IN THE SUPREME COURT OF FLORIDA

VAHTIECE ALFONZO KIRKMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC16-808

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The Guilt Phase

On January 23, 2012, Vahtiece Alfonzo Kirkman was indicted by the grand jury of Brevard County, Florida, for the March 17, 2006, first degree, premeditated murder of Darice Knowles. (R126-27).[1]

Before trial, the State filed a notice of intent to offer evidence of other criminal offenses. (R: 475-78) The State sought to introduce evidence that Appellant was involved in the murder and robbery of Willie Parker, and that Appellant directed Christopher Pratt to murder Ms. Knowles because Appellant believed that Ms. Knowles was providing information to law enforcement concerning Mr. Parker's murder. (R: 475)

Appellant's trial counsel argued that the evidence was not inextricably intertwined with Ms. Knowles' case, and argued that the prejudicial effect of that evidence outweighed any probative value. (T9: 1372) In its ruling, the trial court reasoned that

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[1] The record on appeal consists of eighteen volumes. The volumes containing the trial transcript will be designated as "T," followed by appropriate volume and page numbers. The volumes containing the penalty phase will be designated as "P," followed by appropriate volume and page numbers. "R" will designate the Record on Appeal, followed by any appropriate page number. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

the evidence the State sought to introduce was not true *Williams*[2] rule evidence, but instead found that the evidence dealt more with the issue of relevance. Specifically, the trial court found that the evidence was relevant in establishing the motive for Ms. Knowles' murder. (T9: 1374-75) The court ruled that Mr. Pratt could testify about the plea agreement he entered into in Mr. Parker's case and Ms. Knowles case, because the testimony would establish Mr. Pratt's involvement in the case. (T9: 1377) However, the trial court ruled that although the State was not allowed to introduce testimony that Appellant shot and killed Mr. Parker, it could elicit testimony that Appellant and Mr. Pratt had been indicted for the murder of Mr. Parker. (T9: 1378-80)

At trial, Christopher "Dread" Pratt testified that he came to the United States from the Bahamas in November 2005, and settled in Brevard County to sell drugs. (T10: 1434) Mr. Pratt said that he became acquainted with Appellant through Appellant's mother, and lived with Appellant for roughly two months in 2006. (T10: 1435-36) While Mr. Pratt lived with Appellant in February 2006, Darice Knowles came from the Bahamas and visited with Mr. Pratt and stayed with him for approximately

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[2] *Williams v. State*, 110 So. 2d 654 (Fla. 1959)

one month. (T10: 1437) Mr. Pratt later left Appellant's residence and moved to the Dixie Motel, along with Ms. Knowles. (T10: 1442) Mr. Pratt said that at one point in the past while living in the Bahamas, he and Ms. Knowles were in a romantic relationship. (T10: 1437)

On March 16, 2006, Jovonnie Freeman, a police officer with the Cocoa Police Department, responded to Norman's, a bar and grill establishment in Cocoa, regarding a disorderly patron. (T11: 1540-42) The manager informed him that a patron, Ms. Knowles, was causing a disturbance and the manager wanted Ms. Knowles "trespassed" from the establishment. (T11: 1542) Officer Freeman issued a trespass warning to Ms. Knowles, and after obtaining permission from his supervisor to take Ms. Knowles home, he drove Ms. Knowles to the Dixie Motel, where she stayed with Mr. Pratt. (T11: 1542-46) On the way to the motel, Mr. Freeman and Ms. Knowles exchanged phone numbers and made plans to meet later that evening. (T11: 1547)

After Officer Freeman's shift ended that night, he went back to the motel to pick up Ms. Knowles and take her to Cocoa Beach. (T11: 1548) As Ms. Knowles approached the officer's vehicle, Mr. Pratt approached Ms. Knowles and asked her what she was doing. (T11: 1549) Mr. Pratt said that he recognized Officer Freeman as the police officer who had made a traffic stop on his

vehicle earlier that day. (T10: 1443-44) Ms. Knowles told Officer Freeman that Mr. Pratt was her ex-boyfriend, and she left with Officer Freeman. (T11: 1549-50)

After Ms. Knowles and Mr. Freeman left, Mr. Pratt left the motel and went to the Ramada hotel on Merritt Island. (T10: 1445) Mr. Pratt called Appellant and told Appellant that he saw Ms. Knowles with a police officer from the Cocoa Police Department. (T10: 1445-46) Mr. Pratt subsequently left the hotel and went to meet Appellant at Appellant's girlfriend's house, where they further discussed Ms. Knowles and the police officer. (T10: 1446-48) Mr. Pratt then left Appellant's girlfriend's residence and returned to the Dixie Motel. (T10: 1449) He began to pack his belongings, because he did not know the nature of their relationship and was afraid that she had told the officer about his and Appellant's criminal activities. (T10: 1450)

In the meantime, after socializing with Officer Freeman on Cocoa Beach, Ms. Knowles did not return to the Dixie Motel but instead spent the night with Mr. Freeman. (T11: 1551) Officer Freeman took Ms. Knowles back to the Dixie Motel the following morning. (T11: 1551) When they returned to the motel, Officer Freeman saw Mr. Pratt, and at this point he recognized Mr. Pratt from the traffic stop he conducted on Mr. Pratt's vehicle on the previous day. (T11: 1552)

Inside the motel room, Mr. Pratt confronted Ms. Knowles and asked her about the nature of her relationship with the police officer. (T10: 1452) Ms. Knowles explained that she was trespassed from Norman's and said that she wanted to have a little fun. (T10: 1452-53) He and Ms. Knowles subsequently left the hotel and went to Appellant's girlfriend's house. (T10: 1453) After arriving at the house, Appellant questioned Ms. Knowles about her relationship with the police officer. (T10: 1455-57) Appellant told Mr. Pratt that he did not believe Ms. Knowles' account of her relationship with Mr. Freeman. (T10: 1460) Appellant left Mr. Pratt and Ms. Knowles at the house, and went to Home Depot. Appellant was observed on video surveillance purchasing cement, a shovel, and duct tape at Home Depot.[3] (T11: 1565-81)

After Appellant left to go to Home Depot, Mr. Pratt became upset with Knowles because he believed that she placed him and herself in a life or death situation with Appellant. (T10: 1461-62) Appellant later returned with a shovel, cement, and duct tape in his possession. (T10: 1463) Appellant got in a van along with Mr. Pratt and Ms. Knowles, and Appellant proceeded to drive the van for approximately half an hour to a dirt road off of

[3] The video surveillance was entered into evidence as State's exhibit 14. (T11: 1571)

State Road 524. (T10: 1463-64)

While driving the van, Appellant ordered Mr. Pratt to tie Ms. Knowles up with the duct tape that he purchased. (T10: 1464-65) Mr. Pratt told Appellant that Ms. Knowles was not cooperating with the police, but Appellant refused to listen and did not believe Mr. Pratt. (T10: 1467) Appellant gave Mr. Pratt an ultimatum, that either Mr. Pratt did as Appellant instructed or Mr. Pratt would also be killed. (T10: 1468) Mr. Pratt believed that Appellant would have killed him, and believed that he had no other choice but to do as Appellant commanded. (T10: 1468-69) Mr. Pratt also noticed that Appellant had a firearm on his waist. (T10: 1468)

After reaching the location where Ms. Knowles would be buried, Appellant got out of the van and ordered Pratt to duct tape Ms. Knowles' feet and mouth. (T10: 1466-67) The area where Ms. Knowles was buried was described as an area covered by tall grass in a heavily wooded and swampy area off of Cox Road and Interstate 95. (T12: 1780-81) With Ms. Knowles draped over Mr. Pratt's shoulder, Appellant ordered Mr. Pratt into the woods. (T10: 1469) After reaching the location desired by Appellant, Appellant ordered Mr. Pratt to dig a hole. (T10: 1470) While digging the hole, Appellant dictated the physical dimensions of the hole, while Ms. Knowles lay nearby on the ground, still

bound by duct tape, watching as the hole was being created. (T10: 1469-71) After the hole was created to Appellant's satisfaction, Appellant ordered Mr. Pratt to mix the cement he purchased with water from a nearby pond. (T10: 1471-72)

