IN THE SUPREME COURT OF FLORIDA

FRED ANDERSON, JR.,

Appellant, **CASE NO.SC01-336**

v.

STATE OF FLORIDA,

Appellee.
____________/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This appeal is from the convictions and sentence of death imposed upon the defendant, Fred Anderson, Jr., on January 11, 2001, for the murder of Heather Young in Lake County, Florida. Anderson pleaded not guilty and was tried by a jury in a trial

presided over by Fifth Circuit Judge G. Richard Singeltary.

On March 30, 1999, the Lake County, Florida, Grand Jury returned a five-count indictment charging the defendant, Fred Anderson, Jr., with Burglary of a Structure, Grand Theft of a Firearm, Armed Robbery, Attempted Murder in the First Degree, and Murder in the First Degree, arising from the armed robbery of United Southern Bank, the attempted murder of Marisha Scott and the murder of Heather Young, which occurred on March 20, 1999. (R6-7). Anderson was arraigned, adjudged insolvent, entered a plea of not guilty, and was appointed counsel on March 21, 1999. (R4-5, 8). The case proceeded through the pre-trial stages, and on September 27, 2000, the jury was impaneled and sworn (R1312). A motion for a Judgment of Acquittal as to Count I, Burglary of a Structure, was requested and granted on October 2, 2000. (R2035, 2040). On October 3, 2000, the jury returned a verdict of guilty on all remaining counts charged within the indictment. (R2298-2299).

This case proceeded to the penalty phase with respect to the capital conviction. On October 5, 2000, the jury returned an advisory sentence of death by a unanimous vote of twelve to zero. (R2667). A *Spencer* Hearing was conducted on December 8, 2000. (R2677-2739). On January 11, 2001, the Circuit Court of Lake County, Florida, sentenced Anderson to death for the murder of Heather Young. (R851-863). The court found the following four aggravating circumstances:

(1) The capital felony was a homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (2) The capital felony was committed for pecuniary gain. (3) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. (4) The defendant was convicted of another capital felony or of a felony involving the use or threat of violence to the person. (R 852-856).

The defense did not argue that any of the statutory mitigating circumstances were aplicable. Instead, Anderson relied exclusively on non-statutory mitigation falling under section 921.141(6)(h), *Florida Statutes*. (R856). The court considered and weighed the following as mitigation:

(1) remorse for his conduct - given moderate weight. (2) strong religious faith; activity in his church; and active in community churches - given substantial weight. 3) past achievements and constructive involvement; contributions to community and society through exemplary work; care for family and community; well-liked in his community; sympathetic and thoughtful of people - given moderate weight. (4) loving relationship with family - given little weight. (5) employment history - little weight. (6) potential for rehabilitation; skill to be productive in prison - little weight. (7) no history of prior violence - substantial weight. (8) appropriate courtroom demeanor - little

weight. (9) willingness to plead - little weight. (R857-862). Notice of appeal was duly given on February 6, 2001. (R888-889). On May 29, 2001, the record was certified as complete and transmitted. Anderson's initial brief was filed on or about November 19, 2001.

STATEMENT OF THE FACTS

The Statement of the Facts set out in Anderson's Initial Brief is argumentative and is denied. The State relies on the following facts.

Sherry Howard worked very closely with victim Marisha Scott at the Eustis branch of United Southern Bank (hereafter USB) for approximately three years. (R1344). At about 11:50 a.m. on March 20, 1999, she and her children went to the Mount Dora branch of USB. (R1341). She noticed the lobby and teller windows were empty but heard voices near the vault. (R1342). She heard a woman say, "Please don't. Please no." She recognized the voice as that of Marisha Scott. (R1344). She saw the back of a "medium to heavy build," black male with his arms extended toward the vault. (R1343). She did not recognize the back of this person. (R1349). She then heard a scream and "two or three gunshots." (R1343, 1349). She grabbed her children and ran out of the bank to the nearby Publix supermarket and requested they call the police. She testified police arrived "within seconds." (R1345).

Michael Thomas is currently employed as a Deputy Sheriff with the Collier

County, Florida, Sheriff's Department. (R1355). In March of 1999, Deputy Thomas worked for the Mount Dora Police Department. (R1355). On March 20, 1999, at about 11:50 a.m., Deputy Thomas and Corporal Cantwell responded to a call for "shots fired at the United Southern Bank." (R1355). He arrived at the bank in "under a minute" and Corporal Cantwell arrived "within seconds" after him. (R1356). He looked through the window into the bank and saw a black male "yanking" an electrical cord from the wall with a trash can in his hand. (R1357). Deputy Thomas and Corporal Cantwell simultaneously entered the bank with weapons drawn. (R1360). After informing Anderson, "freeze, police, get on the ground," Anderson dropped the electrical cord and trash can on the floor. (R1362). Subsequently, Deputy Thomas handcuffed Anderson. (R1362). He read Anderson his constitutional rights and asked him who he was. Anderson responded that he was "the janitor." (R1365). Deputy Thomas "starting hearing moans, like human voices, help me, very faint voices." (R1363). Thomas and Cantwell saw the victims, Marisha Scott and Heather Young in the vault. Thomas saw "flesh" and "a little bit of blood" in the area. (R1363). Other officers arrived and assisted in "clearing the building." Deputy Thomas testified that there was no one else in the bank. (R1364). After the bank was cleared, fire fighters from the Mount Dora Fire Department arrived to administer first aid to Marisha Scott and Heather Young. (R1367). Thomas testified that there was money and a weapon

inside the trash can that Anderson had been found holding. (R1368). In addition, there was a second firearm found in the bank manager's office "underneath the desk." (R1368).

Lori Weed is a "floater" teller with USB. (R1387). On March 19, 1999, the day before the shootings, Mrs. Weed was working at the Mount Dora branch. (R1390). Between 11:00 a.m. and 12:00 p.m., Anderson approached Mrs. Weed and told her that he was a college student and was "interviewing banks" and "wanted to talk to someone about banking procedures." (R1392). Weed referred Anderson to Marisha Scott as she was the new head teller at the branch. Marisha told him to have a seat as he would have to talk to the branch manager, Allen Seabrook. (R1392). Anderson eventually went into Seabrook's office. (R1393).

At approximately 12:00 p.m. on March 20, 1999, Lori Weed, her sister and two children were in the drive-thru at McDonald's, located in the same parking lot as the bank. (R1388). Weed saw "cops swarming in" at the bank and went to see the commotion. (R1389). She then proceeded to talk to Sherry Howard to "find out what was going on." (R1389). Subsequently, Anderson was brought out of the bank in handcuffs. Weed recognized Anderson as the same person who had been in the bank the day before. (R1390).

Deputy Devon Turner worked for the Lake County, Florida, Sheriff's

Department. (R1395). He responded to an alarm by the Lake County dispatcher at 11:52 a.m. to report to USB for a "shots fired call." (R1396). Upon arrival, Deputy Jeff Taylor and he went into the bank to assist the Mount Dora officers. (R1397). Deputy Taylor was carrying a shotgun. From his vantage point, Deputy Turner saw Officers Thomas and Cantwell "standing over a heavyset black male and they were in the process of handcuffing the gentleman." (R1397-1398). It was of utmost concern to Deputy Turner that there were "no other suspects in the bank." (R1398). Deputies Turner and Taylor watched the front of the bank while the Mount Dora Officers checked the back. At this point, Anderson said, "I did it by myself. I did it by myself." (R1398, 1404). These were voluntary or spontaneous remarks made by Anderson. (R1399). He then proceeded toward the vault. Deputy Turner saw Marisha Scott and Heather Young in the vault and positioned himself at the vault door for protection. (R1399). Deputy Turner was the "acting sergeant for the whole east side of the county that day" and offered the services of the Sheriff's Office including technical support and the helicopter. (R1400). Shortly after lunch, Deputy Turner located the vehicle believed to have been used by Anderson. (R1400). Deputy Mitch Blackmon was assigned to watch the vehicle to ensure its safety. The vehicle was transported by the Sheriff's Office wrecker unit to the Sheriff's bay for processing. (R1404).

