

IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Appellant,

vs.

CASE NO. SC00-1042

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT, IN AND
FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CURTIS M. FRENCH
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 291692

OFFICE OF THE ATTORNEY

THE CAPITOL
TALLAHASSEE, FLORIDA 32399-

(850) 414-3300 EXT. 4583

COUNSEL FOR APPELLEE

GENERAL

1050

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STATEMENT OF THE CASE AND FACTS

The statement of the case and facts set out in Hurst's brief is generally acceptable to the State. The State will, however, offer its own statement of the evidence presented by the State at the guilt phase.

The victim, Cynthia Harrison, was an assistant manager of a Popeye's fast food restaurant on Nine Mile Road in Pensacola (2T 206-07, 209). She was four feet, eight and one half inches tall and weighed 86 pounds (4T 659). Her face had abnormalities suggestive of Downs syndrome (4T 660). In addition, she wore glasses, and she also wore a wig because she had some kind of physical ailment which caused her hair to fall out (2T 335).

The Appellant, Timothy Hurst, worked at this same Popeye's (2T 334). He was six feet tall, weighed 280 pounds, and wore a size 14 shoe (3T 544, 547). Cindy Knight, the manager of this Popeye's, said that Hurst typically wore "white tennis shoes" and a "visor" that he turned around backwards (2T 331-32). He worked in the morning, and was the "prep person," making rice and biscuits and washing dishes, and he normally went home between 1:00 and 2:00 p.m. (2T 334).

On Saturday, May 2, 1998 (the day of the murder), the restaurant was supposed to open for business at 10:30 a.m. (2T 337). Harrison and Hurst were to be at work by 8 a.m. (2T 331). No one else was supposed to be there until 9:00 a.m., when

Anthony Brown was scheduled to begin work (2T 207, 331). Harrison, being assistant manager, had a key to the restaurant; Hurst did not (2T 332). Until 10:30, the restaurant would have been locked; if the door were opened from inside, it would relock automatically upon closing (2T 337).

Harrison's duties upon arriving at the restaurant in the morning included turning the alarm off, counting the money, putting \$375 in change in the drawers for business that day, and taking the cash from the previous day's business to the bank (2T 333-34). The money and the bank deposit slip from the night before would have been in a locked safe when Harrison arrived (2T 223-24).¹ Only the manager and two assistant managers, including Harrison, would have had the combination to the safe; Hurst did not (2T 225-26, 332).

Between 7:15 to 7:20 a.m. on May 2, David Kladitis, an occasional customer at the Popeye's on Nine Mile Road, was standing outside a feed store on North Palafox, waiting for it to open, when he saw Harrison drive by (2T 291-92). He waved at her and she waved back (2T 292-93). Following her, Kladitis noticed, was a man in a large blue sedan (2T 293). Although he could not identify the driver other than to say

¹ Because Harrison had closed out the store the night before the murder, the deposit slip in the safe that morning would have been filled out by her (2T 224).

he was a black male (2T 293, 3T 519), Kladitis later identified Hurst's blue Mercury Grand Marquis as the car he saw following the victim's that morning.²

Carl Hess, who worked at the Wendy's next door to Popeye's (the two restaurants were across the street from each other, but were on the same side of Nine Mile Road), got to work at 7 a.m. on May 2, 1998 (2T 299-300). While doing a "[parking] lot check" sometime thereafter, he saw Harrison arrive at Popeye's, followed soon afterwards by a man driving a blue Ford "Taurus" (2T 300-02). The man was about six feet tall, weighed 280-300 pounds, and wore a Popeye's uniform and a baseball cap that was on backwards (2T 302-03). He went to the door of Popeye's and banged on the door until Harrison opened the door and let him in (2T 303). Hess testified that he recognized the man from having seen him at Popeye's before and also from an occasion when the man, whose name he thought was Timothy Hudson, had filled out an application at Wendy's (2T 304-05). Hess picked Hurst out of a six-person photographic lineup, and also made a courtroom identification of Hurst as being the man he had seen that morning (2T 304-06).

² The Appellant states in his brief that Kladitis picked Hurst's car from photographs. Although not a matter of great significance, the State's reading of the record is that Kladitis actually viewed four *automobiles* at the sheriff's department, not four *photographs* of automobiles (2T 245-47, 294, 3T 519).

At 7:55 a.m., Jeanette Hayes, an employee of the Popeye's at Pea Ridge, called Harrison to tell her that a delivery truck was leaving her Popeye's for Harrison's (2T 285-88). Harrison answered, as she always answered the phone: "Good morning, Popeye's. This is Cynthia. How may I help you?" (2T 286). She did not sound scared (2T 286).

Anthony Brown was supposed to report to work at Popeye's at 9:00 a.m. that morning, but arrived early because he had ridden with his mother and she had to be at work at 8:30 (2T 207-08). Harrison's car was at Popeye's when he got there, but Hurst's was not (2T 209-10). The door was locked and, although Brown waited, no one came to open the door (2T 208-09). Brown did not have a watch on, and was not sure when he arrived at Popeye's (2T 218). However, a delivery driver arrived five minutes after he did (2T 209).³

³ Brown testified on cross-examination that it was his "impression" that he got to Popeye's at 8:05 a.m., but testified that his mother (who is now deceased, 2T 209) had told him they did not get there until 8:15 (2T 212). On redirect, he testified that he knew only that he and his mother left their house after 8:00 a.m. and that the truck driver arrived five minutes after he did (2T 218). The delivery truck driver did not testify, but the parties stipulated that he would have testified that he had arrived at 8:10 a.m. (4T 716). The State did not stipulate that he actually did arrive at that time, nor concede that any of these times were more than guesswork, arguing to the jury that the only times established accurately were that Jeanette Hayes had called the victim at 7:55 (because she had looked at the clock) and that Hurst had bought shoes at Wal Mart at 10:10 (as evidenced by the store's records) (5T 898-99).

Tanya Crenshaw, the other assistant manager (besides Harrison), testified that she arrived at 10:30, unaware there was any problem until she got to Popeye's and saw two employees and an delivery man standing outside waiting (2T 220-221). She unlocked the door, only to find the safe unlocked, papers on the floor, and the drive-through window open (2T 221).

Cynthia Harrison and Timothy Hurst were supposed to be working that morning (2T 221). Hurst was no where around (2T 212), but the delivery driver and one of the other employees found Cynthia Harrison's body in the freezer (2T 223).