After Mr. Pratt finished mixing the cement and water together, Appellant ordered Mr. Pratt to throw Ms. Knowles in the hole, to which Mr. Pratt complied. (T10: 1473) After Ms. Knowles was thrown into the hole, she lay on her back and had a terrified look on her face. (T10: 1473) Appellant then ordered Mr. Pratt to cover her with cement and dirt. (T10: 1474) As Ms. Knowles was buried, Appellant took out his firearm and pointed it at her, but he did not shoot her. (T10: 1475) After Ms. Knowles was buried, Mr. Pratt and Appellant discarded Ms. Knowles' belongings in garbage bins at different gas stations, and went to Tamiko Smith's house, and placed the shovel and duct tape in her garage. (T10: 1476)

Mr. Pratt testified that in June 2006, he was indicted for the murder of Willie Parker, along with Appellant and Jonathan Page, and that the case was active from 2006 through 2010. (T10: 1478) In July 2010, Mr. Pratt spoke with law enforcement and members from the State Attorney's Office. (T10: 1478) Mr. Pratt subsequently entered into a plea agreement where Mr. Pratt agreed to show law enforcement where Ms. Knowles was buried, and

in exchange plea to second-degree murder and robbery with a firearm for the murder of Willie Parker and second-degree murder for Ms. Knowles' murder. (T10: 1479) Mr. Pratt was also required to provide truthful testimony against Appellant. (T10: 1479)

Eric Austin, an officer with the Cocoa Police Department, testified that he was assigned to investigate Ms. Knowles' disappearance. (T13: 1923-24) He said that in June 2006, he went to South Carolina and spoke with a man named Carlos Buckner. (T13: 1924) Based on his conversation with Mr. Buckner, he returned to Brevard County and began to search for Ms. Knowles in an area off of Interstate 95 in Cocoa; however, he was unsuccessful in locating Ms. Knowles' remains. (T13: 1924-25) He also spoke with Tamiko Smith after speaking with Mr. Buckner, and recovered shovels from her garage. (T13: 1931) After obtaining a bar code from one of the shovels, he went to Home Depot, and obtained video of the purchase of the shovel along with a receipt reflecting the purchase. (T13: 1938-39)

Officer Austin also met with Appellant on June 23, 2006, in South Carolina. During his interview, Appellant stated that he purchased the shovel, duct tape, and cement for work at Rainbow Concrete. (T13: 1979) Appellant later confessed during the interview to telling someone to burn the van. (T13: 1988) The State introduced into evidence phone calls made by Appellant

while he was incarcerated after Ms. Knowles' murder, where he asked his girlfriend, Tamiko Smith, to burn the van that he used on night of Ms. Knowles' murder. (T11: 1635-44) Tamiko Smith admitted that she was charged with arson for burning the van, and pled to the offense. (T11: 1648)

Douglas Levine of the Cocoa Police Department testified that on July 26, 2010, he met with Mr. Pratt, and Mr. Pratt led him to the location where Ms. Knowles' was buried. (T12: 1779-81) The area was excavated, and human remains were recovered on July 30, 2010. (T12: 1782-89)

Candace Matthews, a forensic photographer and crime scene investigator assisted the Cocoa Police Department with their investigation. (T12: 1795-97) Upon her arrival at the location where the remains were discovered, she observed that the head was slightly elevated, and Knowles was lying face-up. (T12: 1801) The body had duct tape around the area of the mouth as well as the wrists. Knowles ankles were taped together and her spine was extended in a downward position. (T12: 1801)

Dr. Sajid Qaiser, the Chief Medical Examiner for Brevard County, testified that he went to the location where the remains were discovered. (T13: 1892-94) He said that Ms. Knowles was buried in a shallow grave and her body was surrounded by cement. (T13: 1895) Dr. Qaiser did not see any injury on the remains.

(T13: 1899) He said that for a person who is buried alive with cement and dirt poured over them, respiratory cessation would cause that person's death. (T13: 1904-03) He determined that the cause of death for the remains was homicide. (T13: 1904)

Jay Wenner, a forensic scientist for the Minnesota Bureau of Criminal Apprehension, verified Ms. Knowles' identity through DNA testing. (T14: 2088-90)

Pete Ewer testified that he was the owner of Rainbow Concrete, and purchased concrete for his business from Rinker and Tarmac. (T15: 2169) He said that he never purchased concrete from Home Depot because Home Depot did not sell concrete in large quantities, so he purchased concrete from commercial vendors who could supply him with the amount of concrete necessary to complete a job. (T15: 2169-70) Other than his ex-girlfriend, Mr. Ewer never allowed anyone else to purchase concrete for his business. (T15: 2170) He also said that Appellant never worked for him, and that he never asked him to purchase concrete, a shovel, and duct tape for a job. (T15: 2171)

The jury found Appellant guilty of first-degree murder. (P: 625)

The Penalty Phase

During the penalty phase, the State presented testimony

from Nancy Boyett, who worked for the Department of Corrections. (T16: 2370) Ms. Boyett testified that she was responsible for supervising Appellant while Appellant was on felony probation from March 2004 to October 2008. (T16: 2373-79) The State entered into evidence copies of Appellant's felony convictions, showing that Appellant had been convicted of burglary of a dwelling with assault or battery, aggravated battery, attempted robbery with a deadly weapon in case number 1995-CF-28783, and first degree murder, attempted first degree murder, and attempted robbery with a firearm in case number 2006-CF-14913. (T16: 2379-81)

Dr. Sajid Qaiser testified that he went to the location where Ms. Knowles' remains were discovered, and saw that Ms. Knowles' skeleton was in a propped up position, and that her hands were above her skull in a flexed position, which indicated that Ms. Knowles had tried to escape. (T16: 2420, 2425)

Also, based on the position on Ms. Knowles' remains at the time of her death, Ms. Knowles went into an extreme form of rigor mortis known as cadaveric spasm. (T16: 2425) Dr. Qaiser said that cadaveric spasm occurs when a person is in terror and apprehension at the time he or she is trying to escape a situation. He said the body becomes clenched or flexed in the manner in which they are trying to escape. (T16: 2425) In this

case, the cement operated as a means to maintain that position. (T16: 2426) Thus, based on the position of the remains, because Ms. Knowles' legs were tied, she tried to lift herself up, but because she was bound, she was unable to dig herself out of the hole. (T16: 2426) He further testified that Ms. Knowles would have lost consciousness from twenty seconds to one minute after being buried alive in that manner. (T16: 2426-27)

The State also presented testimony from Marvis Christian (T16: 2446) Mr. Christian testified that on the night of February 28, 2006, he was sitting in the driver's seat of Willie Parker's car, and Mr. Parker was seated in the passenger seat. (T16: 2447) While sitting in the vehicle, two guns were pointed at them, and a voice demanded that he and Mr. Parker exit the vehicle. (T16: 2448-49) He was unable to see the man's face, but the man shot Mr. Parker. When Mr. Christian began to flee, he was also shot. (T16: 2449-50)

Christopher Pratt also testified during the hearing. (T16: 2452) Mr. Pratt said that he was involved in the shooting death of Mr. Parker, along with Appellant and another individual, Jonathan Page. (T16: 2453-54) The three men went up to Mr. Parker's car and tried to rob Mr. Christian and Mr. Parker of their belongings. (T16: 2456-58) Appellant, who was armed with a firearm, fired the weapon. (T16: 2459) Mr. Pratt testified that

shortly before Ms. Knowles' murder, he told Appellant that he did not tell Ms. Knowles about Mr. Parker's murder. (T16: 2460-61)

The defense presented the testimony of Risha Ford, Appellant's God-sister. (T16: 2487-88) She said Appellant was the perfect brother, that she spent every weekend with him, and that he would encourage her to do her homework and to do everything she was instructed to do. (T16: 2488)

At the conclusion of the proceedings, the jury was given a special verdict form and unanimously found that the State had proven five aggravating factors beyond a reasonable doubt, and by a vote of ten to two, recommended that Appellant be sentenced to death. (P: 965-66) Appellant waived a *Spencer*[4] hearing, and did not present any other evidence in mitigation. (T17: 2594) The trial court followed the jury's ten-to-two recommendation and sentenced Appellant to death for Ms. Knowles' murder. (P: 1027) The court found five aggravating factors: 1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation, given great weight; 2) Appellant was previously convicted of another capital felony or felony

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

involving the use of threat of violence to a person, given great weight; 3) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of or attempt to commit a kidnapping, given substantial weight; 4) the capital felony was especially heinous, atrocious, or cruel, given great weight; and 5) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, given great weight. (P: 1014-23) The court did not take into consideration the sixth aggravator advanced by the State, that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape, because the jury did not unanimously find the existence of this aggravator. (P: 1019)

In mitigation, the trial court found that Appellant was caring and helpful towards his relatives, and assigned moderate weight to this mitigator. However, the trial court rejected the other mitigator asserted by the defense, that Appellant's role in the commission of the offense was minor. Specifically, the trial court found that Appellant was a major participant in the commission of the offense, and that Appellant planned, directed, and controlled every aspect of Ms. Knowles' murder, and therefore Appellant did not establish that he was not equally

culpable for Ms. Knowles' murder. (P: 1023-25)

SUMMARY OF ARGUMENT

ISSUE I: Appellant is not entitled to a new penalty phase hearing, because any *Hurst*[5] error was harmless beyond a reasonable doubt.

