IN THE SUPREME COURT OF FLORIDA

ZACHARY TAYLOR WOOD,

Appellant,

v.

CASE NO. SC15-954
L.T. No. 2014-CF-000137 CFAXMX

STATE OF FLORIDA

Death Penalty Case

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR WASHINGTON COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

This brief will refer to Appellant, Zachary Wood, as Appellant, or by proper name, e.g., "Wood." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The co-defendant will be referred to as Dillon Rafsky, as co-defendant, or by proper name, e.g. "Rafsky." The victim will be referred to as James William Shores, or as Victim.

The record on direct appeal will be cited throughout this brief as "R" followed by the appropriate volume and page number. It will also include the Spencer hearing and the sentencing hearing. (R. V#:page#).

The transcript of the jury trial and penalty phase will be cited throughout as "T" followed by the appropriate volume and page number. (T. V#:page#).

Appellant's initial brief in this proceeding will be cited as "IB" followed by the appropriate page number. (IB:page#).

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

OVERVIEW

This is a direct appeal in a capital case. A Grand Jury in Washington County, Florida, indicted Zachary Taylor Wood for the first-degree murder of James Shores. (R.1:16-17). A total of three charges were filed by way of indictment: (count one) first-degree murder of James Shores; (count two) burglary of a structure with a firearm; (count three) robbery with a firearm. (R.1:16-17). The trial commenced on February 24, 2015. The jury found Wood guilty as charged on all counts. (R.1:78-80).

The penalty phase was conducted on February 27, 2015. The jury returned an advisory sentence of death by a vote of twelve-to-zero for the murder of James Shores. (R.1:83). The trial court held a Spencer[1] hearing on April 17, 2015. (R. 5:890). On May 12, 2015, the trial court imposed the following sentences: (count one) first degree murder James Shores – death; (count two) burglary of a structure with a firearm – 100 years' prison; (count three) robbery with a firearm – 100 years' prison. (R. 2:233-241). Wood filed a notice of appeal on May 21, 2015. (R. 2:242). This appeal follows.

[1] Spencer v. State, 691 So. 2d 1062 (Fla. 1996).

STATEMENT OF THE CASE AND FACTS

In April 2014, Zachary Wood and Dillon Rafsky went on a two-day crime spree, during which they killed James Shores and culminated in a high-speed chase and shoot out with Trooper Marcel Phillips.

On April 19, 2014, Zachary Wood and Dillon Rafsky were speeding in a Toyota Camry in Alabama. (T. 15:119). Trooper Phillips clocked the Camry doing 88 miles per hour. (T. 15:119). The Camry's speed increased to 94 miles per hour and the trooper put on his lights and sirens. (T. 15:118-119). He got behind the Camry but they did not stop. (T. 15:120). Their speed increased even more, and the trooper called in that he was in pursuit, gaining speed up to 130 miles per hour. (T. 15:120). The driver suddenly slowed down allowing Trooper Phillips to drive parallel to the car. (T. 15:121). When he got closer to the car, Trooper Phillips looked over and saw the barrel of a gun pointed at him. (T. 15:121). The trooper heard a loud explosion and the glass shattered. The trooper's car drove off of the road and crashed into a ditch. (T. 15:122).

When he regained consciousness, Trooper Phillips was receiving gunfire from the car. (T. 15:122). He called in the crash, that shots were being fired, and he began returning fire as well. (T. 15:122). By the time Trooper Phillips exited his car, he realized that someone had already exited the Camry and was shooting

from the tree line and another suspect was still in the car. (T. 15:122). Trooper Phillips eventually realized that the other person was surrendering, saying don't shoot. (T. 15:123-124). The suspect in the car had his hands up and had been shot multiple times. (T. 15:124). Trooper Phillips ordered the suspect out of the car, but could not handcuff him because he realized that he had also been shot. (T. 15:124, 131). The suspect remaining in the car was the Appellant, Zachary Woods. (T. 15:130, 133). Trooper Phillips and Wood were taken to the hospital to treat their wounds. (T. 15:127, 136). Eventually Rafsky was captured and apprehended. (T. 15:132).

After the Camry was taken to the impound, law enforcement noticed a wallet and a passport belonging to James Shores, the registered owner of the car. (T. 15:146). Law enforcement then contacted Washington County Sheriff's Office asking them to do a welfare-check on James Shores. (T. 15:146). The victim's brother, Joe Boy Shores, was also contacted and he went over to the victim's trailer, which was located behind the family's old farmhouse. (T. 15:163-164, 169-170). Joe Boy Shores was met at the victim's trailer at 1:30 a.m. by a deputy. (T. 15:171, 177). There was no sign of the victim and Joe Boy suggested they check at the old house because he saw an abandoned jeep on the property. (T. 15:171, 177). As Joe Boy and the deputy were walking from the victim's trailer to the house,

they noticed the victim dead, at the back of the old house. (T. 15:171, 177). The victim was wearing a red flannel shirt, blue jeans, he was bound at the legs with a cloth, his hands were chained behind his back, and there was massive trauma to his head. (T. 15:172, 177-178).

On April 20, 2014, law enforcement officials spoke to Wood at the jail about what occurred. (T. 16:277). Wood gave a complete statement about the activities of both himself and Rafsky. Wood informed the police that on Thursday, April 17, 2014, he went with Rafsky to get Kelly Eggleston's jeep. (T. 16:283, 306). They went back to the hotel where Wood was staying for a little while and then they went mudding or dirt road riding. (T. 16:284). The first day they were mudding they got stuck at a property and ended up spending the night on the dirt road at this property. (T. 16:284).

The next morning, April 18, 2014, a farmer arrived and pulled them out. (T. 16:284). From there, the pair went to Rafsky's parents house arriving around 9:30 a.m. (T. 16:284-285, 307). They stayed there for about an hour before they started driving around again. (T. 16:284). After leaving Rafsky's parents house, they headed towards Florida and stopped at Dollar General and a Chevron food mart. (T. 16:287, 308). They also stopped at Fred's, another store, and Wood took a pair of pants, shirts, and two Gatorades without paying. (T. 16:289, 307). Wood told

law enforcement that they were in Bonifay, Florida at this point which led him to believe that the dirt road they turned onto was where a friend of Rafsky's lived. (T. 16:289-290, 310). Driving down that dirt road, the pair was still mudding and saw the mail lady. (T. 16:292, 311). They stopped and Wood stated that he went over to the mail lady and asked her for cigarettes. (T. 16:292, 311).

As they continued driving down the road, the pair then saw what appeared to be an abandoned house. (T. 16:292). Rafsky said to Wood that they were supposed to be there and reversed into the yard. (T. 16:292, 312). However, the jeep got stuck in the mud. (T. 16:292-293). The two attempted to dig the car out. (T. 16:293). After a while they went into the house where Rafsky took some paperwork and personal information belonging to the victim. (T. 16:304). Wood stated that Rafsky used the bathroom in the house and that a fire extinguisher was sprayed throughout the house. (T. 16:303, 319). Wood also stated that he turned the mailbox around on the pole. (T. 16:303, 315).

About an hour and a half after getting stuck, the victim arrived on the property. (T. 16:293). When the victim arrived he asked the defendants what they were doing on his property and informed them that they had to leave. (T. 16:294, 313). Wood stated that he told the victim they would be leaving as soon as they got the jeep unstuck. (T. 16:294, 313). However, the victim stated that he would

take down their tag number and call the Sheriff. (T. 16:294, 313). The victim drove around to the back of the jeep, took down the tag number, and then drove to the back of the house. (T. 16:294, 313).

However, Rafsky followed the victim to the back of the house. (T. 16:294). Wood stated that he was still up front with the jeep trying to dig it out when he heard a struggle occurring at the back of the house. (T. 16:314). Wood went to the back of the house and saw the victim lying on the floor. (T. 16:314). Rafsky told him that he had hit the victim with the hoe several times. (T. 16:295, 314). Rafsky asked Wood for a chain and Rafsky used it to tie the victim's hands up, but it was not enough. (T. 16:295, 297). Wood went to the back porch of the house and found a shirt, that he then used to tie up the victim's feet. (T. 16:296, 316). Wood stated that the victim was still alive while they were tying him up. (T. 16:296, 316). Wood also stated "if I punched him, it would have been only like one time just to maybe show Dillon that I wasn't gonna run and tell or something." (T. 16:298, 316).

Some liquid was poured over the victim, which Wood believed to be STP gas treatment. (T. 16:317). Wood stated that Rafsky asked him to catch the old man on fire. (T. 16:317). "[E]very match was lit, but what I did was I struck it and

threw it, like it wouldn't light." (T. 16:317). Wood claimed that he did not throw the matches on the victim because he did not want to set him on fire. (T. 16:317).

Wood stated that after the attempt to light the victim on fire, he went to remove the license plates from the jeep and put it in the victim's Camry. (T. 16:297, 299). Wood was taking the license plates off of the jeep, when Rafsky went into the victim's car, got out the smaller shotgun, and shot and killed the victim. (T. 16:297, 301). Wood stated that he only heard one round go off. (T. 16:300, 318).

After the victim was killed, Rafsky and Wood drove off in the victim's Camry. (T. 16:299). Wood stated that he threw his clothes on the side of the road somewhere because they were ripped and old. (T. 16:320-322). Rafsky's clothes had some blood on them and Rafsky also changed his clothing. (T. 16:321, 325). Wood stated that they did not have any guns with them before they got to Florida and he did not know of Rafsky having any guns until they got to the abandoned house. (T. 16:324).

They drove around and stopped at various stores. (T. 16:305). After stopping at the stores they began driving down the road at which point the trooper put his lights on, but they did not stop. (T. 16:328). Wood stated that during the chase with the trooper, Rafsky asked him to shoot the trooper's car, but he could

not do it. (T. 16:329). However, Wood brought the gun from the back seat to the front and gave it to Rafsky. (T. 16:330). Rafsky slid it across his lap and shot at the trooper through the window. (T. 16:329). After they got in the accident, Rafsky ran out of the car and Wood put his hands up. Wood claimed that he did not shoot at the trooper. (T. 16:331). Wood was then arrested and charged with first-degree murder.

During the trial, the victim's daughter-in-law, Joanna Shores, testified that on Saturday morning, April 19, 2014, James Shores had watched his grandchildren while she and her husband went to work. (T. 14:40-41). She came home from work around noon that day and James Shores told her he was going to the grocery store. (T. 14:43). Video from the store, Doc's Market, verified that Mr. Shores went to the store and used his card to make his purchases. (T. 14:71).

The mail lady testified at trial that she was delivering mail on April 19, 2014 around 12:00-12:15 p.m., when she witnessed a jeep playing on the road and they splashed some mud on her. (T. 14:55). They stopped and the passenger came out of the jeep and apologized to her. (T. 14:57). He then asked her if she had cigarettes and she gave them two Marlboro 72 Ultra Lights, which matched the two found in the victim's abandoned house. (T. 14:56, 60, 186-87)

The victim, James William Shores, did not live at the abandoned house, but instead lived in a trailer on the property. (T. 15:162-163). The abandoned house was a family home where James Shores grew up. (T. 15:162-163). The victim's brother, Joe Boy Shores, testified that the victim usually kept all of his important information and his guns in the trunk of his car for safety reasons. (T. 15:173-174).