Randall Kirk Lewis is an EMT with the Mount Dora Fire Department. (R1407).

On the day of the shootings, his lieutenant was scanning the radio when he heard the police were going to an armed robbery at USB. (R1408). Mr. Lewis and his lieutenant immediately went to the bank in anticipation of being called. After the police secured the bank, Lewis and other EMT's entered. Other rescue units and ambulance crews were arriving at the scene. (R1409). Lewis proceeded to the rear of the bank where he found Heather Young and Marisha Scott lying in supine positions on the floor. Two emergency medical technicians worked on Marisha and Lewis and another worked on Heather. (R1410). It was determined that Heather Young had more severe injuries than Marisha Scott. EMT Lewis assessed Young as having at least five to seven gunshots to her head and a few to her torso. (R1411). The paramedics arrived and took over the care of Heather Young. Lewis then proceeded to assist in the care of Marisha Scott. (R1415).

Lieutenant Mark O'Keefe is a certified paramedic employed by Florida Hospital-Waterman's Ambulance Services. (R1426-1427). On March 20, 1999, Lt. O'Keefe was at a public relations event in Tavares, Florida, serving in his capacity as a Public Information Officer. (R1428). He was alerted by radio to a "major event" by the 911 Communications Center, and immediately drove to the scene of the shootings. (R1429). As the senior ranking officer on duty that day, he was in command of the scene upon his arrival. (R1430). Upon entering the vault, he saw EMT personnel

performing CPR on Heather Young as she was not breathing and did not have a pulse. (R1432). After he instructed his ambulance crew to work on Heather Young first, he then assessed the damage to Marisha Scott. After unsuccessful attempts to intubate her, he performed a tracheotomy as she had become cyanotic. (R1436-1437). Subsequently, Heather Young was transported by ambulance to Florida Hospital Waterman and Marisha Scott, by helicopter, to Orlando Regional Medical Center. (R1440-1442). While being transported, Marisha Scott repeatedly asked Lieutenant O'Keefe not to let her die. (R1452).

Ron Shirley is a Crime Scene Technician with the Lake County Sheriff's Department. (R1454). Upon arrival at the bank on March 20, 1999, he spoke with two police officers outside of the bank and subsequently requested additional personnel to come to the scene. (R1456). A vehicle parked outside the bank was identified as being Anderson's. (R1457). Shirley video-recorded the condition of the vehicle and the condition of the inside of the bank at that time. (R1458). The security VCR was removed from the bank and given to Jake Caudill with the Major Crime Scene Unit. (R1464-1465). Mr. Shirley went to the Mount Dora Police Department and collected the Gunshot Residue Test from Anderson approximately two hours after the shootings had occurred. (R1465-1466). It was sent to the FDLE lab for analysis. (R1468). Shirley collected Anderson's clothes and took pictures prior to removal.

In addition, he collected Anderson's tennis shoes. (R1468, 1471). Shirley returned to the bank and assisted Jake Caudill in collecting additional evidence, including taking still photographs and removing a portion of the vault in order to do a blood spatter test. (R1473-1474). The following day, Mr. Shirley inspected Anderson's vehicle and removed certain items including USB pamphlets, latex gloves, a brown leather holster, and a .357-caliber weapon with ammunition. (1475-1476, 1486).

Nathaniel Griffin is Anderson's cousin. (R1494). On occasion, he lent his vehicle to Anderson's mother, Geneva, and had done so on March 20, 1999. (R1494-1495). The police had received permission from Griffin to search his vehicle after the shootings at the bank. (R1495). The .357 pistol and ammunition that Ron Shirley retrieved from the car belonged to Griffin. (1495-1496). Griffin testified that the gun was loaded. Griffin was expecting his car to be in the parking lot where he worked when he got off at 5:00 p.m. that afternoon. (R1497).

Joseph Zirbes was a Crime Scene Technician in training with the Lake County Sheriff's Office on March 20, 1999. (R1508-1509). He assisted in collecting, bagging and packaging various pieces of evidence under the direction of Jake Caudill. (R1510, 1519). He transported the tape from the bank's VCR to the photography lab. (R1510).

Farley "Jake" Caudill is a Deputy Sheriff and a Senior Crime Technician with

the Lake County Sheriff's Department. (R1521). He testified that the casing to the bank's VCR was dented and the cord was missing when he received it on March 20, 1999. (R1522). In addition, the tape from the VCR would not eject and he called the Department's Computer Services Supervisor to the scene. (R1523). Deputy Caudill created a diagram to scale indicating where various pieces of evidence were located and collected. (R1524, 1525). He assisted Ron Shirley in the blood stain analysis of the portion of the vault that was removed from the bank. (R1607).

Greg Smith is an Auditor with United Southern Bank. (R1557). After the shootings occurred on March 20, 1999, he audited the Mount Dora branch. After auditing the money recovered from the trash can, vault and tellers' drawers, he concluded that no money was missing from the bank. (R1558).

Dr. Susan Rendon is a Forensic Pathologist and performed the autopsy on victim Heather Young. (R1563, 1565). Dr. Rendon testified that Heather Young had seven gunshot wounds to her head and body and two blunt force trauma injuries to the top of her head. (R1570, 1575, 1576).

Theodore Cushing is a Crime Scene Technician with the Lake County Sheriff's Department. (R1592). He attended the autopsy of Heather Young, and collected four bullets and blood samples retrieved from her body. (R1593, 1594). He photographed the injuries sustained by the surviving victim, Marisha Scott, and videotaped her

identification of Fred Anderson as the shooter. (R1595, 1596). He also retrieved a blood sample that was collected from Ms. Scott. (R1596).

Robert Claffy, R. N., is the Supervisor of the Lake County Jail, Medical Department. (R1600). He withdrew a blood sample from the defendant, Fred Anderson, in June 1999. (R1604).

Deborah Lightfoot is a Senior Crime Laboratory Analyst in the Gun Residue Section of the Florida Department of Law Enforcement. She has analyzed approximately two to three thousand gunshot residue tests. (R1715). She analyzed the swabs collected from Anderson and found gunshot residue. (R1720).

Susan Komar is a Senior Crime Laboratory Analyst in the Firearms and Toolmark Section of the Florida Department of Law Enforcement and has worked with firearms for approximately thirty-three years. (R1727). She examined a total of seven bullets, four .22 long rifle caliber and three .22 short caliber. (R1734). Four of the bullets were recovered from Heather Young's body.[1] (R1733-1734). Two of the bullets were .22 caliber long rifle and two bullets were .22 caliber short. (R1733-1734). She test fired both weapons-- the .22 long rifle caliber revolver is a single action revolver and the .22 caliber short revolver is a double action. (R1731,1737, 1739). The

[1]The bullets were recovered during the autopsy performed by Dr. Susan Rendon. (R1567-1568).

four .22 caliber long rifle bullets displayed the same poor rifling characteristics as those test-fired from the .22 long caliber revolver, but she was not able to make a positive determination that they were fired from that revolver. (R1735). She concluded the three .22 short caliber bullets were fired from the .22 caliber short revolver. (R1736).