Although the jury was not instructed to find that the aggravating factors outweighed the mitigating factor, or that their recommendation of death had to be unanimous, the jury found the existence of five aggravating factors, and the only mitigation evidence presented by the defense was that his God-sister spent her weekends with him, and that he instructed her to do her homework. Thus, it is clear beyond a reasonable doubt that the jury did determine that the mitigation in this case was not sufficiently substantial to call for a life sentence, that the aggravation greatly outweighed the mitigation evidence, and that any properly instructed rational jury would have determined death was the appropriate sentence. Accordingly, any *Hurst* error was harmless beyond a reasonable doubt.

Furthermore, Appellant's argument that the death penalty statute is unconstitutional for failing to narrow the class of persons eligible for capital punishment also fails. Courts have repeatedly rejected this argument and deemed it meritless.

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[5] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

Therefore, Appellant is not entitled to have his death sentence vacated.

ISSUE II: The trial court properly allowed the State to elicit testimony that Appellant was indicted for the murder of Willie Parker. The testimony was relevant as it showed the motive for Ms. Knowles' murder. Mr. Pratt testified that Appellant believed that Ms. Knowles was cooperating with the police and had informed them of his criminal activities, and subsequently ordered her to be killed.

Thus, as the testimony was relevant to establish the motive for Ms. Knowles' murder, the trial court did not err in admitting testimony about Appellant's indictment for murder. Furthermore, any prejudice that resulted from the admission was outweighed by the probative value of the evidence.

ISSUE III: Appellant's death sentence is proportionate. The *Enmund/Tison* culpability requirement does not apply to cases such as Appellant's, because the evidence adduced at trial was sufficient to support a premeditation theory. Even if the *Enmund/Tison* requirement did apply, the evidence adduced at trial showed that Appellant's state of mind at the time of the incident greatly exceeded the reckless indifference to human life state of mind to warrant the death penalty. Appellant was not only a major participant in the offense, but he planned,

directed, and controlled every aspect of Ms. Knowles' murder. Accordingly, even if the *Enmund*/*Tison* requirement did apply, the evidence met the requirements of *Enmund*/*Tison*, and therefore he is not entitled to relief.

Lastly, the State submits that the evidence in this case was sufficient to support Appellant's conviction for first-degree murder. Additionally, qualitative review of the totality of the circumstances in this case and a comparison between this case and other capital cases demonstrates that the death penalty is proportionate in this case.

ARGUMENT

I. APPELLANT IS NOT ENTITLED TO A NEW PENALTY PHASE HEARING BECAUSE ANY *HURST* ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT. (Restated)

During the penalty phase, the jury was given a special verdict form, and the jury unanimously found that the State proved five aggravating factors beyond a reasonable doubt. Specifically, the jury found that the murder was committed while Appellant was on probation and also found that Appellant had been previously convicted of a capital felony or felony that involved the use of threat of violence. The evidence supporting these aggravating factors was based on the testimony of Appellant's probation officer and the copy of Appellant's convictions which showed that Appellant had been convicted of burglary of a dwelling with assault or battery, aggravated battery, attempted robbery with a deadly weapon in case number 1995-CF-28783, and first degree murder, attempted first degree murder, and attempted robbery with a firearm in case number 2006-CF-14913.

The jury also unanimously found that Appellant committed the offense while engaged in the commission of a kidnapping. The evidence showed that after Appellant returned from Home Depot with cement, duct tape, and a shovel, Appellant ordered Ms. Knowles to be bound by her hands and feet, and she was taken to

a remote, swampy area, and was buried. Additionally, the jury also found that Ms. Knowles' murder was especially heinous, atrocious, or cruel, and was committed in cold, calculated, and premeditated manner. The evidence showed that Ms. Knowles was in such a great state of fear and apprehension when she was buried alive that at the time of her death, she entered into an extreme form of rigor mortis. The evidence also showed that Appellant carefully planned Ms. Knowles' murder, by going to Home Depot, purchasing cement, duct tape, and a shovel, and then driving to a desolate swampy area. The single mitigating factor, which was given moderate weight, was that Appellant was caring towards his relatives.

Appellant argues that this Court should reverse his death sentence and remand his case for a new penalty phase proceeding, because the jury did not unanimously recommend the death sentence and was not instructed to find that the aggravating factors outweighed the mitigating factor. (IB: 22) The State respectfully disagrees. The fact that the jury was not instructed to unanimously find that the aggravating factors outweighed the mitigation, and was not instructed to unanimously recommend a death sentence was harmless beyond a reasonable doubt.

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the United

States Supreme Court held that Florida's sentencing scheme, which required the trial judge alone to find the existence of an aggravating factor, was unconstitutional under the Sixth Amendment. *Id.* at 624. The Court did not reach the issue of whether the failure to require a jury to find the existence of an aggravating factor was harmless. *Id.* Instead, the Court said, "[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 . . . ." *Id.*

On remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), (hereinafter "*Hurst II*") this Court ruled that the Sixth Amendment required the jury to find that the existence of each aggravating factor has been proved beyond a reasonable doubt, and that the aggravating factors outweigh the mitigating circumstances. *Id.* at 44. The *Hurst II* decision also included a holding that under the Eighth Amendment of the United States Constitution, the jury's recommended sentence of death must be unanimous in order for the trial court to impose a sentence of death. *Id.* Still, this Court held that a *Hurst* claim is subject to review under the harmless error test. *Hurst II*, 202 So. 3d at 67.

The harmless error test is derived from the United States Supreme Court decision in *Chapman v. California*, 386 U.S. 18

(1967). In *Chapman*, the Court said that the test is, whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. at 24. Rephrased, in subsequent cases, the United States Supreme Court stated that "the question [is] whether the jury verdict would have been the same absent the error . . . ." *Neder v. United States*, 527 U.S. 1, 19 (1999). Thus, after a thorough examination of the record, if the court can conclude beyond a reasonable doubt that a rational jury would have found the defendant guilty, then the error is harmless beyond a reasonable doubt. *Id*. at 18-19.

As applied to the right to a jury trial regarding the facts necessary to impose death, this Court has said, "it must be clear beyond a reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence." *Mosley v. State/Jones*, 2016 WL 7406506 * 26 (Fla. Dec. 22, 2016). Rephrased, under the harmless error standard, the test views how a rational juror, properly instructed, would have voted based on the aggravation presented. The State recognizes that this Court in *Dubose v. State*, 2017 WL 526506 (Fla. Feb. 9, 2017), stated that "in cases where the jury makes a non-unanimous recommendation, the *Hurst* error is not harmless." *Id*. The State submits, however, that the

"rational jury" test remains applicable. Under that test, the Court must determine whether, under the facts of a particular case, a rational jury would have unanimously found the facts necessary to impose death and would have found that death was the appropriate sentence. *Mosley v. State/Jones*, 2016 WL 7406506 at *26 (Fla. Dec. 22, 2016). Under that test, it is clear beyond a reasonable doubt that in this case, a rational jury would have determined that death was the appropriate sentence based upon the aggravation presented.