The police were called and investigators documented the scene. Harrison's body had been "thrown up on cardboard boxes . . . inside the freezer" (2T 242). She was bound and gagged with black electrical tape (2T 242). She had over 60 incised wounds to her body, all of which were consistent with having been made by the box cutter found on the top shelf of a baker's rack by the back door (2T 243, 4T 655, 657-58). Directly in front of the box cutter was a blood smear (4T 655). There was also blood on the box cutter itself which was later determined by DNA analysis to be the victim's (2T 244, 4T 623-25). Water covered the floor near the freezer where someone had recently hosed down the area (2T 253, 271, 4T 656). The victim's necktie had been cut off and lay near the entryway to the freezer (2T 251). Blood was spattered on the victim's pants, and there were medium-velocity blood spatters

(consistent with forced injury occurring) on both sides of the door to the freezer and on boxes inside the freezer (2T 255, 258-59). There were also cast-off blood spatters (described basically as having been flung off a moving object like an arm) on food trays inside the freezer (2T 260), and areas of “arterial spurt” near the victim’s head (2T 261). Finally, there were blood contact stains on the victim’s pants indicating she had at some point knelt in her own blood (2T 255-56), and, as well, a “heavy” area of contact blood stain behind the victim’s head (2T 260-61).

The medical examiner described the 60 plus incised wounds. Several tendons and the radial artery in her left wrist, just above where she had been bound with electrical tape, had been severed (4T 661, 664). Her shirt was actually imbedded in one of the many incised wounds to her back (4T 661). She had been cut to the bone on the top of her scalp, on the back of her head, and across the back of her neck (4T 662-63). She had been repeatedly cut in the face - from underneath her eyelids down through her upper lip - deep enough to cut to the bone and even penetrate into the “gingival mucosa” area inside her mouth (4T 662). Some of the “gaping” wounds on the left side of her face extended “down into the neck region” (4T 662). There were more “gaping” wounds on the left side of her body that were the result of “multiple wounds coming together,” extending from the neck region and down “on across the midline” (4T 662). The other side of her body had additional incised wounds,

including some which exposed and cut into her trachea, causing her to inhale her own blood (4T 662-63). In addition, her jugular vein had been cut (4T 666). Finally, her left lung had been penetrated and had collapsed, causing the victim to have “pneumothorax on that side as well as all the bleeding that would have come from that particular wound” (4T 663).

The medical examiner testified that if more than one weapon had been used, it would have had to have been “extremely sharp,” have a “sharp-sharp” configuration, make a “very clean cut,” and leave identical wound markings to the box cutter found at the scene (4T 671). That box cutter was the only item at the scene which was consistent with having inflicted the victim’s wounds (4T 671).

The medical examiner testified that several of these wounds could have been fatal, including the cut trachea, the perforated lung, the incised jugular vein, and the arterial cut to her left wrist (4T 665-66). These wounds would not have been instantaneously fatal, however (4T 666).⁴ He thought Harrison might have lived perhaps fifteen minutes, although that would be “stretching it” (4T 668-69).

⁴ An incision to the jugular vein can allow air to get to the heart, causing an “air embolus” to the heart which would be instantly fatal; however, a postmortem radiograph of the chest did not demonstrate any appreciable air in Harrison’s heart (4T 665-66).

Willie Williams testified that, on April 29, 1998 (three days before the murder), Hurst accidentally cut him with a box cutter while the two of them were playing around (2T 352-53). Williams testified that State's Exhibit 36 (the box cutter found at the scene, 2T 266) "looked like" the box cutter Hurst had cut him with (2T 353, 356).⁵

Cynthia Knight testified that they kept two-for-ninety-nine-cent box cutters at the store; they did not have box cutters like State's 36 (2T 335-36). Nor was there any black electrical tape kept on the premises (2T 336).

Lee Smith, called Lee-Lee by his family and friends, testified that Hurst had stopped by Lee-Lee's house the evening of May 1, 1998 (3T 395-96).⁶ Hurst told Lee-Lee that he planned to rob Popeye's (3T 396). At 8:30 the next morning, Hurst returned (3T 396). This time, he had a clear plastic container with money in it and also a bank bag, and he told Lee-Lee that he got them from Popeye's, after killing "the manager" or "the lady" (3T 396-97, 414, 417). Hurst told Lee-Lee that he had "cut her" and put her "in the freezer" (3T 400). Lee-Lee observed that Hurst had spots of

⁵ On defense cross-examination, Williams testified that, although State's 36 was similar, it was not the "same" box cutter that Hurst had cut him with (2T 354-55).

⁶ At the time, Lee-Lee was 15 years old and living with his parents (2T 371). He was five feet, seven inches tall and wore size nine, ten or eleven shoes (2T 378, 381, 3T 404-07). His parents had gone to Selma, Alabama, and were not scheduled to return until Sunday (2T 371-72).

blood on his pants (3T 397). According to Lee-Lee, Hurst told him to wash the pants and he did (3T 397-98). Their dryer did not work, so Lee-Lee dried them with an iron (3T 398).

Besides money, Lee-Lee testified, Hurst had a wallet with the victim's identification (3T 399). Lee-Lee threw it away in the family's garbage can, along with Hurst's shoes and socks (3T 399). Afterwards, they went to the Wal-Mart on Highway 29, in Hurst's blue Grand Marquis, with Hurst's brother Jermaine (3T 401-02). There, Lee-Lee testified, Hurst bought a pair of shoes, for which he paid about \$30 (3T 401). From Wal-Mart, they went across the street to a pawn shop (3T 402). Hurst saw three rings he wanted, so they returned to Lee-Lee's house so Hurst could get more money (three to five hundred dollars, Lee-Lee thought) (3T 402). They returned to the pawn shop, and Hurst bought the rings he had seen earlier (3T 403).

Sales records from the Wal-Mart on Highway 29 show that, at 10:10 a.m. on May 2, 1998, a pair of LA Gear white and navy shoes were purchased for \$31.95 plus tax (3T 385-86). No other such shoes were purchased on that date (3T 486-87).⁷

⁷ Hurst was wearing black size 14 tennis shoes when interviewed by police Saturday afternoon (3T 544). The shoes he had bought at Wal-Mart, along with the sale receipt, were later recovered from Hurst's car (3T 542-43).

Robert Little, of the Cash USA pawn shop located across the road from the Highway 29 Wal-Mart, testified that some time in the morning of May 2, 1998, three black males, one much bigger than the other two, came into his pawn shop and bought a couple of necklaces (3T 487-88).⁸ The bigger person paid for the necklaces, and also indicated that he would return later to buy some rings (3T 488-89). A half an hour later, he did return, buying two or three gold rings for about \$300 and paying cash (3T 489). Little identified State's Exhibit 46 as being the three rings the heavy-set man had bought the morning of May 2 (3T 490-91).⁹

Lee-Lee's parents returned home Sunday (May 3), and they called police after hearing about the murder at Popeye's and finding money in Lee-Lee's room (2T 372-73).

