designed to inflict a high degree of pain with enjoyment of the suffering of the victim.

n. The killing of Inmate Elton Ard was accompanied by acts that show that the crime was conscienceless and pitiless and was unnecessarily torturous to the victim.

o. This aggravating circumstance was proven beyond and to the exclusion of every reasonable doubt.

4. The crime for which you are to be sentenced was

committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "Calculated" means having a careful plan or prearranged design to commit murder. A killing is "premeditated" if it occurs after the Defendant consciously decides to kill. However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

a. By your written and taped statements, you, CHARLES A. GLOBE, had been contemplating the murder by ligature strangulation of an inmate or correctional officer for at least two weeks.

b. By your written and taped statements, you decided to kill Inmate Elton Ard more than 24 hours prior to the actual killing.

c. By your written and taped statements, you carefully prefabricated two garrotes with which you intended to strangle Inmate Elton Ard.

d. By your written and taped statements, you then attempted the strangulation of Inmate Elton Ard on at least three occasions before being able to carry it out as you had pre-planned.

e. By your written and tape recorded statements, you strangled the victim for an extended period of time.

f. By your written and tape recorded statements, after a period of strangulation you released the victim and checked his vital signs to make sure the victim was dead.

g. By your written and tape recorded statements, after believing that you possibly detected vital signs, you then applied the second garrote to the victim and sat back to smoke a cigarette and watch inmate Alton Ard die.

h. The killing of Inmate Elton Ard was cold as defined by statute and court decision.

i. The killing of Inmate Elton Ard was calculated as defined by statute and court decision.

j. The killing of Inmate Elton Ard was premeditated as defined by statute and court decision.

k. A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise could, calculated or premeditated nature of the murder. As justification or excuse for the killing of Inmate Elton Ard, you, by written and taped statements, offered the following:

   i. The killing was one of a contemplated seven killings in which you would kill seven inmates and officers who displeased you.

   ii. Inmate Elton Ard deserved to die because he was a homosexual and a convicted prisoner. This does not constitute a pretense of moral or legal justification.

   iii. The murder was committed as a political statement to highlight the unfair treatment of prisoners in the Florida Department of Corrections. This does not constitute a pretense of moral or legal justification.

iv. The murder was committed in retaliation for Inmate Alton [sic] Ard sexually harassing your lover. Your written and taped statements described the most benign form of sexual advances by the victim toward your lover. Assuming that your statements in that regard are totally true, this does not constitute a pretense of moral or legal justification.

l. The Court finds beyond all reasonable doubt that the killing of Inmate Elton Ard was cold, calculated, and premeditated, without any moral or legal justification.

* * * * *

C. WEIGHT OF AGGRAVATORS

1. The first aggravating circumstance is: "The crime for which you, CHARLES A. GLOBE, are to be sentenced was committed while you had been previously convicted of a felony and were under sentence of imprisonment."

   a. Corrections serve the twin objectives of deterrence and punishment.

   b. You are currently serving three life sentences. You have no release date. Your only hope of release from prison is escape.

   c. Without the death penalty, there is no deterrence. Without the death penalty, there is no punishment.

   d. This aggravating circumstance is accorded great weight. Assuming that all the above-discussed mitigating circumstances do exist,

and all the mitigating circumstances proffered by the Defense do exist, this aggravating circumstance standing alone outweighs any and all those mitigating circumstances.

2. You, CHARLES A. GLOBE, have been previously convicted of a felony involving the use or threat of violence to some person. This aggravating circumstance does not merge with the previous and is accorded great weight. This aggravating circumstance outweighs any and all previously discussed mitigating evidence.

3. The crime for which you, CHARLES A. GLOBE, are to be sentenced was especially heinous, atrocious or cruel.

    a. The circumstances of this crime were so extremely wicked, so shockingly evil, so outrageously wicked and vile, so obviously calculated to inflict a high degree of pain with utter indifference to (and even enjoyment of) the suffering of Inmate Elton Ard, that this circumstance is accorded the greatest possible weight.

    b. This circumstance, standing alone is sufficient to outweigh any and all the mitigating evidence discussed by the State or proffered by the Defense.

4. The crime for which you, CHARLES A. GLOBE, are to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense or moral or legal justification.

The court has very carefully considered and weighed the

> aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.
>
> The Court has also given great weight to the Jury's nine to three (9-3) recommendation of death.
>
> The Court has now discussed all the aggravating circumstances, and mitigating circumstances. The aggravating circumstances in this case far outweigh the mitigating circumstances. Each of the aggravating factors in this case, standing alone, would be sufficient to outweigh the entire mitigation that was presented.
>
> This Court agrees with the nine to three (9-3) recommendation of the Jury and finds that the facts that suggest a sentence of death are so clear and convincing that virtually no reasonable person could differ.
>
> * * * * *

(R. XIII-2424-2428, 2434-2436).