During the penalty phase in *Hurst II*, the State presented evidence concerning the circumstances of the murder. *Hurst*, 202 So. 3d at 47. The defense presented mitigating evidence which consisted of expert testimony regarding Hurst's brain damage, low IQ, and other significant mental health mitigation. *Id*. The defense also presented mitigating evidence of Hurst's childhood and poor performance in school. *Id*. The jury recommended that Hurst be sentenced to death by a vote of seven to five. *Id*. In the sentencing order, the judge found that the murder was committed while Hurst was engaged in the commission of a robbery, and that the murder was especially heinous, atrocious, or cruel. *Id*. In mitigation, the trial court found that the defendant had no significant criminal history, that he was nineteen years-old, and that Hurst had an even younger mental

age. *Id.* The trial court also found that Hurst had significant mental issues, including limited mental and intellectual capacity and widespread abnormalities in his brain affecting impulse control and judgment consistent with fetal alcohol syndrome. *Id.*

After applying the harmless error test, this Court concluded that the error was not harmless. *Id.* at 69. This Court reasoned that Hurst was slow mentally and had difficulty caring for himself and performing normal daily activities. *Id.* This Court also reasoned that Hurst had abnormalities in multiple areas on his brain, and his IQ score dipped into the intellectually disabled range. *Id.* More importantly, this Court reasoned that there was no interrogatory verdict reflecting the findings of the jury. *Id.* Thus, this Court concluded, "we cannot find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was 'sufficiently substantial' to call for a life sentence." *Id. See also Williams v. State*, 2016 WL 224529 at *19 (Fla. Jan. 19, 2017) (holding that the jury's nine to three recommendation for a death sentence was not harmless, where it was unclear whether sufficient aggravation existed to warrant a death sentence).

In contrast to the situation in *Hurst II* and *Williams*, where the mitigation was extensive and compelling, here, the

aggravation found unanimously by the jury was extensive and compelling. During the penalty phase, the State presented testimony from Nancy Boyett, who testified that she was responsible for supervising Appellant while Appellant was on felony probation at the time of Ms. Knowles' murder. The State also entered into evidence copies of Appellant's felony convictions, which showed that Appellant had been convicted of burglary of a dwelling with assault or battery, aggravated battery, attempted robbery with a deadly weapon, first degree murder, attempted first degree murder, and attempted robbery with a firearm.

Moreover, Dr. Sajid Qaiser testified that based on the position on Ms. Knowles' remains, Ms. Knowles went into an extreme form of rigor mortis known as cadaveric spasm, which occurs when a person is in terror and apprehension at the time of death. Dr. Qaiser also said that Ms. Knowles tried to lift herself up out of the grave, but because she was bound, she was unable to dig herself out. The State presented additional testimony from Marvis Christian and Christopher Pratt to establish that Appellant was involved in the shooting death of Willie Parker shortly before Ms. Knowles' murder.

Furthermore, the jury was aware of the egregious and horrifying nature of Ms. Knowles' murder. Ms. Knowles was buried

alive in cement and dirt, with her feet and legs bound and mouth taped shut. Ms. Knowles watched as she was buried in cement and dirt and was in such a great state of apprehension and fear that upon her death, she went into an immediate and extreme form of rigor mortis.

The only evidence of mitigation presented by the defense came from a single witness, Risha Ford, who testified that she spent her weekends with Appellant and that he would encourage her to do her homework.

Therefore, unlike *Hurst* and *Williams*, the error was harmless beyond a reasonable doubt, because a rational jury, properly instructed, would have determined that death was the appropriate sentence based on the extensive aggravation presented. Unlike *Hurst* and *Williams*, no substantial evidence of mitigation was presented by Appellant during the penalty phase. There was no evidence to suggest that Appellant was mentally challenged or had difficulty caring for himself. There was no evidence to suggest that Appellant had any abnormalities on his brain, that his IQ score was within the intellectually disabled range, or that Appellant was the victim of some type of abuse.

More importantly, unlike *Hurst*, the jury was given a special verdict form, and the jury unanimously found that the State proved five aggravating factors beyond a reasonable doubt.

The jury found that: 1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation; 2) Appellant was previously convicted of another capital felony or felony involving the use of threat of violence to a person; 3) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of or attempt to commit a kidnapping; 4) the capital felony was especially heinous, atrocious, or cruel, given great weight; and 5) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Therefore, unlike *Hurst* and *Williams*, it is clear beyond a reasonable doubt that the jury did determine that the mitigation in this case was not sufficiently substantial to call for a life sentence, and that the aggravation greatly outweighed the mitigation evidence. It is beyond a reasonable doubt that any properly instructed rational jury would have determined death was the appropriate sentence. Accordingly, as the error was harmless beyond a reasonable doubt, Appellant is not entitled to a new penalty phase hearing.

Appellant further contends that the death penalty statute is unconstitutional because the statute fails to narrow the

class of cases eligible for the death penalty. This argument is without merit.

"The determination of a statute's constitutionality is a question of law subject to de novo review." *Henry v. State*, 134 So. 3d 938, 944 (Fla. 2014). This Court has repeatedly rejected the claim that the death penalty statute failed to narrow the classes of cases eligible for the death penalty. *See Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003) ("We have previously rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty."); *Shere v. State*, 579 So. 2d 86, 95 (Fla. 1991) (Rejecting the defendant's argument that the death penalty statute was unconstitutional for failing to limit the classes of eligible cases and stating that the argument merits no further discussion.) Thus, as this Court has long held that the death penalty statute is not unconstitutional for an alleged failure to limit the classes of cases eligible for the death penalty, Appellant's argument is without merit and therefore he is not entitled to relief.

In sum, because the jury unanimously found the existence of five aggravating factors, and the only mitigation evidence presented by the defense was that Appellant's God-sister spent

her weekends with him, a rational jury would have found that the aggravating factors outweighed the single mitigating factor and that death was the appropriate sentence. Accordingly, any *Hurst* error was harmless beyond a reasonable doubt. Additionally, Appellant's argument that the death penalty statute is unconstitutional for failing to narrow the class of persons eligible for capital punishment also fails, as courts have repeatedly deemed that argument as meritless. Therefore, Appellant is not entitled to relief.

II. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE TESTIMONY THAT APPELLANT HAD BEEN INDICTED FOR THE MURDER OF WILLIE PARKER BECAUSE THE EVIDENCE WAS RELEVANT TO ESTABLISH THE MOTIVE FOR THE MURDER OF MS. KNOWLES AND WAS ALSO INEXTRICABLY INTERTWINED WITH THE EVENTS IN THIS CASE. (Restated)

Prior to trial, the State sought to introduce evidence relating to Appellant's involvement in the murder of Willie Parker. The State argued that the evidence was relevant to establish the motive for Ms. Knowles' murder and was inextricably intertwined with the events in this case. Appellant argued that the evidence was overly prejudicial, and the trial court addressed Appellant's concerns by limiting the evidence that the State could elicit. The trial court ruled that for the guilt phase, the State could elicit testimony that Appellant had been indicted for the murder of Mr. Parker along with Mr. Pratt and Jonathan Page, but the State could not elicit any testimony about the nature of Mr. Parker's murder and how it occurred.

During the guilt phase, the following exchange occurred between the prosecutor and Mr. Pratt:

> Q Now at that time, after June of 2006, and the Cocoa police were talking to you asking you about her whereabouts, shortly thereafter you were indicted on a murder charge for Willie Parker; is that correct?
>
> A Yes, sir.
>
> Q Along with a Vahtiece Kirkman and Jonathan Page?
>
> A Yes, sir.

Q And that case was pending through 2006 up until 2010?

A Yes, sir.

Q Did there come a time in July of 2010 that you spoke to law enforcement and the State Attorney's Office?

A Yes, sir.

Q And were you talking a proffer, a plea agreement, to try to tell us where the body of Darice Knowles could be found?

A Yes, sir.

Q And as part of that plea agreement, was the agreement that if you showed us where Darice Knowles; body could be located, that you would be sentenced to second degree murder and robbery with a firearm for the murder of Willie Parker, along with a ten-year sentence of second degree murder for the murder of Darice Knowles, followed by ten years probation, and to give truthful testimony against Vahtiece Kirkman?

A Yes, Sir.

(T10: 1478-79)

Later during direct examination, the following ensued:

Q Mr. Pratt, when we were talking about your plea agreement, the date of the homicide of Willie Parker that you pled to when you were under indictment with Mr. Kirkman, that was February 28th of 2006?

A Yes, sir.

(T10: 1499)

Appellant contends that it was error for the trial court to allow the State to elicit testimony that Appellant had been indicted for the murder of Willie Parker. However, Appellant is incorrect. The evidence was relevant to establish the motive for Ms. Knowles' murder and therefore was relevant and probative of

a material fact.

