IN THE SUPREME COURT OF FLORIDA

MARTIN PUCCIO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 86,242

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit of Florida, In and For Broward County.

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PRELIMINARY STATEMENT

In this Brief, the following symbols will be used:

"R" Record on Appeal

"SRII" Second Supplemental record on Appeal (Appellant is filing simultaneously with this brief a motion to supplement the record).

"AB" Answer Brief

In this Brief, Appellant responds to Appellee's arguments in Points I-VI, IX, XI, and XV, and will rely on his Initial Brief for the arguments in Points VII, VIII, X, XII-XIV, and XVI-XX.

ARGUMENT

POINT I

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE WHERE EQUALLY CULPABLE CODEFENDANTS DID NOT RECEIVE THE DEATH PENALTY.

In its answer brief, Appellee makes two basic claims: (1) that this Court will not reduce a death sentence to life imprisonment due to disproportionate treatment where an equally culpable codefendant has been sentenced to life, and (2) that Appellant is more culpable than all of the other codefendants in this case. Both of these claims are without merit.

Appellee relies on dicta in Garcia v. State, 492 So. 2d 360 (Fla. 1986) to claim that this court will not perform an in-case proportionality review -- that is, reduce a sentence to life where an equally culpable codefendant did not receive the death penalty. However, in Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court found Scott's sentence to be disproportionate because an equally culpable codefendant was sentenced to life:

> Even when a codefendant has been sentenced subsequent to the sentencing of the defendant seeking review on direct appeal, it is proper for this Court to consider the propriety of the disparate sentences in order to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime.

604 So. 2d at 468. Appellee attempts to distinguish Scott on the ground that the codefendant had been originally sentenced to death. However, the codefendant had the death sentence vacated and his case

was remanded for an entire new sentencing. At the operative time that Scott's death sentence was being reviewed, the codefendant had received a life sentence from the trial court. In Scott, this Court specifically rejected any premise that Garcia prevents an in-case proportionality review of equally culpable codefendants by expressly noting that Garcia did not involve equally culpable codefendants:

> Based upon this record, this Court probably would have found Scott's death sentence inappropriate had Robinson's life sentence been factored into our review on direct appeal. See Slater v. State, 36 So. 2d 539 (Fla. 1975) (defendants should not be treated differently upon the same or similar facts). The instant case is distinguishable from Garcia v. State, 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 102, 107 S.Ct. 730 (1986), where this Court rejected a defendant's argument that his death sentence denied him equal justice because none of the other three participants in the crime received a sentence of death. Garcia did not involve equally culpable participants.

604 So. 2d at 469.[1]

Assuming arguendo, that at the time of the Garcia decision in 1986, this Court had "not thus far" done an in-case proportionality

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[1] Justice Grimes stated in his dissent in Scott v. Dugger that this Court has rejected the argument Appellee now makes: "In Garcia v. State, 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 1022, 93 L. Ed. 2d 730, 107 S. Ct. 680 (1986), this Court specifically rejected the very argument that Scott now makes." Scott v. Dugger, 604 So. 2d at 471 (Grimes, J., dissenting). It should be quickly pointed out, however, that Justice Grimes indicated that codefendant culpability could be raised, as here, on direct appeal; his disagreement stemmed from raising the issue collaterally: "It is one thing to allow consideration of an accomplice's punishment in an original sentencing proceeding. It is quite another to set aside a valid death sentence because an accomplice's sentence has been subsequently reduced." Scott v. Dugger, 604 So. 2d at 471 (Grimes, J., dissenting)(emphasis added).

review so as to ensure that defendants are not treated differently on the same or similar facts, subsequent to Garcia, this Court has recognized and performed such an in-case proportionality review. E.g. Scott,, supra. For example, in Cardona v. State, 641 So. 2d 362 (Fla. 1994), this Court recognized two types of proportionality analysis: (1) proportionality to the other codefendant in the case and (2) proportionality to other cases:

> Cardona's seventh claim, that it was error to sentence her to death when her equally culpable codefendant received a lesser sentence, also is without merit. A codefendant's sentence may be relevant to a proportionality analysis where the codefendant is equally or more culpable. See, e.g., Scott v. Dugger, 604 So. 2d 465, 468-69 (Fla. 1992); Hayes v. State, 581 SO. 2d 121, 127 (Fla.) cert. denied, ___ U.S. ___, 112 S.Ct. 1022 (1988). However,, the record in this case supports the trial court's finding that Cardona was the more culpable of the two defendants. Thus, the disparate treatment is justified. Rogers, 511 So. 2d at 535.
>
> We also reject Cardona's contention that imposition of the death penalty will result in cruel and unusual punishment and a violation of her due process rights. We have compared this case to other death penalty cases to ensure that death is proportionately warranted. This review leads us to agree with the trial court that, in light of the extended period of time little Lazaro was subjected to the torturous abuse leading to his death, the ultimate sentence is warranted in this case.

641 So. 2d 365. Likewise, in Downs v. State, 572 So. 2d 895 (Fla. 1990), this Court performed an in-case proportionality comparison to the culpability of the codefendant:

> Finally, we reject the claim that the death penalty is disproportional punishment. First, there is substantial competent evidence in the record to support the trial court's conclusion that **Dons was** the triggerman in a cold-blooded contract murder. This Court has affirmed the death sentence in similar cases where the trial court followed the jury's recommendation of death. See Ventura v. State, 560 So. 2d **217** (Fla. 1990); Kelley v. State, 486 So. 2d 578 (Fla.) cert. denied, 479 U.S. 871,. 107 S.Ct. **244**, 93 L.Ed.2d 1178 (Fla. 1985; Hoffman State, 474 So. 2d 1178 (Fla. 1985). Second. are satisfied that the penalty is not disproportional when compared to treatment of coconspirator Johnson. Disparate treatment of **a** codefendant renders punishmentdisproportionalif the codefendant is equally culpable. E.g. Slater v. State, 316 So. 2d 539 (Fla. 1975) (reducing defendant's death sentence to life imprisonment because "triggerman" codefendant was sentenced to life in a plea bargain). In this case, however, evidence in the record supports the trial court's conclusion that Downs was the triggerman and thus was more culpable than Johnson.