Moreover, this Court previously rejected an argument analogous to that now before it:

> Kilgore claims that the inclusion of the "license to kill" language indicates that this trial judge would impose the death sentence on any defendant serving a life sentence from a prior conviction. We disagree. In context, the sentencing order is simply an attempt by the judge to evaluate the specific evidence in this case and independently apply it to Kilgore. The challenged language comes after an express evaluation of both the aggravating and mitigating factors. All proposed statutory mitigators were individually evaluated. Two were found to exist. The judge also evaluated the nonstatutory mitigation. Finally, the trial judge also considered the recommendation by the jury. In our view, the record

> clearly supports the conclusion that Kilgore received an individualized sentence. The essence of his complaint is that the trial judge gave too much weight to his prior convictions. There is no constitutional infirmity in using prior convictions as aggravators.

Kilgore v. State, 688 So.2d 895, 899-900 (Fla. 1996), cert. denied, 522 U.S. 832 (1997).

That the trial court gave great weight to the aggravator that Globe committed the murder at the time he was previously convicted of a felony and under a sentence of imprisonment (R. XIII-2434), does not establish in itself that the court considered a nonstatutory aggravating factor or imposed a mandatory death sentence. Globe makes no attempt to demonstrate that the trial court abused its discretion by showing a lack of competent evidence to support the finding. To the contrary, the above-described evidence established the aggravators found. The trial court's sentencing order reflects that it properly considered the evidence presented in determining the existence and weight of the aggravating circumstances.

Globe also complains regarding the trial court's consideration of mitigating circumstances. App.Br. at 80. While this Court has held that "a trial court's written order must carefully evaluate each mitigating circumstance offered by the defendant, decide if it has been established, and assign it a proper weight," Hurst v. State, 819 So.2d 689, 697 (Fla.), cert. denied, 123 S.Ct. 438 (2002), Florida law is long-settled

that the weight to be afforded a mitigating factor is within the discretion of the trial court and will not be disturbed on appeal so long as it is supported by competent, substantial evidence. Nelson, 27 Fla. L. Weekly at S803 (citing Trease, 768 So.2d at 1055). "The trial court's finding is not subject to reversal merely because the appellant reaches a different conclusion." Blackwood v. State, 777 So.2d 399, 409 (Fla. 2000), cert. denied, 122 S.Ct. 2603 (2002).

In regard to capital sentencing,

> trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to "expressly evaluate in [their] written order[s] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence." *Campbell*, 571 So.2d at 419; *Ferrell v. State*, 653 So.2d 367, 371 (Fla.1995) (reaffirming *Campbell* and establishing enumerated requirements for treatment of mitigating evidence).
>
> This bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of. To satisfy *Campbell*:
>
> This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. *The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the*

> *enumerated requirements deprives this Court of the opportunity for meaningful review. Ferrell,* 653 So.2d at 371 . . . .

Hudson v. State, 708 So.2d 256, 259 (Fla. 1998) (emphasis in original).

A review of the sentencing order demonstrates that the trial court complied with the dictates of Florida law pertaining to consideration of mitigating circumstances:

> **B. EXISTENCE AND WEIGHT OF MITIGATING CIRCUMSTANCES**
>
> 1. The crime for which you, CHARLES A. GLOBE, are to be sentenced was committed while you were under the influence of extreme mental or emotional disturbance.
>
> The Defense expert emphatically testified that this mitigating circumstance does not exist.
>
> The Court finds that this mitigator does not exist.
>
> 2. You, CHARLES A. GLOBE, raised the defense that you acted under extreme duress or under the substantial domination of another person.
>
> The Defense expert emphatically testified that this mitigating circumstance does not exist, and the Court finds that this mitigator does not exist.
>
> 3. Your capacity to appreciate the criminality of your conduct or to conform your conduct to the requirements of law was substantially impaired, was raised as a mitigating factor.
>
> The Defense expert emphatically testified that this mitigating circumstance does not exist, and the Court

finds that this mitigator does not exist.