First, a trial court's ruling on the admissibility of evidence is reviewed under the abuse of discretion standard. *Frances v. State*, 970 So. 2d 806, 813 (Fla. 2007). A trial court abuses its discretion "[o]nly where no reasonable [person] would take the view adopted by the trial court." *Trease v. State*, 768 So. 2d 1050, 1053 n. 2 (Fla. 2000) (quoting *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990)). Therefore, absent a showing that the lower court's action was arbitrary or unreasonable, its ruling will not be disturbed on appeal. *Nowell v. State*, 998 So. 2d 597, 606 (Fla. 2008) *citing Schoenwetter v. State*, 931 So. 2d 857 (Fla. 2006).

Second, the prerequisite to admissibility of evidence is relevancy. *Armstrong v. State*, 73 So. 3d 155, 168 (Fla. 2011). Section 90.402, Florida Statutes (2016), defines relevant evidence as evidence tending to prove or disprove a material fact. In determining what constitutes relevant evidence, courts look to the elements of the crime charged, and whether the evidence tends to prove or disprove a material fact. *Taylor v. State*, 855 So. 2d 1, 21 (Fla. 2003). "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative

evidence." §90.403, Fla. Stat. (2016). "In order for relevant, probative evidence to be deemed unfairly prejudicial, it must go beyond the inherent prejudice associated with any relevant evidence." *State v. Gad*, 27 So. 2d 768, 770 (Fla. 2d DCA 2010). Indeed, "[a]lmost all evidence introduced during a criminal prosecution is prejudicial to a defendant." *Amoros v. State*, 531 So. 2d 1256, 1258 (Fla. 1988). Section 90.403 "is directed at evidence which inflames the jury or appeals improperly" to the jurors' emotions. *Steverson v. State*, 695 So. 2d 687, 689-90 (Fla. 1997) (citations omitted).

Moreover, Section 90.404(2)(a), Florida Statutes (2016), allows evidence of other crimes, wrongs, or acts to be admissible at trial when relevant to prove a material fact. Specifically, the statute states that the "evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." § 90. 404(2)(a), Fla. Stat. Contrary to Appellant's contention, the only situation where evidence of other crimes or wrongs is required to be similar to the facts of the instant case, is where the evidence is offered to prove identity of the defendant. *See McLean v. State*, 934 So. 2d 1248, 1255 (Fla.

2006) ("Specifically, in cases where the purported relevancy of the collateral crime evidence is the identity of the defendant, we have required "identifiable points of similarity" between the collateral act and charged crime that "have some special character or be so unusual as to point to the defendant.")

The facts of this case are similar to those in *Sexton v. State*, 775 So. 2d 923 (Fla. 2000). There, the defendant was charged with the first-degree murder of his son-in-law, Joel Good, *Id.* at 834.[6] At trial, the State introduced evidence that the defendant and his family moved to Florida approximately four years prior to Mr. Good's murder, so that the defendant could evade arrest and prevent law enforcement from removing his children from his care. *Id.* at 835. After arriving in Florida, the defendant's daughter, Pixie, who was also the wife of the victim, testified that the child she shared with the victim became ill. *Id.* at n. 2. Pixie testified that the defendant would not allow her to take the child to a doctor. *Id.* One night as the child cried, the defendant told Pixie to quiet the baby, or else he would do it for her. *Id.* After giving the baby medication, Pixie placed her hand over the baby's mouth until it stopped crying. *Id.* The following morning, the child was dead.

[6] Mr. Good was strangled to death by the defendant's mentally disabled son, Willie Sexton. *Id.* at 834-35.

Id. Pixie later confessed to her husband that the defendant, her father, was the father of two of her children. *Id*. On appeal, the defendant argued that the evidence that he fathered two of his daughter's children and was involved in the murder of his infant grandchild should not have been admitted at trial. *Id*. at 836.

This Court rejected the defendant's argument that the trial court abused its discretion in admitting the testimony that he fathered two of Pixie's children and was involved in the murder of his infant grandchild. *Id*. at 837. Specifically, this Court reasoned that because the defendant did not actually kill the victim, a material issue in the case was whether the defendant had a motive for wanting the victim to be killed, such that he would direct another person to commit the offense. *Id*. Thus, this Court reasoned, had the trial court excluded this testimony, the jury would not have understood why the defendant perceived the victim as a threat. *Id*. Accordingly, the Court concluded that the testimony was properly admitted. *Id*.

Here, the State introduced testimony from Christopher Pratt, in which Mr. Pratt testified that he, along with Appellant and another individual, had been indicted for the murder of Willie Parker. Mr. Pratt testified that Appellant believed Ms. Knowles was cooperating with the police and

informing them of his criminal activities and ordered her to be killed. After Mr. Pratt's indictment for the murder of Mr. Parker, Mr. Pratt entered into an agreement with the State where in exchange for entering a plea to the second-degree murder of Mr. Parker, he would show law enforcement where Ms. Knowles was buried.

Applying *Sexton*, the trial court did not abuse its discretion in admitting Christopher Pratt's testimony, that he and Appellant, along with another individual had been indicted in the murder of Willie Parker. Like the defendant in *Sexton*, the central issue in this case was whether Appellant had a motive for wanting Ms. Knowles to be killed, such that he would direct another person, in this case, Mr. Pratt, to commit the offense. As evidenced by Mr. Pratt's testimony, Appellant believed Ms. Knowles' had informed Officer Freeman of Appellant's criminal activities, which was why he ordered her to be killed. Therefore, the evidence was relevant and properly admitted at trial.

Furthermore, even if the trial court did err in allowing the State to elicit testimony that Appellant and Mr. Pratt had been indicted for the murder of Willie Parker, the error was harmless beyond a reasonable doubt. In *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) this Court set out the test for harmless

error. This Court stated that "[t]he harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *Id*. at 1135.

Here, the testimony that Appellant had been indicted for the murder of Willie Parker was so minimal, that the error, if any, in allowing the jury to hear the testimony was harmless beyond a reasonable doubt. After the prosecutor asked Mr. Pratt whether Appellant had also been indicted for Mr. Parker's murder, the State asked no follow-up questions about that case, nor did the State elicit any testimony about the facts of that case. More importantly, the State did not argue the fact that Appellant had been indicted for Mr. Parker's murder during closing argument or rebuttal argument. Thus, the only time the jury heard that Appellant had been indicted for the murder of Willie Parker occurred during the brief exchange between the State and Mr. Pratt. Thus, even if the trial court did err in admitting the testimony, given the brief exchange between the State and Mr. Pratt, there is no possibility whatsoever that the testimony had any effect on the jury. Accordingly, the error, if any, was harmless beyond a reasonable doubt and Appellant is not

entitled to a new trial.

Appellant's argument relating to the portion of the interview where he requested an attorney is not only relevant to this issue. The interview was in reference to Ms. Knowles case and not Mr. Parker's murder. More importantly, Appellant specifically stated that he had no objection to the admission of the interview. Thus, the issue was waived for appellate review. *See Pagan v. State*, 830 So. 2d 792, 811 (Fla. 2002) (holding that the defendant's argument that the trial court improperly admitted certain items into evidence was not preserved due to lack of a contemporaneous objection at trial).

Appellant also raises other claims in support of his argument that he is entitled to a reversal. Appellant argues what he believes the jury was required to believe in order to accept the State's theory of the case, and also argues his failure to explore other areas of the case. As previously mentioned above, these arguments have no bearing on the issue of Mr. Pratt's limited and miniscule testimony about the indictment for Mr. Parker's murder. Nevertheless, the jury did not have to believe that Mr. Pratt was a good guy, and there was nothing to suggest that the jury had to ignore Mr. Pratt when Mr. Pratt testified that he slapped Ms. Knowles after Appellant went to Home Depot to purchase the supplies to murder Ms. Knowles, in

order to convict Appellant. Accordingly, Appellant's additional arguments are irrelevant and meritless.

In sum, the trial court properly admitted testimony that Appellant was indicted for the murder of Willie Parker, because the testimony was relevant to establish the motive for Ms. Knowles' murder. Additionally, even if the trial court did err in admitting the evidence, because the testimony was so limited in nature, and only referenced the indictment, and given the fact that the prosecutor did not mention the indictment during closing or rebuttal argument, the error, if any, was harmless beyond a reasonable doubt and Appellant is not entitled to reversal.

