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IN THE SUPREME COURT OF FLORIDA

KHADAFY KAREEM MULLENS,

Appellant,

CASE NO. SC13-1824
L.T. No. CRC08-18029 CFANO

v.

STATE OF FLORIDA

DEATH PENALTY CASE

Appellee.
_________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on appeal concerning the original trial court proceedings shall be referred to as “V___:___” followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This is a direct appeal in a capital case. The grand jury of Pinellas County, Florida, indicted Appellant Kahadafy Kareem Mullens and his co-defendant Spencer Peeples for the first degree murders of Ronald Hayworth and Mohammad Uddin and for the attempted murder of Albert Barton (V1:5-8). On April 29, 2013 Mullens plead guilty as charged (V5:864-865). Mullens waived his right to a sentencing jury (V15:2255-2256) as well as to a Spencer hearing (V6:1047-1048; V10:1520-1521). The penalty phase hearing was tried before the court (V6:881 through V10:1526). The court sentenced Mullens to death for the murders of Ronald Hayworth and Mohammad Uddin, and to life in prison for the attempted murder of Albert Barton (V11:1591-1609, 1612-1618; V15:2286-2325).

Facts - Guilt Phase

Prior to his plea, Appellant filed a suggestion of incompetency (V1:35). The trial court appointed Dr. Scott Machlus, Dr. Peter Bursten and Dr. Jill Poorman to examine Appellant. The trial court then held a competency hearing to assess Appellant's competency.

Dr. Machlus opined that Appellant suffers from Bipolar I Disorder, Most Recent Episode Manic Severe, with psychotic features (V1:103) and that he was not competent to proceed to trial. He agreed, however, that Appellant is exaggerating his symptoms (V2:189) and that Mullens was manipulative and malingering in order to obtain medications and other benefits (V2:248).

Dr. Poorman examined Appellant but had extreme difficulty completing her evaluation. Appellant was "tangential and circumstantial" but she felt that it was "volitional and manipulative and behavioral in nature." (V2:303). She gave Appellant the Rey Fitness Test, and concluded that he was malingering his reports of mental illness (V2:304). She concluded that he was competent to stand trial (V2:328).

Dr. Bursten reviewed Appellant's records and noted that while Appellant complained of auditory hallucinations, for example, all of his complaints appeared to be self-reported. There were no descriptions of him appearing to be psychotic or any record of "active symptoms of mental illness" (V3:364,366). Appellant's medical records while incarcerated for the instant offenses include frequent references to malingering for secondary gain (V3:370). Dr. Bursten initially determined that Appellant was capable of describing his family, including the number and gender of his siblings (V3:373-374) however when asked about the criminal charges, Appellant professed not to understand. Dr. Bursten felt that Appellant was oriented, and not actively psychotic during his interview (V3:375), and there was no legitimate reason, including bipolar disorder, schizophrenia, or schizoaffective disorder, that would account for Appellant's alleged inability to understand the charges (V3:380). Dr. Bursten concluded that Appellant was malingering, or attempting to fake trial incompetence (V3:385). He was unable to provide a definite opinion regarding Appellant's competence because Appellant refused to comply with the examination (V3:390). Based on his review of Appellant's DOC medical records, however, Dr. Bursten concluded that Appellant does not suffer from schizophrenia or schizoaffective disorder or bipolar disorder (V3:422).

The trial court made oral findings relating to competency. First, all three doctors believed Appellant was either malingering or exaggerating his symptoms (SV1:2404). Second, all of the symptoms of mental illness were self-reported by Appellant; no one has ever observed him when he was actively hearing voices or otherwise hallucinating (SV1:2408). Third, Appellant would not answer questions asked him by either Dr. Poorman or Dr. Bursten regarding the charges, the range and nature of possible penalties, or understanding the adversarial process; both doctors believed Appellant was able to answer, but was being noncompliant. However, Appellant was able to answer those questions when asked by Dr. Machlus, which the trial court found to be very persuasive. (SV1:2411-2412). Based on this, the trial court concluded that Appellant does understand the charges, the penalties, and the process (SV1:2413). Fourth, the court noted that Appellant's description of his hallucinations did not make sense, which supported the court's finding that Appellant was feigning or malingering mental illness (SV1:2415-2416). The trial court found Dr. Poorman's testimony to be highly credible (SV1:2419), and ultimately concluded that Appellant was competent to stand trial (SV1:2425).

Appellant entered a plea of guilty on April 29, 2013 and the trial court conducted its colloquy at that time. The State presented the following factual basis:

> "Judge, the State would be prepared to prove that Khadafy Mullens committed two counts of first degree murder and one count of attempted first degree murder. This all occurred on August 17th of 2008, approximately 6:39 p.m., at a location of 2157 Central Avenue in St. Petersburg. That is in Pinellas County, Florida.
>
> The owner of that Central Food Mart is Mohammad Uddin, 44 years old, and there was a customer in there. His name was Ronald Hayworth. His age is 50. They were in the store at the time that Kahdafy

Mullens, age 24, and Spencer Peeples, age 27, came into that food mart.

Spencer Peeples pulled a pistol and demanded money from Mr. Uddin, at which time the process took place where they were in and out from behind the counter, taking lottery tickets, going through the cash register, demanding keys from Mr. Uddin to his car.

This all was captured on videotape through the surveillance of seven cameras. At the time Mr. Peeples then handed the gun to Mr. Khadafy Mullens, and they did get the keys from Mohammad Uddin. Spencer Peeples then left the food mart and went around back to get the car of Mr. Uddin, and Kahdafy Mullens was left in the food mart with Mohammad Uddin and Ronald Hayworth. At the time Mr. Uddin observed Mr. Mullens go around the corner. It looks like from the videotape he thought he had an opportunity to use 911 on the telephone. He picked up the phone, and was caught doing that by Mr. Mullens. A struggle occurred, at which time you can see Mr. Uddin fighting for his life and Mr. Mullens attempting to put the muzzle of the gun to Mr. Uddin's head. Ultimately he was able to do that and pull the trigger and killed Mr. Uddin. He fell and slumped behind the register.

Ronald Hayworth, who was a customer within the food mart, was also accosted by Mr. Mullens at that time, and a brief struggle occurred where he was also shot in the head and died.

At the time of this moment, Mr. Mullens then gathered a bag that contained lottery tickets as well as other items that they had gathered from the store and he was preparing to leave the store that Albert Barton was walking into the store at the exact same time.

Albert Barton realized something was wrong with the scenario and tried to pull back through the door and go back out to the sidewalk, but he was prevented from doing so by Mr. Mullens who drug him into the store at which time a violent fight occurred and Mr. Barton was fighting for his life as Mr. Mullens attempted to shoot him in the head.

The gun that was in possession of Mr. Mullens was somewhat defective, and the cylinder kept falling out of the gun, and as he would shoot, the cylinder would fall out. He’d have to put the cylinder back in to make it fire again.

Ultimately, Mr. Barton was shot three times. One of the times was in the face. Mr. Mullens then left the store and got into the car that was waiting outside driven by Spencer Peeples, and they left the scene and went to Mr. Peeples’ apartment.

St. Petersburg Police Department arrived and were flagged down by Mr. Barton who was on the sidewalk bleeding profusely, at which time they went into the food mart and observed the bodies of Mr. Uddin and Mr. Hayworth lying on the floor.

Ultimately, St. Petersburg were able to get into an office door and retrieve a videotape hard drive, at which time they were able to view the entire scenario on a TV camera and were able to identify the two suspects as Mr. Peoples and Mr. Mullens, and a BOLO was put out for their arrest. They also knew that they were in the car of the victim, Mr. Uddin’s vehicle, which was also posted in part of the BOLO.

Ultimately, Spencer Peeples was pulled over in the victim’s car, and, in fact, they did find a piece of evidence in the car that corresponded with what was depicted in the videotape, which is the cylinder of the pistol falling out, which was lying on the floor of the car.

Nearby Mr. Mullens was also arrested as he was walking down the street a short distance away from this area. Located within his pocket were two lottery tickets that have been identified by an expert or the commissioner for the lottery department as coming from the food mart at – on Central Avenue.

It was revealed through the evidence that – through other witnesses that Spencer Peeples’ apartment was used shortly thereafter of the homicide and robbery, at which time police were able to locate from within Mr. Peeples’ apartment clothing that matched the description from the videotape taken from the food mart that matched Mr. Mullens’ shorts as well as his shirt as well as Mr. Peeples’ clothing as well.

Located on the shorts that were taken from Mr.

> Peeples' apartment that match up with Mr. Mullens were sent to experts, at which time they determined that the blood of Albert Barton was on the shorts of Mr. Mullens' clothing.
>
> Also located within the apartment of Mr. Peeples was a VCR, which was identified from another individual that worked within the Central Food Mart, and it was a dummy or fake VCR which they had taken in order to secure their identities; however, the real one was still intact."

The trial court found that there was a sufficient factual basis and accepted Appellant's plea (V15:2265-2270).

Facts - Penalty Phase

Appellant waived a jury presentment and the penalty phase was tried before the court. The following facts were established:

The murders of Ronald Hayworth and Mohammad Uddin and the attempted murder of Albert Barton occurred during a robbery of the Central Food Mart in St. Petersburg which occurred August 17, 2008. Video surveillance of the store includes seven discs (V14:2194-2200). The surveillance video was introduced into evidence over defense objection (V6:953). Detective Rodney Towers explained that the store had a DVR surveillance system inside a locked office; Mr. Dematti of Able Solutions helped retrieve the video taken of the robbery (V6:928). Detective Towers testified that the clothing worn by the two robbers, Mullens and Peeples, was clearly visible in the video (V6:929). Photographs of both men were taken around the time they were arrested (V6:931). Spencer Peeples was later arrested as he was driving Mr. Uddin’s car. A dummy VCR that was taken from the store (V6:932) was recovered from Spencer Peeples’ apartment (V6:1024-1025); clothing worn by both men during the robbery was also recovered (V6:943). The dark shirt and do-rag worn by Appellant, specifically, was recovered; these items, Detective Tower stated, are visible in the surveillance video (V6:948-949). Some of the clothing recovered from Peeples’ apartment had bloodstains (V6:1029-1030). When he was arrested, Mullens had lottery tickets in his pocket; serial numbers from those tickets matched numbers of those stolen from the Mart (V6:1040-1042).