Sheriff's investigator John Sanderson went to the Smith residence on May 3 (3T 498). Lee-Lee's mother showed Sanderson a plastic container with cash in it and a "tin can" with change in it (3T 498). His father brought to Sanderson a pair of size 14

⁸ Little was not sure exactly when the three entered his pawn shop, but estimated that it was within an hour of the time his wife made their morning deposit "around a little after 11:00" (3T 489).

⁹ Although Little had picked Hurst's photograph out of a six-person lineup as the person who had bought the rings, by the time of the trial two years later he did not think he would be able to identify the defendant in person and was not asked to (3T 491-92, 504).

tennis shoes that he had retrieved from the garbage can out back (2T 281, 4T 499). The shoes (State's Exhibit 37) appeared to have blood on them (3T 499).¹⁰

Police conducted their own search of the garbage can, retrieving a black leather coin purse containing Harrison's driver's license and other identification, and a First Union bank bag marked "Popeye's" and the word "Cynthia" (3T 573). The bank bag contained keys, a pencil, a sheet of notebook paper with "Lee Smith, language lab" written on the front and some numbers written on the back, a mis-matching pair of socks having what appeared to be bloodstains on them, and a First Union deposit slip (3T 573). The deposit slip had been signed by Cynthia Harrison and showed an amount of \$1751.54 (3T 574).¹¹

¹⁰ Jack Remus of the FDLE serology and DNA section testified that the shoes had "indications of blood in several areas" but the areas were too small to do a DNA typing (4T 625-26). Remus noted that water can wash blood off shoes (4T 626).

¹¹ According to the transcript, crime scene investigator Mike Hallmark testified that the amount on the deposit slip was \$751.54 (3T 574). Whether he misspoke, or the court reporter misunderstood his testimony, or there is a typographical error on that page is unclear. However, assistant manager Crenshaw looked at this exhibit and testified that it was \$1751.54 (2T 224). Furthermore, the writing on the back of Lee-Lee's language lab paper included the number \$1751.54 (3T 447-48), which Appellant himself states was the "same" amount as on the deposit slip. Initial Brief of Appellant at 10. Knight (the manager) and Crenshaw (the assistant manager) testified that the amount reflected on the deposit slip would have been in the restaurant, in a bag in the safe, when Harrison arrived that morning (2T 224-25, 333).

Lee-Lee's fingerprints were found on the plastic money box and the bank bag (4T 610-11). Three of Hurst's fingerprints were found on the deposit slip (4T 609-10). Blood on one of the two socks was identified by DNA analysis as being that of the victim (4T 628-29).

On the afternoon of May 3, sheriff's investigator Donald Buddy Nesmith interviewed Hurst, ultimately tape-recording a statement (3T 520, 523). Hurst told Nesmith that he had awakened at 7:30 a.m. that morning and had left his house at 7:45 (3T 523).¹² His car "stopped" (3T 523). He got it running and went to his friend Andre's house (3T 523).¹³ Because Andre's mother was on the telephone, he drove to an EZ-Serve across the street to use a pay phone to call Popeye's (3T 524, 526). He told Nesmith that he had called in before 8:00 a.m. (3T 539). Hurst initially told Nesmith that he had told Harrison he would not be in that day and she had said, "Yeah," and hung up (3T 526). Subsequently, he stated that she had answered "Okay" in a "scary" voice, or that her voice had a "scary tone" in it, and he had heard

¹² The evidence is undisputed that it would have taken Hurst 7-8 minutes to drive from his house to Popeye's, either by taking Highway 29 to Nine Mile Road, or by driving over to Palafox and then down to Nine Mile Road (4T 761-62, 5T 813-14).

¹³ On cross-examination, Nesmith was asked if he had talked to Andre about this claimed visit. Nesmith answered that he had, but Andre had failed to corroborate it (3T 550).

whispering in the background (3T 527-28). Asked by Nesmith to describe this “scary voice,” Hurst explained:

It’s like -- you know, like -- like when you’re like -- how can I put it? It didn’t feel like -- you knew something happened. Her voice -- her voice -- her voice -- changed -- [Nesmith: Uh-huh.] -- from something like -- from a regular voice to like -- you know, like a low tone. [Nesmith: Uh-huh.] Her voice was wiggly, you know, like speaking in a voice. [Nesmith: Uh-huh.] She wasn’t speaking the way she normally speaks. But, usually, when she’s on the phone, she say her name, and then Popeye’s, and then afterward can she help you; but when she got on the phone, she said -- she said hello. And then usually when I call in by some -- I usually tell them, like I’m trying to find another way to come to work, but she didn’t ask me no questions about how to come to work or nothing, but I told her I couldn’t -- I wouldn’t be able to make it, and she said okay, then hung up. [Nesmith: What did you think about that?] I feel like she probably would have been sick, tired, or something, something. Something had gone wrong.

(3T 528-29). Hurst told Nesmith that, when he got off the phone, he went to Lee-Lee’s house and then back to his own house, where his brother Jermaine asked Hurst if he could take him to a pawn shop (3T 530). Hurst agreed, but told Jermaine that he needed something to clean his gas tank out (3T 4530). So he drove back to Lee-Lee’s house, where he got some and put it in his car (3T 530-31). From there, he drove back to his house, picked up his brother, and drove to the Cash USA pawn shop across the street from Wal-Mart (3T 531). With him were Jermaine, Lee-Lee and Lee-Lee’s friend whose name Hurst did not know (3T 531). Hurst first stated that he had bought his brother two necklaces, with his brother’s money, but then he changed that

to he had bought one necklace each for his brother and Lee-Lee's friend, with their money (3T 532-33). Hurst told Nesmith that each of them had \$20, and the necklaces cost \$15 each (3T 533). Afterwards, they went to Escambia Arms to visit his cousin Lola, arriving there at 8:00 or 8:20 a.m., and remaining there until he got a call from his mother that the police were looking for him, between 1:00 and 1:30 p.m. (3T 533-34). Then he went straight home, with Lee-Lee (3T 534-35).

Hurst acknowledged that although sometimes both managers would be in at 8:00 a.m., there routinely would have been no one there at that time but one assistant manager and Hurst (3T 539-41).

Hurst went home the evening of May 2, but was arrested the next evening (3T 546-47, 556).

Police searched Hurst's car and found black electrical tape on some speaker wires that had the "same characteristics" as the tape used to bind Harrison and could have come from the same roll of tape (3T 479-83, 4T 735-39). In Hurst's home, police found the three rings Hurst had bought at Cash USA pawn (3T 502-04, 490-91).

Michael Williams testified that, the night before Hurst was arrested, Hurst had told Williams that he had "an argument with a woman," that she had "retaliated," and that he had hit her, cut her with a box cutter, tied her up and put her in a freezer (2T 321). Hurst was laughing as he told Williams this (2T 322).