There was evidence of a footprint on the door showing that someone had kicked it in order to enter the abandoned home. (T. 15:183). Two cigarette butts were found in the home, in the bathroom toilet and in the fireplace. (T. 15:186-187). A wallet was found in the back of the jeep, underneath a lot of stuff, with a debit card for Rafsky and a drivers' license for Zachary Wood. (T. 15:193-195). Also on the dashboard of the jeep, a checkbook belonging to the victim was found. (T. 15:206). DNA analysis determined that Wood's DNA was on the glove box of the jeep as well as the victim's DNA- transferred through touch of the victim's bodily fluid. (T. 15:244). In the Camry, clothes from Walmart, spoiling groceries, and packaging for new cell phones were found. (T. 15:210). A receipt from Doc's Market was also found with numbers on the back, which were eventually matched to the tag from the jeep. (T. 15:210-11). The clothes that were being worn by the victim was also tested and it was determined that petroleum distillate an ignitable

liquid other than STP gas treatment was on the victim's clothes. (T. 15:213-214; 16:267-268).

The medical examiner (M.E.) testified that the victim had blood on his clothes in various places and there was binding on his wrists. (T. 16:345). He had multiple injuries to the head, an impact injury to the right area of his scalp, an impact over the nose area, and bleeding on the bony prominence of the nose. (T. 16:347). There was a laceration on his chin consistent with being caused by a garden hoe. (T. 16:348). There was also an injury to the right side of the victim's face and scalp and two small contusions on the right side of his neck. (T. 16:349). The bruising on the right eye and on the nose could have been caused by a fist. (T. 16:361). The M.E. testified that he could not rule out if the victim was conscious after he sustained these injuries. (T. 16:358).

The victim also had a shotgun wound to the back of his head, but the M.E. determined that the muzzle was not right up against his head as there was no evidence of stippling. (T. 16:353). However, the shot distribution around the wound indicated that the shot was not that far in distance. (T. 16:354). The actual entrance of the gunshot wound was to the top of the head in the back, in a downward trajectory. (T. 16:355). The M.E. testified that the cause of death was a shotgun wound to the head and the manner of death was homicide. (T. 16:361).

On April 19, 2014, the victim's credit card was used at various stores by Wood. (T. 14:72). Wood and Rafsky stopped at Fenway Express and purchased pizza and other items using the victim's credit card. (T. 14:76-77). They also stopped at Walmart where they were recorded on surveillance video. (T. 14:78). Wood took the change out of the victim's card and exchanged it at a Coinstar machine. (T. 14:82-83). Inside of Walmart, Wood purchased two cell phones again using the victim's credit card. (T. 14:88; 15:109). After shopping for a while, they went to the front of the store to purchase additional items. (T. 14:85). At the self-checkout, Wood swiped the card six times, however, the card did not go through. (T. 14:86). Eventually Rafsky walked out of the store with his items unpaid. (T. 14:86). Wood went to speak to an attendant and then he also walked out of the store with his items unpaid. (T. 14:87; 15:114). After leaving the Walmart, the pair was speeding and at that point Trooper Phillips attempted to pull them over. (T. 15:119).

The defense raised a motion for judgment of acquittal arguing that there was insufficient evidence of felony murder or premeditated murder on Wood's part, when the evidence all pointed to Rafsky. (T. 17:405-8). The trial court denied the motion. Defense then presented their case. Testimony was presented that Wood's sexual orientation was bisexual and he had a drug problem. (T. 17:395). Wood

used methamphetamine but his behavior did not become violent when he used. (T. 17:395). Kelly Eggleston testified that on Tuesday, April 15, Rafsky took her car. She reported it stolen two days later on Thursday, April 17, 2014. (T. 18:465).

Wood's father also testified that he did not approve of the friendship between his son and Rafsky. (T. 18:470). He stated Wood borrowed his van but lied about the reason he needed it, which was to get Rafsky from Pensacola. (T. 18:470). However, the van was totaled while Rafsky was driving it because there was drug use. (T. 18:470).

Wood testified at trial in his own defense. He testified that he completed high school with a 3.8 GPA and he had started college. (T. 18:476, 522). At the time of the offense he was 22 years old. (T. 18:476, 522). He stated that he dropped out of school because of drugs. (T. 18:476). He started using prescription pain pills and then upgraded to methamphetamine. (T. 18:481). Through another friend, Wood met Rafsky, who he thought sold drugs. (T. 18:482-83). Eventually they hit it off as friends, and Wood and Rafsky lived together and began a sexual relationship. (T. 18:483).

Wood testified regarding the events surrounding the murder of Mr. Shores. Wood admitted that the statement he gave to law enforcement at his arrest was accurate. (T. 18:492, 543). At trial, Wood asserted that Rafsky shot him with a

handgun in his left thigh, yet, Wood did not get medical treatment and he did not tell law enforcement after his arrest. (T. 18:490, 544-5). And even though the video surveillance of Wood in Wal-Mart the next day did not show him limping, injured, or scared, Wood maintained that he was afraid of Rafsky after the shooting. (T. 18:491; 14:78-86).

When they arrived at what appeared to be abandoned property, Rafsky told Wood, "It's okay because we're supposed to be here." (T. 18:496). Wood testified that at this time both he and Rafsky were high and had been using methamphetamine. (T. 18:496, 526, 547). When the victim arrived on the property, Wood stated that he assisted the victim in getting the license plates number from the jeep because he wanted the Sheriff called. (T. 18:499-500, 549). However, Wood admitted to knowing that Rafsky was on the run from legal issues and warrants and to both of them plundering the victim's home and another home. (T. 18:487, 551).

Wood testified, that by the time he got behind the house, where the victim and Rafsky were located, Rafsky was tying up the victim's hands with a chain. Wood admitted that he did get the shirt from the back of the victim's house. (T. 18:501-502, 554, 555). After the victim was tied up Wood asserted that Rafsky asked him to light the victim on fire. (T. 18:503). Wood maintained that he did not

pour the ignitable liquid on the victim, but he did strike the matches. (T. 18:503, 570).

Wood maintained that Rafsky told him to take the license plates off of the jeep and put it in the Camry. (T. 18:504-505). Wood claimed that even though he opened the trunk to put the license plates in there, he did not see the guns in the trunk. (T. 18:505). Contrary to his initial statement, Wood claimed that Rafsky told him to get into the Camry and Rafsky began to drive off. (T. 18:506). However, Rafsky then stopped the car, popped the trunk, went to where the victim was tied up, and fired a shot. (T. 18:506). Wood admitted that he did not tell law enforcement in his initial statement that he was inside the Camry, but that he was over by the jeep taking the license plates off, when the victim was shot and killed. (T. 18:552, 557, 562).

Wood maintained that he was afraid that Rafsky would hurt him if he did not do as he was told. (T. 18:532). However, he admitted that he was smiling while in Walmart and acting happy-go-lucky, because he was pretending not to be scared. (T. 18:533-34). He was hoping someone would come and help him, but even though he spoke with the attendant, he did not say anything. (T. 18:536). However, after he got out of the store, he began running to the car. (T. 18:537). Wood testified that during the chase with the police, Rafsky tried to shoot him

before he ran off into the woods. (T. 18:493). During that episode, Wood was shot multiple times, but he did not believe he got shot in the leg. (T. 18: 494).

The jury found Zachary Wood guilty of first-degree murder on count one, finding that the killing was done with premeditation and during the commission of a felony, through a special verdict form. (T. 19:697). The jury also found Wood guilty of burglary of a structure with a firearm (count two) and robbery with a firearm (count three). (T. 19:697-98).

Penalty Phase

The penalty phase began on February 27, 2015. The State did not present any additional witnesses during the penalty phase. (T. 20:718). The defense called six different witnesses. (T. 20:720). Heather Griffin, Wood's sister, testified that she raised the defendant after their mother died from colon cancer, that he was a smart person, and not a violent person. (T. 20:725). Matthew Walker, the brother of the defendant, testified that their father abused their mother and their father told Wood that he was not his biological son. (T. 20:727-8). He also testified that the defendant was afraid of Rafsky. Jeffrey Wood, the uncle of the defendant, testified that Wood's mother had divorced his father and that Wood was not his biological child. (T. 20:733). He also discussed Wood attending college and staying with him for a while and then his eventual drop out of school. (T. 20:735). He had not

had contact with Wood for a year and a half. (T. 20:739).

Pat Lindsey, the best friend of Wood's sister, and also a retired Judicial Assistant for the State of Alabama, testified that Wood would help her out periodically at work and he was a well behaved young man, when she knew him. (T. 20:742). Laura Kinman, knew the defendant through her daughter and because he lived with her for a couple of months. (T. 20:745). He admitted to her that he had a drug problem and was quitting, but she only knew him when he was not using and abusing meth. (T. 20:749). Lastly, defense counsel called Kacia Kinman, a childhood friend of the Defendant who testified that when she last talked to him, he seemed to be getting his life back on track. (T. 20:753).

The jury recommended a sentence of death by a vote of twelve-to-zero for the murder of James Williams Shores. (T. 20:798).

Spencer Hearing

The Spencer hearing was held on April 17, 2015. Both the State and defense counsel submitted sentencing memorandums to the trial court. (R. 1:167-180). Wood was again called as a witness at the Spencer hearing. He stated that it was Rafsky who actually broke into the abandoned house. (R. 12:4). He stated that he watched as Rafsky went through stuff, but Wood admitted that he may have gone through a drawer or two. (R. 12:4). He testified that the victim's checkbook came

from inside the house before the victim arrived. (R. 12:5).

Wood admitted to pouring some flammable liquid on the victim. (R. 12:9, 15). He stated that as he would try to strike the match he would act as if it was wet and throw the match to the ground. (R. 12:10). Wood admitted that at trial he stated that he was taking the tag off the jeep when he heard the gunshot, not that he was in the car. (R. 12:16). Wood stated that he had gotten a teardrop tattoo because he lost a loved one since he was incarcerated, after which he learned that in Florida it means that you have killed someone. (R. 12:14-15). Wood agreed that there was no reason to kill the victim and that they could have gotten away in the victim's car. (R. 12:19). He also agreed that he wanted the judge to give him the death penalty. (R. 12:19-20).

Defense also called Captain Brock, a jail guard, who testified that she has had no problems with Wood other than his teardrop tattoo. (R. 12:23). At the conclusion of the Spencer hearing, the trial court heard victim impact statements. A letter was read on behalf of Joanna Shores, the daughter in law of the victim. (R. 12:25). Joe Boy Shores, the victim's brother, and Debbie Whitaker, the victim's niece, also gave statements. (R. 12:27, 29).

Sentencing

On May 12, 2015, the sentencing hearing was held. Wood read a statement to the trial court prior to sentencing. (T. 13:3-5). The trial court then sentenced Wood to death. (T. 13:5). The trial court found three aggravating circumstances: 1) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (CCP) (very great weight); 2) The capital felony was committed while Defendant was engaged, or was an accomplice in the commission of, or an attempt to commit burglary and or robbery (great weight); and 3) The capital felony was committed for the purpose of avoiding arrest (great weight).