4. Any of the following circumstances that would mitigate against the imposition of the death penalty:

    a. Any other aspect of your character, record, or background.

    b. The Defense proffered your relationship with your parents as a mitigator. Evidence in the form of your psychological history was offered to show that your mother was abusive.

    c. The Defense psychologist was defensive about this history, and stated that even if it wasn't true, something very much like it must have occurred.

    d. Assuming arguendo that you were actually abused by your mother, the persuasiveness of this as a mitigating factor is substantially, lessened by the following circumstances:

        i. The testimony of the Defense psychologist that you knew the difference between right and wrong.

        ii. The testimony of the Defense psychologist that you understood the nature and consequences of your acts.

        iii. The testimony of the Defense psychologist that you understood the criminality of your conduct.

        iv. The testimony of the Defense psychologist that you had the capacity

to conform your conduct to the requirements of law.

v. Once your mother moved from Florida to Delaware approximately 10 to 12 years ago, she cut off all contact with you. Her excuse was that she had left your address in Florida even though she was well aware you were an inmate in the Florida penal system and it is common knowledge that inmates can be located with relative ease. It was agreed that contact with family members is, in essence, a lifeline for persons incarcerated in your situation. Your mother was found through these proceedings.

The Court finds that this mitigator exists, and gives it little weight.

e. The Defense also contends that you are a good friend to other inmates. How one treats one's friends is not nearly as telling as how one treats people one doesn't like. Even the worst among us treat those they like in friendly fashion. This mitigator is entitled to slight weight.

f. The Defense proffered testimony that you met the diagnostic criteria for Antisocial Personality Disorder. This is technically a mitigator, but its persuasiveness as a mitigating factor is substantially lessened by the following circumstances:

i. The testimony of the Defense

psychologist that you knew the difference between right and wrong.

ii. The testimony of the Defense psychologist that you understood the nature and consequences of his acts.

iii. The testimony of the Defense psychologist that you understood the criminality of your conduct.

iv. The testimony of the Defense psychologist that you had the capacity to conform your conduct to the requirements of law.

v. The testimony of the Defense psychologist that you were sadistic and took a sexual pleasure in inflicting pain on others.

The Court finds that this mitigator exists and gives it slight weight.

5. The Court heard a lengthy and detailed confession by you which occurred on July 3, 2000. Another confession was given on July 7, 2000. In addition, a series of letters written by you constituting confessions were read to the jury. The Court specifically considers in mitigation the fact that you had confessed and your statements were used to obtain a conviction against you. The confessions did not show any remorse.

This mitigation is given slight weight.

6. You, CHARLES A. GLOBE, have a history of

substance abuse beginning at an early age when your father began giving you beer. This progressed to inhaling chemicals in your early teens and evolved into the use of multiple drugs.

The Court finds this mitigating circumstance to exist and gives it slight weight.

7. The Court heard unrebutted testimony from Inmate Perkins regarding the charitable deeds which were performed for him by you. You, in a prison environment where commodities are scarce, would share sugar and cigarettes with Inmate Perkins.

The Court finds this mitigator exists and gives it slight weight.

8. Your mother stated that she still loved you. It is interesting to note that while she has been abandoned by all of her other children, she was supported by you when her husband died and you have maintained contact with her to the best of your ability.

The Court finds this mitigator exists and gives it slight weight.

9. Through the testimony of Pastor Wright, the Court heard you were remorseful over your act and felt sorry for the decedent's family. This is contrary to your taped confessions and letters to State personnel.

The Court finds this mitigator does not exist.

10. The Court was able to observe your conduct during the trial. You caused no problems and were compliant with all orders given to you by security

personnel. At no time were you abusive in anyway to the Court, courtroom personnel, or any of the attorneys present in the courtroom. In essence, you conducted yourself in a gentlemanly and appropriate fashion.

The Court finds this mitigator exists and gives it little weight.

11. Your religious devotion was testified to by Reverend Wright. He has been a prison chaplain for over seven years and says he would be able to distinguish those who were using religion for ulterior purposes. From your actions and proud confession it would not be possible to determine that religious values existed before or after the murder.

The Court finds that this mitigator does not exist.

12. In addition to the testimony of Inmate Perkins outlined above, Reverend Wright testified that you had assisted him in his prison ministry by drawing a religious cartoon. In addition, you assisted Reverend Wright in lifting the spirits and hopes of a cancer victim. Reverend Wright testified that your writings assisted him not only in his prison ministry but also in his outside ministry. It is suggested that this is not a recent character trait developed by you for the purpose of avoiding the death penalty. Your mother testified that at a young age you obtained a job which was obviously very helpful as the family finances were very tight. She also testified that when your sister ran away from home at a young age you went with her to protect her.

The Court finds this mitigator exists and gives it slight weight.

13. Your capacity to form relationships is evidenced by your strong relationship with Mr. Busby and your capacity to continue your relationship with your mother even after she severely abused you as a child and abandoned you as an adult.

The Court finds this mitigation exists and gives it slight weight.

14. You are currently afflicted with the HIV virus and have a back problem, as evidenced by a copy of a portion of your inmate file. While you had this virus you made a list of seven people to kill.

The Court finds this mitigator does not exist.