Anthony Williams testified that while he was in jail with Hurst, Hurst admitted participating in the murder at Popeye's (2T 358). Hurst told him someone else was involved but, according to Williams' testimony, did not identify any accomplices (2T 358).¹⁴

Willie James Griffin, Jr, testified that, while he was in the Escambia County Jail with Hurst, he asked Hurst how he felt about "that incident" (2T 364-65). According to Griffin, Hurst answered: "I did that swine, and 'F' the rest of them" (2T 365). Hurst added that "they didn't get along in the first place, and she was like slow or something like that, like something was wrong with her mentally or something" (2T 365).

¹⁴ On cross-examination, however, he was confronted with a pre-trial deposition in which he apparently had identified Lee-Lee and Mike Williams as also being involved (2T 362-63).

SUMMARY OF ARGUMENT

Hurst presents four penalty phase issues on appeal. In addition, the State has addressed the sufficiency of the evidence to support the conviction for first degree murder:

A. Because this Court automatically reviews the evidence in a death penalty case whether or not the defendant raises the sufficiency of the evidence to support the conviction as an issue on appeal, the State has addressed the sufficiency of the evidence.

From the lack of forced entry and other factors, it is obvious that this robbery/murder was an “inside job.” Hurst was the only other employee who was supposed to be in the restaurant at the time Harrison was murdered. He has no alibi for the period of time during which the murder occurred and no innocent explanation appears for Hurst suddenly having several hundred dollars to spend the morning of May 2. His statement to police was glaring in its omissions and was contradicted in significant respects by the testimony of other witnesses. Furthermore, there is no innocent explanation for his fingerprints being on the bank deposit slip that the victim had filled out, and the jury was entitled to believe the many witnesses to whom Hurst admitted having committed the robbery/murder.

1. The trial court did not err in finding the avoid arrest aggravator even though that aggravator had not been presented to the jury or argued by the prosecutor. Under this Court's precedent, a trial court may find an aggravator not presented to the jury. Moreover, so long as the trial court finds at least one valid aggravator, this Court on appeal may consider all additional aggravators established by the record even if not found by the trial court. Here, the trial court found two aggravators (murder during robbery and HAC) which are not disputed by Hurst and are clearly valid under the evidence. Since, in these circumstances, this Court could consider an additional aggravator shown by the evidence even if not found by the trial court, it stands to reason that the trial court committed no reversible error in finding such additional aggravator itself.

The evidence supports the avoid arrest aggravator. Hurst planned this robbery in advance, and took no precautions to prevent Harrison - who knew him well - from identifying him. Hurst was six feet tall and weighed almost 300 pounds, while the victim was less than five feet tall and weighed 86 pounds. She was hardly a threat at the outset, but Hurst murdered her *after* binding and gagging her. He later explained to a friend that he had not wanted Harrison to see his face. The evidence supports the trial court's finding that Hurst murdered Harrison to avoid arrest by eliminating the only witness.

2. The trial court committed no abuse of discretion in its consideration and evaluation of Hurst's proposed mitigation. Of the ten proposed mitigators, Hurst complains only about four of the court's findings, including three findings in which the trial court *did give weight to Hurst's proposed mitigation*, albeit, not as much weight as Hurst would have liked.

The trial court did not err in rejecting Hurst's good family background in mitigation, or in giving little weight to his contributions to the community and to his church, or in giving little weight to his religious activities. Hurst has not explained why the fact that he was not abused or deprived as a child mitigates this brutal murder. As for the contributions to church and community, and his religious activities, no member of the community or the church testified except for Hurst's immediate family (mother, father and sister). Hurst's contributions to the community and to the church appear to have been minimal, and no special contributions have been shown.

As for the age mitigator, Hurst was 18, was gainfully employed, and owned his own car. Although his mother testified that he was emotionally immature, her testimony was not corroborated by any expert mental health testimony. Nor was the family's opinion that Hurst was a little slow corroborated by school records or expert testimony showing that he has a low IQ or other mental or emotional problems or deficiencies. In fact, he appears from the testimony to have made average grades in

school and was given responsibilities around the house, in church, and on the job. In these circumstances, the trial court committed no abuse of discretion in giving “very little weight” to the age mitigator.

3. The death penalty is not disproportionate for the brutal stabbing murder of a co-employee during a robbery, especially in view of the modest mitigation presented in this case.

4. Hurst’s Apprendi claim is meritless under recent precedent from this Court.

ARGUMENT

A.

PRELIMINARY ARGUMENT ABOUT SUFFICIENCY OF EVIDENCE OF GUILT.

Hurst raises no guilt phase issues and does not question the sufficiency of the evidence to support his conviction for first degree murder. However, under Florida Rule of Appellate Procedure 9.140(h), this Court reviews the evidence supporting the conviction when a defendant is sentenced to death regardless of whether insufficiency of the evidence is an issue on appeal. Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981); Stano v. State, 473 So.2d 1282, 1288 (Fla. 1985). The State will therefore address this issue.

Although there is some evidence in this case that one or more other persons may have been involved in this crime, at least after the fact,¹⁵ the State insisted at trial, and the evidence clearly demonstrates, that Hurst was the “main perpetrator” (5T 903), who actually entered the restaurant and committed the murder. This obviously was an “inside job.” Harrison simply would not have let a stranger in the restaurant at that time of the morning, but she would have let Hurst in, not only because she knew him,

¹⁵ According to the State’s sentencing memorandum, Lee Lee Smith has been charged by information with the offense of Accessory After the Fact to Capital Murder (3R 464).

but because he was supposed to be there, having been assigned to work that morning. Hurst was the “inside man” who worked at Popeye’s, knew the layout, knew the procedures, knew that over \$2000 would be in the restaurant that morning, knew where that money would be, knew that Harrison would be by herself at 8:00 a.m., and would have been let in the building by Harrison because she knew him and knew he was supposed to be there that morning. And as the prep person, Hurst is the person who would have known where the buckets were, where the mop was, where the hose was, and who would have been able quickly to find these items, hose down the area and leave. There simply is no person other than Hurst who would have had the necessary knowledge, means and opportunity to carry out this crime.

Moreover, there is no evidence in this case that anyone but Hurst wore a size 14 shoe, that anyone but Hurst spent hundreds of dollars in the hours after the murder, that anyone but Hurst had electrical tape of the type used to bind the victim, that anyone but Hurst was in possession of a box cutter capable of inflicting wounds identical to those suffered by the victim, or that anyone but Hurst had handled (and left his fingerprints on) the \$1751.54 deposit slip the victim had filled out.

In addition, Hurst has no alibi, and his own statements about his activities that morning are problematic in several ways, and are contradicted by other witnesses.