Of the six statutory mitigators presented, the trial court only found that two existed and gave them weight: 1) Defendant is capable of employment and contribution to workforce (little weight); and 2) Defendant's family background and abusive childhood (some weight). The trial court found that Defendant under extreme duress or domination of another and drug and alcohol abuse had not been proven by a preponderance of the evidence and assigned no weight to them.

The trial court found four nonstatutory mitigating circumstances: 1) The Defendant had good jail conduct pending and during trial (very little weight), 2) Defendant's education (little weight), 3) Defendant has support from loving

siblings and friends (little weight), and 4) Defendant's cooperation with law enforcement (little weight).

The trial court found that the aggravating circumstances far outweigh the mitigating circumstances in this case. (R. 2:218). The trial court followed the jury's recommendation and imposed the death penalty for the murder of James Shores. (R. 2:218; T. 13:5). As to count two, burglary of a structure with a firearm, Wood was sentenced to 100 years' prison and as for count three, robbery with a firearm, Wood was sentenced to 100 years' prison. (R. 2:218; T. 13:5).

SUMMARY OF THE ARGUMENT

ISSUE I: The evidence is sufficient to support Wood's conviction for first degree premeditated murder as a principal. The evidence presented to the jury was that the murder of the victim occurred during the course of the burglary and robbery and was a foreseeable consequence. Wood knew beyond a reasonable doubt that the intent was to kill the victim. Moreover, the jury rejected Wood's alternative hypothesis of innocence. He argued at trial that he did not know the co-defendant intended to kill the victim and he was under the total domination of the co-defendant. However, since Wood was an active participant and the murder of the victim was a foreseeable consequence, the evidence of premeditated murder is sufficient.

ISSUE II: Wood's sentence of death is proportionate. Wood was convicted of first-degree premeditated murder and therefore, Enmund/Tison is not applicable to his case. Further, the sentence of death is proportionate as compared to similar cases. The trial court found three aggravators and gave them each great weight, assigning very great weight to CCP. The trial court noted that the three aggravators in this case far outweighed the statutory mitigators and non-statutory mitigators, which were given little to some weight. The mitigation was not

substantial. Based on the weighty aggravators and minimal mitigation, this Court has found the death sentence proportionate in similar cases.

ISSUE III: The trial court did not err in applying the CCP and avoid arrest aggravator to Wood. The CCP aggravator was not applied vicariously to Wood as he actively participated in the plan to kill the victim. Even if Wood was not the actual shooter, he was an active participant in the murder of the victim. Moreover, Wood admitted that he knew the victim intended to call the Sheriff and had written down the license plates from the jeep. He also admitted that he knew that the co-defendant did not want the Sheriff called and so his continued actions and solidarity with the co-defendant supports the imposition of the avoid arrest aggravator.

ISSUE IV: The trial court did not err in rejecting Wood's drug abuse and remorse as mitigating. The trial court evaluated the mitigating factors and found that although there was evidence of voluntary drug use it did not ameliorate his culpability or provide a reason to impose a lesser sentence. Further, there was no request by defense for the trial court to consider remorse as a mitigating factor. Nevertheless, based on Wood routinely minimizing his actions rather than taking full responsibility, the trial court was not required to accept Wood's self-serving testimony of alleged remorse.

ISSUE V: Wood's sentence of death does not violate Hurst v. Florida, 136 S.Ct. 616 (2016). The jury in the guilt phase unanimously found that Wood was guilty of burglary with a firearm and robbery with a firearm, which supports imposition of the committed during the course of a burglary/robbery aggravator and does not violate the holding in Hurst v. Florida. Further, any error is harmless because the jury would have found the aggravators beyond a reasonable doubt based on the evidence presented at trial and the jury's penalty phase vote of twelve-to-zero (12-0). Moreover, Caldwell v. Mississippi, 472 U.S. 320 (1985), is not applicable in this case as the jury was adequately informed of the law at the time of the case. Lastly, this case does not need to be remanded for a life sentence pursuant to §775.082(2), as the death penalty has not been declared unconstitutional.

ARGUMENT

ISSUE I: THE EVIDENCE IS SUFFICIENT TO SUPPORT WOOD'S CONVICTION AS A PRINCIPAL TO PREMEDITATED MURDER.

Wood alleges that the evidence to convict him was not sufficient to sustain a conviction for premeditated first-degree murder, but concedes that resolution of this issue in his favor does not undermine his conviction for felony murder. His claim of harm only goes to the imposition of the cold, calculated and premeditated aggravating factor. (IB:41). Nevertheless, he asserts that the evidence failed to establish beyond a reasonable doubt that Wood intended to kill the victim. (IB:41). However, the evidence shows that by his own statement and testimony, Wood not only acted in concert with the co-defendant and knew that the co-defendant intended to kill the victim, but also that he personally attempted to kill the victim. It is clear that there was sufficient evidence to convict Wood of not only felony murder, but also premeditated murder. [2]

[2] This Court applies a de novo standard of review when examining the sufficiency of the evidence to sustain a conviction for first-degree murder. See Jones v. State, 790 So. 2d 1194, 1197-98 (Fla. 1st DCA 2001); see also Fisher v. State, 715 So. 2d 950 (Fla. 1998). "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Gregory v. State, 118 So. 3d 770, 785 (Fla. 2013) (quoting Simmons v. State, 934 So. 2d 1100, 1111 (Fla. 2006); Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001)).

Generally, felons are "responsible for the acts of their co-felons." Jackson v. State, 18 So. 3d 1016, 1025-26 (Fla. 2009), quoting, Lovette v. State, 636 So. 2d 1304, 1306 (Fla. 1994). "As perpetrators of an underlying felony, co-felons are principals in any homicide committed to further ... the initial common criminal design." Id. This Court has defined a principal as anyone who aids, abets, counsels, or hires an offense to be committed. Principals may be charged, convicted, and punished as such. §777.011, Fla. Stat. (2005). "Whether a defendant knows of a criminal act ahead of time or physically participates in the crime, participation with another in a common criminal scheme renders the defendant guilty of all crimes committed in furtherance of that scheme." Id. citing Jacobs v. State, 396 So. 2d 713, 716 (Fla.1981), see also Staten v. State, 519 So. 2d 622, 624 (Fla. 1988).

An independent act of a co-defendant occurs when a person other than the defendant commits a crime that the defendant did not intend to occur, the defendant did not participate, and was outside of, and not a reasonably foreseeable consequence of, the common design or unlawful act contemplated by the defendant. Jackson, at 1026. Where, as here, the State presents competent, substantial evidence that Wood was a principal in the burglary/robbery, which involved tying up the victim, beating him, attempting to set him on fire, and

ultimately his murder, and that he fully participated in creating the circumstances that directly produced the victim's death, the evidence is sufficient to support the murder conviction of the jury on either theory of first-degree murder.[3] Jackson, at 1027.

In Michael Jackson v. State, 18 So. 3d 1016 (Fla. 2009), Jackson and his four co-defendants had an elaborate plan to rob an elderly couple and then bury them. They dug a hole and then watched the house for several days as they developed a strategy for the robbery. Id. at 1021. Two of the co-defendants gained entrance into the house and then tied the victims up as they searched the house for valuables and bank information. Id. at 1021. The victims were then forced into the trunk of their Lincoln car and driven to the hole, which had been previously dug. While they were still alive, the victims were placed inside of the hole and buried. Jackson, at 1022. The co-defendants then went to the ATM where Jackson withdrew money for each participant. Id. at 1022. Over the course of the next few days, Jackson continuously withdrew money and when the card was frozen, he even called the bank pretending to be one of the victims. Id. at 1022.

[3] In the special jury verdict form, the jury checked that Wood was guilty of first-degree murder. The jury specifically found that the killing was premeditated and during the commission of a felony. (R. 1:78-80).

Jackson argued at trial that the plan was merely to rob the victims and did not involve murder, which were the independent acts of his codefendants. Jackson, 18 So. 3d at 1025. The jury rejected Jackson's independent act defense, and Jackson was found guilty of first-degree premeditated murder. Id. at 1025. This Court upheld the conviction for first-degree premeditated murder finding that even though Jackson walked away from the grave his failure to summon help for the couple presented a question for the jury to decide whether he intended the murders. Id. at 1027. In addition, the kidnapping and killing occurred during the course of the robbery and Jackson fully participated in creating the circumstances that directly produced the victims' deaths. Id. at 1027. As such this Court found that the evidence was sufficient to uphold the convictions.

Similarly, in Wood's case, there was sufficient evidence to establish that Wood was equally culpable and guilty of premeditated murder. The trial court made the following findings of fact:

> The Defendant admits to being present at the crime scene through his post arrest statement and trial testimony. The Defendant further admits to being inside the old farm house, and physical evidence such as his foot print found and a cigarette butt from inside the house with his matching DNA further support his admission. The Defendant admits to ingesting methamphetamine which made him do things he would not normally do. Defendant admits to "plundering" inside the farm house. The Defendant further admits to using the garden hoe to assist with unsuccessful attempts to dig out the stuck Jeep Cherokee.

The Jeep, upon which both Wood and Rafsky arrived, was adjacent to the front porch of the house. The victim, who was driving his Toyota Camry, arrived on the scene a short time thereafter and encountered both Wood and Rafsky. Defendant Wood knew that the victim had written down the license tag number of the Jeep and placed it on his person. Subsequently a struggle ensued. The Defendant in his post arrest statement admits that he may have punched the victim in a show of solidarity to Rafsky. Additional evidence found inside the Jeep Cherokee glove box indicates the presence of DNA from both Defendant and the victim. A piece of chain link length similar to the type that was used to bind the victim's hands was found on the front porch of the farm house with matching DNA to Defendant Wood. Defendant admits that Rafsky sent him looking for additional items with which to bind the victim. The Defendant admits to securing the victim's feet with a shirt he obtained from the farm house back porch. The Defendant admits the victim was bound behind the back porch of the farm house, where the garden hoe was later found. The Defendant admits that a potentially flammable liquid was poured on the victim while he was still alive and to striking matches over the victim's body. Physical evidence establishes that victim was brutally attacked, receiving in excess of fifteen strikes of a linear and repeated nature consistent with the garden hoe found at the scene. No defensive wounds were found on the victim's body. The victim did not die from the blunt force trauma. The victim suffered immediate death from a shotgun wound to the top of his head. The location of the victim's body and shotgun gun wound is consistent with being shot while lying face down. Upon fleeing the scene in the victim's car, Defendant admits to throwing out alongside the roadway the clothes he was wearing during the murder. Thereafter, Defendant controlled the money and valuables. Defendant admits to using the victim's money and credit cards at several locations after the murder.

There is substantial and competent evidence in the record to support the jury's determination that Wood was a major participant in the premeditated murder of James William Shores. Likewise, there is competent evidence that Wood participated in the felony murder of the victim by burglary of his farmhouse and/or vehicle and robbery of his valuables and motor vehicle all while a firearm was employed.

> Given the jury's verdict, the jury determined that Wood was a major participant in each of the crimes for which he is convicted and that these crimes were not independent acts of one another.

(R. 2:203-204). Based on the foregoing, the evidence, when taken in the light most favorable to the State, supports a jury finding of both premediated and felony murder.

