IN THE SUPREME COURT OF FLORIDA

TIFFANY ANN COLE

Appellant,

v. CASE NO. SC08-528

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

References to the appellant will be to "Cole" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The record on appeal will be referenced as "TR" followed by the appropriate volume and page number. References to Cole's initial brief will be to "IB" followed by the appropriate page number.

INTRODUCTION

Tiffany Ann Cole challenges the double first degree murder convictions of Reggie and Carol Sumner, a retired elderly couple living in Jacksonville, Florida, in this direct appeal. Cole and three other co-defendants enter the Sumner's home, bound them and then kidnapped them, by stuffing both into the trunk of their Lincoln Town Car. They were driven some 30 miles into an isolated, wooded area in Southern Georgia and buried alive in a grave dug days before the planned murders. Thereafter, the defendants, including Cole, withdrew and spent a significant sum of money drawn from the Sumners' bank account, using the victims' ATM card, with the numbers acquired at the grave site from the victims.

At Cole's trial, the evidence showed that co-defendant Jackson planned and participated with Alan Wade and Bruce Nixon,

along with Tiffany Cole, in robbing, kidnapping and murdering the Carol and Reggie Sumner. The jury found Cole guilty of two counts of first degree murder, two counts of robbery and two counts of kidnapping. Following the penalty phase of the trial, the jury recommended imposition of the death penalty by a vote of 9-3 for the two murders.

In sentencing Cole to death for both murders, the trial court found seven (7) aggravators to exist beyond a reasonable doubt. In mitigation, the trial court found and weighed four (4) statutory mitigators - and a number of non-statutory mitigators. The trial judge found the aggravators far outweighed the mitigators and sentenced Cole to death for both murders. On appeal, Cole raises five (5) issues.

STATEMENT OF THE CASE

On or about July 8, 2005, Michael Jackson, along with Tiffany Cole, Alan Wade, and Bruce Nixon murdered Reggie and Carol Sumner. Cole, Jackson, and Wade were arrested on July 14, 2005, in Charleston, South Carolina. The Sumners' bodies were found two days later, on July 16, 2005, in south-east Georgia.

On August 18, 2005, a Duval County Grand Jury handed down a six count indictment charging Cole with two counts of first degree murder, two counts of armed kidnapping, and two counts of armed robbery. (TR I 2-4). Prior to trial the State deleted

that portion of the indictment that alleged the use of a weapon during the kidnappings and robberies. (TR I 147-149).

The defendants were tried separately and Cole's trial commenced on October 15, 2007. (TR V 1) On October 19, 2007, the jury returned a verdict of guilty on all six counts of the indictment. (TR XII 1441-1444, R1 133-138). The jury's verdicts as to the two murders were based upon premeditation and felony murder (with robbery and kidnapping satisfying the underlying felony component). (R1 133-134) Cole was adjudicated guilty by the court after the verdicts were returned. (TR XII 1444). A Motion for New Trial was filed on October 22, 2007. (R1 171-173).

Cole's penalty phase commenced on November 29, 2007. (TR XIV 1461) Upon completion of all the penalty phase evidence, the jury returned a 9-3 death recommendation for both first degree murders. (R1 189-191, TR XV 1777). A Spencer hearing was held on January 31, 2008, (R4 573) and, on March 6, 2008, the trial court imposed two death sentences for the first degree murders of Carol and James Sumner, life imprisonment for the kidnappings, and 15 years imprisonment for each count of robbery. (R1 275-284, R4 633-652). Following an initial sentencing order dated March 6, 2008, a corrected sentencing order was filed April 1, 2008. (R2 289-308, R3 465-484).

In the Corrected Order, the trial court found seven (7) aggravating circumstances: 1) previous conviction for a capital felony based upon the contemporaneous conviction for each of the two murders; 2) the homicides were committed during the commission of the kidnappings; 3) the homicides were especially heinous, atrocious, or cruel; 4) the homicides were committed in a cold, calculated and premeditated manner; 5) the homicides were committed for financial gain; 6) the homicides were committed to avoid arrest; and 7) the victims were particularly vulnerable due to advanced age or disability. (R3 465-477).

The four (4) statutory mitigating circumstances found were 1) Cole had no significant history of prior criminal activity, given some weight; 2) Cole was an accomplice to the homicide committed by another and her participation was relatively minor, given little weight; 3) Cole's age of 23, was given some weight; and 4) Cole acted under the substantial domination of another, given little weight. (R3 477-479) As to non-statutory mitigating circumstances, the trial court found, 1) Cole's minimal involvement, given little weight; 2) Cole's minimal criminal history, given some weight; 3) Cole's psychological problems, given little weight; 4) Cole's model behavior while incarcerated awaiting trial and the likelihood of good adjustment to prison life, given some weight; 5) Cole's family history, caring for her younger siblings and ill father, given

some weight; 6) Cole's history of alcohol and drug abuse and resulting personality changes, given little weight; 7) Cole's positive character traits, including a history of caring for others, good employment record, and expressions of concern and remorse for the victims, given some weight. (R3 479-482).

The notice of appeal was filed March 13, 2008.

STATEMENT OF THE FACTS

Appellee accepts Appellant's Statement of the Facts with the following additions:

Tiffany Cole, along with Michael Jackson, Alan Wade and Bruce Nixon, murdered Reggie and Carol Sumner, by burying them alive in a pre-dug grave, after they were tortured for PIN numbers for the Sumners' bank account.

The trial court in his sentencing order found the facts to be as follows:

> During the several days surrounding the Fourth of July, 2005, Alan Wade, Michael Jackson, Tiffany Cole, and Bruce Nixon, accosted, kidnapped, robbed, and buried alive Reggie and Carol Sumner. All four (4) were indicted for first degree murder, robbery, and kidnapping. Nixon pled guilty and agreed to testify. Jackson was tried during the summer of 2007. Wade and Cole were tried later that fall. By the time of the entry of the present order, Michael Jackson had been sentenced to death. Alan Wade had been sentenced to death. Bruce Nixon had been sentenced to forty-five (45) years.
>
> It should be noted at the outset that the trials of these defendants were substantially similar, if not

identical. It has been, therefore, difficult to particularize the sentencing orders. Although that effort has been made, passages of the orders, of necessity, are similar and, in some instances, are verbatim.

Prior to the summer of 2005, Tiffany Cole's father lived next door to Carol and James "Reggie" Sumner, the victims in this case. At the time, their residence was in Charleston, South Carolina. Although not intimately, Cole knew the Sumners well enough to have purchased an automobile from them. She also knew that the Sumners had moved to Jacksonville to establish a new residence. At some point prior to July 4, 2005, defendants Jackson and Cole traveled to Jacksonville and actually spent an overnight or two (2) with the Sumners at their home in the San Marco/Saint Nicholas area of Jacksonville.

Sometime prior to July 4, 2005, defendant Michael Jackson decided that the Sumners would be the easy targets of a raid on their bank accounts. He apparently believed they had significant funds from the sale of their home in Charleston. At the time, it was obvious that the Sumners were easy marks, as both were approximately 61 years old, were frail, and were in incredibly bad health.

Carol was suffering from liver cancer and at the time of her death had been undergoing debilitating chemotherapy. She suffered from diabetes, hepatitis, fibromyalgia and osteoporosis. The course of chemotherapy rendered her only minimally ambulatory. The pain medications she took frequently caused her to be drowsy.

Reggie had severe diabetes, was insulin dependent, and had bladder control issues. At the time of his death, he was confined to a wheelchair or, at best, a walker. He was almost completely immobile as a fall had broken one of the bones in his leg. He was bound up in a brace for that leg. His osteoporosis was worse than his wife's.

After considering the Sumners, Jackson invited his girlfriend Tiffany Cole, the defendant herein, into the planned crime. He also involved his close

friend, Alan Wade. Alan Wade invited his close friend, Bruce Nixon. A few days before the murders, all four (4) went to an area north of Macclenny, Florida, and just across the Florida/Georgia line, where they dug a hole approximately six (6) feet long by four (4) feet wide and six (6) feet deep. Nixon had stolen the shovels they used to dig the hole. Wade and Nixon were the primary diggers, assisted by Jackson. Cole held the flashlight.

At a local store, Wade, Jackson, and Cole purchased duct tape and disposable latex gloves, the one to be used for securing the Sumners, the other to be worn to preclude fingerprints. A toy, but lifelike, gun was also in their possession having been purchased before Cole and Jackson came to Jacksonville.

On the night of the murders, all four (4) defendants went together to the Sumners' residence in a Mazda rented by Tiffany Cole. Because the Sumners were likely to recognize them, Jackson and Cole remained outside in the Mazda. Alan Wade and Bruce Nixon, both wearing gloves, knocked on the door, and told the Sumners that they needed to use the phone. Wade carried the duct tape. Nixon carried the toy gun. When the Sumners let them in, Nixon produced the lifelike gun and commanded their silence and compliance. Wade grabbed Reggie and sat him down. The Sumners were bound, gagged, and blindfolded with the duct tape. Wade and Nixon then searched for any and all personal financial documents in the residence. Although they found bank account numbers and significant personal identification information, they could not locate the ATM account information that they were seeking.

Since the Sumners were subdued and secured, they called for Jackson's assistance. Jackson came in and eventually located the ATM information. However, he was not able to locate the ATM PIN numbers. The search of the Sumners' home having been for the most part successful, the Sumners were taken outside. Wade and Nixon locked them in the trunk of their own Lincoln Town Car, still bound and gagged with the duct tape. The Sumners' clearly identifiable car keys had been found during the search of the home.

In addition to the car keys, the defendants took assorted items including Reggie's coin collection. The foursome also took mail, bank records, and other materials that they hoped would contain personal information like account numbers and PIN numbers.

The two (2) vehicles then left the Sumners' neighborhood. Alan Wade drove the Lincoln with the Sumners bound and gagged in the trunk. Nixon was the passenger. Cole and Jackson were in the Mazda. Cole drove.

The two (2) vehicles proceeded to the pre-dug grave. However, as none of them had anticipated that the Lincoln might need fuel, they had to stop on the way at a gas station. The Sumners remained in the trunk. They did, however, anticipate the possibility that law enforcement might appear and planned accordingly. Per the plan, were the police to show up, Jackson and Cole in the Mazda would act as a decoy to lure officers away from the Lincoln.

When the two vehicles arrived at the grave, Wade and Nixon drove the Lincoln into the woods. Cole remained at the roadway with the Mazda. The Lincoln was backed up to the grave. Apparently there was a momentary consternation as to who was going to do what, but when the Lincoln's trunk was opened, it was discovered that the duct tape binding the Sumners had loosened and that they were moderately mobile. They were hugging each other.

Jackson immediately directed Nixon to bind them again tightly and to replace the duct tape which Nixon did. Nixon went to the road to be with Cole. Wade and Jackson remained at the hole with the Sumners. Though there is no direct evidence of exactly what happened, the Sumners were placed together into the grave, still alive, and the grave was filled in. Wade and Jackson then drove the Lincoln away from the hole. By that point, Jackson had a small yellow pad containing the PIN numbers to the Sumner's accounts.

According to the Medical Examiner, the already frail Sumners were buried alive. They suffered a slow and torturous death from the weight of the soil being

built up around them and inhaled into their lungs until they lost consciousness and expired.

Wade drove himself and Nixon in the Lincoln, followed by the others in the Mazda, to a location some 20-30 miles west of the burial site. There they wiped the Lincoln down and all four (4) left in the Mazda. Shortly after dumping the Lincoln, and probably no more than two (2) hours after burying the Sumners, Jackson began withdrawing funds from their bank accounts using the stolen ATM cards and PIN numbers. The Mazda was used at each stop. Jackson handled the transactions and the security numbers. As might be expected, Jackson's photograph was taken by the various ATM machines at which the group stopped.

During the few hours immediately after the murders, Wade and Cole went back to the same local store where they bought more gloves and Clorox. They returned to the Sumner's residence. While there was no direct evidence that they used the gloves and Clorox to attempt to clean the residence, one can certainly infer that they did so. While there, the two (2) did steal other items including, at least, the Sumners' computer tower. The tower was later pawned along with Carol's rings which had been taken during one of the visits to the Sumners' home. Cole handled the pawns.

Armed with their proceeds, the group spent one (1) or two (2) nights at local motels where they were videotaped by the security systems at each of the motels. It appears that Cole handled the check-ins. Using the proceeds from the thefts, the group also "went shopping" at local stores. Within a day or two (2), Nixon returned to his residence and the remaining three (3) departed for Charleston. They also "shopped" in Charleston.

In the meantime, the Sumners' family realized that they were missing and reported that to the Jacksonville Sheriff's Office. When officers and a family member arrived at their home, it was clear that something was amiss. There was indication that a full meal had been prepared, but seemingly uneaten. Carol's cell phone was still plugged in. Her day-planner, with which she was never without, was in the

residence. All of the medications for both Reggie and Carol were in place. It was obvious that family pets had not recently been tended. Reggie's cane, walker, and wheel chair were still in place. The surgical boots known to normally be worn by each were unmoved. The computer tower was missing.

Investigating officers found bank statements in the residence and contacted the bank. Bank personnel searched the Sumners' accounts and found a significant number of out of the ordinary thdrawa1s. The bank assisted investigators in acquiring ATM photos that were coupled with several of the transactions. The ATM photos were of Jackson (his identity then unknown to investigators) and the Mazda. BOLO's were put out by the JSO.

Media coverage of the disappearance of the Sumners eventually reached the defendants. Presumably recognizing that the ATM accounts had been, or were about to be suspended, Jackson had the temerity of actually calling the Jacksonville Sheriff's Office. Using personal information from the stolen mail and bank statements, Jackson called and claimed to be Reggie Sumner. By the time of Jackson's call, the Sumners had already been found to be missing and the JSO was alert enough to recognize that the caller was not Reggie Sumner.