Even accepting the testimony of Hurst's defense alibi witnesses at face value, the fact is that none of them can account for Hurst's whereabouts between about 7:45 a.m. and 8:30 a.m. the morning of May 2, which happens to be precisely the time period during which Harrison was murdered. Furthermore, the testimony of the defense witnesses does not credibly establish an accurate time line for Hurst's whereabouts following the murder. For just one example, several family members testified that Hurst was at his cousin's home in Escambia Arms from about 10:00 to 10:40 a.m. and for the next several hours afterward (4T 776-89). But Hurst was at Wal-Mart at 10:10 a.m. buying shoes. He went from there to the pawn shop and bought necklaces. He left there stating he would return 15-20 minutes later to buy some rings and clearly and irrefutably did so. As the prosecutor pointed out in his argument to the jury, "there's just no way that [Hurst could have done] all of this . . . and [gotten] back to Escambia Arms by 10:40" (5T 910). The prosecutor argued that these witnesses and others just did not know what time it was.

As for Hurst's statement to police, one of the more compellingly incriminatory aspects of it is that he completely failed to mention having gone to Wal-Mart and bought a brand new pair of shoes that just happened to be the same size as the pair found in Lee-Lee's trash with blood on them and, although he did tell the police about having bought necklaces for his younger companions (with *their* money, he claimed),

he also completely failed to mention that he had returned 15-20 minutes later and bought \$300 worth of rings. One has to wonder why he did not want police to know that he had money or that he had bought new shoes and expensive rings within hours of Harrison's murder. Moreover, his statement that he had called the victim just before 8:00 a.m. and she sounded scared and did not answer in her usual manner is not only dubious on its face given his difficulty in describing how she sounded, but is contradicted by the testimony of the manager of the Pea Ridge Popeye's who had called Harrison at 7:55 and everything was fine. Aside from all this, Hurst's description of his aborted attempt to go to work does not make sense. If his car really broke down, one has to wonder how was he able to drive it all over the place -- according to his own statement, over to Andre's house, then to a convenience store across the street from Andre's, then to Lee-Lee's house, then home, then back to Lee-Lee's house, then to the pawn shop, and then to Escambia Arms. And why drive to Andre's house to call anyway? He could not have been more than a couple of minutes from home. Why not just go home and call from there?

In any event, Hurst's description of his activities and whereabouts during this time is contradicted not only by the evidence and testimony concerning the Wal-Mart shoes and the pawn shop rings, but also by the testimony of Kladitis and Hess, the former having seen Hurst following Harrison down Palafox on her way to work, and

the latter having seen Hurst arrive at Popeye's shortly after Harrison did, go to the door, and be admitted into the restaurant.

Finally, Hurst confessed to Michael Williams before he was arrested and to Anthony Williams and Willie James Griffin after he was arrested. These statements are direct evidence of his guilt, Hardwick v. State, 521 So.2d 1071 (Fla. 1988), and coupled with all the other facts and circumstances established by the evidence, are more than sufficient to support the jury's determination that Hurst is guilty of first degree murder beyond any reasonable doubt.

ISSUE I

THE TRIAL COURT DID NOT ERR IN FINDING
THAT THE MURDER WAS COMMITTED TO
AVOID ARREST.

In the first issue presented and argued by Hurst, he contends the trial court erred in finding the avoid arrest aggravator for two reasons: (a) the avoid arrest aggravator had not been presented to the jury or argued by the prosecutor, and (b) the evidence does not support the aggravator. The State disagrees on each count.

It is well settled that a trial judge may find aggravators not submitted to the jury. Hoffman v. State, 474 So.2d 1178 (Fla. 1985); White v. State, 403 So.2d 331 (Fla. 1981). Furthermore, this Court on appeal may consider aggravators supported by the evidence even though not argued to and not found by the trial court, in accordance

with this Court's "responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision." Echols v. State, 484 So.2d 568, 576-77 (Fla. 1986). If, as the State contends, the evidence is sufficient to support the avoid-arrest aggravator, the trial court did not err, in finding that aggravator even though not argued by the state below. Hurst's reliance on Hamilton v. State, 678 So.2d 1228, 1232 (Fla. 1996) and Cannady v. State, 620 So.2d 165, 170 (Fla. 1993) is misplaced. Neither of those cases overruled Echols. In those cases, this Court merely held that, when it determined on appeal that *none* of the aggravators found by the trial court was valid, it would not uphold a death sentence on the basis of an aggravator not presented to or found by the trial court. Here, the trial court found two aggravators besides avoid arrest (HAC and murder committed during a robbery), the validity of which Hurst does not dispute. If, as the State contends and the trial court found, the avoid arrest aggravator is established by the evidence, then that aggravator may properly be considered by this Court along with the other two undisputedly valid aggravators in support of the trial court's decision to impose a death sentence.¹⁶

¹⁶ Although Hurst argues that he was deprived of the opportunity to defend against the applicability of the avoid-arrest aggravator, he raised no such objection at sentencing, nor moved to re-open the record to present such evidence, nor even suggested what evidence he could possibly have introduced to rebut this aggravator. Even now, Hurst does not tell us what

Hurst contends the evidence does not support the avoid arrest aggravator, noting that it is not enough to show merely that the victim knew the defendant. Here, however, the evidence does not show merely that the victim knew the defendant, or that Hurst may not have liked the victim. While his dislike for the victim may have been a contributory motive, Hurst planned the commission of the robbery ahead of time, according to statements he made to others. Thus, the robbery itself was no afterthought.¹⁷ Having decided to seize the opportunity he had as an employee to get inside the restaurant before it opened, while no one would be there except the victim, Hurst had to consider how he would avoid being arrested for the robbery, as the victim knew and could readily identify him. Like the defendants in Jennings v. State, 718 So.2d 144 (Fla. 1998) and Riley v. State, 366 So.2d 19 (Fla. 1978), Hurst wore no mask or other disguise to prevent being identified. Of course, if he had done so, Harrison would not have let him into the restaurant. The solution Hurst chose, it seems obvious, was to murder Harrison. Clearly, he did not kill Harrison merely

evidence he would present if given the opportunity. Hurst's due process argument is not preserved for appeal and, moreover, no harm has been shown.

¹⁷ Significantly, Hurst brought a box cutter knife and black electrical tape to the restaurant. Although it is possible that he habitually carried the knife, it is difficult to imagine why he would have brought electrical tape into the restaurant except in connection with his plan to rob the restaurant and tie up Harrison.

because she resisted, as he murdered her *after* rendering her helpless by binding her and gagging her with electrical tape.¹⁸ In fact, Harrison was helpless at the outset, being less than five feet tall and weighing less than 90 pounds as against Hurst's 280-300 pounds. Hurst could readily have overcome any possible resistance and, as in Jennings, "any immediate threat [to Hurst] could have been eliminated by simply closing and securing the freezer door" before killing Harrison instead of afterwards. 718 So.2d at 151.