Wood argues that Rafsky's act of shooting the victim was independent since he was allegedly in the car when the victim was killed. However, mere absence when the crime occurs does not establish an independent act by a co-defendant. Jackson, 18 So. 3d at 1027. Just as in Jackson, Wood was a major participant as he assisted in the binding of the victim, attempting to light matches, and even taking the license plates off of the jeep. Therefore, the murder of the victim was a reasonably foreseeable consequence and the evidence is sufficient to support a conviction for premeditated murder. At any point in time, Wood and Rafsky, could have left the victim and escaped instead of continuing in their crime, ultimately culminating in the victim's death. Consequently, Wood was a principal to the murder of the victim, as he participated in the events that led to the victim's death.

Furthermore, the jury rejected Wood's hypothesis of innocence. Wood asserted that he was under the total domination of Rafsky throughout the entire

weekend. He asserted that he was shot by Rafsky prior to the murder of the victim, which made him afraid of Rafsky. (T. 18:490). However, the jury rejected Wood's hypothesis of innocence based on his original statement to the police the day after the murder and the other evidence presented by the State at trial. See Carpenter v. State, 785 So. 2d 1182, 1195 (Fla. 2001) ("In similar situations where defendant has made inconsistent statements, we have routinely held that the jury was free to reject the defendant's version of the events."); see also Brown v. Crosby, 249 F.Supp.2d 1285, 1318-19 (2003) (In reviewing a claim for sufficiency of the evidence, deference must be paid to the jury's resolution of conflicting inferences.). Accordingly, even taking into account Wood's self-serving testimony his conviction was supported by competent evidence. Jackson v. State, 180 So. 3d 938 (Fla. 2015) (holding that the jury was free to reject the defendant's alibi defense when presented with an alternate and inconsistent version of events by the State.).

The cases cited by Wood do not compel a contrary result. Wood asserts that Clinton Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991) and Van Poyck v. State, 564 So. 2d 1066, 1069 (Fla. 1990) support his contention that he cannot be convicted of premeditated murder. However, these cases are distinguishable and do not warrant Wood any relief.

Van Poyck and his co-defendant planned to break someone out of police custody. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). Van Poyck made one of the officers go below the police van, but shortly thereafter another officer was shot and killed. Id. at 1067. This Court held that the evidence was insufficient to support first-degree premeditated murder because in its order the trial court was not sure of Van Poyck's whereabouts at the time of the killing, stating that Van Poyck may have pulled the trigger. Id. at 1069. Nevertheless, this Court upheld the conviction based on felony-murder. Id.

Van Poyck is distinguishable from Wood's case. In Van Poyck's case, there was no testimony that there was a fully-formed conscious purpose to kill at the time that the victim was killed. However, in Wood's case there was more than just a conscious purpose or decision to kill, based on Wood's testimony he actually attempted to kill the victim. Ignitable fluid was poured on the victim and Wood admitted that he attempted to light matches to set him on fire. Unlike in Van Poyck where there was no testimony regarding an intent/attempt to kill, or that he was present when the killing took place, Wood took actions could have killed the victim in this case. Therefore, there was sufficient evidence of his intent to establish premeditation.

Wood also relies on Clinton Jackson v. State, to support his argument that

there was no premeditation in his case. 575 So. 2d 181 (Fla. 1991). Jackson and his brother robbed a store and killed the clerk. Id. at 185. The testimony presented at trial was that Jackson told a witness that he was going to rob the store. Id. at 185. Further, there was testimony that while in jail awaiting trial, Jackson told his mother they had to do it because the victim "bucked the jack" (resisted the robbery). Id. at 185. This Court held that the evidence presented did not establish an anticipated killing but was consistent with the victim resisting the robbery and a single reflexive shot. Id. at 186. This Court further held there was no evidence of a fully-formed conscious purpose to kill or that Jackson fired the fatal shot. Id.

Wood's case is distinguishable from Jackson's case. Wood knew the victim was unconscious and he helped the co-defendant tie the victim's feet. (T. 16:296, 316). Instead of leaving at that time, Wood attempted to light the victim on fire. (T.16:317). Even after that failed attempt, Wood and the co-defendant did not leave but remained and shot and killed the unconscious victim. Clearly there is sufficient evidence of Wood's intent to kill the victim as supported by the jury's verdict. Consequently, these cases are distinguishable. Accordingly, the evidence is sufficient to support Wood's conviction for premeditated murder.

ISSUE II: THE DEATH PENALTY IS PROPORTIONATE AS WOOD'S DEATH SENTENCE DOES NOT VIOLATE ENMUND/TISON AND THIS IS AMONG THE MOST AGGRAVATED AND LEAST MITIGATED OF CASES.

Wood challenges the proportionality of his death sentence. He asserts that the evidence presented at trial did not prove beyond a reasonable doubt that his mental state amounted to reckless indifference in keeping with Enmund/Tison. (IB:48). He also asserts that his sentence of death is not the most aggravated and least mitigated of cases. (IB:59-61). However, the record reveals that Wood's conviction for premeditated murder supports imposition of the death sentence and does not violate Enmund/Tison. Moreover, Wood's sentence of death is among the most aggravated and least mitigated of cases. The cases that Wood relies upon involve substantially different facts and do not have the level of participation that Wood had in the murder of this victim.

"A trial court's ruling on a pure question of law is subject to de novo review." Demps v. State, 761 So. 2d 302, 306 (Fla. 2000). In determining whether death is a proportionate penalty in a given case, this Court conducts "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and least mitigated of murders, thereby assuring uniformity in the application of the sentence." Bright v. State, 90 So. 3d 246, 262 (Fla. 2012) (quoting Williams v. State, 37 So. 3d 187, 205 (Fla. 2005)).

A direct-appeal determination of death-penalty proportionality is not a matter of simply counting the aggravating and mitigating facts. Phillips v. State, 39 So. 3d 296, 305 (Fla. 2010). In reviewing the trial court's determination of the factual foundation for its death-penalty decision, [this] Court generally defers to the trial court, that is, whether a factual finding is supported by "competent, substantial evidence." See e.g., Allred v. State, 55 So. 3d 1267, 1277-78, 1281 (Fla. 2010).

A. Wood's Sentence of Death Does Not Violate Enmund/Tison as He Was a Major Participant in the Death of the Victim Convicted of Premeditated Murder.

Wood asserts that his death sentence is not proportionate because the Enmund/Tison requirement was not met. He asserts that the evidence did not establish beyond a reasonable doubt that he either intended or attempted to kill the victim or that he acted with reckless indifference. (IB.:48). However, Wood's assertions are incorrect as his sentence does not violate Enmund/Tison. The jury found that he was guilty of premeditated murder showing his culpability. (R. 1:78). The evidence presented at trial accurately reflected Wood's active participation in the plan to kill the victim and the jury rejected Wood's self-serving testimony at trial.

In Enmund v. Florida, 458 U.S. 782, 797 (1982), the United States Supreme Court held that the Eighth Amendment of the United States Constitution does not

permit imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." In Tison v. Arizona, 481 U.S. 137, 158 (1987), the United States Supreme Court limited the Enmund culpability requirement for imposing a death sentence under a felony murder theory to include "major participation in the felony committed, combined with reckless indifference to human life." See Duboise v. State, 520 So. 2d 260, 265 (Fla. 1988) (explaining that "in Tison the Court stated that Enmund covered two types of cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill.").

Therefore, as Wood was convicted of first-degree premeditated murder, by special verdict, the requirements of Enmund /Tison are satisfied. See Revilla v. Gibson, 283 F.3d 1203, 1211 (10th Cir. 2002) (stating that a finding of premeditation "certainly encompasses a culpability sufficient to satisfy the Eighth Amendment prescriptions of Enmund and Tison."). The Enmund/Tison test applies to a non-triggerman convicted of felony murder, not a defendant convicted of premeditated murder who necessarily intended to kill.

In its sentencing order, the trial court found that there was substantial and competent evidence to support the jury's findings that Wood was a major participant in the premeditated murder of James Shores. In the order, the trial court stated:

> **ENMUND/TISON CONSIDERATIONS**
>
> Given that the Defendant and Co-Defendant Dillon Rafsky were both present at the scene of the murder, and that facts suggest Rafsky may have fired the shotgun into the head of the victim, James William Shores, an issue of culpability arises under an Enmund/Tison. This Court is guided by Perez v. State, 919 So. 2d 347 (Fla. 2005). The Defendant admits to being present at the crime scene through his post arrest statement and trial testimony. The Defendant further admits to being inside the old farm house, and physical evidence such as his foot print found and a cigarette butt from inside the house with his matching DNA further support his admission. The Defendant admits to ingesting methamphetamine which made him do things he would not normally do. Defendant admits to ''plundering" inside the farm house. The Defendant further admits to using the garden hoe to assist with unsuccessful attempts to dig out the stuck Jeep Cherokee. The Jeep, upon which both Wood and Rafsky arrived, was adjacent to the front porch of the house. The victim, who was driving his Toyota Camry, arrived on the scene a short time thereafter and encountered both Wood and Rafsky. Defendant Wood knew that the victim had written down the license tag number of the Jeep and placed it on his person. Subsequently a struggle ensued. The Defendant in his post arrest statement admits that he may have punched the victim in a show of solidarity to Rafsky. Additional evidence found inside the Jeep Cherokee glove box indicates the presence of DNA from both Defendant and the victim. A piece of chain link length similar to the type that was used to bind the victim's hands was found on the front porch of the farm house with matching DNA to Defendant Wood. Defendant admits that Rafsky

sent him looking for additional items with which to bind the victim. The Defendant admits to securing the victim's feet with a shirt he obtained from the farm house back porch. The Defendant admits the victim was bound behind the back porch of the farm house, where the garden hoe was later found. The Defendant admits that a potentially flammable liquid was poured on the victim while he was still alive and to striking matches over the victim's body. Physical evidence establishes that victim was brutally attacked, receiving in excess of fifteen strikes of a linear and repeated nature consistent with the garden hoe found at the scene. No defensive wounds were found on the victim's body. The victim did not die from the blunt force trauma. The victim suffered immediate death from a shotgun wound to the top of his head. The location of the victim's body and shotgun gun wound is consistent with being shot while lying face down. Upon fleeing the scene in the victim's car, Defendant admits to throwing out alongside the roadway the clothes he was wearing during the murder. Thereafter, Defendant controlled the money and valuables. Defendant admits to using the victim's money and credit cards at several locations after the murder.

There is substantial and competent evidence in the record to support the jury's determination that Wood was a major participant in the premeditated murder of James William Shores. Likewise, there is competent evidence that Wood participated in the felony murder of the victim by burglary of his farmhouse and/or vehicle and robbery of his valuables and motor vehicle all while a firearm was employed. Given the jury's verdict, the jury determined that Wood was a major participant in each of the crimes for which he is convicted and that these crimes were not independent acts of one another. This Court is satisfied that Defendant Zachary Taylor Wood acted with such reckless disregard for human life during the murder of James William Shores, that the Enmund/Tison standard is satisfied. The Defendant is death eligible.

(R. 2:203-204).

Wood was convicted of both premeditated murder and felony-murder by the jury. In his post arrest statement, Wood gave a full account of what occurred on that fateful day and his statement reflected his active participation in the killing of the victim. Based on his individual actions, Wood was aware of the plan, actively participated in an attempt to kill the victim, and had a reckless disregard for human life.