Emily Booth is a Crime Laboratory Analyst in the Serology DNA Section of the Florida Department of Law Enforcement. (R1746). She created blood stain cards from blood samples collected from Heather Young, Marisha Scott and Fred Anderson. (R1752).

Vicki Bellino is a DNA/STR Analyst in the Serology Department of the Florida Department of Law Enforcement. (R1776). She developed a DNA profile on Heather Young, Marisha Scott and Fred Anderson using the stain cards created by Emily Booth. (R1778). Marisha Scott's blood was found on clothing and shoes belonging to Anderson. (R1780).

Kathy Carver is a Probation Officer with the Probation and Parole Department in Lake County. (R1786). She was Anderson's Probation Officer from April 30, 1997, until March 15, 1999. (R1787, 1791, 1795). Anderson was on probation for grand theft. (R1795). As a condition of Anderson's community control, he was ordered to pay restitution in excess of four thousand dollars to the victims of his 1997 crime. (R1788, 1968-1969). He had paid ninety-six dollars and fifteen cents toward his

restitution as of March 1999. (R1969). Anderson was untimely in paying the remainder of his restitution and Ms. Carver instituted a violation of his community control in 1998. (R1788). As a result, Anderson's community control was revoked and he was sentenced to serve time at the Probation and Restitution Center in Pine Hills, Florida. (R1789). He was to report to the Probation Center on March 19, 1999. (R1794). He had never indicated to her that he was a college student. (R1970).

Kerry Cunningham owned the .22 revolver used in the shootings of Heather Young and Marisha Scott. (R1817). He kept some personal belongings including the revolver in his shed. The revolver was fully loaded.(R1833). He did not give Anderson or anybody else permission to remove the gun from his shed. (R1817, 1820). On March 18, 1999, Cunningham left his shed unlocked to allow Bernard Weatherspoon, his brother-in-law, access to the shed. Weatherspoon was going to do yard work for Cunningham. (R1818).

Bernard Weatherspoon is Kerry Cunningham's brother-in-law. On March 18, 1999, he went to Cunningham's house to do yard work. (R1828). He testified that Anderson came to the house and asked to use the phone located in the shed. (R1831). Weatherspoon did not take Cunningham's gun. (R1832).

Gloria Ware is a Senior Probation Officer with the Parole and Probation Department of the Department of Corrections. (R1835). On March 19, 1999,

Anderson met Ms. Ware at the Probation Office in Tavares. He told her he was there to meet with Kathy Carver, his Probation Officer, and his mother and brother would be meeting him there to give him money. (R1836, 1837).

Alan Seabrook is the Branch Manager for the Mount Dora office of United Southern Bank. (R1842). The security cameras located in the bank all fed into the VCR tape recorder located in his office. The tape held approximately seven days of filming. Seabrook was the custodian of the tapes. (R1846). On March 19, 1999, Anderson spoke with Seabrook and told him that he was a student at Valencia Community College studying banking and finance. (R1849). Seabrook testified that he thought it was suspicious that Anderson repeatedly "looked at my video equipment." (R1851). Seabrook indicated there was a sequence of buttons that needed to be pushed in order to eject the tape from the VCR. The tape could not be removed and the power would not be cut off without first depressing the buttons. (R1858, 1869).

Deborah Laso is a Probation Officer with the Volusia County, Florida, Probation Department. (R1871). Anderson had been re-assigned to her from Lake County after his Violation of Community Control Hearing. (R1871). On March 19, 1999, Anderson called Ms. Laso and told her he had the money to pay off the restitution owed. She informed him he still had to report to the Probation and

Restitution Center as it was court ordered. (R1872).

Lori Beech was a customer at the Mount Dora, USB branch the day of the shootings. (R1875, 1876). Anderson was waiting in the corner of the lobby. He told her he was waiting for one of the other tellers and for her to proceed ahead of him in line. (R1877, 1882-1884).

Johnnie Scott was a floater with United Southern Bank in March of 1999, as well as working part-time for Walgreen's. (R1886). Walgreen's was located in the same shopping plaza as the Mount Dora branch of United Southern Bank. (R1886). Scott had known Anderson for approximately five years through church. On March 18, 1999, she was in the Mount Dora branch as Anderson came in. (R1887). He told her he was in the area and stopped by to tell her about an adult choir he was in the process of organizing. (R1889). On March 20, 1999, Scott was working at Walgreen's. During her morning break, she went into the bank to talk to the tellers. She know both Marisha Scott and Heather Young. (R1895). She saw Anderson waiting in the lobby and briefly spoke to him. (R1891, 1894). Anderson asked her if she would be at church the next day and she indicated she would not. (R1894).

Charles Drosen is the Director of Admissions for Valencia Community College and responsible for all of the students' records for the school. (R1966). Fred Anderson never attended Valencia Community College. (R1967).

Linda Green is a detective with the Lake County Sheriff's Department. (R1972). She was assigned to the case involving the theft of Kerry Cunningham's gun. (R1972). She reviewed the videotape from the bank's VCR and sent it to Lockheed Martin in Tennessee to improve the quality. (R1973). Lockheed Martin was able to enlarge the picture and remove some of the graininess from the original tape. (R1974).

Marisha Scott worked at United Southern Bank for approximately three years. (R1987). She was the Head Teller in March of 1999. (R1987, 2015). On March 19, 1999, while she was working at the Mount Dora branch, Anderson came in and asked to talk to her about banking duties. She referred him to the branch manager. Anderson waited in the lobby until the manager was available. (R1988).

On March 20, 1999, Marisha Scott and Heather Young were the only two tellers working at the bank that day. (R1989). Anderson came into the bank that morning asking questions about the banking industry and new accounts and said he was a student at Valencia Community College doing a paper on banking. (R1991-1992). He was friendly and did not appear nervous. (R1993). He asked Ms. Scott to write a note for him to bring to his teacher indicating he had gone to the bank and asked questions. (R1993-1994). He left the bank at approximately a quarter to twelve, telling the two tellers he was getting a business card out of his car to give to them. (R1995). Ms. Scott decided to lock the front doors of the bank as she had become apprehensive

about Anderson. (R1996). She had taken a few steps toward the door when Anderson re-entered the bank with a gun pointed at them. (R1997). He instructed them to "go to the vault and not set off any alarms." The tellers did as they were told. (R1997). After unlocking the vault, Scott and Young started putting money into a trash liner per Anderson's instructions. (R2000-2001). After handing him the bag filled with money, Anderson asked them, "Which one of you wants to die first?" (R2003, 2022). Then, "he shot at Heather." (R2003). After he shot Heather Young, "I guess he shot at me." Ms. Scott only remembered him shooting her once. (R2004, 2017, 2020). She pleaded with him, "Please don't shoot, don't hurt me." (R2004). Ms. Scott heard a customer come in and ask if the bank was open. Anderson told the customer the bank was closed. (R2005). Scott remembered a "black object" coming at her forehead but could not remember if it hit her. (R2005, 2021, 2022, 2023). In addition to being shot in the arm and neck, Scott was hit in the forehead above her left eye. (R2007). Anderson did not cover his face the whole time he was with Marisha Scott and Heather Young. (R2015).