The telephone number of the incoming call was recorded by JSO communication equipment. Investigating officers concocted a reason for a second conversation and called Jackson back. He reported that he had heard that he and his wife had been reported missing and that he wanted to relate that they were ok. He told the detectives that they had suddenly departed Jacksonville because of a death in Carol's family. Jackson reported that they had arrived in Delaware by plane and that they were staying at a particular community in Delaware. He used a fictitious name for the town. He used the name of a long closed Delaware airport to tell the JSO how they had "arrived" in Delaware. Although he was able to correctly relate certain personal information about the Sumners, such as Social Security numbers, Jackson was not able to give correct answers to information that Reggie Sumner would have known, such as the names

and numbers of family pets. During the course of this call, Tiffany Cole got on the line and posed as Carol.

Jackson asked the JSO to tell the Sumners' bank that they (the Sumners) were ok and to ask the bank to resume normal access to their ATM accounts. Investigating officers told him that they agreed to his request. They, of course, knew that they had already asked the bank not to suspend the account that [sic] so that they would be able to track usage of the ATM card and, hopefully, locate the defendants.

Probably about the same time that Jackson was posing as Reggie Sumner, Alan Wade called his good friend Bruce Nixon to alert him that the Sumners' Lincoln had been found. He suggested that Nixon should remain calm.

Armed with the cell phone number left when Jackson called them, the JSO sought the assistance of the United States Marshal's Office. The Marshals identified the number as belonging to Jackson. They then used cell phone tracking systems to attempt to locate the cell phone. In doing so, they were able to place the phone as having been used very close to the Sumners' residence, as well as very near the burial site. The phone was eventually located in Charleston, South Carolina.

Investigating officers were also able to cross-check with rental car companies and discovered that a Mazda had been rented to Tiffany Cole and that it was overdue. Through a GPS tracking system, the rental company was able to pinpoint where the vehicle had been. They were able to deduce that it had been at a point near the Sumners' residence. Other sources developed by the JSO, the North Charleston police department, and the U.S. Marshal's Service, indicated that the trio was likely to be at a particular motel in North Charleston, South Carolina. The Mazda was found parked not far from the rental company's office, but it had not been "turned in."

When officers arrived at the motel, they found Tiffany Cole and Michael Jackson checked into one room and Alan Wade into another. The keys to the Sumners' Lincoln were found in Wade's room. Found in the room

> with Jackson and Cole, were a suitcase containing mail addressed to the Sumners, the Sumners' bank records, their Social Security information, Reggie Sumner's wallet and his ID and driver's license, Carol Sumner's ID and driver's license, and a handwritten slip of paper bearing personal information about the Sumners. The slip also had the name of the fictitious town in Delaware which Jackson had used when he called the JSO claiming to be in Delaware. Searching officers also found a check drawn on the Sumners' account for $8,000 and made out to Alan Wade. Alan Wade's fingerprint was found on a piece of the mail addressed to Carol Sumner.
>
> The defendants were arrested by the North Charleston officers. Through other sources, Bruce Nixon was arrested as well. Not long after his arrest, he confessed his involvement to JSO and took officers to the scene of the burial site.

Corrected Sentencing Order Dated April 1, 2008, (TR III 464-472).

The State's Case

James Reginald (Reggie) Sumner (61) and Carol Sumner (61), both in poor health, moved from South Carolina near Charleston to Jacksonville, Florida, in February 2005. (TR VII 490, 493-95)

The Sumners ended up missing and as a result, Detective David Meacham contacted the Sumners' bank and inquired about their account usage. (TR VII 529, 533-534) Within hours of the murders, a number of ATM transactions totaling thousands of dollars occurred, starting on the morning of July 9, 2005. (TR VII 534, 536) Det. Meacham identified the ATMs used around north Florida and obtained security videos of the transactions.

(TR VII 534-535) The bank videos revealed that a white male made the ATM withdrawal transactions and, that person was not Reggie Sumner. (TR VII 539)

On July 12, 2005, Jacksonville Sheriff's Patrol Officer Vindell Williams, discovered the Sumners' Lincoln Town Car abandoned in Baker County, (TR VII 518-520), at the end of a dirt road near a small area of woods. (TR VII 520-521) On the same day the Lincoln was located, the Jacksonville Sheriff's Office received telephone calls from a male identifying himself as James R. Sumner. (TR VII 542) Det. Meacham returned the call and recorded their conversation. (TR VII 542-565)(State Exhibit 23) The male identified himself as James Sumner and a female, who the detective later spoke to, identified herself as Carol Sumner. (TR VII 542-543) They were later identified as Michael Jackson and Tiffany Cole. (TR VII 542-543) Jackson, pretending to be James Sumner, inquired about the "Sumners'" bank accounts because the ATM cards did not work. (TR VII 557)

The telephone cell call to the sheriff's office was tracked to a Charleston address of Jackson. (TR VII 566-567; 590-593) Based on the cell towers usage, the cell number was linked to calls made in Jacksonville, on July 8, 2005, in the vicinity of Reed Avenue, the Sumners' residence, between 9:49 and 10:15 p.m. (TR VII 596-TR VIII 606) One call at 12:50 a.m. was made using the cell tower in MacClenny, Florida. (TR VII 600; TR VIII 604-

606) Cell phone records recorded the call to Triangle Rental Car, where Cole rented the Mazda RX-8. (TR VII 567-568) The company's GPS tracking system in the car, when triggered on several occasions because the rental was overdue, showed the car was in Jacksonville near the Sumners' residence on the evening of July 8, (TR VII 568-569), and at an ATM machine where the Sumners' ATM card usage was photographed. (TR VII 569-570)

Michael Jackson, Alan Wade and Tiffany Cole were ultimately arrested in Charleston, South Carolina. (TR VIII 632-644) A search warrant executed for the two motel rooms used by the trio and Tiffany Cole's car, a green Chevy Lumina parked at the motel, revealed several items with the Sumners' name and property later identified as the Sumners'. (TR VIII 644-659) Det. Meacham traveled to Charleston where he interviewed Cole and obtained a recorded statement from her. (TR VIII 754-TR IX 909) (TR VIII 759) (State Exhibit 42)

A summary of the pertinent parts of that recorded statement follows:

Cole knew that Jackson and Wade were going to the Sumners' to get property and credit cards. (TR IX 830-831) Cole's story evolved, and upon further interrogation, she stated she did not know everything that took place inside the Sumners' house, but she knew the Sumners were bound with duct tape. (TR IX 843)

After leaving the house, Cole drove Jackson, and Wade and Nixon drove the Sumners' Lincoln, to a remote wooded area west of Jacksonville. On the way, Jackson talked with Nixon and Wade via cell phone, and on one of the calls, Cole overheard Jackson's mentioned that the Sumners were in the Lincoln's trunk. (TR IX 854-856) After Jackson secured the PIN numbers for the Sumners' bank accounts and the murders, they left the burial site in both cars and after a long drive, abandoned the Lincoln in Sanderson, Florida. (TR IX 858, 863-864, 866)

Cole never saw Carol or Reggie Sumner afterwards, (TR IX 890), and admitted she thought they were dead, and the bodies would never be found in the remote wooded area. (TR IX 890) Thereafter, Jackson accessed the Sumners' account and withdrew money from a number of ATM machines. (TR IX 878-881) Cole, Jackson and Wade, returned to the Sumners' home after the murders and stole coins, jewelry, and a computer. (TR IX 894) Cole was the one who pawned the computer and some of the Sumners' jewelry a day or two later. (TR IX 913)

They left Jacksonville a few days later and drove to Charleston, South Carolina. (TR IX 884-886)

While Cole admitted discussing taking property from Carol and Reggie Sumner, she claimed there were no discussions concerned killing anyone. (TR IX 887) Cole did however, purchase items needed during the days leading up to the crime,

including the duct tape and plastic wrap, (TR IX 871-874, 915-917), and latex gloves used during the crimes. (TR IX 917) When arrested in Charleston, a plethora of property including bank statements, mail, account numbers on a yellow pad, personal birth dates, SSNs information of the Sumners and their wallets and other personal items, were found strewn throughout the motel rooms registered in Cole's name.

An Associate Medical Examiner, Dr. Anthony Clark performed the autopsy on James Sumner and Carol Sumner, July 16, 2005. (TR X 1069, 1073-1101) Both were frail, in poor health and weighted little. (TR X 1086-87) They were clothed in either bed clothing or casual clothing and used adult diapers. (TR X 1077-1079, 1084) He noted that the Sumners' bodies were found together in a kneeling or sitting position at the time of burial. (TR X 1091-1092) In describing the manner of the Sumners' deaths, he observed that although their chests were being compressed by the weight of the dirt being shoveled into the grave upon them, and it was more and more difficult to take a deep breath, the Sumners were alive until their faces were totally covered and could no longer inhale oxygen. (TR X 1090-1091) "That's part of the mechanical asphyxiation, and then as the dirt goes higher and starts to plug up the face and cover the face and cover the nose and cover the mouth then you're going to get that suffocation portion of it, too." (TR X 1090-

1091) "They would have still been able to shallow, breathe as long as they're still getting air in there but they're not going to be able to breathe deep, and then as the dirt gets up to the face then they're going to be in more dire straits and then it's going to start to not be able to get any oxygen at all." (TR X 1091)

When autopsied, Carol Sumner weighed 90 pounds. Reggie Sumner weighed 105 pounds. (TR X 1084, 1077) The Sumners huddled together with their heads draped in a protective posture. (TR Vol. X 1092). As they huddled together, the pre-dug grave was filled with dirt. (TR Vol. IX 1183). The Sumners were still alive when the dirt reached their necks. (TR Vol. X 1091-1092).

The internal examinations of the bodies revealed mechanical obstruction of Carol's and Reggie's airways that caused suffocation or smothering. (TR X 1089-1090) Dirt was found in their airways, mouth, throat, in the trachea and esophagus. (TR X 1093) Carol and Reggie Sumner were alive when placed in the hole and buried alive with dirt. (TR X 1091-1097) Dr. Clark testified that the weight of the dirt on them would have compressed the diaphragm, making breathing very difficult. (TR X 1090-1091) As the dirt reached their mouths and noses, the soil totally obstructed their airways. (TR X 1090-1091) While they might have been unconscious within some seconds, of their

faces being completely covered (TR X 1100), death would have occurred in 3-5 minutes. (TR X 1101)

The Sumners died as a result of both suffocation and mechanical asphyxiation. Suffocation occurred as the Sumners inhaled dirt into their noses and mouths. (TR X 1091). Mechanical asphyxiation occurred as the weight of the dirt covering their bodies compressed the Sumner's lungs and abdominal area making it impossible for them to take sufficient breaths to get air into their lungs. The homicide of Carol and Reggie Sumner was by mechanical asphyxia and smothering. (TR X 1099-1100)

Bruce Nixon admitted he participated in the murder of the Sumners in July 2005, with Wade, Jackson and Cole. (TR IX 963-964)

A day after he assisted in digging the hole, Nixon learned they were getting money from the Sumners' bank accounts and then killing the Sumners. All four of them discussed getting rid of the Sumners, (TR IX 974-976), but he had no idea what the other three may have discussed about killing the Sumners before that time. (TR X 1059) Moreover, he testified when asked about backing out of the plan when it became apparent the Sumners would be killed, that no one, including Cole, backed out. (TR X 975) Jackson had discussed killing the Sumners by injecting them with a lethal dose of some medicine. (TR X 1048-1049)

Nixon testified Cole knew Carol and Reggie Sumner had doctors' appointments, because Cole had been calling them. (TR IX 977) There was no specific plan what to do once inside, however, they had prepared for the robbery, they had fake guns, Wade had the duct tape to bind the Sumners and they knew the Sumners' schedules. (TR X 977-978) Once inside they were to tie up the Sumners and then call Jackson. (TR X 1050)

They got into the Sumners' home about 10:00 p.m., stating Wade and Nixon needed to use the telephone. (TR IX 980) Wade held Mr. Sumner and told him to get his bank statements. Nixon displayed the fake gun and told the Sumners to sit down and tied them with the duct tape. (TR X 980-981) The Sumners complied with the instructions, (TR IX 981) after Nixon and Wade told them they would not be hurt. (TR IX 981) When Jackson entered the house, he and Wade searched for property, credit cards, and banking information. (TR IX 983) Jackson, Nixon and Wade finally placed the Sumners in the trunk of their Lincoln. (TR IX 983-985)

When they reached the wooded area near the burial site, they stopped the Lincoln in front of the gate leading into the woods; the Mazda stopped on the road. (TR IX 988) When Nixon opened the trunk, Jackson got angry because some of the duct tape covering the Sumners' faces and eyes came off. (TR IX 988) Jackson told Nixon to re-tape them. (TR X 1058) Jackson said

it was a "mind thing" for him -- he did not want to see their eyes when he killed them. (TR IX 988-990) Once they were at the hole, Jackson told Nixon to go back to the road with Cole. (TR IX 990-991)

Less than an hour later, they drove out of the woods to the Mazda where Cole was located. (TR IX 991) When Jackson got into the Mazda with Cole, (TR IX 991-992), he had a yellow note pad with the PIN codes obtained from the Sumners for the accounts. (TR IX 996) They abandoned the Lincoln in Sanderson, after Jackson, Wade and Nixon wiped down the car, leaving the four shovels in the trunk. (TR IX 992-993) Even before getting to their hotel, Jackson used an ATM and obtained money from the Sumners' account. (TR IX 997)

Nixon left the next day with $200 and prescription medications, including pain pills, taken from the Sumners. (TR IX 999) Although Nixon lied to the police initially, he later admitted his involvement and returned to the burial site with the police. (TR X 1005-1006)

The record reflects Nixon testified he pled guilty to a sentence of 52 years to life imprisonment; however the actual sentence was to be determined by the trial judge. (TR X 1006-1008) He answered that under the sentencing guidelines applicable 52 years was "the bottom of those guidelines", "up to life imprisonment"; however he was never promised a specific

sentence. (TR X 1007) Additionally, the State inquired whether Nixon was hoping to influence the trial judge by cooperating in this case. (TR X 1008) He hoped that he would not receive a life sentence, but knew he could get a life sentence without parole. (TR X 1008-1009)

On cross-examination, defense counsel asked Nixon about the possible sentence he could receive, specifically whether the better he testified; the judge could impose a sentence of less than 52 years.