This Court upheld a sentence of death in Bush v. State, 461 So. 2d 936 (Fla. 1984) under similar circumstances. Bush and two other co-defendants robbed a convenience store. Bush asserted that he was not aware that this was the plan and he was under their domination during and after the robbery. Id. at 937. The victim was taken from the convenience store and Bush was ordered to drive to a remote location. Id. at 937. When they stopped, the victim was pushed from the car, however, the co-defendants decided that the victim could identify them and they told Bush to dispose of her. Id. Bush asserted that he did not intend to kill the victim and faked a blow with his knife, stabbing the victim superficially. Id. However, after she fell on the ground one of the co-defendants came and shot her. Id. at 938. Bush was found guilty and the jury recommended death by seven-to-five. The trial court found three aggravating factors and no mitigation in sentencing Bush to death.

In upholding the death sentence, this Court found that Bush was a major, active participant in the murder and not a passive aider and abettor as in Enmund. Bush, 461 So. 2d at 941. Further Bush's direct actions contributed to the death of the victim. Bush is similar to Wood's case as he also asserted that he was under duress throughout this murder and under the domination of the co-defendant. Moreover, Wood's actions also directly contributed to the death of the victim. Wood admits to assisting in tying up the victim, hitting the victim in a show of solidarity with Rafsky, and attempting to set the victim on fire. Wood was an active participant and he had a reckless disregard for human life. Accordingly, his sentence of death does not violate Enmund /Tison.

Wood attempts to argue that his case is similar to Jackson v. State, 575 So. 2d 181 (Fla. 1991), and Benedith v. State, 717 So. 2d 472 (Fla. 1998). Yet, these cases are distinguishable. In Jackson, this Court held that although the evidence against Jackson showed that he was a major participant in the crime it did not show that his state of mind was more culpable than any other armed robber whose conviction rests solely on felony murder. Jackson, 575 So. 2d at 192. This Court found that there was no evidence that Jackson carried a weapon, expected violence to erupt, and the single gunshot was a reflexive reaction to the victim's resistance. Jackson, 575 So. 2d at 193. However, Wood's case is different than this situation.

The victim was tied up and bound prior to any attempt by Wood or Rafsky to kill him. Because the victim was bound there was an opportunity for the murder to be avoided as the defendants could have taken the victim's car and left the premises. Instead, they stayed and attempted to kill the victim by burning him alive and when that failed, the victim was shot him in the head. The evidence presented at trial shows that Wood was a major participant in this crime and that he had a culpable state of mind.

In Benedith v. State, 717 So. 2d 472 (Fla. 1998), the victim was attempting to sell his car and met with Benedith and his co-defendant at a motel. Id. at 474. An eyewitness noticed the three talking by the car prior to hearing three gunshots. Id. After hearing the gunshots, the witness looked out his window and only saw the co-defendant getting into a car being driven by a minor. Id. At trial, evidence was presented that Benedith tried to get the victim's car painted, but that attempt failed. Id. at 474. This Court found that the evidence presented was insufficient to support a death sentence pursuant to Enmund/ Tison. Benedith, 717 So. 2d at 476. This Court held that there was no evidence that Benedith provided the weapon to be used, that he possessed the weapon before or during the robbery, or that he could have prevented the use of the firearm while the robbery was being committed. Id. at 477. Accordingly, the death sentence was vacated.

However, this case is distinguishable to Wood's case because the fatal shot was not the first attempt to end the victim's life. Rather, Wood was aware of Rafsky's intent to kill the victim because Rafsky asked him to set the victim on fire. (T. 16:317). Despite being aware of this intent, Wood did nothing to ensure that Rafsky did not kill the victim and he stated that he may have punched the victim to show his solidarity with the plan. (T. 16:298, 316). Moreover, Wood assisted Rafsky in tying up the victim and took off the license tag from the jeep in furtherance of their escape. (T. 16:297, 299). Wood was a major participant and his actions, based on his own testimony, show that there was a reckless indifference for human life. Therefore, Wood's sentence of death is appropriate and does not violate Enmund / Tison.

B. Wood's Sentence of Death Is Among the Most Aggravated and Least Mitigated of Cases.

Wood asserts that his sentence of death is not proportionate to other cases. He maintains that his is not a case that is among the most aggravated and the least mitigated. (IB:59-61). However, the evidence presented at trial support the imposition of the death penalty. The trial court found three aggravators, including CCP-a very weighty aggravator, and gave them great weight. (R. 2:205-211). The trial court found two statutory mitigators and gave them some to little weight. (R.

2:211-215). The trial court also found four non-statutory mitigators and these were given little weight. (R. 2:215-217). Therefore, based on similar cases, Wood's sentence of death is proportional to other cases with the same aggravators and minimal mitigation.

In this case, the trial court found three aggravating factors: 1) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (very great weight); 2) the capital felony was committed while defendant was engaged in an attempt to commit burglary and or robbery (great weight); and 3) the capital felony was committed for the purpose of avoiding arrest (great weight). (R. 2:205-211). The trial court found two statutory mitigators: 1) the defendant is capable of employment and contribution to workforce (little weight); and 2) defendant's family background and abusive childhood (some weight). (R. 2:211-215)[4]. The trial court also found four non-statutory mitigators, Defendant's good conduct in jail, Defendant's education, Defendant has support from loving siblings and friends, and Defendant's cooperation with law enforcement. (R. 2:215-217).

[4] While the trial court in its sentencing order characterized these two mitigating factors as statutory, they are actually really non-statutory mitigators. See §921.141(6)(a-g). Therefore, in total the trial court found no statutory mitigators and six non-statutory mitigators.

In regards to CCP, the trial court found that the execution-style killing of the victim was cold and done after cool reflection at each stage. (R. 2:215-217). The trial court found that the killing was calculated by the efforts to burn the victim and the unimpeded actions of Rafsky and the lethal gunshot to the victim's skull. (R. 2:215-217). There was also heightened premeditation, based on the brutal beating of the victim and tying the victim up, with full knowledge that the victim intended to call the police and had seen their faces. (R. 2:215-217). Wood made no attempt to stop Rafsky and had the presence of mind to take the license plates off of the jeep. (R. 2:215-217). Further, there was no reason to kill the victim, as he was not known to the defendants, did not struggle, and posed no threat. (R. 2:215-217). Based on this, the trial court gave this aggravator very great weight.

The jury found beyond a reasonable doubt that Wood committed burglary of a structure with a firearm and robbery with a firearm. (T.19:697-698; R. 2:208). Wood admitted that he and Rafsky entered the abandoned house and once inside began to plunder the house, taking various items. (R. 2:208-210). Moreover, after the murder, they left in the victim's car. (R. 2:208-210). Wood was seen on video cashing coins from the victim's car. (R. 2:208-210). He also used the victim's credit cards to purchase two cell phones and attempted to purchase other items,

which was unsuccessful. (T. 14:85-88; 15:109; R. 2:208-210). The evidence presented at trial and the jury's verdict supported the finding of this aggravator.

Lastly, the trial court found that the murder occurred to avoid arrest because the victim encountered Wood and Rafsky on his property and asked them to leave. (T. 18:498-99; R. 2:210). The victim took down their license plates number and told them he was going to call the Sheriff to assist them getting their vehicle out. (T. 18:499-500; R. 2:210). However, Rafsky followed the victim to the back of the house and brutally attacked the victim. (T. 18:501). The victim was bound by Wood and Rafsky, but they were not prevented from leaving the property at this time. (R. 2:210-211). Instead they stayed, tried to set the victim on fire, and when that failed the victim was shot. Wood admitted to taking the license plates off of the jeep and to disposing of his clothes on the highway. (T. 18:504-505; R. 2:210-211). The evidence presented at trial supports a finding that the murder of the victim was committed to avoid arrest.

Although the trial court found two statutory and four non-statutory mitigating factors, the trial court found that they did not outweigh the aggravators. Moreover, the mitigation was not substantial. Wood did not present any evidence of mental or emotional issues. Instead evidence was presented that showed that Wood was capable of employment and contribution to the workforce. (R. 2:214).

Further, there was evidence presented of Wood's family background and abusive childhood. (R. 2:214). In addition, the trial court considered Wood's graduation from high school and his attendance at college that ended because of his drug use, his support from his family and friends, cooperation with law enforcement, and his good conduct during trial, in mitigation. (R. 2:215-217).

A proper proportionality review considers the totality of the circumstances compared to other cases. See Woodel v. State, 985 So. 2d 524, 532 (Fla. 2008). The trial court found three aggravators and minimal mitigation. The jury recommended a death sentence by a vote of twelve-to-zero (12-0). Based on the aggravating and mitigating circumstances, this case is comparable to Lawrence v. State, 846 So. 2d 440 (Fla. 2003).

In Lawrence v. State, the defendant and his co-defendant picked up the victim and took her to a secluded area in the woods, where they both had sex with the victim. 846 So. 2d 440, 442 (Fla. 2003). Afterwards, the co-defendant shot the victim in the head and then they removed a part of her calf muscle. Id. at 442-443. Lawrence plead guilty to the crimes and was sentenced to death. Id. The trial court found two aggravators: prior violent felony and CCP. Id. at 444. The trial court found five statutory mitigators: 1) under extreme mental or emotional disturbance, 2) ability to appreciate criminality or conform his conduct was substantially

impaired, 3) age of Lawrence, 4) caring and giving relationship to his family, especially his mother, and 5) sick and disturbed home life in which he was raised. Id. at 445. Lastly, the trial court found four non-statutory mitigators. Id.

In comparing this case with other cases where death has been upheld for similar extensive aggravation and substantial mitigation, this Court determined that Lawrence's death sentence was proportionate. Lawrence, 846 So. 2d at 453. This Court agreed that death is proportionate with other comparative cases where either HAC or CCP were found as they are both considered extremely serious aggravators. Id. Lawrence is similar to Wood's case as it involves extensive aggravation with weaker mitigation. Similar to Lawrence, a co-defendant committed the actual killing of the victim but the trial court still imposed the CCP aggravator based on Wood's participation in the crime. Although, Wood did not have a prior violent felony, he had a contemporaneous conviction for burglary with a firearm and robbery with a firearm and the trial court also found the avoid arrest aggravator, making this extensive aggravation. Wood's mitigators also were minimal and not as substantial as in Lawrence, where there was substantial mental mitigation. Therefore, based on a similarly situated case, Wood's sentence of death is proportional.

This Court has found the death sentence proportionate in other similar cases, where the co-defendant was the trigger-man, but the defendant knew lethal force would be used and actively participated in the events. See Cave v. State, 476 So. 2d 180, 187 (Fla. 1985) (finding death sentence proportionate when the trial court found no mitigating circumstances, but found three aggravators: 1) committed during robbery and kidnapping, 2) HAC, and 3) avoid arrest and no mitigators); James v. State, 453 So. 2d 786, 791-2 (Fla. 1984) (finding death proportionate when the trial court found no mitigating circumstances, but found five aggravating circumstances including prior conviction of violent felonies, committed during burglary and robbery, committed to avoid arrest, HAC, and CCP). Therefore, where the trial court finds substantial aggravators and the mitigation is that of non-statutory and very minimal, a sentence of death has been upheld even when the co-defendant did the actual shooting. This Court has held that such sentences of death are proportional because they are among the most aggravated and least mitigated of cases.