Sergeant James Jicha is a detective with the Mount Dora Police Department. (R2025, 2033). Sergeant Jicha showed Ms. Scott a photo line-up at the hospital on March 23, 1999. (R2026). Gene Cushing with the Lake County Sheriff's Office made a videotape of Ms. Scott while she viewed the photos. (R2026). Marisha Scott

identified Fred Anderson as the shooter. (R2032).

Fred Anderson testified in his own defense, and testified he saw Johnnie Scott's vehicle in the Sandy Ridge Shopping Center and stopped by to talk to her on March 18, 1999. (R2046-2047). He wanted to tell her about the church choir he was forming and that he wanted her to join them. He went into United Southern Bank to speak with her. (R2048). He stated he did not speak to anyone else. (R2048).

Anderson went back to the bank the next day, inventing a story about being a student at Valencia Community College. He wanted to "look around the bank." (R2049). He had "entertained a thought of robbing that bank," and "was having financial difficulties with making restitution on a court order on a case..." (R2050). Ms. Carver had informed him he was to report to the Restitution Center on March 19, 1999. (R2061). He decided to go to the Sandy Ridge bank because he thought he would "rob a bank." (R2062). He planned on opening a savings account at Colonial Bank in Umatilla, Florida, "with the money I would have gotten from the bank robbery." (R2065, 2126, 2127). While his mother went shopping with his cousin's car, he removed a pistol from her drawer. (R2072, 2075). He had decided to "rob the bank." (R2076). He hid the gun under some boxes on the carport with the other gun previously stored there. (R2079). He had gone to Kerry Cunningham's, went into the shed and stole his gun on "Thursday or Friday." (R2122). He drove to the bank in his

cousin's car with both guns. (R2081). After entering the bank, Anderson gave orange juice and donuts, bought at Wal-Mart, to Marisha Scott, and continued "with the story from the day before about being a college student." (R2086-2087). After exiting the bank, he retrieved the guns from the car. (R2093). He went back in the bank and told the tellers, "Well, just back up from the counter" and "pulled a gun from my pocket." (R2095, 2132). He instructed them to go to the vault and he followed them. (R2096). Anderson testified a customer came into the bank and Heather Young "told her the bank was closed because the computers were down." (R2097). He told them to go into the vault and get the money. (R2100). Anderson instructed Marisha Scott to put the money in the trash bag. (R2102, 2134). While Marisha Scott and Heather Young were putting the money in the bag, Anderson told Marisha to "shut up" and "I remember hearing gun fire." (R2104, 2136). "It was like aimed at anybody. I was holding the gun in their direction." (R2105). "The gun at all times was aimed in front of me, just away from me." (R2140). "I believe that it - - I believe it hit Miss Young." (R2105). He remembered firing three shots. (R2105, 2106, 2107, 2138). When he left the vault, Marisha Scott and Heather Young were "on the floor." (R2108). He "went to the office area... to retrieve the video cassette." (R2110, 2142). "And then I then tried to pull the VCR from the wall." (R2111). After the VCR came loose from the wall, he thought he heard a voice coming from the vault and "I noticed the blood

coming from Miss Scott's neck and I dropped the VCR." "I thought it dropped to the floor." (R2111-2112, 2145-2146). Shortly thereafter, Deputy Thomas and Corporal Cantwell entered the bank. (R1360). Deputy Turner arrived and Anderson told him, "I did it by myself. I'm by myself." (R1398).

On October 3, 2000, the jury returned its verdict finding Anderson guilty as charged in the indictment of Grand Theft of a Firearm, Robbery with a Firearm, Attempted Murder in the First Degree and Murder in the First Degree. (R2298-2299).

The penalty phase of this trial began on October 5, 2000. (R2331). The State presented the testimony of David Curbow, who was the live-in boyfriend of Heather Young. (R2369). Mr. Curbow stated that Ms. Young "had the purest heart and freest soul of anybody you would ever want to meet." (R2373).

The State also presented the testimony of Robert Young, who was the younger brother of Heather Young. (R2378). Of all of Ms. Young's siblings, he was the closest to Heather, "...always". (R2379).

Thelma Williams has known Anderson all of his life as he grew up with her son. (R2405). She is a member of Pine Grove Baptist Church where Anderson also attended. (R2406). Anderson worked with her at the church as a young adult supervisor and he helped prepare the food and serve it to the children during a program. (R2407, 2411, 2435). On the third Sunday of every month, Anderson would

be responsible for preparing the program for the church service as well as his involvement with the choir. (R2409). In addition, he helped her prepare food at Camp Lanoche for approximately four hundred children. (R2414).[2] She did not know Anderson had been in trouble in Volusia County. She picked him up at 5:00 a.m. every morning to go to work with her and she never had any trouble with him. (R2416). She and Geneva Anderson (Fred's mother) are friends. She also knew Fred Anderson's father before he passed away. (R2418). According to Ms. Williams, Fred Anderson's parents were good people. (R2418).

Mary Quashie lived next door to Anderson. (R2419). She knew him, "since the time he was born" and until he went away to college. (R2419-20). She saw him frequently, almost every day, or every other day, after she got home from work. She saw him about the same amount of time after he returned from college. (R2420). She never knew him to be violent and never had a problem with him. (R2420). He spoke to her after he was arrested and has sent her cards on various occasions. (R2421). He sang at her grandson's funeral and she found it "very comforting." (R2422). She did not know that Anderson had been on probation, or that he violated his probation and was given a second chance by the judge. (R2423). She did not know that he stole money nor that he had written "a long series of bad checks."(R2423).

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[2]This took place during the summer of 1997 or 1998.

Reverend Clarence Reeves knew Anderson "as a close friend to my kids" and "knew him as a friend." (R2425). He lived in the same neighborhood as the Andersons and knew Fred's mother and father. (R2426). His relationship with Fred "wasn't close"; he was "more close with Fred's mother and father." (R2429). He testified Fred Anderson "came from a good family" and never knew him to cause any trouble. (R2427). He also knew Marisha Scott (surviving victim)as he banked where these crimes took place. (R2427-28). He said he "can't imagine what really happened, what triggered this, because it just wasn't his (Fred's) demeanor to do this...something must have happened to him." (R2428). However, he thought Fred was "a very bright guy." (R2429). He has had no contact with Anderson since his arrest in March, 1999. (R2429).

Loretta Cunningham is the church clerk at Piney Grove Baptist Church. (R2431). Her deceased husband was involved in the church as was Fred Anderson's father. (R2431). She knew Fred Anderson from working with him at the church. (R2431). At her suggestion, he tutored children at the church. (R2442). She did not know if Anderson was paid for his work at the church, but was "pretty sure he wasn't." (R2436). He helped her daughter, Freida, paint her living room and dining room. (R2437). In addition, he rearranged the furniture and hung curtains, blinds and wall hangings for her. (R2437). Anderson also helped take care of her husband's elderly

aunt, Ida Witherspoon. (R2438, 2444). She has known Anderson for most of his life, but got to know him better after his return from college. (R2438-39). She had never seen Anderson "mad or angry." (R2438). He was like one of her own children and would help her with anything she asked. (R2439, 2446). He sent her a sympathy note after her husband passed away.[3] (R2440, 2444). Kerry Cunningham is her son and owned the gun that Anderson stole to commit these crimes. (R2445). She eventually had found out that, prior to the crimes Anderson committed on March 20, 1999, he had been in trouble in Volusia County. (R2446). He had never stolen anything from her. (R2446).