III. THE *ENMUND/TISON* CULPABILITY REQUIREMENT DOES NOT APPLY BECAUSE COURTS HAVE LONG HELD THAT THE REQUIREMENT DOES NOT APPLY IN CASES LIKE THE INSTANT CASE, WHERE THE EVIDENCE WAS SUFFICIENT TO SUPPORT A PREMEDITATION MURDER THEORY. (Restated)

Appellant argues that the evidence adduced at trial is insufficient under the culpability requirement in *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987). (IB: 45) However, Appellant's argument fails. The *Enmund/Tison* culpability requirement does not apply to cases such as Appellant's, where the evidence is sufficient to also support a premeditation theory.

A trial court's findings pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987) are reviewed to determine whether there is competent, substantial evidence in the record to support the determination that a defendant was a major participant in the crimes committed, and that the defendant acted with a reckless indifference for human life. *Perez v. State*, 919 So. 2d 347, 366 (Fla. 2005).

Both this Court and the United States Supreme Court have held that a defendant must be equally culpable with the co-defendants to warrant a death sentence. *Stephens v. State*, 787 So. 2d 747, 759 (Fla. 2001). In *Enmund*, the Court held that a death sentence for felony murder is impermissible if the defendant only aids and abets during the commission of a felony

in which a murder is committed by another person, and the defendant did not kill, or attempt to kill, or intend that a killing take place. *Perez v. State,* 919 So. 2d 347, 365 (Fla. 2005). In *Tison*, the Court revisited its holding in *Enmund* and held that a death sentence in the felony murder context is permissible if the defendant is a major participant in the felony, and the defendant's state of mind constitutes a reckless indifference to human life. *Perez*, 919 So. 2d at 365. However, although unmentioned by Appellant in his initial brief, this Court has long held that the *Enmund*/*Tison* culpability requirement does not apply to cases where the evidence is sufficient to establish a murder conviction under a premeditation theory. *Teffeteller v. Dugger*, 734 So. 2d 1009, 1018 (Fla. 1999).

The facts of this case are analogous to those presented in *Pearce v. State*, 880 So. 2d 561 (Fla. 2004). There, the defendant was charged with the first-degree murder of Robert Crawford, and the attempted second-degree murder of Stephen Tuttle, and was sentenced to death. *Id*. at 565. The evidence showed that Pearce gave money to his employer's stepson and the victims to purchase drugs for him. *Id*. When the victims returned to Pearce without drugs or Pearce's money, Pearce, who was armed with a firearm, ordered the victim's into his employer's office

and locked them in the office, and refused to let them leave. *Id*.

Pearce subsequently called a friend, and asked the friend to bring the co-defendant, Lawrence Joey Smith, with him to the office where the victims were trapped inside. *Id*. at 566. After Mr. Smith's arrival, Pearce ordered the victims into his vehicle, and drove the vehicle to a desolate area. *Id*. Upon reaching a desolate area, Smith got out of the car, shot Tuttle in the back of the head, and fled the area. *Id*. After driving to another desolate area, Pearce ordered Crawford out of the car, and Smith shot and killed Crawford. *Id*. On appeal, Pearce argued that his sentence violated the *Enmund/Tison* culpability requirement. *Id*. at 575.

This Court rejected Pearce's argument. *Id*. at 575. While this Court reasoned that Pearce was a major participant in the underlying felony and orchestrated the events leading to the victim's death, this Court further reasoned that the *Enmund/Tison* requirement was not applicable because there was sufficient evidence from which the jury could have inferred premeditation for the murder by Pearce. *Id*.

Here, the evidence at trial showed that Appellant became concerned that Ms. Knowles was cooperating with the police and had informed them of his criminal activities. Appellant

subsequently went to Home Depot where he was observed on video surveillance purchasing duct tape, cement, and a shovel. Appellant then got in a van with the items, along with Mr. Pratt and Ms. Knowles, and ordered Mr. Pratt to bind Ms. Knowles' hands and legs, and also cover Ms. Knowles' mouth with the duct tape. Ms. Knowles pleaded with Appellant, and told him that she was not cooperating with the police, and that she did not tell Officer Freeman about Appellant's criminal activities. Mr. Pratt also pleaded with Appellant, and told Appellant that he believed Ms. Knowles, and believed that she was not cooperating with police. However, Appellant did not believe Ms. Knowles or Mr. Pratt, and instead continued to drive the vehicle to a desolate area.

After reaching the desolate area, Appellant ordered Mr. Pratt to carry Ms. Knowles out of the vehicle. After reaching the location where Ms. Knowles' remains were ultimately discovered, Appellant ordered Mr. Pratt to dig a hole with the shovel he purchased from Home Depot. When Mr. Pratt began to protest against digging the hole, Appellant threatened to kill Mr. Pratt as well. Mr. Pratt testified that he believed he had no choice except to comply with Appellant's orders, because Mr. Pratt knew what Appellant was capable of, and was aware that Appellant was armed with a firearm.

As Mr. Pratt dug the hole, Appellant directed and dictated every aspect of the physical dimensions of the hole, while Ms. Knowles lay alive and conscious on the ground, watching as the hole was being created. After the hole was created to Appellant's satisfaction, he ordered Mr. Pratt to put Ms. Knowles in the hole, and cover her with the cement Appellant purchased at Home Depot. After Ms. Knowles was buried, Appellant and Mr. Pratt discarded her personal belongings at a gas station.

Applying *Pearce*, Appellant's argument that the evidence is insufficient under *Enmund* and *Tison* is wholly without merit. The record is filled with overwhelming evidence to prove Appellant's premeditation to murder Ms. Knowles. The evidence showed that Appellant went to Home Depot and purchased the items used to murder Ms. Knowles. Appellant ordered for Ms. Knowles to be bound, drove to the location where she was murdered and singlehandedly selected the location where she would be buried. Appellant ordered Ms. Knowles to be placed in the hole and also commanded Mr. Pratt to cover her with the cement he purchased. Thus, as noted by this Court in *Pearce*, because there is an abundance of evidence in the record to prove that Appellant premeditated Ms. Knowles' murder, the *Enmund*/*Tison* culpability requirement does not apply.

Furthermore, even if the *Enmund/Tison* culpability requirement did apply, the evidence showed that Appellant was a major participant in the offense and that he showed reckless indifference for Ms. Knowles' life, and thus satisfied the culpability requirement.

As previously stated, it is not necessary for a defendant to be the "triggerman" in order to impose the death penalty. *See Jackson v. State*, 502 So. 2d 409, 412 (Fla. 1986). Instead, the record evidence need only show that the defendant attempted to kill, or intended or contemplated that life would be taken. Id. Also, a death sentence is proper where the record evidence shows that the defendant was a major participant in committing the offense and whose mental state exhibited a reckless indifference to human life. *Diaz v. State*, 513 So. 2d 1045, 1048 (Fla. 1987).

In addition to *Pearce*, the facts of this case are also similar to *Van Poyck v. State*, 564 So. 2d 1066 (Fla. 1990). There, the defendant was convicted of first-degree murder, attempted first-degree murder, aiding in an attempted escape, aggravated assault, and six counts of attempted manslaughter and was sentenced to death. *Id.* at 1067. The facts showed that two corrections officers were transporting a prisoner to a doctor's office. *Id.* When the officers arrived at the doctor's office, the defendant pointed a firearm at one of the officers, while

the co-defendant ordered the other officer out of the transportation van. *Id*. After being ordered to lay on the ground, one officer heard several gunshots and saw that the other officer had been shot and killed. *Id*. At trial, the defendant argued that he did not shoot and kill the officer, but admitted that he planned the operation and recruited the co-defendant to assist him. *Id*. The defendant argued that the evidence was insufficient to show that he had the requisite culpable mental state. *Id*. at 1070.

This Court rejected the defendant's argument. *Id*. This Court reasoned that although the defendant was not the "triggerman," the evidence did show that the defendant was the instigator of the offense, that the defendant was a major participant, and the defendant knew lethal force could be used during the offense. *Id*. at 1070-71. Therefore, this Court concluded that the defendant had the requisite mental state to support the death sentence. *Id*. at 1071.

Here, the evidence adduced at trial showed that Appellant, operating under the belief that Ms. Knowles was cooperating with the police and informing them of his criminal activities, singlehandedly devised the plan to kill Ms. Knowles. Appellant went to Home Depot and purchased the cement, duct tape, and shovel that were used to murder Ms. Knowles. Appellant ordered

Ms. Knowles to be bound by her hands and feet, drove to a desolate area, and selected the exact location where Ms. Knowles would be killed.