The trial court reviewed the videos. Detective Tower, who was familiar with the appearances of the parties involved, identified Mr. Uddin as being the clerk, Peeples as wearing a skull cap and shirt, and Mullens as the individual wearing a tank top (V6:954). Review of the video reveals Peeples as the individual who first produced the firearm; he then handed the weapon to Appellant. Peeples emptied the money from the register and took Mr. Uddin’s car keys; the two men both took lottery tickets. Peeples exited the store and Mullens then shot Mr.

Uddin in the head after seeing him using the telephone. After shooting Mr. Uddin, Mullens shot Mr. Hayworth in the head, and then also shot Mr. Barton before leaving the scene.

Autopsy results showed that Mr. Uddin (V6:1010) as well as Mr. Hayworth (V6:1013) each died, respectively, of a single gunshot wound to the head.

Aggravation

The State presented evidence that Mullens was previously convicted of aggravated battery (V6:904-908, V13:2702-2103). Other aggravators established by the State's evidence included that the capital felonies were committed while Appellant was engaged in an armed robbery (as established by video showing Appellant and Peeples robbing Mr. Uddin at gunpoint), that they were committed for pecuniary gain (established by the fact that the two men stole cigarettes, money and lottery tickets from the store), and that the murders were committed to prevent arrest (established by evidence showing that the robbery was complete and Peeples had already left the store when Mullens shot and killed the two victims, and attempted to kill a third man, Barton, who happened into the store by a misfortune of timing. Mullen's only reason for shooting the three victims was to eliminate witnesses, as all of the men were essentially passive during the robbery and allowed it to proceed with minimal protest, Appellant and Peeples wore no masks, and Mullens believed he had removed the store's video surveillance system).

Victim Impact

The State then presented letters written by the wife and child of Mr. Uddin (V13:2104-5), and a letter written by Mr. Hayworth's daughter as well as his former wife (V13:2106-2107) for the purposes of victim impact. The statements were read into the record over defense objection (V8:1298-1301). Mr. Uddin's wife and daughter expressed his value as a husband and father and their devastation at his sudden loss; Mr. Hayworth's daughter stated that while Mr. Hayworth (who appears to have been homeless at the time of his death) had his flaws, his value as a human being was still far beyond any of the things Mullens and Peeples stole from the food mart.

Mitigation

The defense called nine witnesses for the purpose of mitigation. Mullens' first witness was Reginald Moorer, who testified that Mullens was not retarded, but he was "slow" (V7:1084).

Ali Sultan testified that he owned a convenience store in St. Petersburg (V7:1090). He knew Peeples as someone who was both intimidating and violent (V7:1092). Sultan never met Mullens, but he knew his reputation in the community, which was that he was not known to be a thief but he was known to be a drug user who would do whatever he had to do to get cocaine (V7:1097-1098).

Cassandra Washington, Appellant's mother, testified that her family had a history of mental illness, including a maternal uncle who was diagnosed with schizophrenia and was also a drug and alcohol abuser (V7:1104). Appellant's father also abused drugs and alcohol (V7:1107). The family had financial problems and moved several times (V7:1113-1114). She attended school and worked evenings and weekends, leaving Appellant on his own. Appellant's father was physically violent, causing Appellant to cry (V7:1117-1118). The father ultimately went to prison for murder for ten years but when he returned the violence and drug use resumed (V7:1120-1121). Appellant's father singled him out and treated him harshly (V7:1122). Appellant went to prison when he was 16, and when he returned he was angry and paranoid (V7:1139). Appellant was so belligerent and confrontational that the neighbors drew up a petition asking Appellant's mother to make him leave (V7:1141). Appellant went to prison a second time and when he returned he was taking medications which helped with his behavior (V7:1143). Appellant resumed his old ways and began drinking and using drugs again, becoming angry and challenging like he was before going to prison (V7:1146). After his arrest on the instant charges he was medicated in jail and his behavior improved (V7:1148).

Charlotte Berry was Appellant's elementary school girl friend (V7:1162). She visits him in jail and tries to be supportive (V7:1169).

Kenneth Mullins is Appellant's uncle. Appellant stayed with him as a child during several summers. This witness explained that Appellant often was without adult supervision at home (V8:1190). Mr. Mullins at one point considered taking Appellant into his home but after discussing it with his wife concluded that Appellant's violent behavior would make it too dangerous, and a bad influence on his own children (V8:1192).

James Mullins is Appellant's cousin. He visited Appellant and said Appellant's home was like a "shack" and his neighborhood felt dangerous (V8:1198-1199). Appellant appeared to be intellectually slow (V8:1204).

Anthony Washington testified that Appellant's uncle was diagnosed with "schizo paranoia" and spent time in a psychiatric hospital (V8:1209). Appellant acted inappropriately at times, like at Christmas when the family was together and he started talking about getting a "blowjob" from a girl. Appellant's mother had to make him stop (V8:1211-1212), and Appellant seemed unaware that the topic was inappropriate.

Sharon Mullens is Appellant's aunt. She talked about Appellant's step-father, Levi McClendon, who she felt was being too "flamboyant" with Appellant, by which she appears to have meant he was being too familiar with him physically (V8:1217-1218). Appellant's real father, John, was addicted to crack cocaine and smoked marijuana, the latter when the children were with him (V8:1219). Appellant's family was poor, the children's hygiene was neglected, and there was not enough food (V8:1220). As a child, Appellant was gullible and easily influenced by others (V8:1222).

Atari Russ was a childhood friend of Appellant's. Appellant is a "good guy" (V8:1230). Appellant's brother, Wesley, picked on Appellant, punched him, put him in a chokehold until he passed out, and on one occasion tried to force him to eat insects (V8:1232-1233). Mr. Russ saw Appellant talking and laughing to himself, and knew Appellant to use marijuana, ecstasy and cocaine (V8:1236-1237). Appellant had a friend, Brian, who was murdered while he was selling drugs, and Mr. Russ opined that this had an effect on Appellant. Similarly, when Appellant returned from prison, he was "completely different," acting more aloof and paranoid (V8:1238-1239).

Shandra Washington, Appellant's older sister, testified that the neighborhood where the family lived was rough, they lived on food stamps, and there was not enough food (V8:1246-1247). When Appellant's father, Mohamid Ibrahim, was home it was violent, brutal and loud (V8:1248-1249). Appellant's father taught her to steal food from the grocery store, and on one occasion he took the TV from the home so he could trade it for drugs (V8:1251). She described Appellant as a follower (V8:1253). After Appellant returned from prison the first time, he wasn't himself; when he returned from prison the second time, he was like a different person. He would talk to himself and his hygiene was terrible (V8:1257-1258). In the year or two prior to his sentencing, Appellant's mental condition had improved and his thinking seemed to be clearer (V8:1261).

Mohamid Ibrahim is Appellant's father. He was formerly known as John Mullens (V8:1263). He named Appellant after Muammar Gaddafi because he admired the man for standing up to the Reagan administration (V8:1264). Mr. Ibrahim admitted to abusing heroin, cocaine, marijuana and alcohol (V8:1265). He stole the food money and other things to finance his drug habit (V8:1266-1267). He beat Appellant’s mother in front of the children (V8:1268). Mr. Ibrahim has been to prison five times (V8:1271).

Michael Wonka was Appellant’s room-mate at the time of the robbery. He testified that Appellant would burst out laughing for no reason, and that he believed Appellant to be mentally ill (V8:1286). Mr. Wonka and Appellant both used cocaine (V8: 1287), and Appellant sold crack cocaine to make money (V8:1288).

Dr. Machlus was called to present mental health mitigation (V9:1323). He diagnosed Appellant with Bipolar I Disorder most recent episode mixed, a personality disorder NOS (“not otherwise specified”), and polysubstance dependency (V9:1328). He explained that the bipolar diagnosis is manifested by a mixture of simultaneous depression and agitation (V9:1329). Dr. Machlus admitted that “in looking at Mr. Mullens, it is difficult to determine what is genuine and what is not because he gives very conflicting reports.” Appellant “was malingering” his claims of suicidal ideation (V9:1331). He opined that Appellant’s ability to conform his conduct to the requirements of the law was “substantially impaired” (V9:1365). He also testified that the offense was committed by Appellant when he was under the influence of extreme mental or emotional disturbance (V9:1381). Appellant does know the difference between right and wrong (V10:1403). He has a history of feigning mental health issues in order to manipulate his housing at the jail (V10:1414).

Sentencing and Trial Court Findings

The trial court rendered its Sentencing Order on August 23, 2013 (V11:1591-1609). The trial court found the following aggravating circumstances and supported each with findings of fact:

1. Mullens was previously convicted of a felony involving the use or threat of violence to the person or another capital felony ("Great Weight") (V11:1594-1595).

a. The State produced evidence of a Judgment and Sentence from the Sixth Judicial Circuit in and for Pinellas County showing that Mullens was previously convicted of aggravated battery with a deadly weapon. In addition, Appellant pled guilty to murdering both Mohammad Uddin and Ronald Hayworth, and attempting to murder Albert Barton during a single criminal episode (V11:1594-1595).