> "[MR. TILL]: And Judge Weatherby the better you testify he could go down below that 52 years to life, can't he?"

(TR X 1011) The prosecutor objected, and the trial judge in the presence of the jury, stated, "That's absolutely not the case, Mr. Till." (TR X 1011)

Defense counsel raised the terms of any sentencing agreement at a later bench conference, where the prosecutor and the judge discussed whether the trial court had the latitude to sentence below the 52 years guideline's base. (TR X 1042-1044) Defense counsel was then permitted to ask Nixon about the agreement allowing a sentence less than 52 years. (TR X 1045) Nixon was sentenced to 45 years in prison. (TR III 465) That colloquy reads as follows:

> MR. TILL: Judge, I have one other -- while we are up here, in Richard Kuritz' trial -- are you telling me that he can't get below 52 years? He testified in

Michael Jackson's case that he could go below 52 and that stunned me when you said you ain't going into that, and that's in the record.

MR. MESSORE: He said it's not possible he said on the record.

MR. TILL: That's in the Michael --

MR. MESSORE: Right.

MR. TILL: You said it's not possible but in Michael Jackson's case he testified to it. I was just --

THE COURT: What's the agreement?

MR. PLOTKIN: Did he say that in Jackson's case?

MR. MIZRAHI: What? I think he thinks he can go below 52 years. Your question which was incredibly objectionable how he testifies what he is going to sentence him to and that's a whole different question.

THE COURT: He can get less than 52 years?

MR. MIZRAHI: Yes.

MR. PLOTKIN: If I could -- if I could interject. I think Mr. Till can ask him if he thinks he can get less than 52 years. I think that's a relevant question.

MR. MESSORE: But he can get less than 52 years.

MR. TILL: Yeah.

THE COURT: Is that part of the agreement?

MR. MIZRAHI: The agreement is he plead straight up. There is no hard floor. It's a guideline sentence.

MR. MESSORE: Hold on one second. Let me just make it absolutely clear. He plead to a sentence of guidelines 52 to life. The state can make a recommendation based on his testimony in all these trials that he get below that and you can either go with it or not go with it, right?

THE COURT: That's not the way I remember it. All right. You can clear it up.

MR. MESSORE: It would matter because that ridiculous.

MR. PLOTKIN: But it was also the way he asked the question
which was objectionable.

THE COURT: What's the relevance to the – I will let you go back and question -- go over that because I thought that --

MR. TILL: That's okay.

THE COURT: -- he couldn't get anything less than 52. What's the relevance of the tattoos, Quentin?

MR. TILL: I will go on to something else.

THE COURT: Okay.

(Sidebar discussion concluded.)

BY MR. TILL:

Q Mr. Nixon, did you previously tell us that the tape over the eyes of the Sumners, maybe what you testified to, but also the additional reason was so that they could not see Michael Jackson?

A Yes, sir.

Q Huh?

A Yes, sir.

Q Okay. If I may address one other issue. Under your plea agreement and after you testify and you are sentenced you can get below the 52 years and life in prison, could you not?

A Whatever the Judge want to give me. I am not real sure.

Q It's up to the Judge, isn't it?

A Yes, sir.

Q But Mr. Chipperfield told you that that's a possibility, isn't it?

A He said it's a possibility but probably won't happen. That's what he said.

Q Possibility -- a possibility after you testify, is that right?

A It's a possibility.

Q And you would like that, wouldn't you?

A Yeah. Yes, sir.

(TR X 1042-1045)

The Defense Case

Tiffany Cole testified about her meeting Michael Jackson and the events leading to the homicides:

During the weekend of May 14-15, 2005, Cole and two friends went to Myrtle Beach, (TR X 1162), where she met Michael Jackson. He ended up joining Cole and her friends during the weekend, and subsequently, on June 4, 2005, asked Cole to go the Jacksonville to see his friend, Alan Wade. (TR X 1164-1165) Driving Cole's green, Chevrolet Lumina to Jacksonville, they spent some time with Wade, and they returned to Charleston on the same day. (TR X 1165-1166) On June 13, 2005, Jackson again showed up with a large amount of money, as much as $10,000, purportedly from the sale of some property. (TR X 1167-1168, 1169) Jackson gave Cole $1000 to rent a car, a Mazda RX-8.

During this time, Alan Wade came to Charleston on the train. (TR X 1167-1168) Jackson and Wade left together a couple of times, and Jackson returned with more money, another $5000. (TR X 1168-1169) Cole, Jackson and Wade then took a week-long trip to Myrtle Beach where they partied, shopped and spent a lot of money. (TR X 1169-1172) Jackson and Wade bought toy pistols. (TR X 1171-1172)

After spending a couple of days in Charleston, the three drove back to Jacksonville. (TR X 1172-1173) Wade returned to his home in Jacksonville, and Cole and Jackson had money for two hotel nights. (TR X 1172-1173) In order to stay one more night before returning to Charleston, Cole contacted Carol Sumner who had invited her to visit her in Jacksonville. (TR X 1157-1162, 1174) Cole and Jackson spent one night in the Sumners' spare bedroom. (TR X 1174-1178) During the stay, Carol Sumner happened to mention to Cole, that they had made a profit of $99,000 on the sale of their house in Charleston. (TR X 1176) Although Jackson was not in the room, the door was open, and Cole thought Jackson overheard the conversation. (TR X 1177)

The day they returned to Charleston, Thursday, June 30, 2005, Jackson left Cole, and took the Mazda back to Jacksonville. On Sunday, July 3, 2005, Jackson returned to Charleston, driving the car with Alan Wade. (TR X 1182) On Monday, July 4, 2005, Jackson, Wade and Cole made another trip

to Jacksonville. (TR X 1184-1185) Jackson was expecting more money, and he talked about starting a business in Jacksonville. He told Cole the trip would be for one night to allow him a day to look at a building that was for sale. (TR X 1184-1185) After the trip began, Cole learned that Jackson only had $20 to make the trip, so Cole started writing bad checks to fund the trip expenses. (TR X 1184- 1185) On July 6th, Wade and Jackson left Cole, and went purportedly, to check on the Sumners. (TR X 1189-1190) While driving around that evening, July 6, Cole overheard Jackson and Wade talking about getting some property, and overheard Wade talking to someone on the cell phone about digging a hole. (TR X 1190-1191) Cole asked Jackson for an explanation, and he told her they planned to get money and property from the Sumners' house. Cole said that was the first she heard anything about a theft. (TR X 1192-1193) She told Jackson that she did not want anything to do with taking property from the Sumners. (TR X 1193)

Later in the evening July 6, they all drove to the MacClenny area where they picked up Bruce Nixon. (TR X 1193-1194) There was more discussion about obtaining money and property. (TR X 1195) Nixon gave Cole directions which led them to a remote wooded area near where he used to live. (TR X 1195-1196) Upon arrival in the wooded area, at Jackson's directions, Wade and Nixon dug a hole, (TR X 1196-1197) and Cole

held a flashlight. Cole stated that she assumed the hole would be used to secret some stolen property; claiming she had no idea the hole would be a grave. (TR X 1197) As they drove away from the site, Wade asked Jackson if Nixon could "get in on the deal." (TR X 1198)

Carol Sumner and Cole spoke on July 7, (TR XI 1205-1206) about the location of a "smartcard" for the cable television receiver for the spare bedroom where Cole and Jackson had stayed. (TR XI 1205-1206) Cole did not know anything about the device and told Carol Sumner she had not seen it. (TR XI 1206) Cole claimed she did not call the Sumners to initiate a conversation. (TR XI 1205)

On July 7, Jackson, Wade, Nixon and Cole went shopping. (TR X 1199) On July 8, at 8:36 p.m., they bought duct tape and a large roll of plastic wrap from a Home Depot Store. (TR XI 1208-1210) Although Jackson selected these items, Cole paid the bill. Cole said she did not know why Jackson bought these items. (TR XI 1210)

Cole drove Jackson, Wade and Nixon to the house that night, July 8. (TR XI 1211) Cole dropped Nixon and Wade at the Sumner's house, and Cole and Jackson waited down the road. (TR XI 1213) After Nixon and Wade entered and tied up the Sumners, Jackson was called via walkie-talkie on the cell phones. Cole then drove Jackson back, and he entered the house. (TR XI 1213-

1214) Cole waited in the car near the house, (TR XI 1214) but drove away when she saw someone walking nearby. (TR XI 1214) Finally, Jackson called her on the cell phone, cursing her for driving away, and told her to come back. (TR XI 1214-1215) When she drove back to the house, Jackson came to the car and placed a white trash bag in the car. (TR XI 1215) Cole then saw Wade backing the Sumners' Lincoln Town Car down the driveway. (TR XI 1219)

Cole driving the Mazda, and Wade and Nixon in the Lincoln, left Jacksonville and headed on I-10 toward MacClenny. During the drive, Jackson called Nixon in the Lincoln, and talked about the Sumners being in the trunk of the Lincoln. Jackson told Cole that the Sumners were in the trunk. (TR XI 1223) Although scared, she continued to drive to the remote, wooded area. (TR XI 1223-1227)

When they reached the wooded area, Jackson told Cole to park the car and stay on the roadway. (TR XI 1227-1229) Wade pulled the Lincoln up to the gate area leading into the woods. (TR XI 1229) While she was near enough to see Wade, Nixon and Jackson open the trunk of the Lincoln, she could not see what was in the trunk from her location at the road. Nixon took over driving the Lincoln back into the woods, and she lost sight of the car. (TR XI 1229-1230)

Nixon came to check on her, and then walked back into the woods. (TR XI 1232-1233) Alan Wade came to her location and, told her Jackson had obtained the PIN codes from the Sumners. (TR XI 1234) Cole admitted that the purpose in taking the Sumners into the woods was to get the PIN codes. (TR XI 1232-1233) After Jackson got the codes, Jackson pushed the Sumners in the hole. (TR XI 1234-1235) Cole did not think Wade knew Jackson was going push them in the hole. (TR XI 1234-1235)

Following the murder of Carol and Reggie Sumner, the four returned to Jacksonville, after ditching the Lincoln. Jackson proceeded to utilize the Sumner's ATM card and withdrew funds from the Sumner's account. (TR XV 880) Cole admitted she and Jackson and Wade went through the Sumners' property when they returned to the motel after the murders, and then returned to the Sumners' home and stole more items. (TR XV 879)

Subsequently, Jackson, Wade and Cole went back to Charleston. (TR XI 1137) Cole admitted she talked to Detective Meacham on the telephone pretending to be Carol Sumner. (TR XI 1237) After her arrest, Cole said she tried to cooperate with Detective Meacham and gave him the best information she could about what happened and how to find the burial site. (TR XI 1239) Cole testified she felt bad about what happened to the Sumners, (TR XI 1246-1247) but, did not knowingly participate in

the plan to kidnap, rob and murder the Sumners. (TR XI 1241-1242)

The Penalty Phase

At the penalty phase of the trial, two victim impact witnesses -- Reggie Sumner's sister, Jean Clarke and his sister-in-law, Carolyn Sumner testified. (TR XIV 1478, 1484) Carolyn Sumner also read a statement from Carol Sumner's daughter, Rhonda Alford. (TR XIV 1484-1488) The defense called Tiffany Cole's mother; a prison classification officer; two jail correctional officers; a friend met in jail; other relatives, Cole's aunt and two cousins; and a psychiatrist, Dr. Earnest Miller. (TR XIV 1489, 1596, 1579, 1603, 1612, 1622, 1626, 1631, 1634) Detective David Meacham was called in rebuttal. (TR XV 1702)

Shirley Duncan, Cole's mother testified that she 16 years old and unmarried when Cole was born on December 3, 1981, in Charleston, South Carolina. (TR XIV 1489, 1491, 1541) Cole's father David Duncan, was imprisoned at the time of her birth. (TR XIV 1492) As a result Cole and her mother moved a number of times and required government assistance for support for a time. (TR XIV 1492-1493) Her parents did marry, (TR XIV 1494-1496) and Cole's brother was born when she was five. (TR XIV 1541) David Duncan provided financial support for the family, but he had little interest in Cole or her younger brother, D.J. (TR

XIV 1496) Her parents were divorced, and Cole was shuttled back and forth between them. (TR XIV 1528) Her mother met another man, Rick, when Cole was twelve. (TR XIV 1498, 1541) A younger stepbrother came along from this relationship. (TR XIV 1498)

Although a good student with good grades, Cole dropped out of tenth grade and ran away from home. (TR XIV 1543, 1550, 1555-1556) Subsequently, she obtained her GED. (TR XIV 1517) Cole dated, however her second boyfriend, Wayne, was abusive. (TR XIV 1536, 1543) Brian, her boyfriend before Jackson, suffered from a seizure disorder leaving him on disability. (TR XIV 1528-1529, 1543) When they broke up, in April or May of 2005, Cole was heartbroken. (TR XIV 1543) Additionally during this time, her father was suffering with terminal cancer and had become weak and dependant. She cared for him. (TR XIV 1429-1530, 1543)

After leaving school, Tiffany worked at a number of jobs. (TR XIV 1533-1537) Cole's mother displayed a number of pictures depicting her daughter with family and friends, (TR XIV 1490-1539) and read letters from others. (TR XIV 1544-1547)

Dr. Earnest Miller, a psychiatrist, evaluated Tiffany Cole. (TR XIV 1641 - XV 1697) As to any issues of competency to stand trial and insanity at the time of the offense, Dr. Miller found her competent and sane. (TR XIV 1647-1648) Miller did find that Cole suffered from mental problems, but there was no

evidence of a psychotic disorder. (TR XIV 1648-1653) Cole abused drugs and alcohol and suffered from substance dependency. (TR XIV 1651-1652) She was chronically depressed, (TR XIV 1652), and had a personality disorder, not otherwise specified.[1] (TR XIV 1653-1654, TR XV 1683-1685) His diagnosis also included the "lifelong stressors" in Cole's life history that shaped her. (TR XIV 1655) Dr. Miller believed Cole's adaptive functioning was relatively good, given the several mental problems she suffered. (TR XIV 1655)

Cole's mental health problems, (TR XV 1660-1695) were premised upon:

1. Her abnormal dependency problems and masochism which came from experiences she had early in life. (TR XV 1660)

2. Her parents divorced during her early, critical formative years, never feeling support nor a home. (TR XV 1660)

3. She was a surrogate mother to her brothers and took care of them, (TR XV 1660-1661), thus she never had a childhood. Her stepfather's abuse of her younger brother and the puppy incident which Dr. Miller opined had a profound impact on her. (TR XV 1661)

4. Cole's natural father sexually molested her at 16 or 17, (TR XV 1661), about the time she ran away from home. (TR XIV 1543, 1550, 1555-1556; TR XV 1684) The betrayal of trust caused feelings of confused, guilty and dirty. (TR XV 1663-1664) She told no one except her mother about the sexual molestation. (TR XV 1661)

[1] The personality disorder was based on an abnormal dependency on others; "masochism" by seeking things that caused her problems in life; "cluster B" features that lead to failures of conscience to stop behaviors.