15. As a young boy and young man you did not have a positive role model. Your father berated you, blamed things on you, and called you dumb and stupid. In addition, instead of assisting you with a substance abuse problem when you were fifteen or sixteen years old, your father kicked you out of the family home and instructed your mother to call the police when you returned.

The Court finds this mitigator exists and gives it slight weight.

16. The Court considered every other circumstance of the offense.

a. Certain circumstances of the offense were considered as they relate to the existence or non-existence of previously discussed mitigating circumstances.

b. No additional circumstances of the offense

serve as mitigators.

c. Assuming that each and every one of the above-discussed mitigating circumstances are found to exist, none of them deserves more than slight weight.

* * * * *

(R. XIII-2429-2434).

Appellant also contends that the trial court improperly relied upon "Globe's sanity to reduce the weight of nonstatutory mitigating factors" in violation of both Florida and federal law. App.Br. at 80-82. In making this argument, Appellant apparently believes that in determining the *weight* to apply to mental health nonstatutory mitigating circumstances, the trial court cannot properly consider whether Globe knew the difference between right and wrong, understood the nature and consequences of his behavior, understood the criminality of his conduct, or had the capacity to conform his conduct to the requirements of the law. Appellant paints too broadly in asserting that State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), stands for the proposition that the "[m]itigating factors also may not be analyzed according to whether the defendant is sane." App.Br. at 81. This simply is not the law. Rather, "[t]he finding of sanity, however, does not eliminate *consideration* of the statutory mitigating factors concerning mental condition."

Campbell v. State, 571 So.2d 415, 418-419 (Fla. 1990) (emphasis added). Thus while the sentencer must be permitted to consider mental mitigation that does not rise to the level of insanity, the Eighth Amendment neither requires that a proffered mitigating circumstance be given "full effect" in the absence of evidence to establish its existence nor requires that it be given a particular weight. Compare Lockett v. Ohio, 438 U.S. 586, 604 (1978) (requiring that the sentencer not be *precluded from considering* evidence proffered in mitigation) (emphasis added). Here, contrary to Globe's suggestion otherwise, the trial court did not find that Globe's nonstatutory mental health mitigators were obviated by the lack of mental disease or defect. Instead, the trial court considered the evidence bearing on the lack of statutory mitigating circumstances in exercising its discretion to assign the weight to the nonstatutory mitigation evidence. The trial court considered the nonstatutory mitigating circumstances of Globe's childhood abuse and of his Antisocial Personality Disorder and found that each existed and were given little weight. See also Kilgore, 688 So.2d at 900-901 (concluding that it was well within trial court's discretion to afford little weight to mental health factors, and citing cases).

Based upon the foregoing, Issue V is without merit as the sentencing order demonstrates that the trial court gave careful consideration to the aggravating and mitigating circumstances, carefully weighed them as required by Florida law, found

that the aggravators outweighed the mitigation, and consequently concluded that death was the proper sentence. The sentencing court did not abuse its discretion in sentencing Globe to death, and Globe's sentence should not be disturbed.

VI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH THE INSTRUCTION ON PRINCIPALS.

Appellant contends that the trial court committed reversible error in giving the jury the instruction on principals, on the basis that the "evidence was insufficient to allow the giving of the principal instruction." App.Br. at 84.

The facts underlying Globe's claim are as follows. During the preliminary charge conference, the State agreed to withdraw the instruction on principals because the defense objected, without explanation, to the giving of that instruction (R. XXVI-707). Subsequently, after the State had rested its case-in-chief, the matter of the instruction on principals resurfaced during a recess:

> MR. PAYNE [defense counsel]: With regard to the other instructions, your Honor, with, I believe, two were pulled out yesterday, principal instruction.
>
> THE COURT: I have some concern about the principal instruction. I did pull it out. I have reread it. What is the defense position on principal? I know the state has offered to withdraw the principal instruction.
>
> MR. DEKLE [prosecutor]: Yes.
>
> THE COURT: The court thinks the principal instruction should be given. But I am willing to hear argument about it.
>
> MR. PAYNE: Your Honor, just in plain, simple terms, if one of the jurors thinks that Mr. Busby struck the fatal blow or whatever, under

the principal instruction that lays over to my client. I think if the principal instruction is not given, the jury will have no law to allow them to lay that blame over.

MR. DEKLE: In other words, what Mr. Payne wants to do is to give the jury a false impression of the law in the hopes that they might render a verdict contrary to the law.

THE COURT: By giving the jury no law?

MR. DEKLE: By giving the jury no law on that. Yes, sir. I withdraw my offer to withdraw the instruction.

THE COURT: I think the court is obligated to give the principal instruction. And it is a standard jury instruction. This is a clear principal case. Issues are clear there may be such an issue. I will hear further argument by the defense before I give the instruction.