572 So. 2d at 901 (emphasis added). Finally, in Larzelere v. State, **676 So.** 2d 394 (Fla. 1996), this Court performed an **analysis of** the proportionality based on the culpability of the codefendants:

> Nor do we find the death penalty in this case to constitute a disproportionate sentence even though two of the State's key witnesses were apparently not prosecuted despite their involvement in this crime and even though Jason was acquitted. When a codefendant (or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate. Downs **v. State, 572 so.** 2d 895 (Fla. 1990), cert. denied, 502 U.S. 829, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991); Slater v. State, 316 So. 2d 529 (Fla. 1975). Thus, an equally or more culpable codefendant's sentence is relevant to a proportionality analysis.

> Cardona v. State, 641 So. 2d 361 (Fla. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1122, 130 L.Ed.2d 1085 (1995). Disparate treatment of a codefendant, however, is justified when the defendant is the more culpable participant in the crime. Hayes v. State, 581 So. 2d 121 (Fla.), cert. denied, 502 U.S. 972, 112 S.Ct. 450, 116 L.Ed.2d 458 (1991).
>
> * * *
>
> As indicated by the trial judge, we find that the evidence establishes beyond question that the appellant was the dominating force behind this murder and that she was far more culpable than the State's two key witnesses. Additionally, the evidence supports the judge's conclusion that the aggravating factors outweigh the mitigating factors. Consequently, we find that the appellant's sentence is not disproportionate.

676 So. 2d at 407 (emphasis added). See also Johnson v. State, 22 Fla. L. Weekly S253, S260 (Fla. May 16, 1997) (performing in-case proportionality review).

All of the above cases are based on proportionality analysis due to equally culpable codefendants and none are based on codefendant culpability as mitigation.

While Appellee does not discuss codefendant culpability in this point, Appellee does discuss the issue at pages 35-36 of its answer brief. Appellee relies on the trial court's conclusion in its sentencing order that Appellant was more culpable than any of the codefendants. Specifically, Appellee claims that Appellant is more culpable than the other codefendants because he "conceived the idea to kill Kent and initially convinced Connelly and Willis to shoot him" and

afterward enlisted the aid of Kaufman. AB at 35. However, this representation is contrary to the trial court's finding of fact. As explained in the trial court's finding of fact, Willis and Connelly conceived the idea of killing Kent and enlisted Kaufman; Kaufman devised a plan, but Willis and Connelly would not follow Kaufman's advice and instead tried to shoot Kent at the remote area:

> 5. On July 13, 1993, Lisa Connelly telephoned Alice Willis in Palm Bay. Willis was told that Bobby Kent was planning to come to Palm Bay to murder her (Willis) and smother her baby, unless she returned to Broward County to date him again.
>
> 6. Shortly after this discussion, Alice Willis, Donald Semenec and Heather Swallers arrived at Connelly's house from Palm Bay, Florida. They all proceeded to Derek Kaufman's house. There, Willis and Connelly enlisted Derek Kaufman's assistance in the plan to murder Bobby Kent.
>
> 7 Derek Kaufman portrayed himself as a gang leader. He had the reputation of one who could do, and had previously done, harm to others. He suggested that they (Connelly and Willis) wait to attack Bobby Kent until plans could properly be made, so that the crime could be committed without detection.
>
> 8. Kaufman suggested that the proper place to attack Bobby Kent was a remote area of western Broward County (Weston) . He claimed that he had previously killed others at this site. This is where Bobby Kent was murdered the next night.
>
> 9. Lisa Connelly and Alice Willis did not heed Kaufman's advice. That night, they took Connelly's mother's handgun, concealed it, and drove with Bobby Kent to the remote

> site where he was ultimately murdered the next night. After their attempt failed, . . .

R 3759. The prosecutor below even conceded that Appellant was probably not involved at the beginning of the conspiracy, but Appellant was also culpable because he later joined the planning:

> There is no justifiable use of deadly force in this particular case. Mr. Puccio may not have been involved with the initial core of conspirators, yes. Perhaps, Lisa Connelly is the casting director for this loosely-knit group. Perhaps, Mr. Kaufman, with the aid of Mr. Kaufman, became the choreographer how this murder is going to take place, that's what we get from Mr. Dzvirko and Ms. Swallers, both at the house and at the scene before they got out there.
>
> In any event, the evidence is clear that at some point he [Appellant] joins this conspiracy. And the evidence is also clear that he's a participant in it and that he, in fact, delivered some of the fatal wounds to Bobby Kent.

R2687 (emphasis added). Thus, there is no meritorious claim that Appellant was more culpable due to the planning. In fact, the other defendants were more culpable. As the prosecutor noted, Derek Kaufman was the "choreographer," Lisa Connelly was the "casting director," and Appellant "joins in" R2687. Appellant does not disagree with Appellee that the primary planners and movers of a killing are most culpable. Certainly, Appellant was less culpable than Kaufman.

Appellee next claims that Appellant is more culpable because he concocted the alibi. Clearly, the creation of the alibi was a group effort led by Derek Kaufman. The seven teenagers met twice to discuss

the alibi -- once at the beach and once at Lisa Connelly's house R1820-1821. It was Kaufman who ordered everyone to the beach R1813. Appellant was not even present at the second meeting which lasted for an hour and a half R1824. More importantly, Kaufman certainly appeared to be the dominant force behind the alibi as demonstrated by making it clear that if anyone mentioned his name they would be dead by the end of the week R1831.