Her mother did not believe her, resulting in a feeling of no parental support. (TR XV 1661)

5. Her low self-esteem and guilt, left her entering abusive relationships with men. (TR XV 1661-1665)

While minimizing the testimony about a happy childhood presented by some of Cole's relatives, (TR XV 1662-1663), Dr. Miller opined that parents who raise children in an abusive environment do not usually come forth and talk about it. (TR XV 1663; 1685)

Dr. Miller viewed Cole's use of street drugs (Xanax, Valium, street drugs, cocaine) and alcohol as self-medication for psychological pain. (TR XV 1665-1666) Dr. Miller opined, given her low self-esteem, her drug supplier, Brian, provided some acceptance and leadership in that he could get drugs. (TR XV 1666) She got away from drugs, but Dr. Miller was unimpressed since Cole did not receive treatment for any underlying dependency. (TR XV 1666-1667)

Dr. Miller observed Cole's relationship with Michael Jackson and the murders of Carol and Reggie Sumner, (TR XV 1667-1670), was a part of her pathological need to be in abusive relationships. (TR XV 1667) Based upon his knowledge of the crimes and Cole's personality pathology, Dr. Miller noted she was a follower and would not initiate the crimes. (TR XV 1668)

Acknowledging that Cole unquestionably followed and pushed aside her conscience, (TR XV 1668) Dr. Miller found no diagnosis termed a major conscience problem. (TR XV 1669) Dr. Miller did not conclude Cole was trying to rationalize her conduct; she could not discern how she could be involved with an abusive person. (TR XV 1669-1670) Cole had no insight as to her role in terms of her "personality disorder." (TR XV 1670)

SUMMARY OF THE ARGUMENT

ISSUE I: Cole argues that the trial court improperly commented on the evidence when during cross-examination by defense counsel of Bruce Nixon, after sustaining the prosecution's objection, the court stated "That's absolutely not the case, Mr. Till." Not only was the remark not a comment on the evidence but the remark was neither an admonishment as alleged nor prejudicial. Defense counsel was able to question Nixon regarding the sentence that might be imposed as a result of Nixon testifying against Cole.

ISSUE II: Cole alleges the trial judge erred in erroneously admitting photographs of Cole, Jackson and Wade partying in Myrtle Beach prior to the murders. The photographs were part of a multitude of evidence retrieved from the motel room where Cole and Jackson were staying when they were arrested. The prosecutor's mention of the photographs during

his closing to show Cole's possible motive for the murders was not error.

Additionally any error in the admission of these innocuous photographs would be harmless beyond a reasonable doubt.

ISSUE III: Cole's first issue as to the imposition of the death penalty is groundless. She avers the trial judge erred in sentencing her to death following the 9-3 jury recommendation, when co-defendant Nixon only received a term of years. Because Nixon pled guilty to second degree murder, under the law, his relative culpability for these murders has already been determined to be less than Cole's culpability. Cole's sentences of death should be compared to the death sentences received by co-defendants Michael Jackson and Alan Wade. When compared to their sentences, based on the aggravating and mitigating factors found by the trial court, death is the appropriate sentence for her participation in these cold-blooded murders.

ISSUE IV: The two aggravating factor challenged by Cole, to-wit: HAC and avoid arrest were properly found by the trial court. Cole participated in all aspects of the murders with the exception of shoveling dirt into the faces of her victims. Beyond per adventure Cole's actions fell within conduct contemplated under the HAC aggravator. As to the avoid arrest aggravator, the record clearly shows that the Sumners knew her,

and that the sole motive for the murders was witness elimination to insure she and Jackson not be identified and apprehended.

Even assuming error with the inclusion of one or both of the challenged aggravating factors, the remaining five (5) aggravating factors, including CCP, makes these murders one of the most aggravated criminal events, even with Cole's mitigation found by the trial court.

ISSUE V: Cole asserts various constitutional challenges to her sentences to death based upon Ring v. Arizona, 536 U.S. 584 (2002) and its progeny. Every permutation of Ring, raised by Cole has been resoundingly rejected by this Court. She is entitled to no relief on this claim.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT COMMITTED REVERSIBLE ERROR WHEN IT ADDRESSED DEFENSE COUNSEL DURING CROSS-EXAMINATION OF THE STATE WITNESS BRUCE NIXON CONCERNING THE PARAMETERS OF NIXON'S POSSIBLE SENTENCE UNDER HIS PLEA AGREEMENT.

In this case, the State presented the eyewitness testimony of Bruce Nixon. Nixon testified that Jackson planned and, along with Alan Wade, Tiffany Cole and Bruce Nixon, they executed the robbery, kidnapping and murders of Carol and Reggie Sumner.

During the course of Nixon's testimony, the defense on cross-examination, asked Nixon about any sentencing agreement to be

imposed in exchange for testifying. The State objected and the court stated: "That's absolutely not the case, Mr. Till." (TR X 1011) Based on this brief statement, Cole asserts that the court's "improper admonishment of defense counsel in the jury's presence" misled the jury, and equates to a denial of Cole's right to due process and a fair trial, citing Hamilton v. State, 109 So. 2d 422, 424 (Fla. 3rd DCA 1959). (IB 42-42)

Cole specifically complains that, "First, the remarks were emphatic, immediate and pointedly directed at counsel…."

First, it is rather difficult to discern how a cold record can evidence anything more than the plain meaning of the words used in context with the colloquy reported. In this case, the State pointedly, and in anticipation of the defense asking questions about Nixon's plea and any agreement regarding testifying against co-defendants, questioned Nixon on direct about any possible sentence for these crimes. After reporting that he, Nixon, took responsibility for his role in these murders, he was asked to tell the jury what (sentence) "he plead guilty to?" (TR X 1006)

A 52 to life.

Q 52 to life. That's 52 years to life?

A Yes, sir.

(TR X 1006)

Q So 52 years is the bottom of those guidelines?

A Yes, sir.

Q And then it's up to life in prison?

A Yes, sir.

Q Who will decide your sentence?

A Judge Weatherby.

Q Judge Weatherby?

A Yes, sir.

Q Have I ever promised you a specific sentence?

A No, sir.

Q Has Mr. Plokin ever promised you a specific sentence?

A No, sir.

Q So what is your understanding about whether or not you could receive a life sentence?

A Something I am going to have to deal with.

Q Do you know that you could get a life sentence?

A Yes, sir.

Q And you know Judge Weatherby could say I hereby sentence you to life?

A Yes, sir.

(TR X 1007-1008)

Q Now, Mr. Nixon, are you hoping that your cooperation is taken into account when Judge Weatherby sentences you?

A Yes, sir.

Q So you know that he may not sentence you to life.

A Yes, sir.

Q But do you understand that you could get that life without parole sentence?

A Yes, sir.

(TR X 1008-1009)

Within minutes -- on cross examination, defense counsel predictably, started his examination with questions as to the sentence "agreed to." (TR X 1010-1011)

Q Let's talk about this plea agreement, plea of guilty and negotiated sentence. You were arrested a short time after the murders back in July of 2005, is that right?

A Yes, sir.

Q It's not until March 12th, 2007 that you finally work out some type of deal with your lawyer and Mr. Mizrahi, is that right?

A Yes, sir.

Q Now I have been hearing this 52 years to life. Long period of time, isn't it?

A Yes, sir.

Q You had Alan Chipperfield as your lawyer, did you not?

A Yes, sir.

Q Very good lawyer, isn't he?

A Yes, sir.

Q And he told you what that 52 years to life really means, didn't he?

A Sir?

Q He told you what that 52 years to life really meant, didn't he?

A Yes, sir.

Q And Judge Weatherby the better you testify he could go down below that 52 years to life, can't he?

MR. MIZRAHI: Objection, Your Honor.

THE COURT: That's absolutely not the case, Mr. Till.

BY MR. TILL:

Q **Your sentence is to be determined by the Judge, is that right?**

A **Yes, sir.**

Q **And no one has promised you any specific sentence, have they?**

A **No, sir.**

Q And rather than pleading to first degree murder they allowed you to plead to second degree murder, is that right?

A Yes, sir.

Q Which is a lesser included charge of first degree murder --

A Yes, sir.

Q is that right? And your sentence will be deferred until they see how you do, how you testify, is that right?

MR. MIZRAHI: Objection, Your Honor.

BY MR. TILL:

Q How come you are not -- how come you are not sentenced already?

A I don't know. I really don't.

Q You don't know? I understand that my sentencing will be deferred. I will agree to provide truthful testimony regarding this case in any and all proceedings. You won't be sentenced until at least after Alan Wade is -- his trial is finished, will you?

A No, sir.

Q Prior to entering your plea for this July, 13 2005 crime spree you met with your lawyers or lawyer, is that right?

A Yes, sir.

Q You met with the prosecutors, is that right, Mr. Mizrahi?

A What date is that?

Q After you were arrested.

A I ain't never meet with the state attorney right after I was arrested.

Q No. I don't mean right after. I am talking -- I am talking between 2005 and the time you entered into this plea agreement.

A In '07.

Q In '07?

A Yes, sir.

Q In that time period you have talked to your lawyer. Of course you have.

A Yes, sir.

(TR X 1010-1013)

The objection and the court's remark to defense counsel, occurred timely following defense counsel's question. Based on

the colloquy involving Nixon's possible sentence, the court's remark was neither prohibitive nor prejudicial.

Second, the trial court was not factually wrong as urged by Cole. The question as presented was: "And Judge Weatherby the better you testify he could go down below that 52 years to life, can't he?" was open ended and not related to Nixon's sentencing plea. The jury was provided neither improper information nor any remark equating to a comment on evidence. In fact when revisited at an unrelated side bar conference, the court after hearing additional facts allowed defense counsel to re-inquire.

That colloquy resulted in the jury being provided basically the same information--that if Nixon cooperated by testifying against his codefendants, Nixon might get a lighter sentence. (TR X 1045) The jury was informed that his guideline's sentencing agreement was between 52 years and life imprisonment. They were told that if he testified he would be eligible for a lighter sentence. The trial court's remark under scrutiny here, was a correct statement of the trial court's belief, that the sentence would not be below the minimal guideline of 52 years. And in fact, until the matter was rekindled at an unrelated bench conference, defense counsel did nothing to correct any "perceived misunderstanding." Certainly neither the tone nor the actions of the trial court or defense counsel, based on the cold record, would suggest prejudice to the defense. Moreover

as evidenced in the colloquy that follows, defense counsel after asking his questions, certainly would not have wanted to diminish the impact of the testimony by asking the court for clarification of the trial court's previous remark.

> MR. TILL: **Judge, I have one other -- while we are up here, in Richard Kuritz' trial -- are you telling me that he can't get below 52 years? He testified in Michael Jackson's case that he could go below 52 and that stunned me when you said you ain't going into that, and that's in the record.**
>
> MR. MESSORE: He said it's not possible he said on the record.
>
> MR. TILL: That's in the Michael --
>
> MR. MESSORE: Right.
>
> MR. TILL: You said it's not possible but in Michael Jackson's case he testified to it. I was just --
>
> **THE COURT: What's the agreement?**
>
> **MR. PLOTKIN: Did he say that in Jackson's case?**
>
> **MR. MIZRAHI: What? I think he thinks he can go below 52 years. Your question which was incredibly objectionable how he testifies what he is going to sentence him to and that's a whole different question.**
>
> **THE COURT: He can get less than 52 years?**
>
> **MR. MIZRAHI: Yes.**
>
> **MR. PLOTKIN: If I could -- if I could interject. I think Mr. Till can ask him if he thinks he can get less than 52 years. I think that's a relevant question.**
>
> **MR. MESSORE: But he can get less than 52 years.**
>
> **MR. TILL: Yeah.**

THE COURT: Is that part of the agreement?

MR. MIZRAHI: The agreement is he plead straight up. There is no hard floor. It's a guideline sentence.

MR. MESSORE: Hold on one second. Let me just make it absolutely clear. He plead to a sentence of guidelines 52 to life. The state can make a recommendation based on his testimony in all these trials that he get below that and you can either go with it or not go with it, right?

THE COURT: That's not the way I remember it. All right. You can clear it up.

MR. MESSORE: It would matter because that ridiculous.

MR. PLOTKIN: But it was also the way he asked the question which was objectionable.