2. The capital felony was committed while Appellant was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit an

armed robbery (“Great Weight”).

a. The state presented evidence that Appellant and Peeples intended to commit an armed robbery of the Central Food Mart with a loaded revolver. The two men stole cash, lottery tickets, and cigarettes, and robbed Uddin of his car to facilitate their escape. Appellant murdered Uddin and Hayworth, and attempted to murder Barton once the robbery was completed (V11:1595).

3. The capital felony was committed for pecuniary gain (V11:1596).

a. The trial court found that this aggravator was proven beyond a reasonable doubt, but merged it with the previous aggravator (capital felony committed during commission of an armed robbery) in order not to run afoul of the rule prohibiting doubling of aggravators.

4. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody (“Great Weight”) (V11:1596).

a. The trial court found that the murders of Uddin and Hayworth, and the attempted murder of Barton, were committed entirely to prevent the three men from being able to identify the perpetrators of the robbery. Appellant had stolen what he believed to be the store surveillance system and the only purpose in killing or attempting to kill the three victims was to eliminate them as possible witnesses (V11:1596-1598).

Mitigation

The trial court found the following statutory mitigators:

1. The capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance ("Moderate Weight") (V11:1599-1601).

a. The trial court noted the testimony of Dr. Machlus, who opined that Appellant suffered from Bipolor I Disorder (Mixed). However, the court also noted that Appellant's behavior during the robbery, from the standpoint of someone wanting to successfully commit a robbery and avoid capture, showed rational, intelligent thinking.

2. The capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired ("Moderate Weight") (V11:1601-1604).

a. The trial court found that while Appellant's behavior during the robbery showed he was capable of appreciating the criminality of his actions, evidence of his "bleak" childhood combined with his mental health and poly-substance abuse was sufficient to establish this mitigator.

The trial court found the following non-statutory mitigators:

1. Appellant's mental illness can be successfully treated ("Some Weight") (V11:1605).

2. Appellant is immature, impulsive, and easily manipulated ("Little Weight") (V11:1605).

3. Appellant was acting under the domination and control of co-defendant Spencer Peeples ("Some Weight") (V11:1605-1606).

4. Appellant's low IQ[1] and poor academic achievement scores ("Little Weight") (V11:1606).

5. Appellant took responsibility for his crimes ("Little Weight") (V11:1606).

6. Appellant has a loving and supportive family and friends ("Little Weight") (V11:1607).

7. Appellant was named after Muammar Gaddafi ("No Weight") (V11:1607).

The trial court "carefully and thoroughly considered the nature and quality of each of the aggravators and mitigators" and concluded that the proper sentence was death. The trial

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[1] Mullens' full scale IQ was determined by Dr. Machlus to be 83 (V9:1348).

court specifically found that the three aggravating circumstances “far outweigh the mitigating circumstances, which fail to reach the magnitude” of the aggravators. The trial court also found, after reviewing other capital cases, that death was a proportionate sentence. (V11:1608).

This appeal follows.

SUMMARY OF THE ARGUMENT

1. The trial court did not err in admitting surveillance videos showing the robbery and murders. This evidence was admitted during the penalty phase after Appellant had already admitted to killing Mr. Uddin and Mr. Hayworth and attempting to kill Mr. Barton. There was no argument from the defense that the videos were tampered with or altered. Detective Tower's testimony established a sufficient foundation to allow the videos to be admitted as evidence.

2. Evidence adduced at the hearing below was sufficient to establish the "avoid arrest" aggravator, and the trial court's findings of fact are supported by the record.

3. The trial court's summary grouping and assessment of non-statutory mitigators argued by the defense was proper.

4. Appellant's plea was knowing and voluntary, and his sentence of death is proportional.

5. Appellant's failure to obtain a written ruling from the trial court finding him to be competent has been waived and is otherwise moot.

ARGUMENT

ISSUE I

SURVEILLANCE VIDEO DEPICTING THE MURDERS WAS PROPERLY ACCEPTED BY THE TRIAL COURT DURING THE PENALTY PHASE.

Appellant first complains that the trial court erred by considering surveillance video as part of the State's penalty phase case. He contends that the State failed to establish a sufficient foundation because it advanced no witness to present testimony that the video was an accurate representation of the events that transpired during the robbery. Appellant's claim of error is without merit, however.

a. Standard of Review

Because the issue here is the propriety of the trial court's decision to admit evidence, the standard of review is abuse of discretion. Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005).

b. Evidence Establishing Foundation Was Sufficient

Initially, the State notes that at the time the prosecution sought to enter the video into evidence, Appellant had already admitted to killing both Mr. Uddin and Mr. Hayworth, and with attempting to kill Mr. Barton; the trial court had previously accepted his plea to those charges and the trial court was in the midst of the penalty phase. There is no question, therefore, regarding the accuracy of the surveillance video insofar as it shows that Appellant killed two men and sought to kill a third. Appellant's complaint here is that because the videos appear to show the *timing* of the murders in relation to the robbery (Appellant did not start shooting until the robbery was substantially complete and it was time for the two robbers to leave), he was prejudiced because the State's use of the video established Appellant's motive (to eliminate witnesses) and the trial court relied upon it in making its findings with regard to the avoid arrest aggravator. The trial court did not abuse its discretion in considering the surveillance video, however.

Appellant advances several reasons in favor of reversal. Primarily, however, he contends that Detective Tower's testimony was insufficient because the video recording system was apparently complex and law enforcement required the assistance of a third party to secure a viewable copy of the surveillance recordings. Appellant correctly argues that the best and most commonly used method for introducing a photograph or video is to present testimony that the recording is a reasonably accurate depiction of what occurred. Appellant, by his own admission, eliminated the only two eyewitnesses, however; Mr. Barton, who survived, arrived late and thus could not testify to anything relating to the shootings of Mr. Uddin and Hayworth. Thus, the State was foreclosed from using this method.

The alternative procedure, identified by most courts as the "silent witness" method, permits the moving party to introduce a video recording by establishing its fundamental reliability by circumstantial means. See, e.g., Hannewacker v. City of Jacksonville Beach, 419 So. 2d 308 (Fla. 1982). In Wagner v. State, 707 So. 2d 827 (Fla. 1st DCA 1998) the First District reiterated the rule identified in Hannewacker, i.e., that in the absence of eyewitness testimony confirming that the contents of the video fairly and accurately portray what happened, the court may also accept as evidence a video recording provided the movant demonstrates its reliability. The Wagner court identified five criteria for the trial judge to consider in assessing the reliability of a video recording:

1. evidence establishing the time and date of the photographic evidence;

2. any evidence of editing or tampering;

3. the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product;

4. the procedure employed as it relates to the

preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and

5. testimony identifying the relevant participants depicted in the photographic evidence.

Before addressing the five <u>Wagner</u> criteria, it is necessary to consider the relevant testimony adduced below.

Detective Tower testified that he was called to the robbery scene at 7:15 pm (V6:914). The scene was secured, and the victims had all been removed by the time he arrived. The surveillance video was recovered from a machine that was inside a locked office in the rear of the store. A representative from the business that had installed the surveillance cameras was called, and with his assistance the video recordings were secured and viewed. Based on his examination of the video, Detective Tower was able to see the faces as well as distinctive clothing worn by the two perpetrators. He also saw that lottery tickets and a VCR had been taken, and that a long-barreled revolver had been used (V6:928-934). Most of these items, including clothing, VCR and lottery tickets and a portion of the firearm, were subsequently recovered. The clothing and VCR were found in Spencer Peeple's residence (V6:943, 948-949), and two lottery tickets were found in Appellant's back pocket (V6:1040-1042, V13:2052-2053). The barrel of the revolver was also recovered from the back seat area of Mr. Uddin's car when Spencer Peeples was arrested (V6:942). Detective Tower then testified that based on his having viewed the crime scene, including examination of the bloodied areas within the store representing the three locations where the victims were shot, the video recordings were a fair and accurate representation of the interior of the store as of the date of the offenses at issue here (V6:949-950). All of the video recordings bear date and time stamps indicating that the events occurred August 17, 2008 and that the robbery commenced at approximately 6:35 pm. (V14:2194-2200). According to the time stamp, the first law enforcement officer entered the store at 6:47 pm (V14:2195). Each video shows the same events but from the views of seven differently located cameras; examination and comparison of the each recording shows internal consistency in terms of what is shown and when the recorded events occurred.

Returning now to the Wagner criteria, it is possible to assess the correctness of the trial court's ruling. (1) The date and time stamps on the video recordings are consistent with the testimony of Detective Tower, who testified that he was called to the scene at 7:15 pm; this would be approximately thirty minutes after the first officer entered the store, according to the video. (2) There is no evidence indicating that the recordings have been edited or tampered with; instead, because all seven recordings are consistent with each other (in that the events shown all match, so that each video is obviously a recording of the same events), it is plain that the discs are unedited recordings of the events depicted. (3 and 4) Detective Tower testified that the equipment used to record the images was found inside a locked room in an area to the rear of the store, and that once the monitor was activated, it showed actual camera views of the store. Tower further explained that a specialist was called to help law enforcement retrieve the recordings. (5) Finally, Detective Tower affirmatively testified that on viewing the video recordings, he was able to identify the perpetrators as being the two defendants who were eventually arrested, Appellant and Spencer Peeples. It is significant that both men admitted to their respective involvement in the offense; Peeples was interviewed and described what happened to law enforcement (V4:631-644), and Appellant eventually admitted his guilt and entered a plea to the charges. Peeples' description of the robbery is consistent with the images recorded. The clothing

Appellant wore during the attack can be seen in the video, and the same clothes were recovered from Peeples' residence; law enforcement tested the bloodstains on Appellant's clothing and determined that it came from Mr. Barton, the surviving and final victim in the attack, also shown in video recordings. In short, the physical evidence recovered by law enforcement is consistent with the events depicted in the video recordings, and there is no evidence, nor even any argument from the defense, to indicate that the recordings are unreliable.