Finally, Appellee claims that it was Appellant alone who dealt the fatal blows. This is contrary to the trial court's sentencing order which states that "Semenec assisted in tackling Kent and assisted Puccio in inflicting the fatal wounds" R3795. In addition, Kaufman was also active in the attack of Kent. As the prosecutor argued, Kent was "finished off with a baseball bat by Mr. Kaufman." R3046. As to who administered each particular blow and which blows were fatal is not totally clear. Moreover, what is most important is that Kaufman, Semenec and Appellant all tried to impose fatal wounds to Kent. The fact that in trying to kill Kent one may have inflicted a serious wound which by itself may not have been fatal is a mere fortuity. The fact is that all three were trying to kill Kent and all were delivering blows to Kent at the scene where Kent died. They were all equally culpable. The most material distinction between the actions at the crime scene is Derek Kaufman's choreography of what was occurring. This sets Kaufman above all others as the dominant player. This Court has even held that the instigator or planner can be more culpable than

the triggerman. Van Poyck v. State, 564 So. 2d 1066, 1070 (Fla. 1990); Williams v. State, 622 So. 2d 456, 464 (Fla. 1993).

Derek Kaufman masterminded the actual killing, alibi, coverup, and he inflicted some of the blows. As explained on pages 31-35 of the Initial Brief, Derek Kaufman was equally, if not more, culpable than Appellant. Appellee has not disputed the facts on these pages showing Kaufman's culpability, except to make the specious assertion that Kaufman merely joined in the group's killing. It is true that Kaufman joined in after Willis and Connelly contacted him about obtaining a gun, but it is more appropriate to say that Kaufman became the dominant figure by masterminding the killing by choosing the remote site (a place where Kaufman bragged that he had previously killed others R3758); deciding how the killing would begin, including the signal to begin R1805; and when it looked like the others may be letting Kent run away it was Kaufman who ordered, the others to get him R1809; directing and carrying out the disposal of the body and removal of its identification R1812; covering up the group's actions by making certain the weapons were cleaned and disposed of R1820; and finally Kaufman made the ultimate gesture to show that he was the dominant figure by stating that he would kill the others if they did not go along with the planned alibi R1831-32. All of this supports what the trial court wrote in Derek Kaufman's sentencing order: "The evidence presented at trial revealed that Derek Kaufman was a dominating force behind the

murder of Bobby Kent." SRII 6[2]

POINT II

THE TRIAL ERRED IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED

A. Pretense of Moral or Legal Justification

Appellee apparently agrees that if Appellant knew of Kent's rape of Alice Willis and of his threat to kill Willis and her baby then a pretense of moral or legal justification would exist sufficient to eliminate the CCP aggravating factor. Appellee asserts, however, that there is no record support to show that Appellant knew of Bobby Kent's rape of Willis, and of his threat to kill her and her baby. First, Appellee has overlooked Appellant's trial testimony that he did know Kent raped Alice Willis R2391-2392. This evidence was never challenged or rebutted by the state. Accordingly, there is evidence in the record to support a pretense of moral or legal justification. Secondly, regarding Kent's threat to kill Willis and her baby if she did not reunite with him, it would be entirely unreasonable to assume that Appellant did not know about this threat. This is especially true when one considers that Alice Willis's best friend was Lisa Connelly, and Connelly was Appellant's girlfriend. Moreover, Kent's threat was the reason Willis, Semenec, and Swallers came to Broward County. The only

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[2] Undersigned counsel is filing simulataneously with the brief a motion to supplement the record with, or take judicial notice of, a certified copy of the sentencing order in Derek Kaufman's case. See footnote 7, infra.

reasonable inference that can be drawn from the facts of this case is that these young people shared with each other their various motivations to kill Kent. Clearly, there is a reasonable hypothesis that Appellant was aware of Kent's threat to kill Willis and her baby; as Appellee concedes, such a threat provides a pretense of moral or legal justification; therefore, Appellee has failed to meet its burden of establishing beyond a reasonable doubt that the killing was CCP. See Geralds v. State, 601 So. 2d 1157 (Fla. 1992) (if there is a reasonable hypothesis that the killing was not committed in a cold, calculated and premeditated manner, then the state has failed to prove CCP beyond a reasonable doubt).

Even assuming, arguendo, that Appellant was somehow unaware of Kent's rape of Willis and of his threat to kill Willis and her baby if she did not reunite with him, Appellant's own personal motivation was itself sufficient to establish a pretense of moral or legal justification. Bobby Kent would beat up Appellant, and Appellant killed Kent to stop these beatings R1652. This is a pretense of moral or legal justification. Banda v. State, 536 So. 2d 221, 225 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989) ("[A] 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide."). Of course, to negate CCP there does not have to be an actual legal justification, but merely a pretense.

Appellant agrees, as Appellee wrote in its brief, that "the record reveals that there was no imminent threat of attack by Kent." AB at p. 16. But "imminent threat" is not the standard for pretense of moral or legal justification. For example, in Christian v. State, 550 so. 2d 450 (Fla. 1989), the defendant stabbed to death a fellow inmate who was handcuffed and under guard. This Court held that the inmate's previous threats to the defendant were sufficient to establish a pretense of moral or legal justification notwithstanding the fact that the inmate obviously posed no "imminent threat" to the defendant at the time he was killed. In short, Appellee is attempting to shift the contours of "pretense of moral or legal justification" to that of legal self-defense. Such an interpretation is not supported by the case law, see Christian, supra, or by a plain reading of the statute as it would require this court to ignore the word "pretense" in § 921.141(5) (i), Fla. Stat. (1993).