THE COURT: What's the relevance to the – I will let you go back and question -- go over that because I thought that --

MR. TILL: That's okay.

THE COURT: -- he couldn't get anything less than 52. What's the relevance of the tattoos, Quentin?

MR. TILL: I will go on to something else.

THE COURT: Okay.

(Sidebar discussion concluded.)

BY MR. TILL:

Q Mr. Nixon, did you previously tell us that the tape over the eyes of the Sumners, maybe what you testified to, but also the additional reason was so that they could not see Michael Jackson?

A Yes, sir.

Q Huh?

A Yes, sir.

Q Okay. If I may address one other issue. Under your plea agreement and after you testify and you are sentenced you can get below the 52 years and life in prison, could you not?

A Whatever the Judge want to give me. I am not real sure.

Q It's up to the Judge, isn't it?

A Yes, sir.

Q But Mr. Chipperfield told you that that's a possibility, isn't it?

A He said it's a possibility but probably won't happen. That's what he said.

Q Possibility -- a possibility after you testify, is that right?

A It's a possibility.

Q And you would like that, wouldn't you?

A Yeah. Yes, sir.

(TR X 1042-1045)(Emphasis added)

Third, Cole suggests that because the jury knew the trial court would be the sentencer, his remark somehow would have greater impact. Clearly the record is not supportive of this notion. The most important information to be conveyed was-- if Nixon testified against Cole his sentence might be lighter. Nixon stated that his defense counsel told him that that was a possibility, however there was not any agreement to that and, Nixon admitted he was not relying on it. The jury heard Nixon

testify more than once that he had no reason to believe his sentence would be something other than 52 years to life.

Fourth, there was no evidence that based on the afore-noted colloquies, the trial court's earlier comment "carried greater credibility." While ultimately, Nixon was sentenced below the guideline's range to 45 years for the murders, the jury did not know what sentence he received. Moreover, based on everything the jury heard from Nixon's testimony re: sentence to be imposed, the jury only knew he was hoping for a lighter sentence—which is exactly the point defense counsel made. The notion that the court rebuked defense counsel is well beyond what actually occurred on this record.

Lastly, Cole argues that the "critical" importance of the trial court's remark, had to do with the "impeachment of Bruce Nixon. . . a key witness for the state." (IB 46)

Nixon was a key State witness. He was able to detail what happened when the Sumners were duct taped in their house and explain what occurred in placing them in the trunk of the Lincoln prior to their murders. He was the only co-defendant to testify against Cole and, was instrumental in clarifying what Cole's role was in the murders. However, having acknowledged his relevance to the State's case, that truth, did not elevate the value of his testimony or diminish the defense's ability to

impeach his testimony. (See Nixon's cross-examination TR X 1010-1057)

Defense counsel on cross-examination, challenged Nixon's motives to testify against Cole based on "finally" working out a deal with the State, almost two year after the murders, on March 12, 2007. (TR X 1010) The jury knew the reason Nixon plead guilty to second degree murder was to avoid harsher sentences. (TR X 1011) The jury also knew that Nixon had not been sentenced yet, and therefore they knew he was motivated in the presentation of testimony unfavorable to Cole. (TR X 1011-1012)

Defense counsel also questioned Nixon about his "willingness" to come forth to authorities regarding the murders. The record shows that, not only was Nixon aware that his roommate was threatening to tell the police that Nixon was involved, but Nixon also was afraid to get into trouble. He decided that he would help himself by showing authorities where the bodies were located, once he became tied to the robberies and murders. (TR X 1019-1021)

Nixon was grilled on cross by defense counsel, about his failure to take any action to stop the murders (TR X 1034, 1035, 1040), and how he bragged to people at a party, post-murders, how he got pills and participated in the crimes. (TR X 1052-1053)

In an effort to rehabilitate Nixon, on redirect, the State questioned him regarding the murders, as to when he knew the Sumners would be robbed. He replied that he knew after the others included him in the crime following his assistance in digging the hole. He was then told the hole was the Sumners' grave. (TR X 1060) He stated that everyone knew it was a grave. He further stated that he was in it for the money, and had he backed out or stopped the crime occurring, he would not have received money. (TR X 1060)

Finally, he stated, he never heard Cole express any desire to back out of the crimes, or murders. (TR X 1061)

Nixon on direct, corroborated Cole's testimony that she was not present when the Sumners were placed in the pre-dug grave and buried, however he did confirm that Cole was:

1. an active member and participant in the selection of the Sumners, (TR X 992, 1048, 1060, 1061),
2. was involved in the planning of the crimes, (TR X 977),
3. discussed the Sumners' murders, (TR X 971, 974-975, 992),
4. participated in securing the grave site, (TR X 968-969),
5. knew it was a grave, (TR X 970),
6. purchased materials needed for the crime, (TR X 994),

7. transported co-defendants to the Sumners and then to the gravesite, (TR X 969, 976, 979-980),

8. participated in spending the money, (TR X 975), and

9. planned and was part of a diversion should the police try and stop them on the way to MacClenny. (TR X 984-985)

Nixon's knowledge of any incriminating evidence as to Cole's participation in the "entire crime" and what happened in Charleston after Cole, Jackson and Wade left Jacksonville, was limited by two major factors. First, Nixon was a late-comer to the criminal plans, he was recruited by Alan Wade a couple weeks earlier to commit a robbery and dig a hole. Nixon was never cross-examined or impeached, on his testimony that he only learned about the murder plans after he helped dig the hole days before the murders. Second, Nixon left Cole, Jackson, and Wade the next day after the murders and never was asked or testified about their arrests in Charleston or the calls Jackson and Cole made to the Jacksonville police.

Cole argues that the "improper admonishment" not only remained uncorrected but, the jury was left with a misleading view of counsel. She likens the remark to a comment about the weight of the evidence, citing Hamilton v. State, 109 So. 2d at 424, Esposito v. State, 243 So. 2d 451 (Fla. 2d DCA 1971) and

Jacques v. State, 883 So. 2d 902 (Fla. 4th DCA 2004) and Simmons v. State, 803 So. 2d 787 (Fla. 1st DCA 2002)

Each case is distinguishable and provides no support for reversal.

In Esposito, supra., the Court held that:

> "Although the state did not elect to conduct a redirect examination and informed the witness that it had no more questions to ask, the trial court judge indicated that 'the statement that he got nothing [was not] correct and shouldn't be so considered by the jury.' Counsel for appellant immediately requested that the court grant a mistrial on the ground that the court's commenting upon the testimony of the witness had prejudiced his client's defense to an extent that made a fair trial highly unlikely. The motion was denied.
>
> We agree with appellant's contention. A determination as to the credibility of a witness is uniquely within the realm of the jury's deliberations and should in no way be infringed upon by the trial court. Stovall v. State, 156 Fla. 832, 24 So.2d 582 (1946)…."

Sub judice, the court did not comment on any evidence before the jury, or for that matter comment on any evidence at all. Rather the court merely stated that that was not the case. Defense counsel made no objection or asked for clarification but rather moved on with his cross-examination. As previously noted, at a later bench conference the matter was discussed further, and the court allowed the defense to re-inquire. The response by the witness was very similar to his previous answer,

that being, that his counsel stated that whatever the sentence would be was up to the judge.

Moreover as noted, there was no sentence, at the point of questioning, and the "agreement" that Nixon testify for the State in Cole's murder trial, was the only factor that was to decide the sentence Nixon was to receive. Defense counsel was not likely to seek further clarification of the judge's remark after he fully explored the limits of Nixon's knowledge as to what sentence he might receive for testifying in this case and co-defendant Wade's case.

While defense counsel had no reservation about raising the issue again, he also had the opportunity on cross-examination of Nixon to further explore this point. Thereafter, he declined to voice any concern that that opportunity fell short of redress. In Esposito, a timely objection preserved the issue for review.

In Jacques, supra., the court found the statement made by the trial court violated the very principle set forth in Hamilton, supra.:

> "…We think the comment in the present case is similar. The trial judge's comment, "That's not what she said and that's not what the record shows," was a comment on the weight of the evidence and credibility of the witness. Just as in Brown, this was a case based on the credibility of the witnesses, and Jacques's defense was predicated entirely on the believability of Fondrose's recantation of her statement identifying Jacques as the shooter. The trial court's comment

> indicated to the jury that there was evidence of bias on Fondrose's part. This comment supporting the state's position might well have affected the outcome of the case.
>
> We conclude that in this case, in which the sole issue was the credibility of the witnesses, the trial court's improper commenting on the credibility of a witness constitutes fundamental error. 'Fundamental error, which can be considered on appeal even without a proper objection or preservation in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action.' McKenzie v. State, 830 So. 2d 234, 238 (Fla. 4th DCA 2002)."

Equally inapplicable to this case is Simmoms, supra., where there, unlike this case, the trial court truly admonished counsel in the present of the jury. The court therein held that: "Appellant, Terrance Simmons, was convicted of aggravated assault by a jury. The State's evidence primarily consisted of testimony from the victim and one other eyewitness. The defense attacked the credibility of these witnesses during cross examination and closing argument. During the State's rebuttal, the prosecutor ridiculed the defense argument, saying, 'according to the defense, no crime occurred here because [the victim] said it was a butcher knife and [the eyewitness] said it was a steak knife.' The trial court overruled defense counsel's mischaracterization of evidence objection by saying, 'it is accurate and dead on point. Sit down, Mr. Boothe.'"

Nothing even vaguely similar occurred herein.

Finally, even if the trial court remark was error, the error was harmless. The harmless error rule does apply to this situation. See Millett v. State, 460 So. 2d 489 (Fla. 1st DCA 1984). The State has carried its burden "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," Rigsby v. State, 639 So. 2d 132, 133 (Fla. 2d DCA 1994) (quoting State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986)). See Harmon v. State, 527 So. 2d 182, 186-187 (Fla. 1988) wherein the Court held:

> We also reject Harmon's argument that the trial judge committed fundamental error by commenting on the credibility of Larry Bennett on four occasions, resulting in a denial of Harmon's constitutional rights to due process and to a fair trial. After the state concluded direct examination of Bennett, defense counsel sought to impeach Bennett with prior statements alleged to be inconsistent. On two occasions, when the prosecutor objected on the ground that the statements were not inconsistent, the trial judge replied that the statements seemed consistent to him also, but that it was for the jury to decide. The third alleged improper comment occurred when, during redirect examination, Bennett testified that he had returned to a Christian life-style. When defense counsel objected to this testimony based on relevancy, the trial court stated that it "may have something to do with his credibility," but did not permit any additional testimony on the subject.
>
> Section 90.106, Florida Statutes (1985), provides that a judge may not comment to the jury on the weight of the evidence or the credibility of the witnesses. Harmon's defense counsel, however, did not object to

the comments described above. In the absence of a contemporaneous objection, a conviction will not be reversed because an improper comment is made unless the comment is so prejudicial as to amount to fundamental error. See Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980). Furthermore, viewed in the context in which they were made, the comments do not constitute "fundamental error." The comments were incidental within the scheme of the overall record and, in addition, were couched in qualifying terms. See Lusk v. State, 446 So.2d 1038 (Fla.), *cert. denied*, 469 U.S. 873, 83 L. Ed. 2d 158, 105 S. Ct. 229 (1984). Harmon has not demonstrated that these comments were harmful error.

All relief should be denied as to this claim.

ISSUE II

WHETHER THE TRIAL ERRED IN ADMITTING PHOTOGRAPHS OF COLE, JACKSON AND WADE WHILE PARTYING IN MYRTLE BEACH.

Next Cole asserts that the admission of photographs taken in Myrtle Beach, depicting Cole, Jackson and Wade partying with Jackson's $10,000, was error. The crux of her complaint is that the photographs, which were taken prior to the murders of the Sumners, were not relevant, and the prosecutor's suggestion during his closing that they showed motive was improper. (TR XI 1328-1329) Cole also notes that the trial court in his sentencing order found no nexus between the trio partying and the murders.

While the record does reflect that defense counsel did objection to the admissions in Exhibit 160-171, (TR IX 923), no objection was made during the State's closing argument as to Cole's motive for being involved in these murders.

Albeit the trial court did not "find anything in the photograph to indicate anything other than that the group was involved in some heavy 'partying' in Myrtle Beach", (TR III 478), the record clearly shows that the motive for these murders was money.

Cole admitted to Detective Meacham during her statement that everyone talked about a plan to get the Sumners' credit cards and stuff, because they had blown all the money they had and needed more. (TR IX 871) Cole, Jackson and Wade returned to the Sumners' house after the murders and took coins, jewelry and their computer. (TR IX 894) Cole pawned the Sumners' jewelry and their computer before they left Jacksonville. (TR IX 913)

Although not preserved, because there was no objection to the prosecutor's statement using the photographs to develop his motive argument in closing, the record is replete with evidence heard by the jury for this exact purpose of the murders. Tying

the photographs to motive was merely one piece of evidence that explained the crime and Cole's involvement.[2]

This Court has consistently held that a failure to raise a contemporaneous objection when "purported" improper closing argument comments are made waives any claim concerning such comments for appellate review. Card v. State, 803 So. 2d 613, 622 (Fla. 2001). In the instant case, Cole has not made a successful assertion that an exception to the contemporaneous objection rule is present herein. Only when an unobjected to comment rises to the level of "fundamental error", which reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have obtained without the assistance of the alleged error, will a failure to preserve the issue be overlooked. See Walls v. State, 926 So. 2d 1156, 1166 (Fla. 2006); see also Dufour v. State, 495 So. 2d 154, 160-61 (Fla. 1986); Poole v. State, 997 So. 2d 382 (Fla. 2008).