Brenda Mitchell lived on the same street as Anderson. (R2448). She would see him at church or when she was passing by his house. (R2452). She has always known Anderson and did not know him to be violent. (R2448, 2453). She was "very shocked" when she heard about the events that occurred on March 20, 1999. (R2448). She has kept in touch with Anderson since his arrest through letters and phone calls. (R2449). She never knew Anderson to be in trouble as a child. (R2451).

Linda Green is employed by the Lake County Sheriff's Department and was one of the lead detectives involved in this case. (R2454). She met with Anderson on three

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[3] Her husband died in November, 1999, after Anderson had been arrested.

separate occasions regarding this case. (R2454). He initiated contacted with her and they met for the first time on March 21, 1999. (R2454-55). In addition, he contacted her on March 25, 1999. (R2455). On each of these occasions, he gave her a "partial confession" regarding these crimes and never denied it. (R2456). He never denied taking the gun from Kerry Cunningham's house. (R2456). She knew Anderson had talked to Officer Jicha subsequent to his arrest, but did not know the substance of the conversation. (R2457). When Anderson talked to her on March 21, two days after his crimes, he told her, "the only thing I can come up with is that I panicked, that's what I've come up with." (R2457). He never told her the reason why he stole Kerry Cunninghams's gun. (R2458). He told her he took his mother's gun out of the junk drawer on Saturday morning, and that it was loaded, as was Cunningham's. (R2458). After arriving at the bank, he waited for the last customer to leave, went back inside and pulled the gun (his mother's). (R2459). He told her, "After it went off, and I dropped it, I think, at that point...I got the other gun out of my pants...and then I shot the gun." (R2459). Green testified he never denied the following: stealing the gun, going into the bank, robbing it, going into the vault, and shooting the victims. (R2461). In Detective Green's words, "He admitted to all of those things." (R2461).

Captain Kevin Drinan is employed with the Lake County Sheriff's Office Corrections Division and oversees the daily operations of the jail. (R2462). Since

Anderson's arrest, he had not created any problems or needed disciplinary actions and had not been in any altercations with any of the other inmates. (R2463). Except for the offenses Anderson has been charged with, there is nothing in his history that would indicate he would not be amenable to work detail. (R2464). He is housed with other inmates in the highest security portion of the jail. (R2466).

Rhonda Bayse was formerly the store manager at a Shell Service station and had hired Anderson as a cashier to work for her in 1995. (R2470-71, 2473, 2484). He told her about the "trouble that he had been in" in Volusia County and had put that information on his job application. (R2471). His honesty was "the main reason" why she hired him. (R2472). He was an excellent employee and got along well with the customers. (R2475). She was "totally shocked" when she found out about Anderson's involvement regarding the events that had occurred on March 12, 1999. (R2482-83).

Sheila Munday met Fred Anderson at Children's Hospital in Umatilla when she brought her son in for admission. (R2487-88). Anderson became her son's caretaker at the hospital. (R2488-89). "Whatever Shawn needed, Fred made an extra effort to get it." (R2489). Shawn "was hysterical" when he saw Anderson on television, because he "couldn't believe it was the same person". (R2491).

Geneva Anderson is Fred Anderson's mother. (R2492). Anderson lived with her prior to his arrest for the events of March 20, 1999. (R2493). As she is very sickly,

Fred would help care for her. (R2494-95). He would cook, clean, do laundry and care for her wounds that resulted from her cancer treatment. (R2495). Fred Anderson and his father were "very close." (R2507). She did not know that her son was on probation for the Volusia County crime until the probation officer came to her house to "check on Fred." (R2512).[4] Anderson never had a problem in school and made "good grades." (R2518). "He was always disciplined, he always would do the right thing." (R2519). She never suspected anything was going to happen on March 20, 1999. (R2523). Fred did not seem nervous or act in any unusual way on that morning. (R2528). He is well-educated, even tempered and very polite. (R2524). Both she and her husband raised him in a loving home and he wasn't abused in any way. (R2524). He went to Bethune Cookman College for approximately six years and told her he had a degree in Psychology. (R2526, 2528, 2530,).[5] She had no idea her gun had been taken until several days after the crimes when detectives from Lake County came and spoke with her. (R2529).

Fred Anderson, Jr., testified he was active in school activities and received a high

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[4] Anderson was on probation for a theft from Bethune Cookman College. (R2526-27).

[5] She did not know if he got a degree as she did not attend a graduation and never saw a diploma. (R2529-30).

school diploma in May 1986. (R2535).[6] He was nominated and voted "the most talented male in the senior class." (R2541). He was enrolled in Bethune Cookman College when his father passed away on March 19, 1992. He was very close with his father but continued college after his death. (R2550). He would have times that were worse than others, "you know, in March." (R2554). He never told his mother that he did not graduate from Bethune Cookman College. He had finished all of his course work but did not "defend his senior paper." (R2561). In addition, he was on "academic probation" and this status prevented him from graduating. (R2561-62). He never told anyone about the "trouble in Volusia County." (R2563). He did not tell his mother because he felt he had "caused enough worry." (R2567). He was sorry for what he had done to three families and was immediately sorry for what he had done to Heather Young and Marisha Scott. (R2568, 2570). He never asked the detectives how Marisha Scott was doing and knew that Heather Young was dead. (R2572).

The jury returned a recommended sentence of death by a vote of twelve to zero on October 5, 2000. (R2667). A *Spencer* Hearing was duly conducted on December 8, 2000, (R2677) and on January 11, 2001, the court followed the jury's advisory sentence and imposed a sentence of death on Fred Anderson, Jr., for the first degree

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[6] He was involved with the band, student government, the chorus, Fellowship of Christian Athletes and Future Business Leaders of America. (R2536, 2539-40).

murder of Heather Young. (R2737). In aggravation, the court found that the capital felony was committed in a cold, calculated and premeditated manner, that the capital felony was committed for pecuniary gain, that the capital felony was committed by a person previously convicted of a felony and under the sentence of imprisonment, and that Anderson was previously convicted of a another capital felony involving the use or threat of violence to another person, or to the person. (R2735-2736). The defense did not argue any statutory mitigating circumstances, relying instead on the section 921.141 (6) (h), *Florida Statutes,* non-statutory mitigation. (R 856). The court found ten nonstatutory mitigating factors were proven. (R2736). The court gave little weight to the following nonstatutory mitigating factors: 1) loving relationship with his family; 2) employment history; 3) potential for rehabilitation, skills to be productive in prison (considered together); 4) appropriate courtroom demeanor; 5) willingness to plead. The court gave moderate weight to the following nonstatutory mitigating factors: 1) remorse for his conduct; 2) past achievements and constructive involvement, contributions to his community and society through exemplary work, care for family and community, well liked in his community and sympathetic and thoughtful of people (considered together). The court gave some weight to the following nonstatutory mitigating factors: 1)cooperation with law enforcement. The court gave substantial weight to the following nonstatutory mitigating factors: 1)strong religious faith, active

in his church, active in community churches (considered together); 2) no prior history of violence. (R 857-862). The court found that the aggravation outweighed the mitigation, and imposed a sentence of death. (R2736-2737).