MR. PAYNE: *I really -- got any other than Mr. Dekle is an indian giver.*

THE COURT: Okay. I will give the principal instruction.

* * * * *

(R. XXVII-772-774) (emphasis added).

Rule 3.390(d) of the Florida Rules of Criminal Procedure provides in pertinent part as follows: "No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. . . ."

Here, at no time did trial counsel distinctly advise the court as to his legal ground for objecting to the instruction. During the preliminary charge conference, the defense objected to the instruction without explanation (R. XXVI-707). Later, after the trial court informed the parties that it intended to so instruct the jury and provided the defense with the opportunity to put its objection on the record, trial counsel relied solely upon the fact that the prosecutor was an "indian giver" (R. XXVII-774). That argument, that the prosecutor changed his mind in withdrawing his withdrawal of the instruction after further reflection, did not provide a legal ground to preserve the objection for review. Compare Carpenter v. State, 785 So.2d 1182, 1199 (Fla. 2001) ("It is clear that defense counsel satisfied the requirements of Florida Rule of Criminal Procedure 3.390(d) [ ] by objecting during the charge conference and *specifically advising the trial court of the basis for the objection*.") (emphasis added; internal footnote omitted); Buford v. Wainwright, 428 So.2d 1389, 1390 (Fla. 1983) (objection to principal instruction preserved for appellate review where "trial counsel specifically requested that the instruction which the trial court intended to give include 'requirements that the State show that as a principal that Mr. Buford have the conscious intent that the crime [murder] be committed and that he say a word or do an act toward the commission or toward the incitement ... [of the crime].'"), cert. denied, 464 U.S. 956 (1983). As the above colloquy illustrates, Globe did not

preserve his challenge to the jury instruction, having failed to properly object before the trial court. Globe fails to address his procedural default. Based upon the foregoing, this Court should not review Appellant's challenge to the instruction.

Even if Appellant's claim is subject to review by this Court, he is not entitled to relief.

In accord with the Standard Jury Instruction No. 3.01, the trial court instructed the jury on principals as follows:

> If the defendant helped another person or persons commit a crime, the defendant is a principal and must be treated as if he had done all things the other person or persons did. [sic] If the defendant had a conscious intent that the criminal act to be done and the defendant did some act or said some word which was intended to and which did insight [sic], cause, encourage, assist, or advise the other person or persons to actually commit the crime.

(R. XXVIII-828; see also R. XI-2119).

This Court has previously addressed the applicable standard upon a claim that the trial court improperly instructed the jury: "[A] trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. *Kearse v. State*, 662 So.2d 677, 682 (Fla.1995)." Carpenter, 785 So.2d at 1199-1200.

The indictment charging Globe with first degree murder was premised upon his participation as a principal:

> THE GRAND JURORS OF COLUMBIA County, Florida, charge that CHARLES GLOBE aka K.D. aka THOMAS DUKE KIDD and ANDREW D. BUSBY on the 3rd day of July, 2000, in Columbia County, Florida, unlawfully and from a premeditated design and intent to effect the death of ELTON ARD or any human being, did kill the said ELTON ARD by choking or strangling him . . . .

(R. I-1). The evidence at trial, including, for example, that Globe made two garrotes specifically for the purpose of strangling someone to death and his planning with Busby to commit a murder, supported giving the instruction, where Globe and Busby each participated in Ard's murder. Shere v. State, 579 So.2d 86, 88-89, 94 (Fla. 1991) (challenge to principal instruction summarily denied); see also Dailey v. State, 594 So.2d 254, 255-256, 257 (Fla. 1991) (challenge to form of principal instruction); Calvert v. State, 730 So.2d 316, 318 (Fla. 5th DCA 1999) (manner in which principal instruction was given basis for challenge); Semenec v. State, 698 So.2d 900 (Fla. 4th DCA 1997) (same).

Globe relies upon Brumbley v. State, 453 So.2d 381 (Fla. 1984) for the proposition that "[t]here can be no finding that Mr. Globe shared with Mr. Busby a premeditated design to effect the death of Elton Ard." App.Br. at 84. Appellant's reliance thereon is misplaced. Unlike the instant case, where Globe personally strangled Ard to death, the appellant in Brumbley did not physically commit the murder but had shrugged his shoulders when his co-defendant suggested killing the

victim, in conjunction with other circumstantial evidence. Brumbley, 453 So.2d at 386. Contrary to Appellant's suggestion that his confession, adopted statement, and writings were insufficient to support giving the instruction, see App.Br. at 84, "'[a] confession is direct evidence in Florida.'" Floyd, 27 Fla. L. Weekly at S704 (quoting Walls v. State, 641 So.2d 381, 390 (Fla.1994), cert. denied, 513 U.S. 1130 (1995)). The evidence here was competent and substantial as to Globe's premeditation and involvement in killing Ard, Woodel v. State, 804 So.2d 316, 321 (Fla. 2001), and properly supported the principal instruction. Pomeranz v. State, 703 So.2d 465, 467 n.1 (Fla. 1997). And because of the extent of Globe's participation in the murder, any error in giving the instruction would be harmless. Hooper v. State, 703 So.2d 1143, 1145 (Fla. 4th DCA 1997).