B. Cold

In order to assert that the "cold" element of CCP is present in the instant case, Appellee relies on Walls v. State, 641 So. 2d 381 (Fla. 1994). Walls is clearly distinguishable. There, the defendant, who was committing a burglary, purposefully woke up the two victims, a man and woman. He forced the woman to tie up the man. The defendant then bound the woman. When the man broke free, a struggle ensued. The defendant slit the man's throat and then shot him in the head several times. The defendant then returned to the woman. As this Court

described it:

> He found her "laying in there crying and everything, asked me some questions." Walls said he could not understand what she was saying, so he removed her gag. She asked if Alger [her boyfriend] was all right. Walls said:
>
> > I told her no. I told her what was going on, and I said, "I came in here, and I didn't want to hurt none of y'all. I didn't want to hurt you, but he attacked my ass, and things just happened.
>
> Walls then untied Peterson, and "started wrestling around with her." During this second struggle, he ripped off Peterson's clothing. Walls' confession stated:
>
> > [Peterson] was like curled up crying like. I don't know, I guess I was paranoid and everything. I didn't want no, uh, no witnesses.
> > . . . .
> > I--all I know is just--all I know I just went out, and I just pulled the trigger a couple of times right there behind her head.
> > . . . .
> > I mean close range, I mean shit, it's got powder burns (unintelligible) and everything.
>
> Walls stated that after the first shot, Peterson was "doing all kinds of screaming." He then forced her face into a pillow and shot her a second time in the head.

Walls, 641 So. 2d at 381.

The emotionless killing in Walls could not be more different than the one in the instant case. The killing in the instant case was the emotional culmination of several things: Kents's physical abuse of

Appellant, his rape of Willis, and his threat to kill Willis and her baby. These young people did not kill Kent for the thrill of it, or to eliminate a witness, or to rob Kent, or as part of some cult ritual. This killing was an emotional response to Kent's actions. This does not justify or excuse the killing, but it does take it out of the class of murders which fall within CCP. Here as in Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993), CCP does not apply because although the killing was calculated it was not cold in that it was the result of emotion and not calm and cool reflection.

C. Harm

The error in finding the CCP aggravating circumstance where it does not exists cannot be deemed harmless. Without CCP, there is only one aggravating circumstance (at most--see Point III) balanced against substantial mitigation, including two statutory mitigating circumstances of no significant history of prior criminal activity, and Appellant's youth (20 years old), as well thirteen non-statutory mitigating circumstances. In addition, four jurors (the death recommendation was 8-4) and the Department of Corrections recommended that Appellant be sentenced to life imprisonment. As noted in the Initial Brief at pp. 40, 46, this Court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. See e.g., Songer v. State, 544 so. 2d 1010 (Fla. 1989).

Appellee's cited cases, Ferrell v. State, 680 So. 2d 390 (Fla.

1996), Duncan v. State, 619 So. 2d 279 (Fla. 1993), and Slawson v. State, 619 So. 2d 255 (Fla. 1993), are all clearly distinguishable. Unlike Ferrell and Duncan, Appellant has no prior second degree murder conviction. Indeed, Appellant has no significant criminal history. Unlike Slawson, Appellant did not kill four people as well as an unborn child.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

Appellee does not disagree with the legal principle that an essential element of HAC is the defendant's intent to inflict a high degree of pain or to torture the victim. Yet Appellee does not point to anything in the record to suggest that Appellant intended to inflict a high degree of pain or to torture Kent. Appellee's only response is to choose from the record those portions which indicate that Kent could have felt pain or suffered; Appellee does not advance any theory of the evidence to support the view that Appellant deliberately intended to inflict a high degree of pain or torture Kent.

Even Appellee's record support for the pain and suffering of Kent is inaccurate. Appellee asserts that "[t]he record reveals, however, that after the [nonfatal] stab wound to the neck,...Bobby Kent grabbed his neck and sought help from Appellant (R 1808-1809)." Its citation to the record notwithstanding, there is no record support for

Appellee's assertion that Bobby Kent "sought help" from Appellant.[3] Instead, Kent said "Marty, I'm sorry" R1809.[4] Appellee states that after Semenec stabbed Kent in the neck, "Appellant then stabbed Kent in the stomach, which was not immediately fatal either, because Kent ran from the group, only to be pursued and tackled to the ground." AB at p. 22. However, this is not evidence that Appellant intended to cause unnecessary and prolonged suffering. It is clear that after the initial blow was struck by Semenec, the group's intent was to kill Kent as quickly as possible. There is simply no evidence that the group intended Kent to suffer at all, let alone unnecessarily. In all of the discussions these young people had, they never discussed the infliction of pain or the torture of Kent. Appellee does not offer any theory of the evidence to support the view that Appellant or the others intended to cause Kent unnecessary or prolonged suffering. Unlike other cases, they did not torture **or** toy with Kent, or attempt to impress upon him the recognition of his impending death. See e.g., Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993), cert. denied, 114 S. Ct. 445 (1993) (torture); Knight v. State, 338 So. 2d 201 (Fla. 1976) (victims knew they were going to die hours before their death).

Moreover, the uncertainty as to what occurred as far as the

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[3] Even if Kent did seek Appellant's help, this would not be evidence that Appellant intended to cause unnecessary and prolonged suffering. Bonifay v. State, 626 So. 2d 1310 (Fla. 1993); Wyckham v. State, 593 So. 2d 191 (Fla. 1991).

[4] Kent's curious response to the attack, "Marty, I'm sorry" (R1690), may have been a recognition of Kent's past abuse of Appellant.

stabbing cannot be used to find HAC. Appellee concedes that the sequence of the stabbing was not known, AB at 22, and the medical examiner could not relate the order of the wounds or estimate how long Kent was conscious, AB at 23. Under similar circumstances, this Court in Brown v. State, 644 So. 2d 52 (Fla. 1994), held that HAC was not established:

> Brown contends that the court erred in finding that the murder was heinous, atrocious, or cruel. We agree. The medical examiner testified that when the victim's body was discovered it was badly decomposed and all that could be determined was that the victim had been stabbed three times and none of the wounds would have been immediately fatal. This evidence standing alone is insufficient to show beyond a reasonable doubt that this was a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 s. ct. 1950, 40 L. Ed. 2d 295 (1974).