Appellant instead focuses his argument on the State's alleged failure to establish a sufficient foundation. In support of his claim of error, he directs our attention to several cases where the reviewing court reversed because of a failure to establish a foundation. None of the cases cited by Appellant, however, merit relief because at the time the State sought to introduce the surveillance video in the instant case, Appellant had already admitted his guilt, and the trial court below was addressing its attention to the proper penalty; this is an important distinction, as the evidentiary standards applied during penalty phase are more relaxed. Section 921.141(1), Florida Statutes (2014) authorizes use of evidence having probative value, so long as the opposing party has a fair opportunity to rebut it. Parker v. State, 873 So. 2d 270 (Fla. 2004) (hearsay admissible during penalty phase). In the instant case, Appellant was given a fair opportunity to rebut the surveillance video, and the trial court's decision to allow it would therefore appear to have been correct.[2]

Significantly, Appellant does not argue that the video erroneously reveals that he shot and killed Mr. Uddin and Mr. Hayworth, those are established facts. He does not argue that the video is incorrect in showing his struggle with Mr. Barton and his attempt to kill him, as this, too is an established fact. Instead, the only aspect of the video that Appellant complains about is the fact that every recording that shows the interior of the store demonstrates that Appellant waited until the robbery was complete and Peeples was outside securing the getaway car before he began to kill the witnesses. In support of his argument, Appellant directs our attention to several cases; all of them are distinguishable and none of them mandate a grant of relief.

In Bryant v. State, 810 So. 2d 532 (Fla. 1st DCA 2002) the

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[2] Although not specifically argued below, this Court recently approved a revision to the evidence code, found at § 90.804(2)(f), Florida Statutes, authorizing use of a hearsay statement against a party whose wrongdoing caused the unavailability of the declarant.

defendant successfully appealed the trial court's evidentiary ruling that allowed the jury to see an edited video surveillance recording which was the only evidence of the defendant's guilt. The First District's reversal was based on a discovery violation because the State neglected to provide the defense with the unedited video prior to trial. There was no discovery violation in Appellant's case.

In D.D.B. v. State, 109 So. 3d 1184 (Fla. 2d DCA 2013), a case involving an audio recording, the Second District reversed a juvenile conviction for misuse of the 911 system. In D.D.B., an officer testified that he was dispatched to the defendant's house based on a 911 call; as he approached the residence, he saw the child speaking on the telephone in what was apparently a second (and false) 911 call. The same officer identified the child's voice in a recording of the 911 call. The recording of the 911 call itself was never properly identified, however. No other witnesses were presented by the prosecution, and this failure warranted reversal, the Court ruled; the prosecution should have presented testimony from the 911 operator to establish that the recording was in fact a call made to the 911 system. Unlike the instant case, the prosecution in D.D.B. sought to introduce the officer's testimony to establish the defendant’s guilt, and its failure to produce a witness to authenticate the 911 recording resulted in a failure of proof in that the State was unable to establish the elements of the offense.

Appellant’s strongest case is from Maryland. In Washington v. State, 961 A.2d 1110 (Md. Ct. App. 2008) the defendant was charged with shooting the victim outside a bar. There were no eyewitnesses to the shooting, only to the fact that the defendant and the victim had been arguing earlier. The prosecution introduced a surveillance video to establish the defendant’s guilt. The bar owner testified that the surveillance system operated all the time, and that he had hired someone to transfer the video images onto a tape which he then gave to law enforcement. The appellate court reversed for lack of authentication, as there was no explanation regarding how the transfer was conducted, and the State relied heavily on the recording to establish the defendant’s guilt. The defense in Washington argued that he was not the shooter, but even if he was he shot the victim in self defense because it was a mutual affray[3].

[3] The Washington court was apparently not concerned about the obvious inconsistency in the defense’s position.

As with the other cases argued by Appellant, _Washington_ is distinguishable because, in addition to there being no dispute here regarding Appellant's guilt, the _Washington_ video was both heavily edited and also had been transferred from disk to a VHS tape, there is no dispute here regarding Appellant's guilt. The concerns regarding authenticity voiced by the Maryland appellate court were raised because the video in _Washington_ was being used to establish guilt-phase issue that was hotly contested, i.e., who shot the victim. Appellant's assertion that the surveillance video was improperly admitted is largely undercut by his admission of guilt prior to the penalty phase. Appellant accepted the State's factual basis at the time he entered his plea without dispute (V15:2265-2270). The trial court's decision to admit the surveillance video was a proper exercise of the court's discretion and should not be reversed.

Finally, it is important to note that even if the recording was improperly introduced, the trial court's conclusion regarding the avoid arrest aggravator is supported by other evidence that was properly introduced - specifically, the statement of Spencer Peeples. Review of his confession reveals that both he and Appellant handled the firearm during the robbery. Peeples did not shoot the gun in the store; when

Peeples left to get Mr. Uddin's car, the two victims were still alive; Appellant was to stay in the store and then let them go. When Peeples looked at the revolver later, he saw that five of the bullets had been discharged (V4:631-644). Based upon Peeples' statement, therefore, the trial court could have reached the same conclusions and the State's use of the surveillance video was merely cumulative of other properly admitted evidence. This Court should therefore affirm.

ISSUE II

EVIDENCE ADDUCED DURING PENALTY PHASE WAS SUFFICIENT TO ESTABLISH THE "AVOID ARREST" AGGRAVATOR.

Appellant next complains that the trial court improperly applied the "avoid arrest" aggravator; he asserts that there was insufficient evidence to justify the court's decision. The evidence before this Court, however, plainly shows the propriety of the lower court's ruling.

a. Standard of Review

The State is required to establish the existence of aggravating circumstances beyond a reasonable doubt. Geralds v. State, 601 So. 2d 1157 (Fla. 1992). The standard of review here is whether there is competent, substantial evidence to support the trial court's finding. Conde v. State, 860 So. 2d 930 (Fla.

2003).

b. The Avoid Arrest Aggravator is Supported by Competent, Substantial Evidence

In concluding that this aggravator had been proven by the State, the trial court made the following findings in its sentencing order:

> "In the instant case, it is clear from the surveillance videos that the murders of Uddin and Hayworth were solely motivated for the purpose of evading capture. After Peeples exited the store – carrying a plastic bag full of cash and merchandise – to steal Uddin's car, the Defendant can be seen standing at the store's front entrance – also holding a plastic bag filled with stolen items from the store – waiting for Peeples to gain possession of Uddin's car. At that point, had the Defendant not intended to murder Uddin and Hayworth he would have simply left the store entirely and joined Peeples in Uddin's car. However, after leaning out the entrance doors, the Defendant turned back into the store. Notably, the Defendant did not attempt to steal any additional items. To the contrary, the Defendant immediately turned to Uddin – who was hurriedly dialing a number on the telephone believing the Defendant had left the store – pointed the loaded revolver at Uddin and shot him in the head as Uddin screamed and begged for his life. Uddin had not resisted the Defendant or Peeples during the entire course of the robbery, he was positioned in a confined space behind the front counter, and did not pose any kind of threat to the Defendant whatsoever.
>
> After murdering Uddin, the Defendant immediately turned to locate Hayworth. Finding him in one of the store's aisles, the Defendant forcefully grabbed Hayworth's arm and spun him about, getting him into a position where he could more easily be shot. Hayworth was not resisting the Defendant and was pleading for

> the Defendant to let him live. Ignoring Hayworth's pleas, the Defendant raised the revolver and fired a shot into Hayworth's head. Like Uddin, Hayworth had been passive and submissive during the robbery and remained so up until his death. He had obeyed all orders from the Defendant and Peeples and stood exactly where they told him to during the robbery. Hayworth posed absolutely no threat to the Defendant.
>
> Additionally, neither the Defendant nor Peeples wore masks during the robbery. Having taken what they believed to be the store's only security surveillance system, the only possible means of being identified would have been through Uddin and Hayworth. The moment the Defendant turned back into the store when he could have simply continued on his way to join Peeples in the car, clearly demonstrated that the Defendant's sole purpose was to kill Uddin and Hayworth, thereby eliminating the last perceived means of identification. Further compelling this conclusion is that as he turned to exit the store after murdering Uddin and Hayworth, the Defendant encountered Barton, who he forcefully dragged into the store purely in an attempt to eliminate him as well.
>
> The circumstances surrounding Uddin and Hayworth's murders leave no doubt that they were perpetrated for the sole purpose of avoiding arrest. The Court concludes that this aggravating factor has been proven beyond a reasonable doubt for each victim and is afforded great weight."

(V11:1597-1598).

The trial court's findings of fact show that competent substantial evidence exists to support this aggravator, which focuses on the defendant's motivation in committing the offense. Jennings v. State, 718 So. 2d 144 (Fla. 1998). The State must prove beyond a reasonable doubt that the sole or dominant motive for the killing was to eliminate a witness. Buzia v. State, 926

So. 2d 1203 (Fla. 2006). Moreover, it is not the reviewing court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt; rather, the reviewing court should determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Aguirre-Jarquin v. State, 9 So. 3d 593 (Fla. 2009). In Foster v. State, 778 So. 2d 906 (Fla. 2000), the Court addressed the propriety of the lower court's avoid arrest determination:

> "Typically, this aggravator is applied to the murder of law enforcement personnel. However, the above provision has been applied to the murder of a witness to a crime as well. In this instance, "the mere fact of a death is not enough to invoke this factor…. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." In other words, the evidence must prove that the sole or dominant motive for the killing was to eliminate a witness. Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Likewise, the mere fact that the victim knew and could identify the defendant, without more, is insufficient to prove this aggravator….
>
> We conclude that the State presented sufficient evidence that Foster and his friends committed the killing for the purpose of avoiding arrest for their prior crimes…. Here, Schwebes was aware of the act of vandalism committed that night at Riverdale…. [T]he State stablished that Foster was concerned that he would ultimately be implicated should either Black or Torrone get arrested. We therefore conclude that the

> trial court properly submitted and relied upon this aggravator in the sentencing phase."