Further, as this Court has held numerous times, the CCP aggravator is one of the most serious and weightiest aggravators set forth in the statutory scheme and the mitigators must be of substantial weight to overcome them. Abdool v. State, 53 So. 3d 208, 224 (Fla. 2010), see Bradley v. State, 33 So. 3d 664, 680 (Fla.

2010). Wood has not established that the mitigators found by the trial court were substantial enough to overcome the aggravators. Accordingly, Wood's sentence of death is proportionate to other death cases.

ISSUE III: THE TRIAL COURT DID NOT ERR IN APPLYING THE COLD, CALCULATED, AND PREMEDITATED AND AVOID ARREST AGGRAVATING CIRCUMSTANCES VICARIOUSLY TO WOOD.

Wood next disputes the application of the cold, calculated and premeditated aggravating factor (CCP), as well as the avoid arrest factor. He asserts that, because he was not aware that his co-defendant, Dillon Rafsky, intended to kill Mr. Shores, these factors cannot be applied vicariously to him. (IB:62).

The trial court rejected Wood's claim factually, specifically finding that these factors should be applied to both perpetrators, "as both were engaged in the attempted burning of the live victim and his subsequent death by gunshot" (R. 2:208). Wood's self-serving testimony that he did not realize Rafsky was planning to shoot the victim was specifically found to be incredible, and the evidence at trial refuted Wood's claim of ignorance. On the facts of this case, both the CCP and avoid arrest factors were properly found and weighed in aggravation.

"The standard of review this Court applies to a claim regarding the sufficiency of the evidence to support an aggravating circumstance is that of competent, substantial evidence." Guardado v. State, 965 So. 2d 108, 115 (Fla. 2007). When reviewing a trial court's finding of an aggravator, 'it is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt- that is the trial court's

job.'" Aguirre-Jarquin v. State, 9 So. 3d 593, 608 (Fla. 2009) (quoting Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997)). Rather, it is this Court's task on appeal "to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Id. (quoting Willacy, 696 So. 2d at 695). See also Williams v. State, 37 So. 3d 187, 194 (Fla. 2010).

A. Competent Evidence Existed to find the Cold, Calculated, and Premeditated Aggravator.

To establish the CCP aggravator the evidence has to show: (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (2) the defendant had a careful plan or prearranged design to commit the murder before the fatal incident; (3) the defendant exhibited heightened premeditation; (4) the defendant had no pretense of moral or legal justification. Williams v. State, 37 So. 3d 187, 194 (Fla. 2010) (quoting Franklin v. State, 965 So. 2d 79, 98 (Fla. 2007)). "The CCP aggravator can 'be indicated by circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.'" Franklin, 965 So. 2d at 98 (quoting Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988)).

The evidence presented at trial established that the victim's murder was cold, calculated, and premeditated. In the sentencing order, the trial court found that the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R. 2:205).

> This Court finds the cold killing of James Shores was done in an execution-style, after cool reflection at each critical stage of event in keeping with Lynch v. State, 841 So. 2d 362 (Fla. 2003). This first prong of the "CCP" aggravator is satisfied by the record evidence. Additionally, after the victim was bound and incapacitated, the Defendant Wood armed himself with what he believed to be an ignitable liquid and struck matches in an attempt to burn James William Shores.
>
> The second prong of CCP, namely "calculated", is satisfied in accord with Wright v. State, 19 So. 3d 277 (Fla. 2009). This prong is satisfied by the subsequent efforts to burn Shores, and the unimpeded actions of Rafsky and the lethal shot gun blast to James Shores' skull. In both instances the Defendant Wood and Rafsky utilized items found on the property to accomplish their developing plans. The evidence before the Court demonstrates Defendants had ample opportunity to release the victim. James Shores was incapacitated after the brutal beating and both Wood and Rafsky could have left the scene either on foot or by using the victim's car. Instead they remained and after a series of events extended over an ample period of time, they bound the victim's hands and feet, attempted to bum him to death, and ultimately took his life with a single shotgun blast to Shores' head.
>
> The record also supports a finding of "heightened premeditation" and deliberate ruthlessness in keeping with Buzia v. State, 926 So. 2d 1203 (Fla. 2006). After the brutal beating, the

> Defendant bound the victim to ensure Shores would not escape. After the hoe attack, and with full knowledge that the Defendants had been seen by Shores, Wood did nothing to implore Rafsky to stop, nor did he impede Rafsky in any manner. Instead, Wood continued his participation in the ultimate killing of Shores. During this period Wood had the presence of mind to remove the license tag and place it in the trunk of victim's car. The circumstantial evidence leads to a conclusion that by removing the Alabama tag from the Jeep, it would be more difficult to locate the perpetrators in another state. Likewise, it is equally reasonable to conclude that the Defendants would have seen the various weapons in the victim' s trunk and procured any one of them for use at the scene. Additionally, in the period before the final gunshot, Wood had ample time to reach into the Jeep glove box, leaving inside traces of Shores' DNA along with his. It is a reasonable inference Wood was looking to remove other identifying evidence or things of value from the glove box. It is equally reasonable to conclude that as Wood was wearing gym shorts, his wallet may have been placed in the Jeep at the time of these events.
>
> Finally, there is no evidence the killing of James Shores was based upon a moral or legal justification. The Defendant's admission before the Court at the Spencer hearing was that "there was no reason to kill Shores". The 66 year old victim had been previously unknown to the Defendants, "did not struggle' and "posed no threat to us". There was no pretense of moral or legal justification to the killing of James Shores in keeping with Christian v. State, 550 So. 2d 450 (Fla. 1989).

(R. 2:205-208). Based on the four factors the trial court found that CCP applied in this case.

Clearly the actions of Wood show a cold, calculated, and premeditated nature and participation in the murder of the victim. In Wood's original statement

to the police he stated that "[Rafsky] wanted me to catch the old man on fire. I think it was STP gas treatment he poured. And every match was lit, but what I did was I struck it and threw it, like it wouldn't light." (T. 16:317-18). At trial, Wood testified that Rafsky asked him to light the victim on fire. "I would light the matches and I would make it to where it wouldn't light every time because he was alive, I know he was alive." (T. 18:503). However, despite knowing that the co-defendant's intention was to kill the victim, Wood did nothing to prevent the killing.

Moreover, the trial court found that Wood was attempting to minimize his involvement. The trial court found that Wood found items on the victim's property to tie the victim up. Wood admitted that he found the shirt in the victim's house and he used it to tie up the victim's foot. The trial court also found that Wood's statement that he was pretending to strike the matches were self-serving. Wood originally told the officers that if he hit or punched the victim it was to show [Rafsky] that "I wasn't gonna run and tell or something." (T. 16:298-99). He also stated that it was to prove to [Rafsky] that he would not snitch on him. (T. 16:317). And despite the ample opportunities he had to leave or to attempt to stop the co-defendant's actions, Wood did not do that. Instead Wood removed the license

plates from the jeep and put it in the Camry in furtherance of the crime. (T. 16:299).

The testimony presented at trial shows that there was no attempt by Wood to stop the co-defendant from completing the murder of the victim, rather only his efforts to assist in the murder of the victim. Therefore, the trial court applied the right rule of law and there was competent substantial evidence to support its ruling. Cf. Jackson v. State, 18 So. 3d 1016, 1026 (Fla. 2009) (aggravators upheld even though he was not the co-defendant that buried the victims alive); Alston v. State, 723 So. 2d 148, 161 (Fla. 1998) (holding that CCP applies when the defendant has an opportunity to leave the scene and does not, showing heightened premeditation).

In Carr v. State, 156 So. 3d 1052 (Fla. 2015), this Court upheld the trial court's finding of the CCP aggravator for the individual actions of the defendant. In Carr, the trial court considered the totality of the circumstances in finding that the murder of the victim was cold, calculated, and premeditated. Id. at 1068. Carr harbored anger towards the victim and participated in the careful plan. Id. She waited until the co-defendant got the victim into the isolated storage trailer and then assisted in binding and suffocating the victim. Id. Carr attempted to break the victim's neck as the victim asked for help. Id. at 1069. The trial court found that there were numerous opportunities for Carr to renounce her planned activity but

instead she chose to participate in the murder. Id. at 1069. Based on Carr's actions, this Court held that the trial court did not err in finding CCP. Id. at 1069.

Similarly, in this case, CCP applies based on the actions of Wood. (R. 2:205-208). As the trial court found, Wood helped to tie up the victim, hit the victim, and attempted to set the victim on fire by lighting matches. The trial court found that Wood had many opportunities to leave and he chose not to, instead staying and helping to further the murder of the victim. See Cave v. State, 727 So. 2d 227, 229 (Fla. 1998) (upholding the trial court's finding of the CCP aggravator for the defendant who did not actually kill the victim but whose actions furthered the killing of the victim). Therefore, this aggravator is not vicariously applied to Wood based on the actions of Rafsky. Instead, the CCP aggravator was properly applied based on Wood's actions.

B. Competent Evidence Existed to find the Avoid Arrest Aggravator.

To establish the avoid arrest aggravator the evidence must show that the sole or dominant reason for the killing was to eliminate the witness. Philmore v. State, 820 So. 2d 919, 935 (Fla. 2002). This Court has stated that the victim's knowledge or seeing the defendant is not sufficient to establish the aggravator of avoid arrest. See Looney v. State, 803 So. 2d 656, 676 (Fla. 2001). However, other factors to look at include whether the defendant used gloves, wore a mask, made

incriminating statements about witness elimination, whether the victim offered resistance, or whether the victim was in a position to pose a threat to the defendant. Philmore, 820 So. 2d at 935.

In this case, the trial court looked at all of the factors in determining that the avoid arrest aggravator applied.

> Being a retired law enforcement officer, Shores wrote down the Alabama license tag number "19AH632" from the Jeep Cherokee stuck in the mud beside his farmhouse. Defendant Wood was aware the license tag number had been recorded. According to Wood, Shores told them they needed to leave his property and that he would call the Sheriff to get them pulled out from the mud hole. No one else was present on the property. There is no record of a phone call to the Sheriff's Office.
>
> According to Defendant Wood, the victim had a subsequent encounter with Rafsky on the back side of the farm house while Wood was still digging out the Jeep. As such, James Shores had an opportunity to see both Wood and Rafsky at the scene.
>
> This Court is mindful that where the victim is not a law enforcement officer, the evidence must be "very strong" to prove that the sole or dominant motive for the killing was to eliminate a witness. Mere speculation cannot support this aggravator. Looney v. State, 803 So. 656 (Fla. 2001).
>
> The circumstantial evidence in this case demonstrates neither Defendant Wood nor Rafsky wore masks or gloves. Wood punched the victim. Shores was brutally attacked by a garden hoe and was bound by Defendant Wood and Rafsky using a chain and a shirt.
>
> Defendants were not prevented from leaving the property as Shores was subdued. Once in a position to offer no resistance or threat, an

> ignitable liquid was poured on Shores with Wood standing over his body striking matches to set him afire. As the attempt to bum Shores failed, Defendants used the victim's shotgun to inflict a lethal gunshot to his skull.
>
> Defendant Wood admits to removing the license tag from the Jeep and placing it into the trunk of victim's car. Defendant went into the glove compartment of the Jeep after physically touching Shores, probably looking for Wood's misplaced wallet so as to avoid leaving his personal identification. Defendant's wallet was later found by law enforcement in the luggage area after the Jeep was towed to the Washington County Sheriff's Office. Wood later removed the gym shorts he wore at the scene and tossed them out on the highway. Wood's clothing was never recovered.
>
> The Court relies upon the similar facts in Willacy v. State, 696 So. 2d 693 (Fla. 1997), as it finds the existence of this aggravator. As such, this Court finds the circumstantial evidence of defendants' actions leads to an inference that the primary purpose of the killing of James William Shores was to avoid detection and arrest. The Court finds beyond all reasonable doubt that the supporting evidence establishes this aggravating circumstance and gives it great weight.