Furthermore, Appellant ordered Mr. Pratt to dig the hole where Ms. Knowles would be buried, and when Mr. Pratt protested against digging the hole, Appellant threatened to murder him as well. The evidence showed that Appellant dictated every aspect of the physical dimensions of Ms. Knowles' grave and commanded that she be placed in the hole and covered with cement and dirt.

Applying *Pearce* and *Van Poyck*, Appellant's argument that the evidence is insufficient under *Enmund* and *Tison* is without merit. Although Appellant did not dig the hole and physically place Ms. Knowles in the hole, the evidence did establish that Appellant was the instigator of the murder, was a major participant in Ms. Knowles' murder, and not only knew that Ms. Knowles could be killed as a result of the offense, but he specifically planned her for her to be killed. Thus, even if the *Enmund*/*Tison* culpability requirement applied, the evidence was sufficient, and thus Appellant's death sentence is proper.

The cases relied upon by Appellant, *Jackson v. State*, 575 So. 2d 181 (Fla. 1991) and *Benedeth v. State*, 717 So. 2d 472 (Fla. 1998), are factually distinguishable and do not apply. In *Jackson*, the defendant was convicted of armed robbery and first-

degree murder. *Jackson*, 575 So. 2d at 184. The victim, Herbert Phillibert, the owner of a hardware store, was found lying face-down behind the counter of his business. *Id*. Mr. Phillibert later perished from a gunshot wound to his lower right chest. *Id*. at 185. One witness testified that he observed the defendant driving in the area. *Id*. The defendant's brother's fingerprints were found on the back of the cash register. *Id*. A jailhouse informant testified that he overheard the defendant tell his mother, "we had to do it because he had bucked the jack," and also told his mother to tell someone else to get rid of the gun. *Id*. On appeal, the defendant argued that his death sentence violated the *Enmund*/*Tison* culpability requirement. *Id*. at 190.

This Court agreed that the defendant's death sentence did not meet the culpability requirement. *Id*. at 190. This Court reasoned that although the evidence showed that the defendant was a major participant in the crime, the evidence did not show that the defendant's state of mind was any more culpable than any other armed robber whose conviction rests solely upon a felony murder theory. *Id*. at 192. This Court further reasoned that there was no evidence that the defendant carried a weapon or intended to harm anyone when he went into the store, or that the defendant expected violence to erupt during the robbery. *Id*. Also, "[t]here was no real opportunity for Jackson to prevent

the murder since the crime took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistance." *Id.* at 193. Thus, the evidence was insufficient to establish that the defendant's state of mind was sufficiently culpable to rise to the level of reckless indifference to human life to warrant the death penalty for the felony murder. *Id.*

In *Benedeth*, the defendant was convicted of first-degree felony murder and robbery with a firearm. *Benedeth*, 717 So. 2d at 473. The facts adduced at trial showed that the body of the victim, John Shires, was found face-down in a motel parking lot. *Id.* The victim had gone to the parking lot to sell his vehicle. *Id.* A witness saw the defendant and co-defendant talking to the victim next to the victim's vehicle. *Id.* at 474. After the witness went to his room, he heard three gunshots, and saw the co-defendant get in the passenger seat of the vehicle, and watched the vehicle drive away. *Id.*

This court held that the defendant's death sentence did not satisfy the culpability requirement of *Enmund* and *Tison*. *Id.* At 476. This Court reasoned that there was no evidence in the record to show that the defendant had the requisite state of mind. *Id.* Also, there was no evidence in the record to show that the defendant could have prevented the use of the firearm while the robbery was being committed. *Id.* Thus, the death sentence

had to be vacated. *Id*.

Here, unlike *Jackson* and *Benedeth*, while Appellant did not physically place Ms. Knowles in the hole where her remains were found, the evidence established that Appellant planned, directed, and controlled every aspect of Ms. Knowles' murder, due to his belief that she was cooperating with the police. Appellant purchased the cement, duct tape, and shovel that were used to kill Ms. Knowles. He commanded Mr. Pratt to bind Ms. Knowles, and he selected the exact location where she would be buried. Appellant dictated how big and deep the hole needed to, and directed Mr. Pratt as he dug the hole and did not relent until the hole was created to his satisfaction. Also, when Mr. Pratt protested against killing Ms. Knowles, Appellant threatened to kill Mr. Pratt and place him in the hole with Ms. Knowles. Pratt believed he had no other choice but to comply with Appellant's demands because he was aware that Appellant had a firearm on his waist.

Thus, *Jackson* and *Benedeth* are completely distinguishable and do not apply. Unlike *Jackson* and *Benedeth*, not only did the evidence show that Appellant was a major participant in committing the murder, but the evidence also showed that Appellant's state of mind was exceedingly more culpable than Mr. Pratt's. Appellant, singlehandedly devised the plan to murder

Ms. Knowles, and when Mr. Pratt protested against killing Ms. Knowles, he threatened to kill Mr. Pratt as well. Therefore, the evidence showed that Appellant could have prevented Ms. Knowles' death, unlike *Jackson* and *Benedeth*. Moreover, unlike *Jackson* and *Benedeth*, the evidence was sufficient to support not only a felony murder theory, but premeditated murder as well. The evidence showed that Appellant carried a firearm and acted with the specific intent to not only harm, but to kill Ms. Knowles.

Although Appellant argues that only a general verdict form was used and the trial court failed to instruct the jury on relative culpability of the co-defendants, no such instruction or special verdict form was requested by Appellant during trial and therefore the issue was waived. *See Williams v. State*, 967 So. 2d 735, 760 (Fla. 2007) (holding that the defendant's argument regarding erroneous jury instructions was waived for appellate review by failing to make a request to the trial court.) Furthermore, the evidence supported both premeditation and felony murder theories, therefore the lack of a special verdict form is wholly without merit.

Likewise, Appellant's argument about the lack of corroboration for Mr. Pratt's testimony is also without merit. Courts have long held that the credibility of a witness is matter for the jury to decide. *Bearden v. State*, 161 So. 3d

1257, 1263 (Fla. 2015). Here, the jury weighed Mr. Pratt's credibility, and resolved the issue of Mr. Pratt's credibility against Appellant.

Therefore, unlike *Jackson* and *Benedeth*, Appellant's state of mind at the time of the incident greatly exceeded the reckless indifference to human life state of mind to warrant the death penalty. Appellant was not only a major participant in the offense, but he planned, directed, and controlled every aspect of Ms. Knowles' murder. Accordingly, as the evidence in the record is sufficient to satisfy the *Enmund/Tison* requirement, Appellant's death sentence is proper.

Appellant further contends that his death sentence is disproportionate because he was not relatively culpable in Ms. Knowles' murder, given the fact that Mr. Pratt admitted to digging the hole and burying Ms. Knowles alive. This argument fails as well.

In *McCloud v. State*, 2016 WL 6804875 (Fla. Nov. 17, 2016), this Court held that an additional analysis of relatively culpability is required in cases involving more than one defendant, regardless as to whether the co-defendant's lesser sentence was a result of a guilty plea or jury trial. *McCloud*, 2016 WL 6804875 at *15-16. Nevertheless, in *McCloud*, this Court still adhered to the longstanding rule that "if 'the

circumstances indicate that the defendant is more culpable than a co-defendant, disparate treatment is not impermissible despite the fact the co-defendant received a lighter sentence for his participation in the same crime.'" *McCloud*, 2016 WL 6804875 at *15, *quoting Brown v. State*, 721 So. 2d 274, 282 (Fla. 1998).

Here, the evidence adduced at trial demonstrated that Appellant was far more culpable than Mr. Pratt. The fact that the jury did not unanimously find that Ms. Knowles' murder was committed for the sole purpose of witness elimination has no bearing on Appellant's culpability. The jury rejected Appellant's theory and recommended a death sentence, because the evidence showed that Appellant was the chief architect of Ms. Knowles' murder, and when Mr. Pratt protested against killing Ms. Knowles, Appellant threatened to kill Mr. Pratt if Mr. Pratt did not obey him. Thus, as the circumstances of Ms. Knowles' murder showed that Appellant was exceedingly more culpable than Mr. Pratt, Appellant's disparate treatment is permissible.