<u>Foster</u> at 918.

In <u>Fotopoulos v. State</u>, 608 So. 2d 784 (Fla. 1992) this Court found that the trial court properly relied upon the avoid arrest aggravator where it found that one of the dominant motives behind killing the victim (Ramsey) was because he knew of Fotopoulos' illegal activities and planned to blackmail him. In Appellant's case, the record shows that he did not move to eliminate Mr. Uddin until he saw him attempting to dial the telephone.

Finally, in <u>Consalvo v. State</u>, 697 So. 2d 805 (Fla. 1996) the court approved use of the avoid arrest aggravator where the evidence showed that Consalvo killed the victim because she threatened to call the police and then reached for the telephone. While Mr. Uddin never voiced his purpose, it is reasonable to conclude, given the circumstances, that he was calling for help.

As the trial court noted, the robbery was complete and Appellant was merely waiting for Peeples to secure the getaway car; he had no reason to kill Mr. Uddin and Mr. Hayworth other than eliminating them as witnesses. Evidence that Appellant removed what he believed to be the surveillance system further substantiates the trial court's findings. Appellant's obvious purpose in taking the dummy VCR was to make his apprehension more difficult.

Appellant's assertion that he killed Mr. Uddin out of an impulsive reaction is not supported by the record and requires this Court to ignore the plain facts before it. Peeples and Appellant stole Mr. Uddin's keys in order to facilitate their escape in his vehicle. Appellant waited in the store while Peeples brought the car up to the door; at that moment, he was temporarily distracted, and the video indicates he was focused on looking out the door. At the same time, Mr. Uddin apparently believed that the robbers were gone, as he picked up the telephone and hurriedly dialed a number as soon as Appellant was out of sight. When Appellant, who was actually standing in the doorway, turned his attention back to the two hostages and saw Mr. Uddin on the telephone, he reacted immediately to prevent him from completing the call. Appellant admitted to Dr. Machlus that he shot Mr. Uddin because he saw him on the telephone (V10:1470). Having killed the clerk, he then shot Mr. Hayworth, and for the same reason attempted to kill Mr. Barton, who appeared on the scene by misfortune of timing. That Appellant's actions were motivated by an intent to avoid arrest is well established by the record on appeal, and the trial court's ruling in this regard should be affirmed.

Appellant argues, however, that instead of avoiding arrest, the attack on Mr. Uddin and Hayworth, and later Mr. Barton, was merely a sudden impulse, anger at Mr. Uddin's attempt to call for help, fueled by the combined effects of his unstable mental condition and Appellant's abuse of drugs and alcohol. The State notes that the record does not affirmatively show that Appellant used drugs and alcohol prior to the robbery; to the contrary, the record instead suggests that he more likely did so *after* the robbery.[4] Even if we were to agree that the attack was a sudden impulse, however, we should conclude that the *nature* of that impulse was plainly to eliminate witnesses, particularly given Appellant's admission to Dr. Machlus that this was his reason for shooting Mr. Uddin. This Court has held that where the State

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[4] The witness who testified to seeing Appellant using marijuana, cocaine and alcohol (Reginald Moorer) indicated that he saw him the *night* of the robbery at Spencer Peeples' apartment. Mr. Moorer stated that Appellant was scratching "a lot" of lottery tickets, which indicates that the use of drugs and alcohol described by this witness occurred at some point following the robbery. Mr. Moorer was not specific as to what time he observed Appellant scratching lottery tickets, but he did explain that Appellant was arrested for the murders "later on that night" (V7:1085-1088).

seeks to establish an avoid arrest aggravator, it must show beyond a reasonable doubt that "the sole or dominant motive for the murder was the elimination of a witness." Alston v. State, 723 So. 2d 148 (Fla. 1998). The State suggests that the motivation to eliminate a witness who, like Mr. Uddin, was actively calling for help is sufficient to establish this aggravator.

Finally, even if the trial court erred in its conclusions regarding this aggravator, the error was harmless because of the remaining aggravators - that Appellant had a prior violent felony, and that the murder occurred as Appellant was engaged in an armed robbery. This Court has held that the prior violent felony aggravator is one of the weightiest aggravators. Sireci v. Moore, 825 So. 2d 882 (Fla. 2006). Appellant killed the two victims while engaged in an armed robbery;[5] these aggravators, when considered with the facts of the case as a whole, would still support the present death sentence even in the absence of the avoid arrest aggravator presently being challenged. Smith v. State, 139 So. 3d 839 (Fla. 2014). This Court should affirm.

[5] The trial court also found that the pecuniary gain aggravator was proved beyond a reasonable doubt, but held that it was precluded from considering it because of the rule prohibiting a doubling of aggravators. (V11:1596).

ISSUE III

THE TRIAL COURT PROPERLY APPLIED THE LAW WHEN ADDRESSING AND WEIGHING APPELLANT'S MITIGATING EVIDENCE.

Appellant asserts in his third issue that the trial judge erroneously rejected some of the nonstatutory mitigating factors, improperly evaluated the strength of other mitigators advanced below, and consequently misapplied the applicable law. Contrary to Appellant's assertion, the record contains competent substantial evidence to support the trial court's evaluation and rejection of his nonstatutory mitigators.

a. Standard of Review

The test on appeal for a trial court's assessment of a defense mitigator is whether the "the record contains 'competent substantial evidence to support the trial court's rejection of [] mitigating circumstances.'" <u>Reynolds v. State</u>, 934 So. 2d 1128, 1159 (Fla. 2006) (quoted citations omitted). A trial court's findings on mitigating factors are reviewed for an abuse of discretion. <u>Foster v. State</u>, 679 So. 2d 747, 755 (Fla. 1996).

b. The Trial Court's Assessment of Mitigators was Proper

This Court in <u>Campbell v. State</u>, 571 So. 2d 415, 419-20 (Fla. 1990), established relevant standards of review for mitigating circumstances: Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard, and the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. See also Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding that, although a court must consider all the mitigating circumstances, it may assign "little or no" weight to a mitigator); Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigating circumstance exists and the weight to be given to that mitigator are matters within the discretion of the sentencing court).

In sentencing Appellant to death for the murders of Mr. Uddin and Mr. Hayworth, the trial judge complied with the applicable law, including the dictates of this Court's decision in Campbell. The trial court expressly evaluated the aggravating factors and mitigating circumstances, and discussed the factual basis for each of the aggravating and mitigating factors. Campbell clearly recognizes that whether a mitigating factor was reasonably established by the evidence is a fact question for the trial judge, and the trial judge has the responsibility to assess the appropriate weight of any mitigation found. The trial court's analysis of the mitigators was a proper exercise of its discretion which merits no relief.

Appellant first complains that the trial court "refused" to consider the non-statutory mitigators in paragraphs 1 through 15 plus those identified in paragraph 21. These mitigators, however, were considered by the trial court (as the sentencing order indicates) as part of its analysis relating to the statutory mitigators. Similarly, Appellant also complains that the trial court failed to address his claims that he was "protective and nurturing to his younger sister" (non-statutory mitigator 32), and that he "was kind and helpful to Michael Wonka" (non-statutory mitigator 33). Appellant's claims in this regard lack merit, because the trial court is not obligated to address each specific factual allegation relating to non-statutory mitigators; instead, the court is permitted to categorize individual non-statutory mitigators into groups of broadly related areas. Gonzalez v. State, 136 So. 3d 1125 (Fla. 2014). For example, the trial court considered as one of the non-statutory mitigators the fact that Appellant has loving and supportive family and friends (V11:1604). The trial court specifically noted that it took into account Appellant's relationship with his family as being loving and supportive, but accorded it little weight (id p. 1607). The trial court did not specifically name Kendra Mullens in its analysis but given the trial court's overall assessment of this mitigator, the State would suggest that the error, if any, was harmless. This Court's analysis in numerous cases, including Gonzalez, Campbell, and Kearse indicates that the trial court may, in its discretion, bundle a collection of related non-statutory mitigators and address them as a group, rather than addressing the facts of each individual mitigator separately. Accordingly, Appellant's complaint regarding the trial court's alleged failure to address mitigators relating to Appellant's relationship with his sister and his friend Michael Wonka is without merit.

The analysis in this regard is consistent with this Court's assessment of proportionality claims. As we shall see in Issue IV, this Court has held that the correct way to evaluate proportionality is to view the case holistically, rather than in terms of the number of aggravators and mitigators. See, e.g., Terry v. State, 668 So. 2d 954 (Fla. 1996). Appellant's concern here could be viewed in terms of whether it was proper for the trial court to reduce the relatively large number of specific mitigators advanced in his sentencing memorandum and group them into smaller related bundles. The trial court's sentencing order demonstrates that the court conducted a proper analytical comparison of the aggravators when weighed against the mitigators in its conclusion that death was the proper sentence under the facts in Appellant's specific case. This Court has clearly and repeatedly concluded that the court acts within its discretion in doing so, and the State concludes that no relief is warranted here. While Appellant spends significant time in his brief addressing his claim that the trial court failed to consider certain of his mitigators, the record fails to support his assertions in this regard as it is clear that the trial court properly grouped Appellant's mitigators into related areas and assessed them in that manner.