Brown, 644 So. 2d at 53. Moreover, the HAC aggravator cannot be found from uncertainty, even if there is a reasonable hypothesis of HAC. Hamilton v. State, 678 So. 2d 1228, 1231-1232 (Fla. 1996) (where there were two theories of the evidence, one supporting HAC and one not, HAC not established beyond a reasonable doubt and trial court erred in finding it). Even if Appellee had provided some 'logical inference" to establish an intent to inflict a high degree of pain or otherwise torture Kent, which it has not done, this would be insufficient to prove the HAC aggravator beyond a reasonable doubt. Robertson, 611 So. 2d 1228, 1232 (Fla. 1993) (trial court may not draw 'logical

inferences" to support a finding of a particular aggravating circumstance when the state has not met its burden).

Appellee also relies on the fact that Kaufman 'bludgeoned" Kent with a baseball bat. AB at 22. However, this is not evidence of HAC for several reasons. First, Kaufman hit Kent to kill him and not for the purpose of inflicting pain. Second, even if Kaufman was excercising his own personal decision to deliberately inflict pain, HAC cannot be applied vicariously to Appellant. Omelus v. State, 584 so. 2d 563, 566 (Fla. 1991). Again the group's sole intent was to kill Kent; they never discussed deliberately inflicting pain or torturing Kent.

Here, as in Frown, supra, and Demps v. State, 395 So. 2d 501, 506 (Fla. 1981) (stabbing death of inmate not HAC), this killing was not especially heinous atrocious or cruel, and the trial court erred in finding it to be so.

POINT IV

THE DEATH PENALTY IS NOT PROPORTIONATELY WARRANTED IN THIS CASE

In Terry v. State, 668 So. 2d 954, 965 (Fla. 1996), this Court summarized proportionality review as a consideration of the "totality of circumstances in a case", and due to the finality and uniqueness of death as a punishment "its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." Id.

Appellee's analysis under this point does not consider the "totality of the circumstances," and does little to advance the idea that this is one of the most aggravated and least mitigated cases for which the death penalty is reserved.[5] Instead, Appellee spends considerable time reviewing the facts selectively and sometimes contrary to the trial court's findings. For example, Appellee tries to lessen Derek Kaufman's role by stating that "Kaufman merely volunteered to 'help.'" AB at p. 35. However, the trial court wrote in the sentencing order that Kaufman was "instrumental in planning the murder of Bobby Kent" and that he "played an integral role in Bobby Kent's death." R3793. Appellee also overemphasizes Appellant's involvement. Appellee states that Appellant 'conceived the idea to kill Kent and initially convinced Connelly and Willis to shoot him." AB at p. 35. As explained in point I, this statement is contrary to the trial court's factual findings as well as the prosecutor's theory of the case (the prosecutor argued that Appellant joined an already formed conspiracy to kill Kent R2687). Appellee states that Kent "turned to Appellant for help," id. at 35, but in reality he said "Marty, I'm sorry" R1690.[6] Appellee states that "Appellant told them what their alibi was going to be," when, as explained in Point I, the

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[5] Appellee has not challenged Appellant's argument made in its Initial Brief at pp.52-53 that if one of the aggravators is deemed inapplicable Appellant's death sentence would be disproportionate.

[6] As explained in point I this curious response to the attack was probably Kent's acknowledgment of his past abuse of Appellant.

alibi was a group effort.

Most disturbing is Appellee's statement in reference to codefendant culpability. In its brief, Appellee implies that the trial court determined Appellant was the most culpable defendant from evidence presented at the codefendants' trials:

> In its written sentencing order, the trial court stated that it purposefully waited to sentence Appellant until all of the other defendants had been tried and sentenced. As a result, it had the benefit of hearing and evaluating the State's evidence against each defendant, and each defendant's defense (R 3792). Although its findings of fact were drawn solely from the evidence presented in this trial, it noted that it had the opportunity, prior to Appellant's sentencing "to reflect upon the relative culpability of each defendant, the various verdicts rendered and, where appropriate, the recommendation of sentence." (R 3792).

AB at p. 34 (emphasis added; footnote omitted). However, the trial court's sentencing order in Kaufman's case rebuts Appellee's assertion.[7] In its "Order of Sentence" in Kaufman's case, the trial court makes findings of fact nearly identical to the findings of fact in Appellant's sentencing order SRII 1-5. Based on the same facts, the trial court concluded that the "evidence presented at trial revealed that Derek Kaufman was a dominatins force behind the murder of Bobby

[7] Undersigned counsel is filing simultaneously with this brief a motion to supplement the record with, or take judicial notice of, a certified copy of the sentencing order in Derek Kaufman's case. At this juncture, supplementing the record with this order is the only way to rebut Appellee's unfair assertion that the trial court relied on evidence from the other trials to establish that Appellant was the most culpable defendant.

Kent." SRII 6 (emphasis added). Accordingly, it cannot be legitimately argued that the trial court determined Appellant was the more culpable defendant based on evidence presented at the other trials. The trial court's sentencing order in Kaufman's case proves that Kaufman was equally, if not more, culpable than Appellant.

Moreover, the trial court's findings of fact in Appellant's sentencing order shows that Kaufman was equally culpable; only the trial court's legal conclusion to the contrary was erroneous. On the same facts in Kaufman's sentencing order, the trial court came to the correct conclusion: Kaufman was a dominating force behind the murder of Bobby Kent, Thus, the trial court improperly rejected the mitigating evidence that Kaufman was equally culpable.