SUMMARY OF THE ARGUMENT

The sentencing court properly found the cold, calculated and premeditated aggravating circumstance. That finding is supported by competent substantial evidence, and should not be disturbed. The facts of this murder, which establish, *inter alia*, extensive advance planning and scouting of the targeted bank with no attempt by Anderson to conceal his identity, more than meet the criteria for application of the cold, calculated and premeditated aggravator.

The sentencing court properly found that the murder of Heather Young was committed for pecuniary gain. The evidence established that Anderson intended to rob the target bank, deposit the proceeds in an account in another bank (where he had already made inquiry), pay his court-ordered restitution in order to avoid being sent to the Probation and Restitution Center, and "continue to live a normal life." As the sentencing court found, Anderson had to kill the two eyewitnesses in order to succeed. The evidence clearly establishes that Heather Young's murder was motivated by Anderson's desire for money.

Death is a proportionate sentence in this case. The foundation for Anderson's

claim of disproportionality is his claim that the coldness and pecuniary gain aggravators do not apply to this case. As set out above, that claim is incorrect. Four aggravating circumstances exist in this case beyond a reasonable doubt, as the sentencing court found. In contrast, the mitigation evidence is extremely weak, and is in no fashion causally connected to the murder of Heather Young. The death sentence should not be disturbed.

The sentencing court did not abuse its discretion in assigning little weight to the non-statutory mitigation related to Anderson's employment history and "potential for rehabilitation." Of course, since this murder was committed to obtain money with which to pay restitution ordered as a result of another crime, Anderson's "potential for rehabilitation" is, to say the least, open to serious question.

The trial court did not abuse its discretion in allowing expert testimony with respect to blood stain pattern analysis.

The claim concerning the "denial" of Anderson's motion to suppress is not preserved for review. The statement at issue was not introduced until the State's rebuttal at the very end of the penalty phase. Anderson never claimed that the statement was involuntary, and, in any event, the transcript of the statement leaves no doubt that it was knowingly, voluntarily, and intelligently given.

Three photographs of Anderson's surviving victim were properly admitted --

they show the nature and extent of the victim's injuries and are relevant to the question of Anderson's intent. In any event, any error was harmless because the subject matter of the photographs was placed before the jury through a videotape, which was admitted without objection. Any error was harmless.

The "cumulative error" claim is based upon matters which, when fairly considered, are not error at all. In any event, the Court gave proper instructions to the jury which cured any error that may have occurred.

The claim based upon *Apprendi v. New Jersey* is not available to Anderson because it was not raised in the trial court. The absence of an objection at trial precludes presentation of the claim on direct appeal from Anderson's conviction and sentence of death.

ARGUMENT

I. THE SENTENCING COURT PROPERLY FOUND THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE

On pages 31-37 of his brief, Anderson argues that the sentencing court erred in finding that the murder in this case was committed in a cold, calculated and premeditated manner. Whether an aggravating circumstance exists is a factual finding which is reviewed under the competent, substantial evidence standard. In *Alston v. State,* 723 So. 2d 148, 160 (Fla. 1998), this Court reiterated that standard of review,

and noted that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our 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." *See also, Willacy v. State,* 696 So. 2d 693, 695 (Fla.), *cert. denied,* 522 U.S. 970 (1997). The sentencing court properly found the cold, calculated and premeditated aggravating circumstance.

In finding that the murder of Heather Young was cold, calculated and premeditated, the sentencing court stated:

> In 1994, Defendant was convicted of grand theft for stealing in excess of $4,000 from Bethune Cookman College in Volusia County, Florida. Pursuant to his sentence, Defendant was placed on probation and was ordered to make restitution. Defendant violated this probation in 1997 and was thereupon sentenced to community control. On March 15, 1999 Defendant was found to have violated community control and was sentenced to the Probation and Restitution Center in Orlando. He was to report to the center by March 19, 1999. Defendant still owed over $4,000 in restitution and felt he had no way of paying this amount other than robbing a bank. On March 18, 1999 Defendant began making plans to do just that after he visited a friend at her part-time job at the United Southern Bank of Mount Dora.
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> In preparation, Defendant went to a friend's house and stole a .22 caliber long-rifle revolver from an outside shed. On the morning of Friday, March 19, 1999 he returned to the United Southern Bank of Mount Dora. Testimony in trial established that Defendant, having no legitimate bank

business, invented the story of being a college student writing a paper so that he could carefully view the bank's physical layout along with its security system. During his visit, Defendant talked with the bank manager in his office. Here Defendant was able to take particular note of the bank's security VCR. Later that same day, Defendant went to the Colonial Bank in Umatilla to obtain information about opening an account at that bank. It was his plan to place the money he intended to steal from the United Southern Bank in an account at the Umatilla Colonial Bank. After visiting the Umatilla Colonial Bank, the defendant next called his community control officer, Debra Laso, to inform her that he would be able to pay off his outstanding restitution amount of over $4,000.

The following day, March 20, 1999, Defendant obtained a second gun, this time from a drawer in his mother's house. Using a car loaned to his mother, he went to buy orange juice and donuts and took them to United Southern Bank intending the refreshments to appear as a thank you gesture for the bank worker's help the day before. Continuing on with the story that he was a student, Defendant gave the juice and donuts to the two tellers who were alone in the bank and then waited until there were no customers. Shortly before the bank closed, Defendant went to his car under the guise of getting his business card. When he returned to the bank he was armed with the two loaded, .22 caliber, six-shot revolvers. Defendant did not try to conceal his identity by wearing a disguise or otherwise hiding his face. He pulled one of the guns upon re-entering the bank and told the two tellers, Heather Young and Marishia Scott, to move away from their windows and to not set off any alarms. He then told the tellers to go to the vault and put the money in a trash liner. The tellers did not argue with Defendant but did exactly what he commanded them to do. After the tellers gave Defendant the money, he asked which one of them wanted to die first. Before the shooting began, one of the tellers desperately and to no avail begged the Defendant, "Please don't."

In total, Defendant fired ten shots from the two guns at point blank range, nine of these shots hitting the two tellers. One of the guns used short ammunition, while the other gun used long-rifle cartridges. When the guns were collected by police after the incident, the short ammunition gun contained four fired and two unfired cartridges. The gun using the long-

rifle cartridges was a single-action gun meaning that for each shot taken, the defendant had to pull the hammer back before squeezing the trigger. All six cartridges in the long-rifle ammunition gun had been fired. Both types of projectiles were recovered from the body of the deceased victim, Heather Young, during the autopsy.

After shooting the two tellers in the vault, Defendant went to the bank manager's office in an attempt to get the security video from the VCR he had observed the day before while sitting in the manager's office. The first officer at the scene observed the defendant pulling the VCR wire from the wall while holding a trash liner containing approximately $70,000 in cash.

Counsel for Defendant argues that while there may have been a plan to commit the robbery, it was unsophisticated at best and that there was no plan whatsoever to kill anyone. Counsel further argues that the death of Heather Young was the result of fear and panic on Defendant's part. However, according to the evidence, Defendant planned the bank robbery over the period of at least two days. He cased the bank the day before the robbery and obtained two loaded firearms. When he returned on Saturday morning the two victims recognized him from the day before. He never made any attempt to prevent them from seeing his face or to disguise his appearance. Neither the testimony of the surviving victim nor the video tape provide any support for Defendant's argument that he panicked. He was attempting to take the VCR from the manager's office when the police arrived. The evidence does not support the defense argument that Defendant was in fear and panicked. Rather, the evidence proved beyond a reasonable doubt that Defendant had a careful plan to rob a bank. An integral part of that plan was to kill the only eye witnesses and to destroy the video tape so that he could not be identified.