Cole has failed to demonstrate error, let alone, reversible error as to this point. Moreover, even if properly preserved any reference to the photograph was de minimus and harmless in

[2] The courts allow attorneys wide latitude to argue to the jury during closing argument. See Thomas v. State, 748 So. 2d 970, 984 (Fla. 1999); Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. See Thomas, 748 So. 2d at 984; Breedlove, 413 So. 2d at 8.

light of the overwhelming evidence of guilt. Terminally, Cole has not shown that the admissions of these "irrelevant" photographs prejudiced her case.

ISSUE III

WHETHER THE TRIAL COURT IMPROPERLY SENTENCED COLE TO DEATH SINCE THE TRIAL COURT SENTENCED CODEFENDANT BRUCE NIXON WHO WAS OF EQUAL OR GREATER CULPAPBILITY TO A TERM OF YEARS IMPRISONMENT.

Cole's first challenge to the death sentences imposed for the Sumners' murders is that Bruce Nixon, a co-defendant of equal or greater culpability, was only sentenced to a term of years.

Bruce Nixon pled guilty to second degree murder, therefore, there was no assessment by the trial court of aggravating and mitigating circumstances to compare to Cole's culpability and mitigation.

While this Court has held that in certain instances, a codefendant's life sentence precludes a death sentence for a defendant, Slater v. State, 316 So. 2d 539, 542 (Fla. 1975) (holding that less culpable non-triggerman cannot receive a death sentence when the more culpable triggerman receives a life sentence), disparate treatment is permissible in situations where a defendant is more culpable than the codefendant who has received a life sentence or lesser sentence. Larzelere v.

State, 676 So. 2d 394, 406-07 (Fla. 1996) (upholding death sentence where evidence showed that defendant was the dominating force behind the murder and was far more culpable than the State's two key witnesses who were not prosecuted despite involvement in the crime). In cases where more than one defendant is involved, this Court will perform an additional analysis of relative culpability guided by the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment. A trial court's determination regarding relative culpability constitutes a finding of fact and will be sustained on review if supported by competent, substantial evidence. Puccio v. State, 701 So. 2d 858, 860 (Fla. 1997).

In Shere v. Moore, 830 So. 2d 56, 61-63 (Fla. 2002), this Court addressed the very argument of disparate treatment between co-defendants receiving the death penalty for capital murder convictions and one, adjudicated guilty for second degree murder. The Court observed:

> In this case, however, we cannot conduct a true relative culpability analysis because the codefendant was convicted of second-degree murder. We cannot make a true comparison of a first-degree murder conviction and a second-degree murder conviction. See Steinhorst v. Singletary, 638 So. 2d 33 (Fla. 1994) (because Hughes, the codefendant, was convicted of second-degree murder, his sentence of life imprisonment was not relevant to a claim of disparate sentencing). A conviction of first-degree murder requires a finding by either a jury or the judge that the defendant

committed a murder with premeditation or during the course of a felony enumerated in section 782.04(1)(a)2, Florida Statutes (1987). When a defendant is convicted of second-degree murder, either a jury or the judge has determined that the defendant committed a murder by doing an act that was imminently dangerous to another and evincing a depraved mind regardless of human life, without any premeditated design, or that the murder was committed during the course of a felony by a person who was not engaged in the perpetration of that felony. See § 782.04(2) - (3), Fla. Stat. (1987). In other words, a conviction of second-degree murder means the defendant did not form the necessary intent to commit first-degree murder and did not commit the murder during the perpetration or attempt to perpetrate drug trafficking, arson, sexual battery, robbery, burglary, kidnapping, escape, aggravated child abuse, aggravated abuse of the elderly or disabled, aircraft piracy, carjacking, home invasion robbery, aggravated stalking, murder of another human, or unlawful throwing, placing or discharging of a destructive device or bomb. Because Shere's codefendant was convicted of second-degree murder, his relative culpability 4 for this murder has already been determined to be less than Shere's culpability.

4 Black's Law Dictionary explains the concept of culpability as follows:

"The concept of culpability is used as a reference point to assess the defendant's guilt and punishment even though, in the two contexts, culpability denotes different aspects of the defendant and the murder. At the guilt phase, culpability is most often used to refer to the state of mind that the defendant must possess. Also at the guilt phase, culpability may reflect a broader judgment about the defendant: when he is culpable for his conduct, it means that he is blameworthy and deserves punishment. At the punishment phase, the concept of culpability stands as the benchmark for when the death penalty is an appropriate punishment." Phyllis L. Crocker, Concepts of

Culpability and Deathworthiness, 66 Fordham L. Rev. 21, 35-36 (1997).

Black's Law Dictionary 385 (7th ed. 1999).

This situation is not unlike the one we addressed in Larzelere v. State, 676 So. 2d 394 (Fla. 1996). In Larzelere, we found a sentence of death proportional where the codefendant was acquitted. In so finding, we noted "that Jason's acquittal is irrelevant to this proportionality review because, as a matter of law, he was exonerated of any culpability." Id. at 407. Similarly, in this case a separate jury has determined Shere's codefendant to be less culpable, evidenced by his conviction for second-degree murder.

On the other hand, equally culpable connotes the same degree of blame or fault. In order to have that same degree of blame or fault the codefendants must, at a minimum, be convicted of the same degree of the crime; third-degree murder does not connote the same degree of blame or fault as second-degree murder, which does [*62] not connote the same degree of blame or fault as first-degree murder. It is the crime for which the defendant is convicted that determines his or her culpability, and in this case that decision has been made by the trier of fact.

Under section 921.141, Florida Statutes (1987), a defendant is eligible for a sentence of death only if he or she is convicted of a capital felony. This Court has defined a capital felony to be one where the maximum possible punishment is death. See Rusaw v. State, 451 So. 2d 469 (Fla. 1984). The only such crime in the State of Florida is first-degree murder, premeditated or felony. See State v. Boatwright, 559 So. 2d 210 (Fla. 1990); Rowe v. State, 417 So. 2d 981 (Fla. 1982). 5 Only in situations where the defendant's blameworthiness for the murder reaches the first-degree level do we proceed to the next step in determining if the circumstances warrant the punishment of death.

5 In Buford v. State, 403 So. 2d 943 (Fla. 1981), this Court held that sexual battery of a child under twelve by a person over

> eighteen is not punishable by death and is, therefore, not a capital crime.

Therefore, once a codefendant's culpability has been determined by a jury verdict or a judge's finding of guilt we should abide by that decision, and only when the codefendant has been found guilty of the same degree of murder should the relative culpability aspect of proportionality come into play. Moreover, the codefendant should not only be convicted of the same crime but should also be otherwise eligible to receive a death sentence, i.e., be of the requisite age and not mentally retarded.6

> 6 Even in situations where codefendants are both convicted of first-degree murder, there may be legal obstacles to imposition of the same sentence. For example, in Henyard v. State, 689 So. 2d 239 (Fla. 1996), we found the defendant's sentence of death proportional even though the codefendant, Alfonza Smalls, could not receive a death sentence because of his age of fourteen:
>
> > In this context, then, Smalls' less severe sentence is irrelevant to Henyard's proportionality review because, pursuant to Allen, the aggravation and mitigation in their cases are per se incomparable. Under the law, death was never a valid punishment option for Smalls, and Henyard's death sentences are not disproportionate to the sentence received by his codefendant. Cf. Larzelere v. State, 676 So. 2d 394 (Fla. 1996) (holding that codefendant's acquittal was irrelevant to proportionality review of defendant's death sentence because codefendant was exonerated from culpability as a matter of law).

Henyard v. State, 689 So. 2d at 254-55.

We have decided numerous cases where we have addressed the proportionality of defendants' death sentences based on the argument that an equally culpable codefendant received a lesser sentence. 7

However, in only ten of those cases did the proportionality analysis involve codefendants who received immunity or codefendants whose lesser sentences were based on convictions for second-degree murder or third-degree murder. 8 See Howell v. State, 707 So. 2d 674 (Fla. 1998) (codefendant pled to second-degree murder and received a sentence of forty years); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (codefendant pled guilty to second-degree murder and testified against the defendant); Mordenti v. State, 630 So. 2d 1080 (Fla. 1994) (codefendant received immunity for [*63] her testimony); 9 Cook v. State, 581 So. 2d 141 (Fla. 1991) (codefendants pled guilty to second-degree murder and received sentences of twenty-three and twenty-four years); Hayes v. State, 581 So. 2d 121 (Fla. 1991) (codefendant pled guilty to second-degree murder and testified against the defendant); Downs v. State, 572 So. 2d 895 (Fla. 1990) (codefendant testified against the defendant under a grant of immunity); Brown v. State, 473 So. 2d 1260 (Fla. 1985) (codefendant pled to second-degree murder); White v. State, 415 So. 2d 719 (Fla. 1982) (codefendant convicted of third-degree murder); Tafero v. State, 403 So. 2d 355 (Fla. 1981) (codefendant received a life sentence after pleading to second-degree murder); Salvatore v. State, 366 So. 2d 745 (Fla. 1978) (codefendant received a ten year sentence after pleading to second-degree murder). In none of these cases did we find the sentence of death disproportional because the codefendant received a lesser sentence or no punishment at all.

7 We have identified more than seventy cases which fall into this category.

8 In Coleman v. State, 610 So. 2d 1283 (Fla. 1992), we found proportional a sentence of death where the defendant was convicted of two counts of first-degree murder but the codefendant received a life sentence after his conviction for one count of first-degree murder and one count of second-degree murder.

9 In Garcia v. State, 492 So. 2d 360 (Fla. 1986), this Court upheld a prosecutor's discretion in plea bargaining

> with a less culpable codefendant and indicated such action does not violate proportionality principles. See also Diaz v. State, 513 So. 2d 1045 (Fla. 1987); Brown v. State, 473 So. 2d 1260 (Fla. 1985).

Shere, controls here. See also Caballero v. State, 851 So. 2d 655, 662-663 (Fla. 2003).

In the trial court's sentencing order, the court found that the statutory mitigator, that Cole was an accomplice was present when it came to these murders compared to co-defendants Jackson and Wade, concluding:

> **The defendant was an accomplice but the offense was committed by another person and the defendant's participation was relatively minor.**
>
> This Court has carefully considered the evidence of this defendant's actions for the several days before and after the murders. While the evidence is clear that two (2) of the other co-defendants were at the hole when the Sumners were buried alive, it is equally clear that this defendant was present and participated in the creation of the future grave. It is equally clear that she was present and directly involved in the purchase of duct tape and other materials prior to the murders. It is also clear that she participated in the purchase of the additional gloves and Clorox and returned to the residence after the murders. It is also clear that it was she who pawned items stolen from the Sumners' home. Lastly, it is clear that she participated in the cover-up and attempt to evade arrest when she posed as Carol Sumner during the telephone conversation with the Jacksonville Sheriff's Office.
>
> While this defendant might not have turned the spade onto the Sumners, this Court cannot say that her participation was relatively minor. Accordingly, this matter is afforded little weight.

(TR III 477-478).

The Court further considered these factors as a non-statutory mitigating circumstance, finding:

> The defense has suggested some thirty (30) non-statutory mitigating circumstances. The Court has considered each circumstance and the evidence and argument pertaining to it. In doing so, the Court has noted that several are related to each other. Accordingly, instead of addressing each suggested mitigator separately, the Court has collected them in groups for discussion.
>
> **Defendant's minimal involvement in criminal activity.**
>
> The defense has asked this Court to consider the defendant's relative involvement in these crimes and the fact that she did not actually participate in the murders. The defendant specifically seeks a comparison with the actions of codefendant Bruce Nixon and the sentence he received. They also have suggested that the Court consider that the defendant committed no acts of violence and that she has no prior reputation for violence. Lastly, the defense suggests that the defendant has been a good and responsible worker who has refrained from committing crimes, even though she could have done so.
>
> Upon consideration, the Court concludes that these issues merely restate the defense suggestions on the statutory mitigators regarding the degree of the defendant's participation in the murders and her lack of significant record. As discussed with regard to the statutory mitigator on the degree of her participation, the Court concludes that the evidence in this cause simply does not substantiate the argument. The defendant's participation in all of this was thorough and varied and was not as simple as her just being there. This suggestion is afforded little weight.
>
> With regard to the suggestion that the defendant has little criminal record, the Court has already noted that this mitigation is afforded some weight.

(TR III 479-480).

Additionally, in determining whether death is a proportionate penalty herein, consideration must be given to the totality of the circumstances of the case, compared with other capital cases. See Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973).

The imposition of death penalties herein, are appropriate and proportionate sentences, because the evidence justifies that the aggravation outweighs the mitigation:

In sentencing Cole to death for each murder, the trial court found seven (7) aggravating factors had been proven beyond a reasonable doubt: (1) the defendant had been previously convicted of a felony and was on felony probation/parole at the time of the murder; (2) the murder was committed in the course of a kidnapping; (3) the murders were especially heinous, atrocious, or cruel; (4) the murders were cold, calculated, and premeditated; (5) the murders were committed for financial gain; (6) the murders were committed to avoid or prevent a lawful arrest; and (7) the victims were particularly vulnerable due to advanced age and disability. (TR 473-477). On appeal, Cole challenges the appropriateness of two of the seven aggravators found by the trial court, however there was no challenge to the consideration or weight provided to the mitigation.

In mitigation the trial court found: four (4) statutory mitigating circumstances found were 1) Cole had no significant history of prior criminal activity, given some weight; 2) Cole was an accomplice to the homicide committed by another and her participation was relatively minor, given little weight; 3) Cole's age of 23, was given some weight; and 4) Cole acted under the substantial domination of another, given little weight. (TR III 477-479) As to non-statutory mitigating circumstances, the trial court found, 1) Cole's minimal involvement, given little weight; 2) Cole's minimal criminal history, given some weight; 3) Cole's psychological problems, given little weight; 4) Cole's model behavior while incarcerated awaiting trial and the likelihood of good adjustment to prison life, given some weight; 5) Cole's family history, caring for her younger siblings and ill father, given some weight; 6) Cole's history of alcohol and drug abuse and resulting personality changes, given little weight; 7) Cole's positive character traits, including a history of caring for others, good employment record, and expressions of concern and remorse for the victims, given some weight. (TR III 479-482).