Based upon the foregoing, Issue VI should be denied.

VII.

GLOBE'S DEATH SENTENCE IS PROPORTIONATE TO THAT IN OTHER CAPITAL CASES.

Globe contends that his death sentence is disproportionate. In support of his position, Globe asserts that the trial court erred in finding the cold, calculated and premeditated aggravator and that the trial court gave undue weight to the heinous, atrocious or cruel aggravating circumstance -- because each improperly rested upon Globe's statements -- and because Globe's case is "not among the least mitigated." App.Br. at 86-87.

In performing its proportionality review function, this Court must "consider the totality of the circumstances in a case and ... compare it with other capital cases." Robinson v. State, 761 So.2d 269, 276 (Fla. 1999), cert. denied, 529 U.S. 1057 (2000); Nelson , 748 So.2d at 246. Proportionality review requires a discrete analysis of the facts entailing a *qualitative* review by the Court of the underlying basis for each aggravator and mitigator, rather than a quantitative analysis. Urbin v. State, 714 So.2d 411, 416 (Fla. 1998) (emphasis in original); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). A proportionality determination does not turn on the existence and number of aggravating and mitigating factors, and the proportionality review function is "not to reweigh the mitigating factors against the

aggravating factors; that is the function of the trial judge." Holland, 773 So.2d at 1078; see also Lawrence v. State, ___ So.2d ___, 28 Fla. L. Weekly S241, S244 (Fla. Mar. 20, 2003).

Regarding Globe's contentions that the CCP aggravator was improperly found and that the HAC aggravator was given undue weight, Globe does not contend that the evidence at trial was insufficient to establish the aggravators, but that improper evidence was considered in making the findings. App.Br. at 86. As discussed under Issue I, however, Globe's statements were properly admitted, supra, at 19-31, and thus Appellant's contentions are without merit. Moreover, "[b]ecause strangulation of a conscious victim involves foreknowledge and the extreme anxiety of impending death, death by strangulation constitutes prima facie evidence of HAC." Barnhill v. State, 834 So.2d 836, 849-850 (Fla. 2002) (citing Mansfield, 758 So.2d at 645 and Orme v. State, 677 So.2d 258, 263 (Fla.1996), cert. denied, 519 U.S. 1079 (1997)). Accordingly, the fact that both of these aggravators were present is significant for purposes of proportionality review. Nelson , 27 Fla. L. Weekly at S803.

Moreover, notwithstanding Appellant's assertion that Ard's murder was "not the most aggravated and least mitigated," App. Br., at 88, consideration of all the circumstances in the case reveals that Globe's death sentence is proportionate to that given in other capital cases.

First, there is nothing disproportionate in imposing a death sentence in the case of murder committed at a correctional facility by a prisoner upon a fellow inmate. See, e.g., Cox v. State, 819 So.2d 705, 723-724 (Fla. 2002) (defendant stabbed victim to death; aggravators included HAC and CCP, whereas thirty-two nonstatutory mitigating factors were found with only three being given "some" weight), cert. denied, 123 S.Ct. 889 (2003); Kilgore, 688 So.2d at 897 (defendant stabbed the victim and poured caustic liquid on his face and in his mouth; aggravators included that the defendant was under sentence of imprisonment at the time he committed the murder and was previously convicted of a felony involving the use or threat of violence to the person, whereas two statutory mitigating factors and three nonstatutory mitigating factors were found); Marshall v. State, 604 So.2d 799, 802 (Fla. 1992) (victim died from blows to the back of the head; aggravators included that the murder was committed by a person under sentence of imprisonment, that the defendant was previously convicted of violent felonies, that the murder was committed while the defendant was engaged in the commission of or an attempt to commit a burglary, and HAC; m]itigating circumstances included that the defendant's behavior at trial was acceptable and that the defendant entered prison at a young age); Williamson v. State, 511 So.2d 289, 290-291 (Fla. 1987) (defendant repeatedly stabbed the victim to death; aggravators included that the capital felony was committed while defendant was under a sentence