In sum, the *Enmund/Tison* culpability requirement does not apply to Appellant's case, because the evidence was sufficient to support both a premeditation and felony murder theory. Moreover, even if the culpability requirement did apply, the evidence adduced at trial showed that Appellant was a major participant in Ms. Knowles' murder, and his actions demonstrated

that he had the requisite mental state to warrant a death sentence. Accordingly, even if the culpability requirement did apply, Appellant had the requisite mental state to satisfy the *Enmund/Tison* requirement. Likewise, Appellant's argument that he was not relatively culpable is also without merit. The evidence showed that Appellant planned, directed, and controlled every aspect of Ms. Knowles' murder, and the only reason why Mr. Pratt buried Ms. Knowles alive was because Appellant was armed with a firearm and threatened to kill Mr. Pratt if he did not obey him. Thus, Appellant was more culpable than Mr. Pratt, and therefore his death sentence is not disproportionate.

STATEMENT REGARDING PROPORTIONALITY

This Court conducts a proportionality review in every case where the death penalty was imposed. *Ocha v. State*, 826 So. 2d 956, 965 (Fla. 2002).

In a proportionality analysis, "[t]his Court's 'review on proportionality is not a comparison between the number of aggravators and mitigators.'" *Russ v. State*, 73 So. 3d 178, 198 (Fla. 2011) (quoting *McGirth v. State*, 48 So. 3d 777, 796 (Fla. 2010)). "Proportionality review requires this Court to engage in a qualitative review of the 'totality of the circumstances and compare the present case with other capital cases in which this Court has found that death was a proportionate punishment.'" *Id.* (quoting *Wright v. State*, 19 So. 3d 277, 303 (Fla. 2009)). Rather than counting the aggravating and mitigating circumstances, the Court will consider the nature of, and the weight given to, the relevant factors. *Serrano v. State*, 64 So. 3d 115 (Fla. 2011); *Abdool v. State*, 53 So. 3d 208, 224 (Fla. 2010) (noting the large quantity of mitigation presented, but confirming that the focus is on the quality, not the quantity, of the evidence).

In addition, the Court will not reweigh the sentencing factors, but accepts the jury's recommendation and the judge's balancing of the evidence. *Rigterink v. State*, 66 So. 3d 866,

899 (Fla. 2011). Because the analysis is a comparison of the totality of the circumstances with factually similar crimes and criminals, the Court can take facts beyond the stated sentencing factors into account. *See, e.g., Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997) (noting the brutality of the attack in upholding proportionality of sentence, despite the trial court's failure to find HAC).

This Court has found that HAC is one of the strongest aggravators in the sentencing scheme. *See Rigterink v. State*, 66 So. 3d 866, 900 (Fla. 2011) (HAC is among the weightiest of aggravating factors and "applies in physically and mentally torturous murders which can be exemplified by the infliction of a high degree of pain or utter indifference to or enjoyment of the suffering of another"); *Johnson v. State*, 969 So. 2d 938, 958 (Fla. 2007) (the HAC aggravator "is among the weightiest in the statutory scheme.") Furthermore, the CCP aggravator is also "one of the most serious aggravators set out in the statutory sentencing scheme." *Silvia v. State*, 60 So. 3d 959, 974 (Fla. 2011).

Here, the court found the existence of five aggravating factors, which were also found unanimously by the jury: 1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on

community control or felony probation, given great weight; 2) Appellant was previously convicted of another capital felony or felony involving the use of threat of violence to a person, given great weight; 3) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of or attempt to commit a kidnapping, given substantial weight; 4) the capital felony was especially heinous, atrocious, or cruel, given great weight; and 5) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, given great weight. The only mitigating factor found by the trial court was that Appellant was caring and helpful towards his relatives, and assigned moderate weight to this mitigator.

Applying the aforementioned legal principles, a qualitative review of the totality of the circumstances in this case and a comparison between this case and other capital cases demonstrates that the death penalty is proportionate in this case. *See Pham v. State*, 70 So. 3d 485, 500-01 (Fla. 2011) (finding that the death sentence was appropriate where the trial court found that the defendant had been previously convicted of a capital felony or felony involving use of threat or violence, capital felony committed while defendant was engaged in burglary

and kidnapping, capital felony was especially heinous, atrocious, or cruel, and capital felony was committed in a cold, calculated, and premeditated manner, and four mitigating factors); *Banks v. State*, 46 So. 3d 989, 1000 (Fla. 2010) (holding that death sentence was appropriate where trial court found three aggravators: prior violent felony, HAC, and CCP, and five mitigating factors); *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006) (affirming the defendant's death sentence where the trial court found prior violent felony, HAC, and CCP aggravators, and several nonstatutory mitigators); *Davis v. State*, 859 So. 2d 465, 479-80 (Fla. 2003) (upholding defendant's death sentence where the trial court found HAC, CCP, that the crime was committed while on probation, and four nonstatutory mitigators); and *Singleton v. State*, 783 So. 2d 970, 979-80 (Fla. 2001) (holding that the death sentence was proportional where the trial court found HAC and prior violent felony aggravating factors as well as substantial mitigating factors which included extreme mental and emotional disturbance and impaired capacity to appreciate criminality).

Moreover, this Court has found the death penalty appropriate in cases where a victim's death was caused by asphyxiation or where the victim was buried alive. *See Carr v. State*, 156 So. 3d 1052, 1071 (Fla. 2015) (affirming the

defendant's sentence of death where the defendant murdered the victim by suffocation with a garbage bag); *Jackson v. State*, 18 So. 3d 1016, 1036 (Fla. 2009) (holding that the defendant's death sentence was proper where he participated in burying the victims alive); and *Stephens v. State*, 787 So. 2d 747, 762 (Fla. 2001) (affirming the defendant's death sentence where the defendant murdered the victim by suffocation).

Hence, as the death penalty is appropriate in this case when compared with similar cases, this Court should affirm the sentence imposed upon Appellant.

STATEMENT REGARDING SUFFICIENCY OF THE EVIDENCE

In every capital case, this Court reviews whether there was competent, substantial evidence to support the murder conviction. *Buzia v. State*, 926 So. 2d 1203, 1217 (Fla. 2006). This statement is offered to assist the Court in that function.

The evidence established at trial showed that Appellant, concerned that Ms. Knowles was cooperating with the police, drove to Home Depot. Appellant was observed on video at Home Depot purchasing a shovel, cement, and duct tape. After purchasing the items, Appellant returned to his vehicle, and ordered Mr. Pratt to bind Ms. Knowles' hands and feet, and to cover her mouth with duct tape. Ms. Knowles pleaded with Appellant, and told him that she was not cooperating with the police and did not share any information with Mr. Freeman. Appellant did not believe her, and drove for approximately half an hour out of the city to a remote location, while armed with a firearm.

After reaching the location where Ms. Knowles' remains were later discovered, Appellant gave Mr. Pratt the shovel he purchased and ordered Mr. Pratt to dig a hole. Mr. Pratt protested against digging the hole and killing Ms. Knowles, and told Appellant that he believed Ms. Knowles' claim that she was not cooperating with law enforcement. However, Appellant ordered

Mr. Pratt to dig the hole for Ms. Knowles, and threatened Mr. Pratt that if he did not dig the hole, Appellant would kill Mr. Pratt and put both him and Ms. Knowles in the hole. Mr. Pratt believed he had no other choice, because he feared Appellant, he knew what Appellant was capable of, and knew that Appellant had a firearm on his waist.

While digging the hole, Appellant stood nearby and dictated to Mr. Pratt as to how wide and deep to dig the hole. When the hole met Appellant's satisfaction, he ordered Mr. Pratt to throw Ms. Knowles in the hole. Ms. Knowles was alive and conscious at the time she was placed in the hole. Mr. Pratt testified that Ms. Knowles' eyes were open and that she had a terrified look on her face as she was buried in the cement and dirt. The State's expert testified that Ms. Knowles perished within six minutes after she was buried in the cement and dirt. Hence, as the evidence established that Appellant planned, directed, and controlled every aspect of Ms. Knowles murder, competent substantial evidence existed to support Appellant's conviction for first-degree murder.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 15, 2017, a true and correct copy of the foregoing was furnished by electronic mail to George Burden, Assistant Public Defender, burden.george@pd7.org, 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was printed in Courier New 12 point and thereby satisfies the font requirements of Florida Rule of Appellate Procedure 9.210.

S/ T Popoola

Tayo Popoola
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