In an attempt to weaken the statutory mitigator of Appellant's age (20), Appellee relies on the trial court's order stating that Dr. Day, the psychologist who evaluated Appellant three years earlier when he was committed to Coral Ridge Psychiatric Hospital, "testified that the defendant manipulated others by using his 'All American Boy Charm'" R3780. However, Dr. Day never testified that Appellant manipulated others by using his "All American Boy Charm." Dr. Day testified on direct examination that when he evaluated Appellant three years earlier, he wrote in his report that Appellant "can also be expected to manipulate others by using his 'All American Boy Charm"' R2895, but Dr. Day clarified his testimony on redirect examination by indicating that Appellant would not manipulate others with his "All American Boy

Charm" but that others might take advantage of that quality for manipulation purposes:

> When I made the statement that he could manipulate on his All American boy looks, I wasn't making that statement on the **basis** that he did do that, but rather it was almost something that someone might do for him. And -- but not that he was getting through his life at that point by that.

R2913-14. Therefore, it is simply incorrect to say Appellant was manipulative. Thus, Appellee incorrectly denigrates Appellant's youth **as a** mitigator on the basis of nonexistent "manipulative" behavior.

Appellee also attempts to weaken the age mitigator on the basis that the evidence showed a "great deal of cunning and leadership" by Appellant. AB at p. 30. This is rebutted by the prosecutor who, in describing the participants roles, called **Kaufman the** "choreographer," Lisa Connelly the "casting director," and noting that Appellant joined the group after the others hatched the plan to kill Kent R2687.

To denigrate the mitigation that Appellant was adversely affected, physically and emotionally, by the use of drugs and/or alcohol, Appellee relies on the trial court's erroneous conclusion in its sentencing order that "according to Appellant's own mental health expert, Appellant had a behavioral problem rather than a drug problem" AB at p. 30; R3788. Again, this is incorrect. What Appellee and the trial court refer to is Appellant's mother's testimony that someone from Coral Ridge Psychiatric Hospital told her that Appellant's problem was not drugs, but a behavior problem. R2872. However, for all anyone

knows Appellant's mother spoke to a clerk or a receptionist who was trying to justify Appellant's insurance related discharge from the unit. There was no competent evidence to support the assertion. The only competent evidence was from Dr. **Day** ('Appellant's own mental health expert") who testified that Appellant's **drug** abuse **was** the "greatest detrimental factor in his personal development" and that defeating his pattern of substance abuse **was** of "paramount importance"[8] R2895. Dr. Day did not testify that Appellant had a behavioral problem, rather than a drug problem.

Finally, Appellee attempts to weaken Appellant's lack of significant criminal history mitigator on the ground that "previous arrests for misdemeanor juvenile and adult crimes, evidence of drug use, and the contemporaneous conviction for conspiracy to commit first-degree murder, which preceded the **murder,** reduced the weight of this mitigating factor." AB at p. 29. First, "arrests" alone **are** not evidence of criminal activity. Hines v. State, 358 So. 2d 183, 185 (Fla. 1978). Although the state need not show criminal convictions to rebut the no significant criminal history mitigator, it must, if it cannot produce convictions, showdirect evidence of criminal activity. Walton v. State, 547 So. 2d 622, 625 (Fla. 1989). Second, regarding Appellant's drug use, Appellant's problems with drugs is itself a

[8] Unfortunately for Appellant, he was discharged from Coral Ridge Psychiatric Hospital before that could happen, and he fell back under the domination of Kent with whom he resumed his drug use. R2874.

mitigating circumstance and does not decrease the weight of this mitigator as would evidence of other types of criminal activity. See Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989)("Moreover the mitigating evidence was not insubstantial. First, there is the lack of prior significant criminal activity. While Smalley did admit to occasional marijuana use, apparently he was otherwise a law-abiding citizen.")

Appellee argues that Appellant's "sentence is not disproportionate to other defendants' sentences for similar murders under similar circumstances" and cites Bonifay v State, 680 So. 2d 413 (Fla. 1996); Johnson v. State, 660 So. 2d 648 (Fla. 1995), cert. denied, 116 S. Ct. 1550 (1996), and Heath v. State, 648 So. 2d 660 (Fla. 1994), cert. denied, 115 S. Ct. 2618 (1995). AB at p 38. However, comparing Appellant's case with these decisions only helps prove that Appellant's sentence is disproportionate, as Appellant's case pales in comparison with Appellee's cited cases.

In Bonifay, the defendant had three statutory aggravating factors: the capital felony was committed while Bonifay was engaged in a robbery; the capital felony was committed for pecuniary gain; and the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. 680 So. 2d at 415 n.1. The killing in Bonifay was motivated by greed and not from the emotional backdrop of threats and abuse, as in this case. See Bonifay v. State, 626 So. 2d 1310, 1311 (Fla. 1993). Nor was the

killing quick and frenzied as in this case, but involved the victim lying on the floor begging for his life and talking about his wife and children. Id.

In Johnson, the defendant stabbed his neighbor 19 times for $20.00. There were three aggravating factors, including the defendant's prior violent felony. Id at 652.

In Heath, the defendant, Ronald Heath, and his brother, Kenneth, picked up a traveling salesman at a bar and drove him to an isolated area to rob him. Again, the killing was motivated by greed and not from the type of emotions involved in this case. After the killing, the two men stole the victim's car and possessions. Heath had two aggravating factors, the most significant of which was his prior second degree murder conviction.[9]

Appellant's case can hardly be more different than Appellee's cited cases. Unlike Bonifay, this killing was not a cold-blooded

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[9] Heath is instructive for another reason. Heath claimed that the trial court erred in sentencing him to death because he was no more culpable than his brother Kenneth who received a life sentence. Heath, 648 So. 2d at 665-666. However, the trial court determined that Kenneth operated under the domination of Ronald and that this domination was the primary causal factor which resulted in the salesman's murder. What is interesting is that in the instant case, the trial court cited Heath when it wrote in Kaufman's sentencing order that Kaufman was a "dominating force behind the murder of Bobby Kent." SRII 6. In other words, the trial court thought Kaufman's dominating role in this murder was similar to Ronald Heath's dominating role in the robbery/murder of the salesman. Ironically, the trial court in Heath still considered Kenneth's life sentence to be a nonstatutory mitigating circumstance and gave it substantial weight, yet the trial court in the instant case rejected the mitigation that equally culpable codefendant's received life.

contract type of killing committed in the hope of pecuniary gain. Unlike Heath and Johnson, this was not a deliberate killing committed in the course of a robbery by a person with a prior violent felony. Again, Appellant had no significant criminal history, and the motivation for the killing was Kent's mental and physical abuse of Appellant, Kent's rape of Alice Willis, and his threat to kill her and her baby. Had these things not happened to these young people, there would have been no killing. This is not to justify the killing in anyway, but it does show that this killing was not one of the most aggravated, least mitigated murders for which the death penalty is reserved.