Based upon the established facts cited above and in consideration of the required elements set forth in *Jackson v. State,* 648 So. 2d 85 (Fla. 1994), this Court finds that Defendant did indeed commit this murder as a result of cool and calm reflection; that Defendant had a careful plan or prearranged design to commit murder; that Defendant exhibited a heightened premeditation; and that Defendant had no pretense of legal or moral justification. Accordingly, this Court finds that this aggravator was

> proven beyond a reasonable doubt and is accorded great weight in determining the appropriate sentence in this case.

(R852-55).

The sentencing court's application of the cold, calculated and premeditated aggravator is supported by competent, substantial evidence, as set out above in the sentencing order. As that order demonstrates, the sentencing Court was well aware of the legal standard for the application of the CCP aggravating circumstance, and conscientiously applied those legal principles. Because that is so, there is no basis for relief of any sort.

The facts of this case are eerily similar to the facts in *Card*, which this Court described in the following way:

> This case involved heightened premeditation in that the defendant called Vicki Elrod the morning of the murder and told her that he would be visiting her and bringing her some money later that day. He had all day to plan his attack. He wore gloves. He armed himself with a knife. He hid the knife inside his pants. After he robbed Ms. Franklin, he kidnapped her, removed her from the scene, murdered her and disposed of the only witness to the crime. He disposed of the gloves, the knife and Ms. Franklin's wallet which could have connected him to the crime and would have been evidence against him. There was more than sufficient time for the defendant to reflect on the seriousness of his acts, plan his attacks and realize what could occur if he were discovered. The evidence leaves no doubt whatsoever that the crime involved heightened premeditation and that the murder was carried out in a cold and calculated manner.

Card v. State, 26 Fla. L. Weekly S670, 675 at n. 9 (Fla., Oct. 11, 2001), *revised op.*,

27 Fla. L. Weekly S25, 30 at n. 9 (Fla. Dec. 20, 2001). If the murder in *Card* is cold, calculated and premeditated, and this Court twice held that it was, then the murder of Heather Young over-meets the criteria for the application of that aggravating circumstance. As this Court held in *Farina v. State*:

> In order to establish the CCP aggravator, the evidence must show that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification. *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994) (citations omitted); *accord Walls v. State*, 641 So. 2d 381 (Fla. 1994). While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." *Walls*, 641 So. 2d at 388. The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." *Geralds v. State*, 601 So. 2d 1157, 1163 (Fla. 1992). **However, CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.** *See Bell v. State*, 699 So. 2d 674, 677 (Fla. 1997).
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> In the instant case the following facts support the CCP aggravating circumstance: this specific Taco Bell restaurant was chosen as the target for the robbery because Anthony was familiar with its employees and procedures; Anthony visited the restaurant earlier in the evening to see who was working and the brothers discussed the fact that Anthony knew three of the employees present that night; the brothers purchased bullets for their gun before the robbery; the employees were rounded up and confined to small area where they would be easier to control; the brothers' discussion just before the shooting began and Anthony's comment that it was "[Jeffery's] call" shows intent to carry out plans to kill; and none of

> the victims offered resistance. Therefore, we find competent, substantial evidence in the record supporting the finding that the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. Accordingly, we hold that the trial court did not err in its finding of the CCP aggravating circumstance.

Farina v. State, 801 So. 2d 44, 54 (Fla. 2001). (emphasis added). The evidence in this case demonstrated that Anderson told his probation officer that he would have the money to discharge his restitution obligation; inquired of another bank into the process for opening a new account, into which he intended to deposit the robbery proceeds; obtained **two** weapons (at least one of which Anderson stole) in advance of the bank robbery; scouted his target (and victims) on the day before the actual robbery and **again** on the morning of the offense; made no effort to conceal his identity, and in fact engaged his victims in extended conversation during his scouting trip and on the day of the murder; encountered no resistance or provocation from his victims, who cooperated fully with his demands; asked his victims which one wanted to die first before firing ten shots[7] from **two** handguns at close range; and then, after both victims were incapacitated, attempting to remove the security video tape so his identity would remain unknown.[8] The evidence supports the application of the cold, calculated and

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[7]Nine of these shots struck Anderson's victims. (R853). Bullets from **both** weapons were removed from the body of the deceased victim. (R854).

[8]Anderson's claim, on page 37 of his brief, that there was a "pretense" of justification for the murder of Heather Young is

premeditated aggravating circumstance, and the Court's finding of that aggravator was correct. There is no basis for relief.

To the extent that further discussion of the application of the cold, calculated and premeditated aggravating circumstance is necessary, Anderson's position seems to be that this Court should credit his testimony that he did not intend to hurt anyone over the testimony of the surviving victim, Marisha Scott, that Anderson asked his victims "Who wants to die first," before beginning to shoot[9]. *Initial Brief,* at 33. Florida law is well-settled that this Court will not substitute its judgment for that of the trier of fact, especially with respect to matters such as the credibility of witnesses. *Bottoson v. State,* 27 Fla. L. Weekly S119 (Fla., Jan. 31, 2002)*; Porter v. State,* 788 So. 2d 917 (Fla. 2001)*; Stephens v. State,* 748 So. 2d 1028 (Fla. 1999); *State v. Spaziano,* 692 So. 2d 174 (Fla. 1997); *State v. Huggins,* 788 So. 2d 238 (Fla. 2001); *State v. Mills*, 788 So. 2d 249 (Fla. 2001). Each of those cases stands for the proposition that credibility determinations made by the trier of fact will not be disturbed absent a palpable abuse

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frivolous. Not only is that "pretense" unidentified, but it also cannot survive in the face of the facts that establish that no such pretense exists.

[9]On page 35 of his brief, Anderson refers to "Young's version" of the events on more than one occasion. Apparently, this is a mistaken reference to Heather Young, who was shot to death by Anderson, and obviously did not testify. Presumably, Anderson meant to refer to Marisha Scott, who survived her encounter with Anderson and testified at trial.

of discretion. This Court should apply long-settled law and deny relief on this claim.[10]

II. THE SENTENCING COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN

On pages 38-40 of his brief, Anderson argues that the sentencing court should not have found that the murder of Heather Young was committed for pecuniary gain. This claim is reviewed under the competent, substantial evidence standard. See pages 31-32, above. Under settled Florida law, the pecuniary gain aggravating circumstance is properly found when "the murder was motivated, **at least in part,** by a desire to obtain money, property or other financial gain." *Hildwin v. State*, 727 So. 2d 193, 195 (Fla. 1998) (emphasis in original); *see, Hertz v. State,* 26 Fla. L. Weekly S725 (Fla., Nov. 1, 2001); *Looney v. State*, 26 Fla. L. Weekly S733 (Fla., Nov. 1, 2001); *Finney v. State,* 660 So. 2d 674, 680 (Fla. 1995). When that standard is applied to the facts of this case, it is readily apparent that Heather Young's murder was motivated by Anderson's desire for money.