(R. 2:210-211).

Wood testified that the victim took down the license plates and told them he was going to call the Sheriff's Office. (T. 18:499). Although Wood testified that he would have wanted the police called, after Rafsky attacked the victim with the garden hoe, Wood assisted him in tying up the victim. (T. 18:501-502). Wood also removed the license plates from the jeep, so that it could not be identified. Further, Wood admitted to knowing that Rafsky had outstanding warrants and was

on the run. Based on the individual actions of Wood, there was intent to dispose of the victim in order to avoid arrest because the victim posed a threat to the defendants.

In Cole v. State, 36 So. 3d 597, 607 (Fla. 2010), the trial court found that the avoid arrest aggravator applied as that was the motive in the burial of the victims. The Court upheld the avoid arrest aggravator finding that if the primary purpose of the robbery was for pecuniary gain, after stealing and obtaining the pin number from the victims, there was no need to eliminate them. Id. at 608. The victims were both in poor health and posed no threat or danger to the defendants. Id. at 608. The defendants also had access to the victims' car and could have left the victims alive without any transportation. Id. Despite this, the defendants still buried the victims alive.

Similarly, in this case, if Wood had no reason to fear arrest, there were many opportunities to leave the premises. However, Wood knew that they had entered the victim's home uninvited and he was also aware that Rafsky had outstanding warrants and was running from the law. (T. 16:487). Moreover, the victim told them that he was going to call the Sheriff's office. As such, Wood participated with Rafsky in tying up the victim and he remained and tried to light matches to set the victim on fire in an attempt to kill him. In furthering their desire to avoid

arrest, Wood also removed the license plates from the jeep. Not once did Wood try to stop Rafsky or to save the victim's life. All of these factors support the trial court's imposition of the avoid arrest aggravator. Accordingly, based on this evidence the trial court correctly found that the victim was killed to avoid arrest and this aggravator was properly applied.

C. Harmless Error Analysis

Nevertheless, even if this Court finds that the trial court's findings of these aggravators were applied vicariously there was no error. Generally, felons are "responsible for the acts of their co-felons." Jackson v. State, 18 So. 3d 1016, 1026 (Fla. 2009) (quoting Lovette v. State, 636 So. 2d 1304, 1306 (Fla. 1994)). As such, this Court has upheld aggravators applied vicariously even when the defendant was not the actual shooter. See Cave v. State, 727 So. 2d 227 (Fla. 1998), Copeland v. State, 457 So. 2d 1012 (Fla. 1984).

In Copeland v. State, 457 So. 2d 1012, 1019 (Fla. 1984), the trial court found that the murder was committed to avoid prosecution for the underlying felonies. The trial court held that even though the liability of defendant Copeland for the murder itself was vicarious, his actions led to the murder. Id. The Court held that the evidence showed that defendant Copeland was an equal participant in

the perpetration of these acts and therefore, the aggravating circumstances could be applied to him. Id. at 1019.

This is similar to the case at hand as the trial court found that based on Wood's actions there was an inference that the primary purpose in killing the victim was to avoid detection and arrest. The trial court found that the victim took down the license plates number from the vehicle in order to call the police. Therefore, as Wood was an active participant in the killing of the victim the aggravating circumstances can be applied to him.

This Court has also upheld the vicarious application of HAC to defendants who were not directly the cause of the victim's death but were particularly physically involved in the events leading up to the murder. See Cole v. State, 36 So. 3d 597, 608-09 (Fla. 2010), cf. Farina v. State, 801 So. 2d 44 (Fla. 2001). Therefore, as the evidence presented at trial supports that Wood actively participated in the events leading up to the murder and was a principal to the murder, the actions of his codefendant would also apply to him vicariously as they were reasonably foreseeable. Accordingly, these aggravators could also be applied vicariously to Wood.

ISSUE IV: THE TRIAL COURT DID NOT ERR IN REJECTING AS MITIGATION WOOD'S (A) DRUG ABUSE HISTORY AND (B) REMORSE.

Wood also challenges the trial court's findings with regard to mitigation. Specifically, Wood claims that the trial court erred in rejecting two non-statutory mitigating factors, relating to his history of drug and alcohol abuse and his purported remorse. (IB:73-78). However, a review of the evidence presented below and the sentencing order establishes only that Wood disagrees with the factual conclusions reached by his trial judge, and no abuse of discretion occurred below. Therefore, this claim is without merit and Wood's sentence must be affirmed. Trial court findings on mitigation are reviewed for an abuse of discretion. Hoskins v. State, 965 So. 2d 1, 16 (Fla. 2007); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996), cert. denied, 520 U.S. 1122 (1997).

A. The Trial Court did not Abuse its Discretion in Rejecting the Non-Statutory Mitigators.

In sentencing Wood to die for the murder of James Shores, the trial judge complied with all applicable law, including the dictates of this Court's decision in Campbell v. State, 571 So. 2d 415 (Fla. 1990). He expressly evaluated the aggravating factors and mitigating circumstances, and insured adequate appellate review of his findings by discussing the factual basis for the findings. Campbell clearly recognizes that the factual question as to whether a mitigating factor was

reasonably established by the evidence is a question for the trial judge. Campbell, 571 So. 2d at 420.

In addition, the weighing of non-statutory mitigation requires a determination by the fact-finder that the mitigating factor at issue has not only been proven to exist, but that it is actually mitigating in the case at bar. See Ford v. State, 802 So. 2d 1121, 1135 (Fla. 2001) ("If a factor does not fall within a statutory category but nevertheless meets the definition of mitigating circumstance, it must be shown to be mitigating in each case, not merely present"); Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) ("while a proffered mitigating factor may be technically relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case").

Wood first asserts that the trial court should have given some weight to his history of drug and alcohol abuse. Although the trial court agreed that Wood established an extensive history with illegal drugs, the court determined that Wood's prior drug use did not reduce Wood's culpability to Shores' murder. While Wood submits that mitigation does not have to specifically relate to culpability as long as it can provide a basis to impose a sentence less than death and observes

that this Court has long held a history of drug abuse to be mitigating in nature, neither of these principles require a trial court to find and give great weight to a history of drug abuse in every case where it is shown to exist. In this case, the drug use was voluntary and there was no evidence that it impacted Wood's mental health or made him more likely to commit these crimes. (T. 18:528). There also was no evidence that Wood was compelled to consume drugs due to his circumstances, where he was at one time enrolled in college and often provided support to family members and other friends. (T. 18:522). Extensive illegal drug use, standing alone, is prior criminal activity, which is not generally considered to be mitigating.

Although Wood claims that the trial court improperly required a "nexus" to the crime by rejecting this factor, the court's order does not support that suggestion. The court did not expressly deny weight due to the lack of a nexus, and properly weighed other non-statutory mitigation (employment history, family background, abusive childhood) where no nexus to the crimes was shown. Instead, the court considered the evidence and determined that Wood's prior drug use did not ameliorate his culpability or provide a reason to impose a lesser sentence.

Wood's reliance on Mahn v. State, 714 So. 2d 391 (Fla. 1998), Clark v. State, 609 So. 2d 513 (Fla. 1992), and Ross v. State, 474 So. 2d 1170 (Fla. 1985),

is misplaced. Notably, those cases were all decided before Trease, where this Court first recognized that a trial court may find a non-statutory mitigating circumstance to exist, but not be entitled to any weight. Moreover, all are distinguishable. In Mahn, there was expert testimony presented that the defendant's personality and behavior were consistent with someone that has abused drugs, including LSD, and that extensive use of drugs could impair the ability to conform conduct to the requirements of the law. In Clark, this Court reversed the death sentence on proportionality grounds, after striking aggravating factors and noting that substantial nonstatutory mitigation existed. Similarly, in Ross, this Court vacated the death sentence as disproportionate, and faulted the trial judge for failing to consider a number of factors, including alcohol abuse, "collectively as a significant mitigating factor." None of these cases hold that a history of substance abuse must always be considered mitigating and weighed in the sentencing calculus. Accordingly, no error has been presented with regard to the trial court's rejection of Wood's history of drug abuse.

As to the purported mitigation based on remorse, no appellate issue has been preserved. The record reflects that the defense did not even suggest that the court consider remorse as a mitigating factor. The defense filed a sentencing memorandum which outlined the proposed mitigating factors, and remorse was not

one of them (R. 1:167-175). Since this factor was not asserted by the defense, Wood cannot complain about the lack of weight assigned. Gonzalez v. State, 136 So. 3d 1125, 1165 (Fla. 2014) ("In order to challenge on appeal the trial court's decision about a nonstatutory mitigating factor, the defendant must raise that proposed nonstatutory mitigating circumstance before the trial court"); Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990).

Even if the issue is considered, no error can be discerned. The trial court could observe Wood's appearance and demeanor and was in the best position to judge his credibility with regard to his motivation in getting the teardrop tattoo and whether he was truly remorseful for his actions. Wood routinely minimized his actions rather than taking full responsibility, which can reasonably be taken as a lack of remorse.

The trial judge was not required to accept Wood's self-serving statement of his alleged remorse as a matter of law. The court properly assessed the authenticity of Wood's claim of remorse and concluded that this mitigating factor, not specifically argued by the defense, had not been proven. No error occurred.

As a general rule, a trial court's rejection of mitigation after a proper inquiry and comprehensive analysis of the evidence will not be disturbed on appeal. Knight v. State, 746 So. 2d 423, 436 (Fla. 1998). The trial court's single-spaced,

16-page sentencing order in this case extensively discusses all of the judge's findings with regard to each mitigating factor proposed by the defense. (R. 2:203-218). A fair review of that order clearly refutes Wood's claim that the trial court did not properly consider the mitigating evidence he presented.

B. Any Error Is Harmless

Finally, even if this Court reaches a different conclusion with regard to the trial court's findings as to any of this mitigation, there is no reason to remand this cause for resentencing since it is clear that any further consideration would not result in the imposition of a life sentence. Wood's death sentence is supported by three strong aggravating factors. Although the trial court determined that neither his drug history nor his alleged remorse were entitled to weight, it found other mitigation to exist and weighed it accordingly. (R. 2:211-217). The court specifically concluded that the aggravating circumstances "far outweigh" the mitigation in this case. (R. 2:218). Any error relating to the trial court's failure to weigh these two additional non-statutory factors is clearly harmless since the mitigation in this case cannot offset the strong aggravating factors found. See Thomas v. State, 693 So. 2d 951, 953 (Fla. 1997); Lawrence v. State, 691 So. 2d 1068, 1076 (Fla.), cert. denied, 522 U.S. 880 (1997); Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995); Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied,

514 U.S. 1085 (1995); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991), cert. denied, 505 U.S. 1209 (1992); Cook v. State, 581 So. 2d 141, 144 (Fla.) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven"), cert. denied, 502 U.S. 890 (1991). Therefore, this Court must affirm the death sentence imposed in this case.