Unlike the murders in Appellee's three cited cases, the basis of the killing in the instant case was not money; the basis here was the emotion due to the rape and threats to kill Willis and the stress of Kent's abusive relationship with Appellant. As such, this case is much closer to those cases where the killing stemmed from a similar type of emotional relationship. See e.g., Wilson v. State, 493 So. 2d 1019 (Fla. 1986) (death sentence not proportionately warranted for emotion based shooting death of father and stabbing death of cousin; jury recommendation of death; presence of heinous, atrocious, or cruel aggravator, and prior violent felony aggravator); Blakely v. State, 561 So. 2d 560 (Fla. 1990) (death penalty not proportionately warranted for emotion based bludgeoning death of wife; unanimous death recommendation; presence of HAC and CCP aggravators) . This case is

also closer to those cases where the defendant's youth and other extenuating circumstances make the death penalty disproportionate. See e.g., Curtis v. State, 605 So. 2d 1234, 1235 (Fla. 1997) (two aggravating factors posed against substantial mitigation including defendant's age, 17); Morgan v. State, 639 So. 2d 6 (Fla. 1994) (death disproportionate where aggravating circumstances were considered against substantial mitigation); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (same).

POINT V

THE TRIAL COURT ERRED IN EXCLUDING THE MITIGATING EVIDENCE THAT THE DEPARTMENT OF CORRECTIONS RECOMMENDED THAT APPELLANT BE SENTENCED TO LIFE

Appellee argues that the DOC's recommendation that Appellant be sentenced to life imprisonment is irrelevant, and that this Court rejected a similar claim in Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993), cert. denied, 114 s. ct. 445 (1993). AB at pp 40-41. First, Thompson did not involve a Department of Corrections life sentence recommendation. In Thompson, this Court affirmed the trial court's exclusion of defense witnesses who were going to express their personal opinion on the appropriateness of the death penalty in Thompson's case. Second, as explained in the Initial Brief, the Department of Corrections is mandated by statute to make a sentencing recommendation to the sentencer. § 921.231(1)(o), Fla. Stat. (1993). When the state agency charged with the responsibility of executing those condemned and housing those that are not recommends that a

defendant receive a life sentence, such evidence is highly relevant mitigating evidence, and its exclusion a violation of the Eighth Amendment under Lockett v. Ohio, 438 U.S. 586 (1978).

POINT VI

THE TRIAL COURT ERRED IN GIVING AN INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED INSTRUCTION WHICH FAILED TO INFORM THE JURY THAT EACH OF THE FOUR ELEMENTS MUST BE PRESENT TO FIND THIS AGGRAVATING CIRCUMSTANCE

The trial court omitted the portion of the jury instruction promulgated by this Court in Jackson v. State, 648 So. 2d 85 (Fla. 1984), that made it clear that in order for the jury to find CCP each of the four elements of CCP must be found. Appellee claims that this portion was mere surplusage. Such a claim is meritless. This Court did not construct a CCP instruction delineating that each of the four elements of CCP must be found as mere surplusage. Appellee claims that the later instruction that "[e]ach aggravating circumstance must be established beyond a reasonable doubt before it can be considered ..." indicates that each of the four elements of CCP must be found. This simply is not true. The individual elements of an aggravating circumstance are only a portion of that circumstance. It is only the omitted portion of the instruction that informs the jury that to find CCP they must find all four elements of CCP.

Finally, Appellee claims that the error of not giving a complete CCP instruction is harmless. Appellee's argument is essentially that there was overwhelming evidence of calculation and heightened

premeditation by the planning and carrying out of the killing and thus the error in the instruction was harmless. Appellee's argument shows the very reason why the error would be harmful. Appellee's argument has focused solely on two elements of CCP -- calculated and heightened premeditation -- and ignored the other two elements -- pretense of moral or legal justification and cold. Appellee's analysis is flawed by ignoring what the omitted portion of the instruction teaches -- that all four elements of CCP must be found. It cannot be said that the error was harmless where there was a very legitimate issue for the jury on the elements of pretense of moral or legal justification and coldness (see Point II, supra). Appellant relies on his Initial Brief for further argument on this point.

POINT Lx

THE TRIAL COURT ERRED IN FAILING TO CONSIDER LIFE WITHOUT PAROLE AS A SENTENCING OPTION AND FAILING TO INSTRUCT THE JURY ON THIS OPTION

Appellee concedes that Appellant would have been entitled to consideration of the life with no parole option by the judge and jury if he had requested this option. AB 51-54. However, it asserts that because he did not affirmatively request this option it could not be considered due to "ex post facto" concerns. AB 51-54. However, Appellee's analysis is completely contrary to the analysis of the Oklahoma Court of Criminal Appeals in a similar situation.

The Oklahoma Court of Criminal Appeals has held that the failure to instruct the jury and to consider the life with no parole option is fundamental error which requires resentencing in all circumstances.