The instance case is very similar to Looney v. State, 803 So.2d 656 (Fla. 2001), a case wherein this Court upheld the imposition of the death penalty for two murders. Looney along with two others (Hertz and Dempsey) broke into the home of

Melanie King and Keith Spears. After immobilizing the victims by binding and gagging both victims with duct tape and placing them face down on their bed, the three co-defendants shot and killed the two, ransacked the victims' home, removing a significant amount of the victims' property, including a VCR, a television, jewelry, furniture, CDs, and $1500 in cash. After loading the victims' property into the victims' white truck and Black Mustang, Looney and the two other men spread accelerant through the house to destroy all evidence of the murders and other crimes.

Ms. King begged Looney and the other co-defendants not to shoot them and told them she would rather burn to death than be shot. Ignoring her pleas, Looney and the other two men shot and killed both Ms. King and Mr. Spears. Looney v. State, 803 So. 2d 656, 662-663 (Fla. 2001).

The trial court sentenced Looney to death. The court found as aggravating factors that: (1) Looney was previously convicted of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Looney was engaged in the commission of a burglary, arson, and robbery; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) the crime was committed for financial or pecuniary gain (the court merged this aggravating factor with the fact that the

capital felony was committed during the course of a burglary, arson, or robbery); (5) the murder was especially heinous, atrocious, or cruel, and (6) the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. Id at 664.

The trial court considered Looney' youth as a statutory mitigator. The trial court gave Looney's age moderate weight. The trial judge also considered and gave significant weight to non-statutory mitigation including: (a) Looney's difficult childhood was given significant weight; (b) the fact that Looney had no significant criminal history or no history of violence and the fact that he posed no problems since being incarcerated were given marginal weight; (c) that Looney was remorseful was given moderate weight; (d) the fact that society would be adequately protected if he were to be given a life sentence without the possibility of parole was entitled to little weight, and (e) the fact that a codefendant, Dempsey, received a life sentence following a plea. Looney v. State, 803 So. 2d at 664.

This Court found Looney's sentences to death proportionate. Id. at 682-683. See also *e.g.*, Salazar v. State, 991 So. 2d 364 (Fla. 2008) (death sentence appropriate where five aggravators, including CCP and HAC were weighed against six non-statutory mitigators, including a difficult and impoverished childhood); Walker v. State, 957 So. 2d 560, 585 (Fla. 2007) (determining

that the death sentence was proportionate where three aggravators (during the course of a felony, HAC, and CCP) outweighed four non-statutory mitigators (defendant's drug use/bipolar personality/sleep deprivation, codefendant's life sentence, defendant's statement to police, and defendant's remorse); Guardado v. State, 965 So. 2d 108 (Fla. 2007) (five aggravating factors, including CCP and HAC and nineteen non-statutory mitigating factors including amenability to prison life and a traumatic childhood); Delgado v. State, 948 So. 2d 681, 691 (Fla. 2006) (affirming the death sentences where the three aggravators -HAC, CCP, and prior violent felony conviction- outweighed four non-statutory mitigating circumstances -non-use of drugs or alcohol, difficult childhood and physical/emotional abuse at the hands of defendant's parents, stepfather, the Cuban government, and neighbors, defendant's love of his family, and good behavior throughout the trial); Lugo v. State, 845 So.2d 74 (Fla. 2003) (two murders, CCP, avoid arrest, murder in the course of a kidnapping and murder committed for pecuniary gain for both murders, and HAC for one of the murders, no statutory mitigators and five non-statutory mitigators given little or no weight).

Cole has cited no authority to support her contention that Nixon was an equally culpable codefendant. When compared with the death sentences of her two other codefendants, Jackson and

Wade, Cole's 9-3 jury death recommendation and the trial court's finding and imposition of death, should be affirmed.

ISSUE IV

WHETHER COLE'S DEATH SENTENCE IS PROPER IN LIGHT OF THE TRIAL COURT'S FINDINGS AND WEIGHING OF TWO AGGRAVATING CIRCUMSTANCES, THE MURDERS WERE HAC AND THE MURDERS WERE COMMITED TO AVOID ARREST.

After Carol and Reggie Sumner were bound and gagged in their home, they were kidnapped and driven to a rural area, where they were placed in a pre-dug grave, made to turn over personal information regarding their bank account and then, buried alive. The Sumners huddled together in a protective posture, in a hole four feet deep, until the dirt shoveled on top of them completely covered their mouths and noses. They both suffocated to death and were mechanically asphyxiated when the weight of the dirt compressed their chests and made it impossible for them to take breaths deep enough to force oxygen into their lungs.

A. Aggravating Circumstance of HAC

Cole argues that, she "could not be held vicariously liable for this factor based on the manner of death Jackson and Wade selected without her knowledge," the giving of this instruction and finding of this aggravating circumstance was error. (IB 55)

Unfortunately for Cole the above-cited statement is not factually accurate. The cases cited by Cole are equally not applicable.

The facts reveal, in summary, that Cole was the key ingredient in these murders. She introduced her codefendant Jackson to the Sumners, who were frail and sickly, facilitated Jackson and Wade gaining access to the Sumners' personal information, transported the codefendant, assisted in digging the grave site, assisted in purchasing needed materials for the crime, and when it was made known that the victims were to be killed as they drove to the remote pre-dug grave site, did nothing to thwart the manner in which the Sumners were to die. Moreover, she profited from her and her codefendants' avarice, attempted to allude detection and assisted in covering up the murders. While maybe not the one who shoveled the last load of dirt over the victims' huddled bodies, she participated in every aspect of the Sumners' deaths.

Citing, Omelus v. State, 584 So. 2d 563, 567 (Fla. 1993), Cole argues that she cannot be responsible for the manner in which the Sumners died. In Perez v. State, 919 So. 2d 347, 379-380 (Fla. 2005) the Court explained the line of cases emanating from Omelus, supra. The Court wrote:

> In addition to the above assertions, Perez also contends that there was a [*380] lack of competent and substantial evidence to support the trial court's

finding that the HAC aggravating circumstance could be applied to him. We agree with Perez that the trial court improperly found the HAC aggravator applicable to him. In Omelus v. State, 584 So. 2d 563 (Fla. 1991), this Court reversed a trial court's sentence of death and remanded for resentencing in a felony murder case where there was no evidence

> that Omelus knew how Jones would carry out the murder of Mitchell, and, . . . no evidence to show that Omelus directed Jones to kill Mitchell in the manner in which this murder was accomplished. **Under these circumstances, where there is no evidence of knowledge of how the murder would be accomplished,** we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously.

Id. at 566. Again, in Williams v. State, 622 So. 2d 456 (Fla. 1993), this Court determined that HAC "cannot be applied vicariously, absent a showing by the State that the defendant directed or knew how the victim would be killed." Id. at 463. In Archer v. State, 613 So. 2d 446 (Fla. 1993), we determined that "a defendant who arranges for a killing but who is not present and who does not know how the murder will be accomplished cannot be subjected vicariously to the heinous, atrocious, or cruel aggravator." Id. at 448 (emphasis supplied).

The State asserts that Perez's case is distinguishable from Archer and other cases applying Omelus because Perez was present at the scene of the murder. Initially, we note that the language quoted above from Archer, alluding to the defendant not being present, merely refers to the facts that were before the Court in Archer. This language in Archer was not intended to modify the standard with regard to "directing or knowing" that the Court announced in Omelus to only apply to those defendants who were not present at the scene. The State also relies on two of our previous opinions in which we upheld the vicarious application of HAC to defendants found guilty of felony murder. See Cave v. State, 727 So. 2d 227 (Fla.

1998); Copeland v. State, 457 So. 2d 1012 (Fla. 1984). However, a review of the facts in those cases cited by the State reveals that the conduct by the defendant in each case was more culpable than the only conduct established by the record in the instant matter on the part of Perez. For example, in Cave, this Court upheld the application of HAC where the trial court found that the

> Defendant personally removed the victim from the convenience store at gun point, placed her in the back seat of the car in which he and a co-defendant were seated, heard her pleas for her life during a fifteen to eighteen minute ride to an isolated area, removed her from the car and turned her over to Bush and Parker who stabbed and then shot her. At some point her panties were wet with urine. The terror she experienced must have been horrible and meets the definition of especially heinous, atrocious and cruel.

727 So. 2d. at 229. Copeland v. State, the second case to which the State refers, is also inapplicable to the instant matter. Initially, Copeland was decided seven years before our decision in Omelus. Moreover, in affirming the trial court's application of HAC to the defendant in Copeland, we noted that the defendant was an equal participant in the hours-long ordeal that involved the defendant initially confronting the victim at gunpoint, the kidnapping of the victim, and ending with her eventual rape and execution-style murder carried out with the defendant's gun. See 457 So. 2d at 1015, 1019. Based on the [*381] foregoing, we conclude that these cases are distinguishable from the instant matter because they all involved conduct on the part of the defendant that established a significantly higher level of culpability than that which is attributable to Perez here and, therefore, do not support the application of the HAC aggravator to Perez.

In Perez, the key factor in applying Omelus, was the defendant neither "knew" nor "directed" how the victims were to be murdered. Here the evidence is to the contrary. Cole states that "the only evidence of a discussion about the manner of death to be used came from the testimony of Bruce Nixon. (T10:1048-1049)." (IB 56) However during the course of Cole's cross-examination she admitted that Nixon's account of what happened at trial was pretty accurate. (TR XI 1229) Additionally, she admitted to Det. Meacham she knew that the victims had been buried. (TR IX 890)

The trial court found, after rejecting defense counsel argument that the HAC aggravating did not apply based on Omelus, that:

> **The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.**
>
> The evidence in this cause has established clearly that Reggie and Carol Sumner, frail and failing in health, were both bound and gagged and buried alive. This Court has had a hard time in coming up with a manner of death that could be more heinous, atrocious or cruel, or more painful and vile. Perhaps watching oneself set aflame would be worse.
>
> The Medical Examiner's testimony in this cause leaves it eminently clear that the Sumners were both alive as the dirt and sand was thrown upon, then over them. According to that testimony, the weight of the soil would have provided compression on their lungs and diaphragm, but they nevertheless would have been able to gasp for air. That they did so is borne out by the autopsy evidence of sand and vegetation found deep within the windpipe of each. The Court concludes that

this aggravating circumstance has been proven beyond a reasonable doubt.

(TR III 474)

Even should this aggravating factor be found inapplicable, the death penalty still is supported by strong aggravating circumstances that outweigh the mitigating circumstances. See Hill v. State, 643 So. 2d 1071, 1073 (Fla. 1994) ("When this Court strikes one or more aggravating circumstances relied upon by a trial judge in sentencing a defendant to death, we may conduct a harmless error analysis based on what the sentencer actually found in determining whether the sentence of death is still appropriate."). Under this analysis we are required to determine whether there is any reasonable probability that the trial court's error in applying HAC contributed to the sentence of death entered in a case. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986); Hurst v. State, 819 So. 2d 689 (Fla. 2002).

B. Avoid Arrest

Cole also argues that the avoid arrest aggravator found by the trial court was not proven because in order to find this aggravator on a non-law enforcement victim, the State must establish that the murder was committed to avoid arrest as the dominant or only motive for the murder.

While not unmindful of cases such as, Reynolds v. State, 934 So. 2d 1128, 1157 (Fla. 2006) ("[T]o establish the avoid arrest aggravating factor where the victim is not a law enforcement officer, the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness.") (quoting Bell v. State, 841 So. 2d 329, 336 (Fla. 2002)), the State would submit here, that although the victims were not law enforcement officers, proof of intent to avoid arrest and detection is very strong. See Jones v. State, 963 So. 2d 180, 186 (Fla. 2007) (citing Riley v. State, 366 So. 2d 19, 22 (Fla. 1978)).

The trial court found:

> **The crime for which the defendant is to be sentenced was committed to avoid or prevent a lawful arrest.**
>
> There seems to this Court to be little doubt that the murders of Carol and Reggie Sumner were committed primarily to assist the defendants in avoiding arrest and prosecution. The circumstantial evidence surrounding the deaths seems to lead to no other inference.
>
> It is clear that the Sumners knew at least two (2) of their killers. It is equally clear that they were buried many miles from their home at a location that the group hoped would not be discovered any time soon. Their deaths, of course, kept them from reporting the theft of their ATM cards, and thereby furthered the defendants' plan. The Court concludes that this aggravating circumstance has been proven beyond a reasonable doubt.

(TR III 476)

The avoid arrest aggravator applies here, where Cole and her co-defendant, Jackson, needed sufficient time to withdraw monies from the Sumners' bank account. In fact, the very ruse used to call the Jacksonville police from Charleston, days after the murders, supports Cole's and Jackson's need to go undetected by trying to convince authorities the Sumners were not dead.

For example, in Buzia v. State, 926 So. 2d 1203, 1209-1212 (Fla. 2006), the Court, in distinguishing Zack v. State, 753 So. 2d 9 (Fla. 2000), held:

> The correct question is whether competent, substantial evidence supports the trial court's finding that Buzia murdered Mr. Kersch to avoid arrest. "[O]ur task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Owen v. State, 862 So. 2d 687, 698 (Fla. 2003) (quoting Way v. State, 760 So. 2d 903, 918 (Fla. 2000)). We have outlined the appropriate circumstances for finding the avoid-arrest aggravator:
>
> > Where the victim is not a police officer, "the evidence [supporting the avoid arrest aggravator] must prove that the sole or dominant motive for the killing was to eliminate a witness," and "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." [*1210] However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.
> >
> > In other cases, this Court has found it significant that the victims knew and could

> identify their killer. While this fact alone is insufficient to prove the avoid arrest aggravator, we have looked at any further evidence presented, such as whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant.