Appellant, finally, turns to the non-statutory mitigator groups addressed by the trial court in its sentencing order. He asserts that the trial court erred in finding, in Section A of the non-statutory mitigators, that the defense failed to prove that Appellant was sexually abused as a child and while he was in prison. Appellant asserts that this was established by Appellant's statement to Dr. Machlus and the trial court therefore erred by failing to agree that it was proven. This Court has recognized that a trial judge is not required to accept expert testimony at face value. Hoskins v. State, 965 So.

2d 1 (Fla. 2007), Philmore v. State, 820 So. 2d 919 (Fla. 2002). There was no other evidence to support Appellant's self-reported claim that he was sexually abused, and the trial court acted within its discretion in finding that this mitigator was not proven.

Appellant then complains that the trial court, in weighing the question of whether the defendant is immature, impulsive and easily manipulated (section C) again failed to consider the testimony of Dr. Machlus, who explained that because Appellant suffers from Bipolar I Disorder, he is likely to be impulsive and act without rational judgment. The court properly discounted the testimony of this witness, however, particularly where it was inconsistent with other evidence. Dr. Machlus conceded that Appellant's decision to kill eyewitnesses to the robbery was goal oriented behavior, which appears to be inconsistent with the defense claim that Appellant's act of violence was mere impulse and a result of being manipulated by Spencer Peeples (V10:597). The trial court properly concluded, therefore, that Appellant was not entitled to the benefit of this mitigator. Knight v. State, 746 So. 2d 423, 436 (Fla. 1998) (noting even uncontroverted expert testimony can be rejected, especially when it is difficult to reconcile with other evidence); Walls v.

State, 641 So. 2d 381, 388 (Fla. 1994). Further, credibility determinations are within the purview of the trial court. Walker v. State, 707 So. 2d 300, 318 (Fla. 1997). The trial court below found that this mitigator was proved, but afforded it little weight. Accordingly, Appellant’s claim that the trial court did not consider the expert’s testimony is speculative and, in any event, not supported by the record.

Finally, Appellant argues that the trial court improperly evaluated his claim that his ability to conform his behavior to the law was substantially impaired. The trial court found that the testimony of Dr. Machlus (indicating that Appellant’s Bipolar I Disorder was sufficient to establish this mitigator) was weakened by the lack of evidence addressing Appellant’s mental state at the time of the murder; while Appellant had been diagnosed with this disorder only ten days prior to the murder, Dr. Machlus presented no testimony to assist the court in evaluating how the diagnosis might have affected his behavior on the day of the crime (V10:1601-1602).

Moreover, the trial court concluded, Appellant’s attempts to minimize the likelihood of arrest demonstrated his knowledge that the robbery was unlawful. This is shown not only by his attempt to remove what he believed to be a surveillance recording system as well as his decision to eliminate witnesses while waiting for Peeples to bring Mr. Uddin's stolen vehicle. This Court has affirmed the rejection of this mitigator under similar circumstances. In Pittman v. State, 646 So. 2d 167, 170 (Fla. 1994), the facts surrounding the murders undermined this mitigator where Pittman took steps to destroy evidence and effectuate a getaway. In Provenzano v. State, 497 So. 2d 1177, 1184 (Fla. 1986), this Court upheld the rejection of the conforming to the law mitigator based upon the facts of the case, in addition to the defendant's knowledge of right and wrong where Provenzano took steps to secret his crime. See also Nelson v. State, 850 So. 2d 514, 531 (Fla. 2003) (affirming trial court's evaluation and rejection of the statutory mitigators where the defendant's "purposeful actions are indicative of someone who knew those acts were wrong and who could conform his conduct to the law if he so desired."). This mitigator was not established by the evidence presented and Appellant's actions belie its finding. There was no abuse of discretion. The trial court was reasonable in rejecting the offered statutory mitigation and its findings must be affirmed.

ISSUE IV

APPELLANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED INTO A GUILTY PLEA AND HIS DEATH SENTENCE IS PROPORTIONATE.

Although not raised on appeal by Mullens' appellate counsel, the State will briefly address the validity of his guilty plea prior to considering the proportionality of his death sentence. As this Court stated in McCoy v. State, 132 So. 3d 756, 765 (Fla. 2013), even when the defendant does not challenge his conviction for first degree murder, this Court has a mandatory obligation to review the basis for the conviction and determine that the plea was voluntary.

In this case, the plea colloquy clearly establishes that Mullens knowingly, intelligently, and voluntarily entered into a guilty plea. At the plea hearing, the court accepted a detailed affidavit signed by Mullens explaining his legal rights and waiver of those rights (V5:864-865). The court also conducted a thorough colloquy with Mullens and Appellant affirmed that he had reviewed the plea form with his attorney and was entering the guilty plea knowing that he had two sentencing options; life in prison or a death sentence. (V15:2254-2270). Because the record establishes that Mullens' plea was knowing, intelligent, and voluntary, this Court should affirm his conviction for first degree murder.

Proportionality

In addition to affirming Appellant's conviction for murder, this Court should also affirm his death sentence based on a finding that his sentence is proportionate. Proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). This Court compares the case under review to others to determine if the crime falls within the category of *both* the most aggravated and the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

In Appellant's case, the trial court found three aggravating factors were established beyond a reasonable doubt and assigned each of them great weight: that Appellant was previously convicted of a felony involving the use or threat of violence or a capital felony (including a prior violent felony as well as the contemporaneous murders of Mr. Uddin and Mr. Hayworth), that the murders were committed during a robbery, and that the murders were committed for the purpose of avoiding or preventing a lawful arrest.

The trial court found two statutory mitigating factors to which it assigned only moderate weight: that the defendant was under the influence of extreme mental or emotional disturbance, and the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (V11:1598-1604). Nonstatutory mitigators included (1) Appellant's mental illness can be successfully treated (some weight), (2) Appellant is immature, impulsive and easily manipulated (little weight), (3) Appellant was acting under the domination and control of co-defendant Spencer Peeples (some weight) (4) Appellant has a low IQ and poor academic achievement scores (little weight), (5) Appellant took responsibility for his crimes (little weight), (6) Appellant has loving and supportive family and friends (little weight), (7) Appellant was named after Muammar Gaddafi (no weight)[6].

In conducting proportionality review, this Court has stated that (except in cases of demonstrable legal error) it will accept the trial court's findings on the aggravating and mitigating circumstances. Rodgers v. State, 948 So. 2d 655 (Fla. 2006). The prior violent felony conviction aggravator is

[6] The trial court found that non-statutory mitigators not proven included that Appellant was sexually abused and that Appellant was "too far gone to be helped" by age ten.

considered one of the “most weighty in Florida's sentencing calculus.” Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002). The trial court found that Mullens had a previous conviction for aggravated battery, and this qualifies as a prior violent felony conviction for the purposes of this aggravator (V11:1594). In addition, the trial court gave great weight to Appellant’s contemporaneous murder and attempted murder conviction in the instant case, finding as follows:

> Additionally, and most importantly, in the instant case the Defendant pleaded guilty to murdering Mohammad Uddin and Ronald Hayworth, and attempting to murder Albert Barton during a single criminal episode. As shown on the surveillance videos, there is no doubt that the Defendant coldly and mercilessly murdered Uddin and Hayworth and attempted to murder Barton. . .
>
> The Court concludes that this aggravating factor has been proven beyond a reasonable doubt for each victim. The aggravating circumstance of a prior violent felony conviction is one of the “most weighty” in the capital sentencing scheme and the Court gives great weight to this aggravating factor. This is especially true in light of the fact that the robbery was all but completed and the Defendant deliberated returned and perpetrated the homicidal violence.”

(V11:1594-1595). Appellant is wholly responsible for the murders in the instant case. The record shows that the robbery was substantially complete, Appellant’s co-defendant having already left the store with cash and other merchandise taken in the robbery, along with car keys stolen from Mr. Uddin. It was

Appellant's sole decision to shoot Mr. Uddin and Mr. Hayworth, a decision which by Appellant's own admission (to Dr. Machlus) was made when he saw Uddin trying to use the telephone to call for help.

The trial court also gave great weight to the contemporaneous armed robbery which was committed with the murders and attempted murder. The court found:

> [T]he Defendant and Peeples went to Central Food Mart on August 17, 2008 with the specific intention of committing an armed robbery. They entered the store armed with a loaded revolver, which they used to assert their dominance and maintain control of Uddin and Hayworth while they raided the store taking merchandise, property, and cash. Specifically, the Defendant and Peeples stole cash from the register, lottery tickets and cigarettes from behind the front counter, and then robbed Uddin of his car to facilitate their escape. It is undeniable that the Defendant's – along with Peeples – specific intention upon entering Central Food Mart was to commit armed robbery and it was during the course of this robbery that the Defendant murdered Udin and Hayworth and attempted to murder Barton.
>
> The Court concludes that this aggravating factor has been proven beyond a reasonable doubt for each victim. This aggravating factor is afforded great weight.[7]

(V11:1595-1596) (emphasis added)

Finally, the trial court found that the killing was

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[7] The trial court also found that Appellant used lethal force for pecuniary gain, but correctly merged it with the robbery aggravator and did not consider it to be an aggravator.

committed to avoid arrest, which it also afforded great weight. The court found as follows with regard to this aggravator:

> In the instant case, it is clear from the surveillance videos that the murders of Uddin and Hayworth were solely motivated for the purpose of evading capture. After Peeples exited the store – carrying a plastic bag full of cash and merchandise – to steal Uddin's car, the Defendant can be seen standing at the store's front entrance – also holding a plastic bag filled with stolen items from the store – waiting for Peeples to gain possession of Uddin's car. At that point, had the Defendant not intended to murder Uddin and Hayworth he would have simply left the store entirely and joined Peeples in Uddin's car. However, after leaning out of the entrance doors the Defendant turned back into the store. Notably, the Defendant did not attempt to steal any additional items. To the contrary, the Defendant immediately turned to Uddin – who was hurriedly dialing a number on the telephone believing the Defendant had left the store – pointed the loaded revolver at Uddin and shot him in the head as Uddins screamed and begged for his life. Uddin had not resisted the Defendant or Peeples during the entire course of the robbery, he was positioned in a confined space behind the front counter, and he did not pose any kind of threat to the Defendant whatsoever.
>
> After murdering Uddin, the Defendant immediately turned to locate Hayworth. Finding him in one of the store's aisles, the Defendant forcefully grabbed Hayworth's arm and spun him about, getting him into a position where he could more easily be shot. Hayworth was not resisting the Defendant and was pleading for the Defendant to let him live. Ignoring Hayworth's pleas, the Defendant raised the revolver and fired a shot into Hayworth's head. Like Uddin, Hayworth had been passive and submissive during the robbery and remained so up until his death. He had obeyed all orders from the Defendant and Peeples and stood exactly where they told him to during the robbery. Hayworth posed absolutely no threat to the Defendant.