Moreover, although Hurst did not make the statement ahead of time that Jennings did, to the effect that if he ever committed a robbery he would leave no witnesses, Hurst did explain afterward that he had not wanted the victim to "see his face" (2T 322) – a comment which, given the fact that she had to see his face when she let him in the restaurant, can only be construed as a reference to eliminating her ability to identify him by eliminating her as a witness.

While Hurst may have been motivated in part by his dislike for Harrison, the evidence as a whole supports the trial courts' conclusion that a dominant motive for

¹⁸ Should Hurst argue in reply that this statement is speculation, the State's response would be that Hurst would have had no reason to bind or gag the victim *after* killing her. The *only* reasonable inference is that he bound and gagged her and *then* killed her. While an aggravator may not be supportable by mere speculation, reasonable inferences are not only proper, but are a necessary and indispensable component of any proof.

Harrison's murder was to avoid arrest by eliminating the only witness. Trease v. State, 768 So.2d 1050, 1055-56 (Fla. 2000) (avoid arrest aggravator properly found where victim knew defendant and defendant told another that the victim had to be killed because he could identify him). The trial court did not err in finding that this murder was committed to avoid arrest. Should this Court disagree for any reason, the State would contend that any error is harmless in light of the undisputed aggravators of murder committed during robbery and HAC and the minimal mitigation presented in this case. Jones v. State, 748 So.2d 1012, 1027 (Fla. 1999).

ISSUE II

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN CONSIDERING AND WEIGHING PROPOSED MITIGATION.

The trial court evaluated ten potential mitigators in its sentencing order. The court gave seven of these potential mitigators at least some weight. On appeal, Hurst complains about only four of the court's ten findings, including three potential mitigators the trial court gave weight to (although not as much as Hurst would have liked), and one of which the trial court rejected.

It is clear that the trial court fully considered, thoughtfully analyzed, and expressly evaluated in its written sentencing order each of Hurst's proffered mitigating circumstances. In conducting this evaluation, the trial court is not required to find

every proposed mitigator; instead, the trial court must “determine whether [the proffered mitigator] is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.” Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). Moreover, there are “no hard and fast rules about what must be found in mitigation in any particular case Because each case is unique, determining what evidence might mitigate each individual’s sentence must remain with the trial court’s discretion.” Lucas v. State, 568 So.2d 18 (Fla. 1990). Nor must a trial court assign any particular amount of weight to a mitigator it has found. The relative weight given to each mitigating factor is within the discretion of the trial court. Campbell. In fact, “there are circumstances where a mitigating circumstance may be found to be supported by the record, but given *no* weight.” Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (emphasis supplied). So long as the trial court conducts a “thoughtful and comprehensive analysis,” Walker v. State, 707 So.2d 300, 319 (Fla. 1997), of the defendant’s proffered mitigators, the trial court’s “determination of lack of mitigation will stand absent a palpable abuse of discretion.” Foster v. State, 654 So.2d 112 (Fla. 1995). Accord, e.g., Bonifay v. State, 680 So.2d 413 (Fla. 1996) (decision as to whether a mitigating circumstance has been established, and the weight to be given to it if is established, are matters within the trial court’s discretion); Wyatt v. State, 641 So.2d 355 (Fla. 1994) (decision whether any mitigating circumstances

had been established was within trial court's discretion); Arbelaez v. State, 626 So.2d 169 (Fla. 1993) (trial court has broad discretion in determining applicability of mitigating circumstances).¹⁹

Hurst is not entitled to appellate relief as to his sentence merely because he disagrees with the judgment of the trial court. Lucas v. State, *supra*. He must show an abuse of the trial court's broad discretion. Ibid. He has failed to do so.

¹⁹ These cases are fully consistent with constitutional standards requiring "individualized sentencing." The premise explicitly underlying the United States Supreme Court's decisions in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), which struck down unanimity requirements as to juries' mitigation findings, is that reasonable persons can differ both as to what circumstances are mitigating at all and, as well, as to the weight to be given to such circumstances. Thus, each juror must be allowed to determine for himself or herself what is mitigating. So long as the sentencer is not precluded as a matter of law from giving effect to proffered mitigation, the "requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 494 U.S. 299, 307, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). The Constitution "does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." Harris v. Alabama, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004, 1014 (1995). In fact, the Court's decisions "suggest that complete jury discretion is constitutionally permissible." Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757, 761-62, 139 L.Ed.2d 702 (1998). See, also, Burger v. Kemp, 483 U.S. 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) ("mitigation may be in the eye of the beholder"); Tuilaepa v. California, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750, 767 (1994)(Souter, J., concurring)("refusing to characterize ambiguous evidence as mitigating or aggravating is . . . constitutionally permissible").

In fact, little evidence was presented in mitigation. Only Hurst's mother, father and sister testified. No testimony was presented about any drug or alcohol abuse by Hurst. No evidence was presented of any deprived or abusive childhood. Nor did any mental health expert witnesses testify. Nor do we have any school records. The only evidence of Hurst's intellectual abilities comes from his family that, although he made average grades in school, he was a "little" slow. They also testified that he was nonviolent, was emotionally immature, and was a follower.²⁰ The State will address the trial court's findings in order:

1. The proposed mitigator that "The Defendant acted under the substantial dominion of another person, Lee Lee Smith." The trial court rejected this proposed mitigator, finding that, instead of Hurst being under the dominion of Lee Lee, the true situation was the opposite (3R 486). Hurst does not object to this conclusion on appeal, and it is clearly supported by the evidence, given the difference in age and size (Hurst being older and much bigger), as well as Lee Lee's testimony and Hurst's own statement to police describing their activities with each other that morning.

2. The proposed mitigator that "The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law

²⁰ However, he was placed in charge of the other children in the family (5T 978).

was substantially impaired.” The only possible evidence to support this mitigator was testimony from his family that he was mentally a bit slow. Even assuming that to be the case (and there is absolutely no evidence in this record of his IQ or his educational attainments), no *substantial* impairment appears in this record. On the contrary, the evidence presented shows that Hurst planned a robbery and murder and carried out that plan at 8:00 a.m. in the morning while he was completely sober. The trial court deprived Hurst of no right by giving this proposed mitigator “little weight,” and Hurst does not even contend otherwise, as he does not attack this finding on appeal.

3. The proposed mitigator that “The defendant exhibited good conduct throughout every phase of the trial.” The trial court found this to be the case, although, in the court’s view, good behavior would be expected given the ample security present during the course of the trial. The court did not err in giving this proposed mitigator “little weight,” and, again, Hurst does not attack this finding on appeal.