Parker v. State, 873 So. 2d 270, 289 (Fla. 2004) (quoting Farina v. State, 801 So. 2d 44, 54 (Fla. 2001)). Buzia argues that the circumstantial evidence is too inconclusive to support this aggravator, while the State asserts that direct evidence of Buzia's thought processes exists to support it. 4 We address each of these arguments in turn.

> 4 Buzia makes various other arguments that do not support his position. First, his argument that he left Mrs. Kersch alive as a witness against him has no bearing on whether he killed Mr. Kersch to avoid arrest. Second, the fact that Buzia attempted to duct-tape the door of the bedroom to keep Mrs. Kersch inside suggests that he was trying to keep her from getting out-and, presumably, alerting someone. If anything, this evidence indicates that he had an intent to do what he could to avoid detection. Third, Buzia argues that his search for valuables proves that he did not immediately flee the house after assaulting Mrs. Kersch. This fact is irrelevant. The question, again, is whether he killed Mr. Kersch to eliminate him as a witness.

First, Buzia relies heavily on Zack v. State, 753 So. 2d 9 (Fla. 2000), arguing that similar circumstances in that case did not warrant application of this aggravator. In Zack, the defendant and the victim returned to the victim's home after meeting at a bar. The defendant hit the victim with a beer bottle, sexually assaulted her, and beat her head against the bedroom's wooden floor. He retrieved a knife from the kitchen and stabbed her in the chest four times. The

defendant went back to the kitchen, cleaned the knife, put it away, and washed the blood from his hands. He then returned to the master bedroom, placed the victim's bloody shirt and shorts in her dresser drawer, stole a television, a VCR, and the victim's purse, and placed the stolen items in her car and drove away. Id. at 14. We concluded that the evidence was inconclusive to support the avoid-arrest aggravator because the defendant had a larger "premeditated plan" in mind. Id. at 20. The defendant's acts were part of a "crime-riddled journey" in which he had committed a variety of assaults and robberies against other victims. Id. at 13-14. Although he did not have to murder the victim "to accomplish his monetary goals, this alone does not make the defendant's dominant motive the desire to avoid arrest." Id. at 20.

This case is distinguishable from Zack. Unlike the defendant in Zack, Buzia was not on a "crime-riddled journey." His actions involved one robbery at one location. Furthermore, aside from not having to murder Mr. Kersch "to accomplish his monetary goals," additional circumstances (which were absent in Zack) prove that Buzia killed him to avoid arrest.

We agree with the State that Willacy v. State, 696 So. 2d 693 (Fla. 1997), is more similar to this case. In Willacy, the defendant bludgeoned the victim and tied her hands and feet together. Id. at 696. Because the victim no longer posed an immediate threat to him, and because she was his next-door neighbor and could identify [*1211] him easily, we concluded that he had little reason to kill her except to eliminate her as a witness. Id. Buzia, too, easily subdued his victim. Mr. Kersch, an elderly man who was injured and bleeding badly, no longer posed an immediate threat to Buzia. He "was incapable of thwarting [Buzia's] purpose or of escaping and could not summon help." Id. Buzia went to the garage not once, but possibly twice, to obtain an ax, which indicates that he had enough time to escape undetected with the Kersches' money and valuables. There was little reason for Buzia to hit Mr. Kersch with an ax, except to kill him so Buzia could avoid arrest.

> In addition to these circumstances, Buzia's incriminating statements to the police evidence his thought processes. We have found that a defendant's statements to the police, in part, support a finding of the avoid-arrest aggravator. Derrick v. State, 641 So. 2d 378, 380 (Fla. 1994) ("In a statement to the [police], [the defendant] indicated that the victim recognized him and that he killed the victim to 'shut him up.'"). Buzia told the police that his "intention [in hitting Mr. Kersch the second time with his fist] was . . . obviously to keep him down longer, so maybe [he] could drive away and get more time." He admitted that, after doing so, he thought Mr. Kersch was going to die: "I was . . . thinking . . . you know . . . he's gonna die, if [I] leave right now." Even more relevant is his statement to the police regarding why he used the ax-the instrument that ultimately killed Mr. Kersch. Buzia stated that his intention in hitting him with it was to "slow him" and "put him out."
>
> In addition, Buzia admitted that, when he heard Mr. Kersch arrive, he considered whether or not he should tell him that he had hurt his wife, or instead attack him as well. He obviously decided on the latter course, most likely because it would help him escape undetected. These admissions prove that Buzia's intent to avoid arrest extends beyond mere speculation. His "sole or dominant" motive for murdering Mr. Kersch was to eliminate him as a witness. We find no error in the trial court's finding of the avoid-arrest aggravator.

And see Looney v. State, 803 So. 2d 656, 677-78 (Fla. 2001), wherein in a comparable situation this Court upheld the avoid arrest aggravator:

> This Court has also said this factor may be proved by circumstantial evidence from which the motive for the murders may be inferred. See Preston v. State, 607 So.2d 404, 409 (Fla. 1992). Had the sole motive for the murders in this case been for financial gain, the defendants' purpose would have been accomplished upon receipt of the stolen property. See Knight v. State, 746 So.2d 423, 435 (Fla. 1998). In addition, Looney and his codefendants were not prevented in any manner

> from leaving the premises without injuring or killing, as they had access to both of the victims' vehicles while both victims were immobilized and, therefore, unable to resist. See id. Once the defendants had obtained the victims' property and secured an uncontested getaway, there was no reason for [*678] the victims to be killed--except to eliminate them as witnesses. See Thompson v. State, 648 So.2d 692, 695 (Fla. 1994) (upholding avoid arrest aggravator where "[o]nce Thompson had obtained the $ 1,500 check from [the victims], there was little reason to kill them other than to eliminate the sole witnesses to his actions").26 Accordingly, we find competent, substantial evidence to the support the trial court's finding that, beyond a reasonable doubt, the dominant motive for the murders of the two victims was the elimination of witnesses in order to avoid prosecution.
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> > 26 This case is not unlike the circumstances in Riley v. State, 366 So.2d 19 (Fla. 1978). In Riley, the defendant and an accomplice entered the business where the defendant worked for the purpose of robbing it. See 366 So.2d at 20. The pair then threatened several of the defendant's coworkers with pistols, forced them to lie on the floor, bound and gagged them, and then shot each of them in the head. See id. In light of the fact the victims knew the defendant and were immobilized and rendered helpless, coupled with one perpetrator's expressed concern for subsequent identification, this Court found that the record supported the conclusion that the victims were killed to avoid identification. See id. at 22.

See also Schoewetter v. State, 931 So. 2d 857 (Fla. 2006).

Based on the afore-cited cases, there is no basis upon which to strike either aggravator in the instant case. Ultimately, whether there are seven (7) valid or five (5) valid statutory aggravators in this case, based on the CCP aggravator

alone,[3] this is one of the most egregious murders. See Frances v. State, 970 So. 2d 806 (Fla. 2007). Any error was harmless beyond a reasonable doubt. Hill v. State, supra.

[3] The trial court found that the cold-blooded and senseless murders of Carol and Reggie Sumner were also CCP. (TR III 474-475) The court concluded:

> At the outset, the Court notes that there was virtually no evidence which would even remotely indicate a pretense of moral or legal justification for the deaths of the Sumners. It is equally clear that the evidence indicates a heightened premeditation with regard to these murders. The evidence is replete with the elements of a cool, calm reflection, and a detailed and careful plan spread over a number of days and designed to commit the murders before they actually occurred.
>
> The evidence in this cause showed that the defendants knowingly singled out the frail victims to be the targets of their attempt to obtain the Sumners' money. Before the killings, a grave was dug in a remote area not likely to be discovered. This defendant held the flashlight while the others dug. She bought the duct tape and disposable gloves before going to the Sumners' residence.
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> To reduce the chance of their being identified by the Sumners, Cole and Jackson remained in the Mazda. Wade and Nixon went in alone. Before going to the residence, the group discussed what was to be taken, particularly in the nature of bank records and other financial records. When some of those records were not found by Wade and Nixon, Jackson entered to search for the items himself. When the records were found, the group departed for the burial site driving the Sumners' Lincoln, the keys for which had been found during the search of the residence. At the burial site, Jackson discovered that the Sumners' bindings had loosened and he became irate. Nixon rebound them and returned to the highway with Cole. Wade and Jackson were left at the Lincoln with the Sumners. One can only imagine how Jackson and Wade got the Sumners' PIN numbers from them, but they did.
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> After the murders, the group continued the plan first by Wade and Cole purchasing more gloves and Clorox and returning to the Sumners' residence for additional thefts

ISSUE V

FLORIDA'S DEATH PENALTY SCHEME DOES NOT VIOLATE THE SIXTH AMENDMENT AND THE DICTATES OF RING V. ARIZONA AND ITS PROGENY.

Finally, Cole argues that Florida's capital sentencing scheme violate the Sixth Amendment and the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). The Court has consistently rejected the arguments made by Cole.

Florida's capital sentencing statute does not violate Ring. In Blackwelder v. State, 851 So. 2d 650, 654 (Fla. 2003), this Court held that Ring does not require that aggravating circumstances be charged in the indictment. *See also* Porter v. Crosby, 840 So. 2d 981 (Fla. 2003). Indeed, death eligibility was determined by the jury, unanimously, beyond a reasonable doubt, when Cole was found guilty of the contemporaneous murders of two victims. Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003)(rejecting Ring challenge when defendant was charged and convicted of contemporaneous crimes by unanimous jury).

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and, presumably, to clean up their mess. The plan continued by going to preselected ATM's to withdraw money. Concurrently, Cole went to local pawnshops and pawned at least the Sumners' computer and some of Carol's jewelry.

When Jackson apparently suspected that the ATM accounts had been suspended by the Sumners' bank, he called the sheriff's office and represented himself to be Reggie Sumner. Cole posed as Carol Sumner. Jackson detailed a well thought-out lie to the police hoping to continue access to the Sumners' money. The Court concludes that this aggravating circumstance has also been proven beyond a reasonable doubt.

Moreover, as noted in Frances v. State, 970 So. 2d 806, 822 (Fla. 2007), this Court has rejected similar Ring claims in capital cases.[4] *See also* Duest v. State, 855 So. 2d 33, 50-51 (Fla. 2003) (J. Pariente specially concurring) (noting that Ring does not hold that either the Sixth or the Eighth Amendment requires jury sentencing).

Moreover, Florida's capital sentencing statute is constitutional although, Florida does not require a special interrogatory verdict form requiring jurors to identify which aggravators they found to exist beyond a reasonable doubt and the vote as to each aggravator. Citing State v. Steele, 921 So. 2d 538 (Fla. 2005), Cole does acknowledge that there is no case authority supporting the propositions she espouses that the statute is constitutionally flawed. In Steele, a majority of this Court ruled that a trial court departs from the essential requirements of law, in a death penalty case, by using a penalty phase special verdict form that details the jurors' determination of the applicable aggravating factors. Steele, 921 So. 2d at 540.

[4] The jury also found Cole to be death eligible, unanimously, and beyond a reasonable doubt when it found her guilty of robbery and kidnapping. Troy v. State, 948 So. 2d 635, 653 (Fla. 2006) (denying Ring relief because the trial court found the "course of a felony aggravator" based on the jury's verdict finding defendant guilty of two counts of armed burglary, two counts of armed robbery, and attempted sexual battery in addition to first-degree murder).

Cole's contention the Sixth Amendment requires juries to unanimously find the existence of aggravating factors and to unanimously recommend that death be imposed, is equally without merit. *See*, Frances v. State, 970 So. 2d 806, 822 (Fla. 2007) (rejecting Frances' argument that Ring requires a unanimous death recommendation or the jurors to find the aggravating circumstances unanimously). *Note:* Coday v. State, 946 So. 2d 988, 1006 (Fla. 2006) ("This Court has repeatedly held that it is not unconstitutional for a jury to be allowed to recommend death on a simple majority vote".).

Other assertions such as the argument that the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence, has likewise been rejected in Williams v. State, 967 So. 2d 735, 761 (Fla. 2007); Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005) (rejecting the claim that the standard jury instructions impermissibly shift the burden to the defendant to prove that death is not the appropriate sentence); and see, Walton v. State, 847 So. 2d 438, 444 (Fla. 2003) ("Walton's claims relating to the constitutionality of Florida's death penalty scheme - that Florida's death penalty statute shifts the burden to the capital defendant during the penalty phase, presumes that death is the appropriate punishment and imposes an unconstitutional "automatic aggravator" when a

defendant is prosecuted under a theory of felony murder--have been rejected by this Court numerous times and are entirely devoid of merit."); Proffitt v. Florida, 428 U.S. 242 (1976) (upholding constitutionality of Florida's death penalty statute against multiple challenges, including challenge based on vagueness and overbreadth of aggravating and mitigating circumstances and the lack of guidance for the jury in weighing such factors); Asay v. Moore, 828 So. 2d 985, 993 (Fla. 2002) (rejecting Asay's claims that Florida's capital sentencing statute is unconstitutionally vague and overbroad on its face, and that the invalidity was not cured by specific instructions; Castro v. State, 644 So. 2d 987, 991 (Fla. 1994).

Conclusively, Cole's sentences of death satisfy the requirements of the Sixth Amendment and the dictates of Ring. One of the aggravating factors found to exist, for each of the murders, was that Cole had previously been convicted of a violent felony, specifically the contemporaneous murder of the other victim. Ring will not act to disturb a death sentence when one of the aggravating circumstances is a "prior violent felony" conviction. Bevel v. State, 983 So. 2d 505 (Fla. 2008) (denying Ring challenge when one of the aggravating factors found to exist was a prior violent felony, specifically the contemporaneous murder of a second victim).

All relief must denied as to this issue on appeal.

CONCLUSION

Based upon the foregoing, the State requests this Court affirm Cole's convictions and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301, this 20th day of April 2009.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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