> Additionally, neither the Defendant nor Peeples wore masks during the robbery. Having taken what they believed to be the store's only security surveillance system, the only possible means of being identified would have been through Uddin and Hayworth. The moment the Defendant turned back in to the store when he could have simply continued on his way to join Peeples in the car, clearly demonstrated that the Defendant's sole purpose was to kill Uddin and Hayworth, thereby eliminating the last perceived means of identification. Further compelling this conclusion is that as he turned to exit the store after murdering Uddin and Hayworth, the Defendant encountered Barton, who he forcefully dragged in the store purely in an attempt to eliminate him as well.
>
> The circumstances surrounding Uddin and Hayworth's murders leave no doubt that they were perpetrated for the sole purpose of avoiding arrest. The Court concludes that this aggravating factor has been proven beyond a reasonable doubt for each victim and is afforded <u>great weight</u>."

(V11:1597-1598) (emphasis added)

The trial court found the existence of two statutory mitigating factors despite the fact that the evaluating doctor (Machlus) conducted less than a thorough evaluation, failed to ask Mullens about his mental state at the time of the offense, and was therefore unable to make a connection between his conclusions and Mullens' conduct on the day of the crimes. Thus, while each mitigating circumstance was found, the judge gave them only "moderate weight." (V11:1601-1604) In pertinent part, the trial court found:

> **A. The capital felony was committed while the**

Defendant was under the influence of extreme mental or emotional disturbance.

Dr. Machlus testified that at the time the crimes were committed, the Defendant was suffering from Bipolar I Disorder (Mixed), which can fluctuate between severe and mild. Dr. Machlus testified that the first recorded indication of Bipolar symptoms occurred in 2001 when the Defendant was 18 years old, a typical age when Bipolar symptoms manifest themselves. Additionally, Dr. Machlus diagnosed the Defendant with having Personality Disorder (Not Otherwise Specified) and Polysubstance abuse.

* * *

Dr. Machlus opined that at the time of the murders, the Defendant was under the influence of extreme mental or emotional disturbance. Dr. Machlus premised his opinion primarily on the fact that individuals who suffer from both Bipolar Disorder and substance abuse are six times more likely to commit violent criminal acts as opposed to those individuals who suffer solely from Bipolar Disorder. He testified that the Defendant's Bipolar I Disorder in conjunction with the Defendant's abuse of alcohol and cocaine resulted in a synergistic effect, causing the Defendant to act irrationally and impulsively. . . . [B]ased on the competent evidence before the Court, it is evident that the Defendant has long suffered from mental illness and substance abuse and has experienced their combined effects throughout his life.

However, the Court also notes that Dr. Machlus was unable to directly link the Defendant's "mental or emotional disturbance" to the Defendant's willful decision to commit murder and attempted murder. While Dr. Machlus testified that the Defendant's Bipolar symptoms could wax and wane from mild to severe, he could not pinpoint where in this spectrum the Defendant's Bipolar symptoms were manifesting themselves at the time of the murders. Interestingly, Dr. Machlus never inquired of the Defendant as to his mental state at the time of the murders. This lack of specificity leaves the Court in a position to have to speculate as to the Defendant's condition and mental state when he murdered Uddin and Hayworth and attempted to murder Barton. Without more, the Court is left knowing that the Defendant suffered from Bipolar I Disorder, but is unaware of the degree to which the Defendant was experiencing its symptoms.

Additionally, the Court finds that the Defendant's actions on August 17, 2008, demonstrate that he was not so overcome by his "emotional disturbance" that he could not act rationally. As the armed robbery developed, the Defendant removed what he believed to be the store's operating surveillance system. This was an intelligent, rational action taken to prevent being caught by law enforcement. Thereafter, as the robbery concluded, the Defendant leaned out of the store's front entrance doors, seeming as though he was exiting the store. However, the Defendant then turned back into the store, walked directly towards Uddin, pointed the revolver in Uddin's face and pulled the trigger, killing Uddin as he pleaded for his life. The Defendant then turned and grabbed Hayworth by the arm, twisted him around and fired a single shot into his head, killing Hayworth as he too begged the Defendant to let him live. As he began to exit the store, the Defendant encountered Barton. As Barton tried to run from the store, the defendant violently grabbed and dragged him into the store and shot him multiple times in an attempt to murder him as well. These actions further demonstrate that the Defendant was acting deliberately with the intent of eliminating any evidence that tied him to the scene.

Such rational, thought-out actions belie the Defendant's claim that his mental illness and substance abuse caused him to act completely irrationally. However, on balance the Court is reasonably convinced this mitigating circumstance existed at the time of these offenses. Accordingly, in light of the foregoing, the Court finds that this factor has been proven and accords it <u>moderate weight</u>.

B. The capacity of the Defendant to appreciate the

> **criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.**
>
> [T]he Defendant's actions and behaviors in committing the armed robbery, murders, and attempted murder are key in considering this mitigator. . . . [The Defendant's] actions are not those of a person who does not appreciate the consequences of his conduct. To the contrary, the evidence consistently demonstrates that the Defendant was capable of appreciating the criminality of his conduct and there is no doubt that the Defendant was cognizant of the nature of his actions.
>
> However, while the Court firmly believes that the Defendant was well aware of the criminality of his actions, competent evidence was presented that suggests that the Defendant's ability to conform his conduct to the requirements of law was substantially impaired. In addition to Dr. Machlus's testimony regarding the Defendant's mental health, the Court also heard testimony from several of the Defendant's family members regarding his upbringing. The totality of their testimonies painted a very bleak picture of the Defendant's childhood and background. . . .
>
> While the Court has no doubt that the Defendant was well aware of the criminality of his actions, it is the combination of the Defendant's mental health and substance abuse issues along with his upbringing that indicate the Defendant lacked the capacity to conform to the requirements of law. In light of the foregoing, the Court finds that this factor has been proven and accords it <u>moderate weight</u>.

(V11:1601-1604)(emphasis added)

The trial court also considered a large number of non-statutory mitigating factors: (1) Appellant's mental illness can be successfully treated (some weight), (2) Appellant is immature, impulsive and easily manipulated (little weight), (3) Appellant was acting under the domination and control of co-defendant Spencer Peeples (some weight), (4) Appellant's low IQ and poor academic achievement scores (little weight), (5) Appellant took responsibility for his crimes (little weight), (6) Appellant has loving and supportive family and friends (little weight) and (7) Appellant was named after Muammar Gaddafi (no weight).

In the instant case, Appellant makes no credible attack on the trial court's assessment of the aggravators, but instead reviews the mitigating factors. The trial court, however, addressed all of the mitigators advanced by Appellant and assigned only moderate weight to the two statutory mitigators, while assigning some or little weight to the remainder. Appellant does not dispute the majority of the trial court's findings in mitigation, other than to challenge the respective weights assigned by the court. Rather, he essentially summarizes the trial court's findings in mitigation and summarily asserts that this case is not among the "least mitigated." However, the underlying evidentiary support for these non-statutory mitigators does not generate any significant reduction of the defendant's moral culpability. For example, Appellant's mother believed her son was a "good boy." However, Appellant's history of criminal behavior does not support his mother's belief. Appellant was known in his neighborhood as a drug addict willing to do anything to get cocaine. In spite of his mother's persistent attempts to get him help at the local mental health clinic, Appellant failed to keep his appointments and instead persisted in his desire to maintain his addiction and, significantly, to avoid effective treatment for his condition.

Appellant next asserts that his case is similar to several capital cases where the death sentence was found to be disproportionate. However, all of the cases advanced by Appellant can be distinguished in one way or another. In Almeida v. State, 748 So. 2d 922 (Fla. 1999), the trial court found only one aggravator (prior violent felony), and substantial mitigation, including the fact that the offense and the prior felony (the basis for the sole aggravator) arose during a six week period apparently triggered by a marital crisis. This Court has held that proportionality is a significant problem in single aggravator cases, especially where there is substantial mitigation. See Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989) and Windom v. State, 656 So. 2d 432, 440 (Fla. 1995). Accordingly, because Almeida is a single aggravator case, it lacks precedential value where, as here, the trial court applied multiple aggravators and found all of them to have great weight. The defense in Almeida presented "vast" mental health mitigation which outweighed the single aggravator applied by the trial court.