Salazar v. State, 852 P.2d 729 (Okl.Cr. 1993); Fontenot v. State, 881 P.2d 69 (Okl.Cr. 1994); Cheatham v. State, 900 P.2d 414 (Okl.Cr. 1995). Appellee seems to agree with this analysis insofar as it agrees that if Appellant had requested the life with no parole instruction he would have been entitled to it. However, it claims that it would violate the Ex Post Facto Clause if this option was not specifically requested by the defense. However, this is contrary to the Ex Post Facto analysis employed by the United States Supreme Court and is specifically rejected by the Oklahoma cases. The United States Supreme Court has defined the two critical elements that must be present for a law to violate the Ex Post Facto Clause.

> Our decisions prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.

Weaver v. Graham, 450 U.S. 29, 30, 101 S.Ct. 960, 964, 67 L.Ed.2d 17, 22 (1981).

The Oklahoma Court of Criminal Appeals has applied the analysis of the United States Supreme Court and specifically rejected the claim that the life with no parole option violates the Ex Post Facto Clause.

> There is no question that in this case consideration of the life without parole sentence is a retroactive application of a punitive statute. However, our analysis may not stop here. In order to affirm the trial court's refusal to consider this punishment, we must also find that imposition of the sentence could have disadvantaged Appellant by subjecting him to a harsher punishment than was available a the time

> he committed the crimes. While we will not speculate as to the comparative drawbacks between a life in prison without chance of parole and the actual imposition of the death penalty, we believe that any possibility of a sentence which avoids the death penalty cannot be said to be disadvantageous to the offender.

Allen v. State, 821 P.2d 371, 376 (Okl.Cr. 1991).

Consideration of the life with no parole option cannot be considered disadvantageous to Appellant as it may well have saved his life. Both the United States Supreme Court and this Court have recognized the right of a capital defendant to every lawful option to avoid death. Beck v. Alabama, 447 U.S. 625 (1980); Jones v. State, 569 So. 2d 1234 (Fla. 1990).

Appellee relies on a series of Florida cases for the proposition that the failure of the defense to request this option bars its consideration. None of these cases support this proposition. In Larzelere v. State, 676 So.2d 394, 403 (Fla. 1996) this Court held that the defendant can personally waive the right to conflict free counsel. In State v. Upton, 658 So.2d 86 (Fla 1995) this Court held that a defendant can personally waive the right to a jury trial. In Armstrong v. State, 579 So.2d 734 (Fla. 1991) this Court held that the failure to instruct on justifiable or excusable homicide is fundamental error. However, it held that this error can be waived if the defense affirmatively requests an incorrect instruction. This Court went on to hold that mere silence does not waive the issue. These cases, especially Upton and Larzerle support the argument that this is fundamental error. Here, there was silence as to the life with no

parole option, but the Oklahoma Court of Criminal Appeals has held that this issue is fundamental error, and that a defendant's silence does not waive this issue. Salazar; Fontenot.

Appellee claims that it would be improper to apply the Oklahoma caselaw without a specific request from Appellant due to the fact that in Oklahoma the life with no parole is an intermediate sentence. Appellant would assert that this is no barrier to the consideration of the life with no parole option. Assuming arguendo that this Court feels that this poses some barrier to consideration of the life with no parole option, there is an easy answer to this problem. It would be to require instruction and consideration of all three options in cases in which the offense was committed prior to May 25, 1994 and the trial was conducted after that date. This would accommodate the concerns of all parties. It would allow the defendant consideration of the life with no parole for twenty five years option and it would allow life with no parole for those cases in which this is the only appropriate alternative to the death penalty. It would avoid Ex Post Facto problems, satisfy due process concerns, and effectuate the intent of the legislature in enacting this law. See Salazar, supra at 739 ("The Oklahoma Legislature, as representatives of the citizens of this State, has determined in some cases, life without the possibility of parole can accomplish the societal goals of retribution and deterrence, without resorting to the death penalty.") Thus, this case must be remanded for a jury resentencing, with consideration of the life with no parole option.

POINT XI

THE TRIAL COURT ERRONEOUSLY APPLIED A PRESUMPTION OF DEATH.

Appellee concedes that the trial judge applied the **same** unconstitutional death presumption that the Eleventh Circuit condemned in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). However, it claims that the order "taken as a whole" somehow cures this problem. However, it points to no specific portion of the order for this proposition. In fact, the judge never corrects this unconstitutional death presumption. Reversal for a judge resentencing is required.

POINT XV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE THE HEARSAY STATEMENTS OF DEREK KAUFMAN

Appellee's claim that this issue was not properly preserved by a **hearsay** objection is specious. AB at 68. The trial court knew that the nature of Appellant's objection was **hearsay,** and it knew that it was admitting otherwise inadmissible hearsay into evidence. R2213-14. Defense counsel's objection that he would be unable to cross-examine Kaufman, and his citation to the trial court of Bruton v. United States, 391 U.S. 123 (1968), **a** case dealing with the confrontation clause implications of hearsay, demonstrates that defense counsel's objection was based on hearsay and the confrontation clause R2314. Thus, this **issue** is properly preserved for appellate review. See Williams v. State, 414 So. 2d 507, 510 (Fla. 1982)(magic words are not necessary to state a proper objection).

Regarding defense counsel allegedly opening the door to this inadmissible hearsay, Appellant simply disagrees with Appellee's assertion that defense counsel's cross-examination of Calamusa left an "incorrect impression with the jury." AB at p. 70. If there was an "incorrect impression with the jury," that impression stemmed from a conflict in the state's case between the medical examiner's testimony and Calamusa's. As explained in the Initial Brief at pp. 86-87, defense counsel's cross-examination of Calamusa left no unfair impression with the jury.

Finally, the error was not harmless for the reasons expressed in the Initial Brief at pp. 87-88, particularly when the prosecutor in closing argument argued the truth of the matter asserted in these hearsay statements, and used them to argue that they corroborated Calamusa's testimony R2585.

CONCLUSION

This Court should vacate Appellant's convictions, and reduce or vacate his sentences, and remand for a new trial or grant relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Sara D. Baggett, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401, by courier this 11th day of July, 1997.

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