4. The proposed mitigator that “The defendant has a good family background.” The trial court found this not to be a mitigating factor and gave it no weight. Hurst argues that this finding was error because the “family background of a capital defendant is always a factor that a sentencing judge is legally required to consider.” Initial Brief of Appellant at 41. But the trial court *did* consider this proposed mitigator;

the court merely rejected it after considering it and deciding that Hurst's good family background did not mitigate his conduct in murdering Cynthia Harrison by stabbing her over 60 times during the course of a robbery. Hurst's reliance on Eddings v. Oklahoma, 455 U.S. 104 (1982) is inapposite. Eddings dealt with a case in which the trial court had been precluded as a matter of state law from giving mitigating effect to Eddings' deprived and abusive childhood. Nothing of the sort occurred here. Florida law explicitly authorizes trial judges to *consider and weigh* nonstatutory mitigating circumstances, and there is nothing in this record to indicate that the judge below failed to understand that he was not limited to the mitigators specifically enumerated in the statute. Nothing in Eddings holds that, having considered proposed mitigation, a sentencer *must* find it, and such an interpretation of Eddings would contradict consistent precedent to the contrary emanating from the United States Supreme Court in the almost 20 years since Eddings was decided. See footnote 19 of this Brief, and cases cited therein.

Moreover, this case is factually the antithesis of Eddings. Unlike Eddings, whose mother was an alcoholic and perhaps a prostitute, and who was emotionally disturbed as the result of his troubled and violent childhood, Hurst by his own evidence enjoyed a good childhood and a good family background and was not in any way emotionally disturbed. Although Hurst complains of the trial court's rejection of

his good family background, he offers no explanation of how that good background mitigates or lessens his culpability for the crime he committed. Hurst was not deprived of familial love as he was growing up. Nor was he deprived of moral guidance by responsible parents. Nor was he deprived of the necessities of existence. In short, he is not someone who can point to an abused or deprived childhood for at least a partial explanation for why he turned out wrong, or as a basis for holding him at least somewhat less than fully responsible for his actions. That being the case, and absent any explanation for why his childhood might somehow mitigate the brutal murder he committed, the State does not think the trial court erred in rejecting this proposed mitigator. Cf. Miller v. State, 770 So.2d 1144 (Fla. 2000) (court did not abuse its discretion in declining to find proposed mitigator of abusive childhood where evidence showed only occasional administration of corporal punishment that ceased when Miller was 13). Should this Court disagree, however, the State would contend that any error is harmless in this case, given the weighty aggravation and the minimal weight that this mitigator might have been entitled to at best. See Banks v. State, 700 So.2d 363, 365 (Fla. 1997) (upholding trial court's conclusion that Banks' good family background was not entitled to significant weight); Miller v. State, *supra* (error in failing to give mitigating weight to long-term alcohol and substance abuse was harmless given weighty

aggravating factors present - prior violent felony and murder committed during robbery).

5. The proposed mitigator that “The defendant has no prior criminal history.” Hurst does not complain about the “moderate weight” that the trial court gave to this mitigator.

6. The proposed mitigator that “The Defendant’s contribution to the community was good in that he assisted his church and he assisted his neighbors during their time of need.” Because the only evidence offered by the defendant in support of this proposed mitigator was the testimony of Hurst’s parents and sister, the trial court found that this mitigator had not been established to any appreciable degree and gave it “little weight.”

In fact, not only did no one from the community or from church testify, but the actual testimony describing any contribution to the community was minuscule - just the lone statement that he “helped” people in the neighborhood, without any description of how he did so, or how often he did so, or who he might have helped. And the same goes for assistance to his church. As best as the State can determine, Hurst went to church and occasionally helped clean the church. The trial court did not err in giving this mitigator little weight. Banks v. State, supra (upholding “little weight”

given to contributions to community and family that were no more than society expects from the average individual).

7. The proposed mitigator that “The defendant maintained regular church attendance and involved himself in weekly Bible study.” The trial judge, again noting the lack of any corroborating evidence from anyone involved in the church or from the pastor, gave this proposed mitigator “little weight.” This conclusion was not erroneous. Banks, supra, 700 So.2d at 368 (“We also find that the trial court did not abuse its discretion in rejecting appellant’s religious activities as mitigating in nature.”).

8. The proposed mitigator of “Lack of future dangerousness.” The trial court, noting that no evidence had been presented to establish this circumstance and that any conclusion about Hurst’s future dangerousness would be “pure speculation,” gave it no weight. Hurst does not complain about this finding on appeal.

9. The proposed mitigator that “The defendant assisted his mother and father around the home and took care of and protected his younger siblings.” Hurst does not complain about the trial court’s conclusion that this mitigator was established and was entitled to “moderate weight.”

10. “The age of the Defendant.” Hurst was 18 at the time of the murder. He was an adult who owned his car and was gainfully employed. The trial court

concluded that, under the circumstances, Hurst's age should not be considered as a mitigating factor and would give it "very little weight."

As Hurst notes in his brief, the age mitigator must be found if the defendant was 17 at the time of the crime. Ellis v. State, 622 So.2d 991 (Fla. 1993). Hurst was 18, however, not 17, and Ellis does not control. Because Hurst was not a minor, his age is not automatically a mitigator, and any rejection of the age mitigator would be reviewed for abuse of discretion. Kearse v. State, 770 So.2d 1119, 1133 (Fla. 2000).

Although Hurst's appellate counsel characterizes the trial court's findings as "bare," the fact remains that Hurst was not still in school, he did have a car and he did have a job. Moreover, minimal testimony was presented as to his emotional maturity, none of it from neutral and competent trained experts. As noted above, we have no evidence of Hurst's IQ, no school records to look at, and no testimony from any expert that Hurst suffered from any mental problems or significant emotional immaturity. Given the evidence presented in this record, the trial court would not have committed an abuse of discretion if it had rejected the age mitigator. Furthermore, the court did give this mitigator some, albeit "very little," weight, and it therefore seems apparent that the trial court did not totally reject this mitigator. "This Court has held that the trial judge is in the best position to judge a non-minor defendant's emotional

and maturity level, and this Court will not second-guess the judge's decision to accept age in mitigation but assign it only slight weight." Kearse, supra. There was no abuse of discretion here. Furthermore, in view of the paucity in this record of any evidence that would justify giving Hurst's age significant weight, any error would be harmless in light of the powerful mitigation and basically minimal mitigation established in this case.

The trial court did not err, or at least did not err reversibly, in its consideration and evaluation of mitigating circumstances.

ISSUE III

HURST'S DEATH SENTENCE IS NOT DISPROPORTIONATE

Hurst contends here that his death sentence is disproportionate. The State disagrees. Hurst robbed his own place of employment, during the course of which he brutally murdered a small, weak, defenseless and mildly handicapped co-employee. Hurst does not even dispute that this murder was committed during a robbery or that it was heinous, atrocious or cruel.²¹ The jury recommended a death sentence by an 11 to 1 vote based upon the submission of these two aggravators. In addition, the trial

²¹ The "HAC aggravating circumstance has been consistently upheld where the victim was repeatedly stabbed." Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998).

court found the avoid arrest/witness elimination aggravator. Thus, there are three strong aggravators in this case, two of which are not even disputed, supporting the imposition of a death sentence.