of imprisonment, the defendant had been previously convicted of a violent felony, and CCP; no mitigating circumstances were found), cert. denied, 485 U.S. 929 (1988); Lusk v. State, 446 So.2d 1038, 1042-1043 (Fla.) (victim stabbed to death; aggravators included HAC, a capital felony committed by a person under sentence of imprisonment, and a previous conviction of another capital felony; no mitigating circumstances found), cert. denied, 469 U.S. 873 (1984); Agan v. State, 445 So.2d 326, 328-329 (Fla. 1983) (defendant stabbed victim to death; aggravators included that the defendant was under sentence of imprisonment--for murder--when this crime was committed and had previously been convicted of First Degree Murder and Robbery, whereas no mitigating circumstances were found), cert. denied, 469 U.S. 873 (1984); Morgan v. State, 415 So.2d 6, 12 (Fla.) (victim was stabbed to death; aggravators included that defendant was under sentence of imprisonment, had previously been convicted of a felony involving the use or threat of violence, and HAC; no mitigating circumstances were found), cert. denied, 459 U.S. 1055 (1982). Here, four aggravating circumstances existed, including HAC, CCP, that Globe was previously convicted of a felony and was under a sentence of imprisonment, and that Globe was previously convicted of a felony involving the use or threat of violence to some person, while no statutory mitigators were found to exist, and the non-statutory mitigating factors that were found were given light or slight weight. See supra, at 52-

59, 62-69.

In addition, the Court has upheld the imposition of a death sentence in strangulation cases. See, e.g., Barnhill, 834 So.2d at 849-853 (aggravators included HAC, CCP, and that defendant committed the murder during the course of a felony, whereas trial court gave little weight to one statutory mitigating factor that was found and to eight non-statutory mitigating factors that were found); Ocha v. State, 826 So.2d 956, 966 (Fla. 2002) (prior violent felony and HAC aggravators found beyond a reasonable doubt, whereas little or some weight was given to defendant's non-statutory mitigating factors); Bowles v. State, 804 So.2d 1173, 1184 (Fla. 2001) (aggravators included HAC, CCP, robbery-pecuniary gain, and that the defendant was on probation at the time of the murder, whereas significant weight was given to one non-statutory mitigator and little or some weight to four other non-statutory mitigators), cert. denied, 122 S.Ct. 2603 (2002); Blackwood, 777 So.2d at 412 (HAC aggravator found beyond a reasonable doubt, whereas one statutory and eight non-statutory mitigators were found), cert. denied, 122 S.Ct. 2603 (2002). As previously stated, here the trial court found that four aggravating circumstances existed, including HAC, CCP, that Globe was previously convicted of a felony and was under a sentence of imprisonment, and that Globe was previously convicted of a felony involving the use or threat of violence to some person, while no statutory mitigators were found to exist,

and the non-statutory mitigating factors that were found were given light or slight weight. See supra, at 52-59, 62-69.

Finally, Globe's co-defendant, Busby, also received a sentence of death.

Based upon the foregoing, Issue VII should be denied, as death is the proper sentence in this case and Globe's sentence of death should be affirmed.

VIII.

THE TRIAL COURT'S SENTENCING ORDER SUFFICIENTLY ADDRESSED THE NONSTATUTORY MITIGATING FACTORS PRESENTED AND DID NOT CONSTITUTE AN ABUSE OF DISCRETION.

Globe raises numerous challenges to the sentencing order under issue VIII. Having failed to raise these issues before the trial court, the claims were not preserved for appellate review and are, accordingly, procedurally barred. Cf. Ray, 755 So.2d at 611 (defendant failed to raise his challenge to the sentencing order at the time of trial); Johnson, 695 So.2d at 266 (allegation of inadequate sentencing order not preserved for review thus precluding appellate consideration).

Even if the claims raised under issue VIII are subject to review, Appellant is not entitled to relief.

First, as he did under Issue V, Appellant again argues that the trial court erred in considering the lack of statutory mental mitigating circumstances to "reject" nonstatutory mental mitigating factors. Compare App.Br. at 92 with App.Br. at 80-82. As the State previously observed, however, see supra, at 70, the trial court did not conclude that the nonstatutory mental mitigating factors did not exist, but instead determined the weight to apply to those factors in light of the evidence that Appellant was not incompetent at the time of the murder (R. XIII-2430-2431). There is nothing improper as to that consideration. Compare Campbell, 571 So.2d at 418-419 ("The

finding of sanity, however, does not eliminate *consideration* of the statutory mitigating factors concerning mental condition.") (emphasis added).