ISSUE V: WOOD'S DEATH SENTENCE DOES NOT VIOLATE HURST v. FLORIDA, 136 S.Ct. 616 (2016).

Wood argues that his sentence was imposed in violation of the Sixth Amendment because the jury did not find all the facts necessary to impose the death sentence. However, Hurst v. Florida, 136 S.Ct. 616 (2016) does not apply in this case as Wood was also convicted of a contemporaneous conviction. Moreover, even if this court finds that Hurst does apply, any error is harmless as the jury would have found these aggravators beyond a reasonable doubt.

The constitutionality of a statute is reviewed *de novo*. Scott v. Williams, 107 So. 3d 379 (Fla. 2013). This Sixth Amendment right to a jury trial claim is purely a matter of law and pure issues of law are reviewed *de novo*. Cf. Plott v. State, 148 So. 3d 90, 93 (Fla. 2014) (stating that because a claim of an Apprendi/Blakely error "is a pure question of law," the "Court's review is de novo.").

A. Hurst does not apply to Wood's Case because He has a Contemporaneous Conviction

Wood asserts that his death sentence must be vacated under Hurst. He asserts that Florida's sentencing statute requires more than the finding of a single aggravator to impose death. (IB:80). Even though the jury voted for death by twelve-to-zero, Wood alleges that a trial judge increased his sentence based on his

own factfinding. (IB:81). However, Wood is entitled to no relief based on the United States Supreme Court's opinion in Hurst v. Florida, 136 S.Ct. 616 (2016), because his guilt phase jury found him guilty of a contemporaneous felony. Consequently, there is no Sixth Amendment error in the imposition of Wood's death sentence, since a jury undeniably found facts necessary to enhance his sentence to death.

In Hurst, the United States Supreme Court held that Florida's death penalty scheme is unconstitutional under the Sixth Amendment to the extent that it "require[s] the judge alone to find the existence of an aggravating circumstance." Hurst, 136 S.Ct. at 624. Accordingly, if a jury finds an aggravating circumstance, it would satisfy the requirements of Hurst. Therefore, the finding of a prior violent felony based on unanimous jury convictions is acceptable as an aggravating factor.

The United States Supreme Court specifically extended the Sixth Amendment protections first identified in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) to Florida cases through its decision in Hurst. Hurst, 136 U.S. at 622. The Court recognized the critical distinction of an enhanced sentence supported by a prior conviction. Ring, 536 U.S. at 598 n.4 (2002) (noting Ring does not challenge Almendarez-Torres v. United States, 523 U.S. 224 (1998) "which held that the fact of prior conviction

may be found by the judge even if it increases the statutory maximum sentence."); see also Alleyne v. United States, 133 S.Ct. 2151, 2160 n.1 (2013) (affirming that Almendarez-Torres provides a valid exception for prior convictions). Importantly, Hurst was convicted only of first-degree murder and his death sentence was not supported by any prior convictions or an express jury verdict from the guilt phase finding facts constituting an aggravating factor. Unlike Hurst, Wood's case is consistent with both Apprendi and Ring and does not conflict with any other case.

In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case. See Ault v. State, 53 So. 3d 175, 205 (Fla. 2010), Zommer v. State, 31 So. 3d 733, 752-54 (Fla. 2010). Death is presumptively the appropriate sentence when at least one aggravator has been found. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). As the availability of the death sentence in a particular circumstance is a matter of state law, this Court's determination controls. Ring, 536 U.S. at 603 ("the Arizona court's construction of the State's own law is authoritative"). Therefore, the finding of a prior violent felony based on a unanimous jury conviction is acceptable as an aggravating factor and Hurst did not disturb this particular aspect of Florida death penalty jurisprudence.

In this case, the jury unanimously found Wood guilty of the contemporaneous burglary of a structure with a firearm and robbery with a firearm, making him independently eligible for a death sentence under Florida law. See Gonzalez v. State, 136 So. 3d 1125, 1168 (Fla. 2014); Frances v. State, 970 So. 2d 806, 822 (Fla. 2007); Gudinas v. State, 879 So. 3d 616, 617 (Fla. 2004). The trial court found the aggravator of capital felony committed during the commission of a burglary or robbery based on the contemporaneous convictions. Therefore, since an aggravating factor was found by this unanimous jury, it rendered Wood's sentence of death constitutional, satisfying the requirement of Apprendi, Ring, and Hurst.

Furthermore, Wood's argument that Hurst requires juries to find as a matter of fact that there are sufficient aggravating circumstances to outweigh the applicable mitigating circumstances is without merit. Hurst specifies that constitutional error occurs when a trial judge "alone" finds the existence of "an aggravating circumstance." Hurst, 136 S.Ct. at 624. This Sixth Amendment error is necessarily one that can be avoided or prevented with the requirement of specific jury findings as to the existence of an aggravating circumstance. Therefore, as the jury convicted Wood of contemporaneous burglary and robbery, facts which

support the finding by the trial court of the aggravator, this Court should affirm Wood's sentence of death.

B. Any Alleged Error is Harmless as the Jury Would Have Found the Aggravators Beyond a Reasonable Doubt

Wood asserts that because the constitutional error identified in Hurst is structural a harmless error analysis is not reliable. (IB:82). However, this argument must be rejected as the United States Supreme Court in Hurst necessarily remanded the case for a harmless error analysis.

The United States Supreme Court remanded Hurst itself to this Court for determination of harmlessness, noting that "[t]his Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here." Hurst, 136 S.Ct. at 624. This Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, can be and often is harmless beyond any reasonable doubt. Galindez v. State, 955 So. 2d 517, 521-23 (Fla. 2007); Johnson v. State, 994 So. 2d 960, 964-65 (Fla. 2008). See also Pena v. State, 901 So. 2d 781, 783 (Fla. 2005) (failure to instruct jury on age requirement was not fundamental error). In Washington v. Recuenco, 548 U.S. 212, 215 (2006), the United States Supreme Court considered whether errors based on the Apprendi line of cases was a structural error. In rejecting the assertion, it

found that Neder controlled the issue and that such errors were subject to harmless error review. Id. at 218-22; Neder v. United States, 527 U.S. 1, 8 (1999).

Not all constitutional errors merit an automatic reversal because "most constitutional errors can be harmless." Neder v. United States, 527 U.S. 1, 8 (1999) (quoting Arizona v. Fulminate, 499 U.S. 279, 306 (1991)). Whether a constitutional error is harmless depends on whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder at 15 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

In this case, any error in having the trial court find the aggravating factors would not change the sentence of death received by Wood. The trial court's finding of CCP, committed while engaged in burglary and/or robbery, and avoiding arrest is supported by the evidence presented beyond a reasonable doubt and the jury's verdict. See Windom v. State, 886 So. 2d 915, 949 (Fla. 2004) (Cantero concurrence) ((stating that "even if the [Apprendi] error affected 'substantial rights,' it did not seriously affect the fairness, integrity, or public reputation of the proceedings") quoting United States v. Cotton, 535 U.S. 625, 633-34 (2002)).

First, the jury found Wood guilty of burglary of a structure with a firearm and robbery with a firearm. Second, the evidence presented at trial necessarily

provided that the victim's murder was the result of cold, calculated, and heightened premeditation. Rafsky brutally beat the victim with a garden hoe and Wood assisted in tying the victim up and may have even hit the victim in a show of solidarity. However, instead of leaving, ignitable liquid was poured over the victim's unconscious body and Wood attempted to light matches to set the victim on fire. Based on Wood's statements there were many opportunities to leave the victim tied up and alive. Third, Wood testified that the victim stated he was going to call the Sheriff. Wood stated that Rafsky had outstanding warrants and they had just burglarized the victim's home. In furtherance of avoiding arrest, Wood took the license plates off of the jeep. Consequently, the evidence presented to the jury proved beyond a reasonable doubt the aggravators found by the trial court.

Finally, even if a jury must ultimately find that death is the appropriate sentence, Wood's jury was able to reach that conclusion, unanimously. By voting twelve-to-zero (12-0) to recommend the death sentence, the jury necessarily had to find, consistent with the instructions, that the applicable aggravating factors outweighed the mitigation which existed. Therefore, even if some Sixth Amendment violation could be discerned on these facts, United States Supreme Court case law clearly demonstrates that it was harmless beyond any reasonable doubt.

C. There are No Caldwell v. Mississippi Issues Involved in This Case and It Does Not Need to Be Remanded for a Life Sentence Pursuant to §775.082(2).

Wood asserts that even if harmless error analysis applied in this case, no weight can be placed on the jury's advisory recommendation because their responsibility was diminished in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). (IB:86). Wood also maintains that pursuant to §775.082(2), Fla. Stat. a life sentence should be imposed in Florida when a capital sentencing scheme had been held unconstitutional. (IB:90). However, Wood is incorrect in his assertions.

Any Caldwell claim should be rejected because the challenged Florida jury instruction accurately reflected the jury's advisory role according to the law at the time. See Combs v. State, 525 So. 2d 853 (Fla. 1988) (noting that there is no Caldwell error in Florida because, as recognized in Spaziano, the trial judge is the sentencer in Florida – not the jury). On the merits, Hurst is not instructive on jury instructions and Combs has not been found unconstitutional under Hurst (overruling Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989) "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for imposition of the death penalty"). Because the jury was properly instructed as to

its role in sentencing at the time of the penalty phase, Wood's Caldwell claim must be rejected.

Wood's suggestion that §775.082(2), Fla. Stat. mandates that he receive an immediate life sentence should also be rejected. The plain language of that provision provides, it is only applicable when the death penalty is declared unconstitutional. Here, as is evident from the fact that the Court has rejected the assertion that the type of error that occurs in Apprendi-based claims is a structural error, the error found here was merely a trial error in the manner in which the decision to impose the death penalty was made. In fact, as the Court itself has recognized, this type of change in law does not even "alter the range of conduct [] subjected to the death penalty." Schriro v. Summerlin, 542 U.S. 348, 353 (2004). Instead, it merely requires a procedural change regarding the identity of the fact finder regarding those facts necessary to make a defendant eligible for the death penalty. Id. at 353-54. Given these circumstances, Hurst did not hold that the death penalty was unconstitutional; it merely found a flaw in the manner in which the decision to impose the death penalty was made. Thus, by its own terms, §775.082(2), Fla. Stat. does not apply. Accordingly, Wood is not entitled to any relief based on the recent United States Supreme Court ruling in Hurst.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, State of Florida, respectfully urges this Court to affirm the convictions and sentence of death imposed herein.

Respectfully submitted and certified,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May, 2016, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the e-portal filing system which will send a notice of electronic filing to the following: Nada M. Carey, Assistant Public Defender, Leon County Courthouse, Suite #401, 301 South Monroe Street, Tallahassee, Florida 32301 at Nada.Carey@flpd2.com.

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