In Crook v. State, 908 So. 2d 350 (Fla. 2005), the aggravators included murder in the course of a sexual battery, for pecuniary gain, and HAC. The trial court gave "significant weight" to the two statutory mental health mitigators (defendant was under influence of extreme mental or emotional disturbance, and his capacity to conform his conduct to the requirements of law). Evidence adduced at Crook's sentencing revealed that he suffered from organic frontal lobe brain damage likely caused by having been beaten with a pipe; the beating was so severe that the damage forced Crook to switch from being right handed to left, and left him unable to distinguish between a feeling and a behavior, a condition which caused him to strike out when angry. Here, the trial court gave far less weight to the statutory mental health mitigators, and the trial court made no findings that Appellant suffered from organic brain damage.

In Hawk v. State, 718 So. 2d 159 (Fla. 1998), the trial court found two aggravators - pecuniary gain, and there was a contemporaneous attempted murder. However, there was substantial mitigation in Hawk; for example, there was unrebutted evidence that the defendant suffered from organic brain damage likely caused by spinal meningitis which left him suffering from delusional thinking and hallucinations.

Larkins v. State, 655 So. 2d 95 (Fla. 1995), is also relied upon by the defense and while there was evidence that the defendant suffered from organic brain damage that impaired his capacity to control his conduct, the trial court's sentencing order was so abbreviated that this Court was unable to conduct a proportionality review. Appellant's suggestion that Larkins is controlling here is not correct, as the court made clear that it was unable to assess proportionality and it remanded for that reason.

Finally, in Urbin v. State, 714 So. 2d 411 (Fla. 1998), the defendant was only seventeen years old at the time of the offense and he lacked the capacity to appreciate the criminality of his conduct. In short, all of the cases relied upon by Appellant are distinguishable because in every case, there are very strong mitigators present, all militating against imposition of a death sentence.

This case, which involves three significant aggravating factors given great weight by the trial court, including the prior violent felony aggravator for contemporaneous murders and attempted murder as well as a prior conviction for aggravated battery, is also comparable to the following cases in which the death penalty has been affirmed by this Court on proportionality review.

In McLean v. State, 29 So. 3d 1045 (Fla. 2010) the defendant was convicted of a single homicide by shooting; aggravators applied by the trial court included that the defendant was a felon on probation (moderate weight), he had a prior violent felony (armed robbery, along with the contemporaneous conviction for attempted murder) (great weight), and McLean committed the murder in the course of committing an armed robbery (great weight). The trial court, in addition to finding that McLean was of average intelligence and suffered from borderline personality disorder, gave “little weight” to the two statutory mental mitigators, that McLean suffered from a mental or emotional disturbance and that he lacked capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. McLean’s death sentence was deemed proportional.

In Troy v. State, 948 So. 2d 635 (Fla. 2006) the trial court applied four aggravators, including HAC (great weight), prior violent felony (considerable weight), the murder was committed while Troy was on community control (considerable weight) and the murder was committed during a robbery or sexual battery (considerable weight). In contrast, Troy established the same statutory mental mitigators at issue here (Troy was under the influence of extreme mental or emotional disturbance (moderate weight), and Troy's capacity to conform his conduct to the requirements of the law was substantially impaired (considerable weight)). In addition the trial court found a multitude of nonstatutory mitigators, many consistent with those applied by Appellant's trial court. This Court found the death sentence imposed in Troy proportional.

In Shellito v. State, 701 So. 2d 837 (Fla. 1997), where a twenty-year-old defendant was convicted in a shooting death, the trial court found two aggravators (prior violent felony conviction and pecuniary gain/commission during a robbery), outweighed nonstatutory mitigation consisting of alcohol abuse, a mildly abusive childhood, difficulty reading, and a learning disability. Death was found to be proportional.

In Singleton v. State, 783 So. 2d 970, 979 (Fla. 2001) the defendant's death sentence was proportional where two aggravators were found, including prior violent felony conviction and HAC; three statutory mitigators were found, including defendant's advanced age (69), impaired capacity, and extreme mental or emotional disturbance. Several nonstatutory mitigators were found, including that defendant suffered from mild dementia.

In Bryant v. State, 785 So. 2d 422 (Fla. 2001) this Court, in finding the defendant's death sentence proportionate, cited cases which all found the death penalty proportionate where the two prior violent felony aggravators were involved. As this Court explained in Bryant:

> [T]his Court has upheld death sentences in other cases based upon only two of the three aggravating factors present in the instant case. See: Pope v. State, 679 So. 2d 710 (Fla. 1996) (holding death penalty proportionate where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed two statutory mitigating circumstances of commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct and several nonstatutory mitigating circumstances); Melton v. State, 638 So. 2d 927 (Fla. 1994) (holding death penalty proportionate where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed some nonstatutory mitigation); Heath v. State, 648 So. 2d 660 (Fla. 1994) (affirming defendant's death sentence based on the presence of two aggravating factors of prior violent felony and murder committed during course of robbery, despite the existence of the statutory mitigator of extreme mental or emotional disturbance). Accordingly, we find that death is a proportionate penalty in this case.

Bryant at 437.

Numerous other similar robbery cases confirm the correctness of the trial court's proportionality analysis. In Hayward v. State, 24 So. 3d 17 (Fla. 2009), death was a proportional sentence where the trial court found as aggravators (1) prior violent felony (great weight) and (2) the murder was committed while Hayward was engaged in a robbery (great weight). The trial court weighed these against eight nonstatutory mitigators, which were afforded some or little weight.

In Sliney v. State, 699 So. 2d 662 (Fla. 1997) death was proportional where the trial court found two aggravators, commission during a robbery and avoid arrest, two statutory mitigators, age and lack of criminal history, and a number of nonstatutory mitigators. In Hurst v. State, 819 So. 2d 689, 701-02 (Fla. 2002) the defendant's death sentence was affirmed where defendant robbed a fast food store and two aggravators outweighed mitigation; in Hayes v. State, 581 So. 2d 121, 126-27 (Fla. 1991) death was affirmed after the trial court found the "committed for pecuniary gain" and "committed while engaged in armed robbery" aggravators outweighed the "age" statutory mitigator, and the "low intelligence," "developmental learning disability," and "product of a deprived environment" nonstatutory mitigators.

Finally, in Anderson v. State, 863 So. 2d 169, 188 (Fla. 2003), the trial court found four aggravating factors, including two which were given great weight: CCP and prior violent felony for the contemporaneous conviction of attempted murder. In comparison, the trial court found a total of ten nonstatutory mitigating factors, and other than Anderson's lack of a violent history and his religious activities, most of the mitigation was given little weight.

In this case, the death sentence imposed for the murders of Mr. Uddin and Mr. Hayworth is not disproportionate when compared to other factually similar cases. The trial court made the following comments with regard to proportionality in its sentencing order:

> "The Court finds that the State has established three statutory aggravating factors beyond a reasonable doubt. The Court further finds that the Defendant has established two statutory mitigating factors, as well as six non-statutory mitigating factors. In weighing the aggravating factors against the mitigating factors, the Court has carefully and thoroughly assessed the significance of every factor. The Court recognizes that, in considering the aggravating and mitigating factors, there is no mathematical formula. It is not enough to weigh the number of aggravators against the number of mitigators. The Court has carefully and thoroughly considered the nature and quality of each of the aggravators and mitigators.

> "The Court has given great weight to each aggravating factor. The Defendant has previously been convicted of aggravated battery with a deadly weapon as well as the contemporaneous murders and attempted murder in the instant case. The Defendant and Spencer Peeples, armed with a loaded revolver, entered Central Food Mart on August 17, 2008, intent on committing an armed robbery. It was during the robbery that the Defendant murdered Mohammad Uddin and Ronald Hayworth as they begged and pleaded for their lives and also attempted to murder Albert Barton; all solely in an attempt to avoid arrest. The Court finds that these aggravating circumstances far outweigh the mitigating circumstances, which fail to reach the magnitude of the aggravating factors. Furthermore, a review of other capital cases has led the Court to conclude that the death penalty is a proportionate sentence in the Defendant's case."

Mullens' request for a life sentence on this basis must be denied.

<u>ISSUE V</u>

THE TRIAL COURT'S FAILURE TO RENDER A WRITTEN COMPETENCY ORDER IS NOT PRESERVED AND DOES NOT CONSTITUTE FUNDAMENTAL ERROR.

Finally, Appellant contends that the trial court's failure to enter a written order finding him competent to proceed entitles him to relief. The State notes that there is no dispute regarding the trial court's ruling; all parties agree that the trial court found Appellant to be competent, and the question of Appellant's competency is not before this Court on review. Moreover, Fla. Rule of Crim. Proc. 3.212 (b) does not expressly require entry of a written order. While the State recognizes that many of the district courts have issued opinions interpreting the Rule so as to require a written order[8], those decisions are not binding on this Court. This Court has never interpreted Rule 3.212(b) to require entry of a written order, and the State's position is failure to do so does not constitute fundamental error, particularly where there is no dispute regarding the substance of that order.

It is also significant that Appellant's claim of error addresses a matter which occurred prior to entry of his plea. The written plea agreement expressly states that Appellant waived appellate review (V5:864-865). This Court has held that a plea agreement containing such a waiver is valid against guilt phase claims that were not expressly preserved at the time the plea was entered. Thomas v. State, 838 So. 2d 535 (Fla. 2003). Accordingly, no relief is warranted here.

[8] See, e.g., White v. State, 548 So. 2d 765 (Fla. 1st DCA 1989), and Marshall v. State, 351 So. 2d 88 (Fla. 2d DCA 1977).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the convictions and sentences imposed below.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Cynthia Dodge, Assistant Public Defender, Public Defender's Office, Tenth Judicial Circuit, Post Office Box 9000-Drawer PD, Bartow, Florida 33831-9000, **appealfilings@pd10.state.fl.us**, **dodge_c@pd10.state.fl.us** [and] **judino_m@pd10.state.fl.us**.

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