Appellant also takes issue with the trial court's use of such terms as "little" and "slight" in quantifying the weight to apply to the mitigator. App.Br. at 93. This Court has previously accorded appellate review to cases where those terms were used, finding nothing unclear in their use. See, e.g., Morris v. State, 811 So.2d 661, 665, 668-669 (Fla. 2002); Darling v. State, 808 So.2d 145, 163 (Fla.), cert. denied, 123 S.Ct. 190 (2002); Jeffries v. State, 797 So.2d 573, 582-583 (Fla. 2001); Cox, 819 So.2d at 723. To the contrary, this Court rejected practically the identical claim in Reese v. State, 768 So.2d 1057 (Fla. 2000), cert. denied, 532 U.S. 910 (2001), stating:

> Reese argues in his first claim that the trial court erred in rejecting the mitigating circumstances of Reese's traumatic childhood, possessive relationship with Jackie Grier, mental impairment at the time of the crime, and amenability to prison life. We disagree. In the original direct appeal opinion, this Court remanded this case to the trial court "for the entry of a new sentencing order expressly discussing and weighing the evidence offered in mitigation according to the terms we outlined in cases like *Campbell*." *Reese*, 694 So.2d at 684. In *Campbell v. State*, 571 So.2d 415, 419-20 (Fla.1990), this Court provided the following guidelines for discussing and weighing mitigators:
>
> > [T]he sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.... The court next must weigh the aggravating circumstances against the mitigating

> and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance.... To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record."

(Footnote and citations omitted.) "The decision as to whether a mitigating circumstance has been established is within the trial court's discretion." *Preston v. State*, 607 So.2d 404, 412 (Fla.1992).

In the original sentencing order, the trial court simply stated:

> The Court finds that no other circumstances that would mitigate a first degree murder were established by the evidence. The Defendant's behavior in jail, the circumstances of his upbringing, the breakup of his relationship with his girlfriend Jacqueline Grier, and the potential sentences on the other two counts for which he was convicted are of minimal or no mitigation, in light of all the facts and circumstances of the case, including the aggravating circumstances listed above.

In contrast, the trial court's amended order devotes eight pages to discussing and evaluating each of the nonstatutory mitigators raised by Reese. The amended order is very detailed and satisfies the requirements of *Campbell*. The record supports the trial court's conclusion that the mitigators either had not been established or were entitled to minimal, little, very little, or very slight weight. Thus, we find that there is no merit to Reese's first claim of error.

Reese, 768 So.2d at 1058-1059.

Further, Globe apparently believes that the weight of a mitigating factor should be determined based upon the amount of evidence produced -- i.e., "However, the evidence underlying the substance abuse mitigator was far more extensive, involved

a much longer period of Mr. Globe's life and addressed one of the formative forces in Mr. Globe's life." App.Br. at 93. Globe cites no authority to support his contention, and fails to address the applicable standard, that the relative weight given any mitigating circumstance is within the province of the trial court. Campbell, 571 So.2d at 420. "[T]hat ruling will not be disturbed if supported by competent, substantial evidence in the record . . . . ," Barnhill, 834 So.2d at 852, and Globe fails to demonstrate a lack of competent, substantial evidence in the record. Moreover, the trial court does not determine the weight to be accorded a factor previously found to be mitigating in nature based upon the amount of evidence adduced in support thereof, but instead determines whether, under the circumstances of the case, how much mitigating effect it should be given. See Bowles, 804 So.2d at 1182 ("Under the total circumstances of this murder and on the basis set forth by the trial judge in the sentencing order, we find no error in the trial court's assignment of little weight to Bowles' use of intoxicants and drugs at the time of the murder. The trial court was well within its discretion in making and weighing such findings.").

Next, notwithstanding Appellant's assertion otherwise, App.Br. at 94, the trial court did set forth its rationale in determining the weight of each mitigating factor. See supra, at 62-69, citing XIII-2429-2434 (setting forth the facts relied upon by the trial court in assigning a particular weight to the mitigators).

Finally, Globe contends that "the trial court did not explain how these mitigating factors were weighed against the aggravating factors." App.Br. at 94. Appellant fails to cite to any case so requiring. Rather, "[t]he court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance." Campbell, 571 So.2d at 420. The trial court did precisely that in this case (R. XIII-2434-2435).

Because the trial court's sentencing order was anything but conclusory and gave due consideration to the mitigating evidence presented, Issue VIII should be denied. Accord Lebron v. State, 799 So.2d 997, 1022 (Fla. 2001) ("While reasonable persons might differ regarding the weight which might have appropriately been assigned the various mitigators, the trial court does not appear to have wholly rejected any proven factors. Rather, consistent with this Court's mandate in *Campbell v. State,* 571 So.2d 415, 419 (Fla.1990), the sentencing order here reflects the trial court's careful consideration of all the evidence presented, and its reasoned determination regarding the weight to be accorded each factor which was established.").

CONCLUSION

Based on the foregoing arguments and authorities, the judgment of conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that this brief was typed using Times New Roman 14-point font, in conformity with Fla. R. App. P. 9.210(a).

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