The mitigation, by contrast, is modest at best, Hurst having presented no evidence of a deprived or abusive childhood, serious mental disorder, low intelligence, or drug or alcohol abuse. The death sentence in this case is proportionate compared to similar cases in which this Court has approved a death sentence.²² See, e.g., Consalvo v. State, 697 So.2d 805, 820 (Fla. 1996) (death penalty proportionate where there were two aggravating factors - avoiding arrest and commission during course of a burglary - with some nonstatutory mitigation); Bates v. State, 750 So.2d 6 (Fla. 1999) (death sentence proportionate where victim stabbed; three aggravators, including murder committed during kidnapping and sexual battery, pecuniary gain and HAC, versus two statutory mitigators and several nonstatutory mitigators; testimony indicated some neurological impairment); Robinson v. State, 24 Fla. Weekly S393, S396-97 (Fla. August 19, 1999) (death penalty proportionate where victim beaten and stabbed; three aggravators, avoid arrest, pecuniary gain and CCP, versus two statutory

²² Hurst's three proffered similar cases are inapposite, being limited to two cases in which the defendant was 17 years old, Snipes v. State, 733 So.2d 1000 (Fla. 1999) and Urbain v. State, 714 So.2d 411 (Fla. 1998), and one case in which the death sentence was supported by a single aggravator, Williams v. State, 707 So.2d 683 (Fla. 1998).

mental mitigators and evidence of abusive childhood, brain damage and heavy drug usage); Guzman v. State, 721 So.2d 1155 (Fla. 1998) (death sentence proportionate for stabbing murder; after striking CCP on appeal, death sentence affirmed based on four remaining aggravators of prior violent felony, avoid arrest, robbery and HAC, versus mitigation of alcohol and drug dependency); Zakrzewski v. State, 717 So.2d 488 (Fla. 1998) (death sentence proportionate where victims killed with machete; three aggravators of CCP, HAC and prior capital felony versus two statutory mitigators including extreme mental or emotional disturbance and a number of nonstatutory mitigators); Cole v. State, 701 So.2d 845 (Fla. 1997) (death proper where victim beaten and stabbed; four aggravators - prior violent felony, murder committed during kidnaping, pecuniary gain and HAC - versus organic damage, mental illness and abused and deprived childhood); Spencer v. State, 691 So.2d 1062 (Fla. 1996) (death penalty proportionate where victim beaten and stabbed; two aggravators of prior violent felony and HAC versus two statutory mental mitigators plus drug and alcohol abuse and paranoid personality); Henyard v. State, 689 So.2d 239 (Fla. 1996) (death proportionate; four aggravators, including prior violent felony, murder committed during the course of a felony, pecuniary gain and HAC, versus both statutory mental mitigators plus low intelligence, impoverished childhood and dysfunctional family); Pope v. State, 679 So.2d 710 (Fla. 1996) (death sentence approved for stabbing

murder; two aggravators of prior violent felony and pecuniary gain, vs. two mental mitigators); Foster v. State, 654 So.2d 112 (Fla. 1995) (death sentence affirmed where victim beaten and stabbed; three aggravators, CCP, HAC and murder committed during robbery, vs. mental or emotional disturbance, impaired capacity, drug and alcohol addiction, learning disabilities and abusive family background); Henry v. State, 649 So.2d 1366 (Fla. 1994) (victims stabbed; two aggravators of prior violent felony and HAC); Lemon v. State, 456 So.2d 885 (Fla. 1984) (victim stabbed; two aggravators of HAC and prior violent felony versus emotional disturbance).

Hurst's death sentence is amply justified under the facts and circumstances presented to the sentencer.²³

²³ Hurst contends that his death sentence is disproportionate because his is not one of the most aggravated and least mitigated of murders. While the State disagrees and relies on its argument set out above, the State would note that our death penalty trial procedures eliminate from consideration most, if not all, murders which are *not* among the most aggravated and least mitigated. As a practical matter, the State must persuade both a jury and a trial judge not only that statutory aggravating circumstances exist and that they are sufficient to justify a death sentence, but also that such aggravation outweighs the mitigating evidence presented by the defendant or otherwise established by the evidence. Thus, by the time a death penalty case reaches this Court, a substantial weeding out process has already occurred and this Court reviews only those cases that are at the top of the "pyramid." See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2739, 77 L.Ed.2d 235 (1981), quoting with approval the Georgia Supreme Court's analogizing the body of law governing homicides to a pyramid (In part, the Georgia Supreme Court stated: "All cases of homicide of every category are contained within the pyramid. The

ISSUE IV

THE RECENT UNITED STATES SUPREME COURT DECISION IN APPRENDI V. NEW JERSEY IS INAPPLICABLE TO CAPITAL SENTENCING.

Relying on Apprendi v. New Jersey, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Hurst argues that Florida's death penalty procedures are invalid. This argument is meritless. Hurst acknowledges that the Apprendi majority specifically rejected the suggestion that its holding would affect the Court's precedent upholding judge sentencing in capital cases, including Walton v. Arizona, which explicitly approved judge sentencing in capital cases and rejected any requirement of jury sentencing in capital cases. Initial Brief of Appellant at 60. The Apprendi Court stated:

Finally, the Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649 (1990); id., at 709-714 (Stevens, J., dissenting). For reasons we have explained, the capital cases are not controlling:

“Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an

consequences flowing to the perpetrator increase in severity as the cases proceed from the base to the apex, with the death penalty applying only to those few cases which are contained in the space just beneath the apex.)

offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge. [cit]

147 L.Ed.2d at 459.

This Court recently rejected an argument that our death penalty procedures are invalid under Apprendi, concluding that the United States Supreme Court “meant what it said when it held that Apprendi was not intended to affect capital sentencing schemes.” Mills v. State, 26 Fla. L. Weekly S242, S244 (Fla. April 12, 2001). Hurst has offered no justification other than Apprendi for his argument that Florida’s death penalty procedures are, after all these years, suddenly invalid. His argument having just been rejected by this Court in Mills, there is nothing further to address.

CONCLUSION

For all of the foregoing reasons, Hurst’s conviction and death sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CURTIS M. FRENCH
Assistant Attorney General
Florida Bar No. 291692

GENERAL

OFFICE OF THE ATTORNEY

The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 Ext 4583
FAX (850) 487-0997

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to W.C. McClain, Assistant Public Defender, Office of the Public Defender, Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida 32301, this 7th day of May, 2001.

CURTIS M. FRENCH
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND FONT

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

CURTIS M. FRENCH
Assistant Attorney General