In finding the pecuniary gain aggravating circumstance, the sentencing Court held:

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[10]Alternatively and secondarily, death is still the proper sentence in this case even in the absence of the cold, calculated and premeditated aggravator. Any error, assuming that one took place, was harmless, and does not supply a basis for reversal. *State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).*

> The defendant's plan was to rob the bank, deposit the stolen money in another bank, pay his restitution in order to stay out of the Probation and Restitution Center, and then continue to live a normal life. In order to successfully carry out his plan, he had to kill the two eyewitnesses who had observed and talked with him for hours over a two day period.

(R855). Those findings are supported by competent, substantial evidence, and fully support the application of the pecuniary gain aggravator. The application of that aggravator should not be disturbed.

To the extent that further discussion of this issue is necessary, Florida law is well-settled that the pecuniary gain aggravator applies when the murder is motivated, at least in part, by a desire to "obtain money, property, or other financial gain." *Hildwin, supra.* Under the facts of this case, there is no credible argument that Heather Young was not killed by Anderson because he wanted money with which to pay court-ordered restitution and thereby avoid incarceration. Part and parcel of that plan, as the sentencing Court found, was Anderson's intent to continue to live a normal life after obtaining the money from the bank (which he intended to deposit into **another** bank). Anderson made no attempt to hide his identity, and was physically in the bank for several hours over a two-day period -- no argument can be made that the victims would not have been able to identify Anderson, as indeed one of them did. The success of Anderson's plan depended upon a complete absence of witnesses -- the sought-after financial gain could not otherwise be accomplished. Any claim to the contrary is devoid

of credibility, and ignores the true facts of this murder. The pecuniary gain aggravator applies in this case, and the sentence of death should not be disturbed.[11] Moreover, assuming *arguendo* that some error occurred, death is still the proper sentence. Any error, and the State does not concede that one occurred, was harmless beyond a reasonable doubt. *DiGuilio, supra.* Anderson's sentence of death should be affirmed in all respects.

III. DEATH IS THE PROPORTIONATE SENTENCE

On pages 41-43 of his brief, Anderson argues that death is a disproportionate sentence "to the facts of this case." This argument is based, at least in part, on Anderson's claim that the cold, calculated and premeditated and "for pecuniary gain" aggravators do not apply to his crime. However, for the reasons set out above, those aggravating circumstances clearly do apply given the facts of this murder. Because the four aggravating circumstances found by the sentencing court exist beyond a reasonable doubt and are properly applied to Anderson, the fundamental premise of the

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[11]Anderson's claim that he "panicked" is belied by the facts, which are that he fired ten shots from two weapons, nine of which hit their target. Far from demonstrating a panic-induced shooting, these facts establish an execution. Likewise, Anderson's claim that once he had the security tape he would have been on his way without hurting anyone is nonsensical. *Initial Brief,* at 39. He had already shot both victims before attempting to remove the security tape.

“disproportionality” argument is faulty.

As discussed above in connection with the substantive claim concerning the applicability of the cold, calculated and premeditated and “for pecuniary gain” aggravating circumstances, the facts of this case are remarkably similar to the facts of the *Farina* and *Card* cases. This Court upheld the sentence of death in those cases -- if death was the proper sentence in those cases, and this Court held that it was, death is clearly the proper sentence for Anderson, whose case is at least as heavily aggravated and unmitigated as were *Farina* and *Card. See also, Hertz, supra; Looney, supra; Hildwin, supra; Finney, supra.*

To the extent that further discussion of the proportionality claim is necessary, the sentencing court found four aggravating circumstances: that the murder was cold, calculated and premeditated (great weight); that the murder was committed for pecuniary gain (moderate weight); that the murder was committed by an individual under sentence of imprisonment (some weight); and that the murder was committed by an individual who had previously been convicted of a violent felony (great weight). (R855-56). Anderson did not argue that any of the statutory mitigating circumstances contained in § 921.141(6) of the *Florida Statutes* applied to his case. (R856). He did,

however, argue some 17 separately-enumerated non-statutory mitigators. (R857)[12]. The sentencing court properly weighed the aggravation and mitigation, and determined that the aggravating circumstances outweighed the limited, uncompelling mitigation.

In *Farina,* this Court described the proportionality analysis in the following way:

> Proportionality review requires a discrete analysis of the facts, entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. *See Urbin*, 714 So.2d at 416. It is not a comparison between the number of aggravating and mitigating circumstances. *See Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990).
>
> Based upon our review of all the aggravating and mitigating factors, including their nature and quality according to the specific facts of this case, we find that the totality of the circumstances justifies the imposition of the death sentence here. Anthony was a major participant in an armed robbery which included a cold, calculated, and premeditated plan to eliminate any witnesses. The four witnesses were shot in either the head or chest in quick succession. The last witness was stabbed only because the gun misfired while pointed at her head. This case is proportionate to other cases where we have upheld the imposition of a death sentence. *See, e.g., Jennings*, 718 So. 2d at 154 (finding death sentence proportionate where murders were cold, calculated, and premeditated and committed during armed robbery to avoid arrest, and defendant had no significant history of prior criminal activity); *Stein v. State*, 632 So. 2d 1361 (Fla. 1994) (same); *LeCroy v. State*, 533 So. 2d 750 (Fla. 1988) (affirming death sentence where murder was committed during course of armed robbery to avoid arrest, and defendant had no significant history of prior criminal activity).

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[12]These non-statutory factors included such things as remorse, cooperation with law enforcement, and "strong religious faith." (R857).

Farina v. State, 801 So. 2d 44, 56-57 (Fla. 2001). If death is proportionate in *Farina,* and this Court held that is was, then that sentence is certainly proper for Anderson, who acted alone. There is no basis for relief, and the sentence of death should be affirmed.[13]

IV. THE WEIGHT GIVEN TO MITIGATION CLAIM

On pages 44-46 of his brief, Anderson argues that the sentencing court gave too little weight to two of the non-statutory mitigators.[14] Under settled Florida law, the applicable standards of review relevant to mitigating circumstances are: 1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to *de novo* review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and 3) the weight assigned to a mitigating circumstance

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[13]Even if there were some basis for removing the coldness and the pecuniary gain aggravators from the sentencing calculus, the two remaining aggravators are sufficient, especially in light of the minimal mitigation, to support a sentence of death. *See, Ferrell v. State,* 680 So. 2d 390 (Fla. 1996).

[14]The mitigation at issue was Anderson's employment history and his asserted "potential for rehabilitation." *Initial Brief,* at 44. It is significant that despite having been under a restitution order for two years, Anderson had paid less than $100 (R1969), and committed this crime to get the money to pay that restitution. Those facts say much about Anderson's employment history and potential for rehabilitation, but none of it is favorable. It would have been error to assign more than little weight to this "mitigation."

is within the trial court's discretion and subject to the abuse of discretion standard. *Campbell v. State,* 571 So. 2d 415 (Fla. 1990). *See also, Kearse v. State,* 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigating circumstance exists and the weight to be given to that mitigator are matters within the discretion of the sentencing court); *Trease v. State,* 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from *Campbell* and holding that, though a court must consider all the mitigating circumstances, it may assign "little or no" weight to a mitigator); *Mansfield v. State,* 758 So. 2d 636 (Fla. 2000) (explaining that the trial court may reject a claim that a mitigating circumstance has been proven provided that the record contains competent substantial evidence to support the rejection).

In evaluating Anderson's "employment history", the sentencing court stated:

> Although Defendant has attended college and has employment skills, Fred Anderson, Jr.'s Memorandum in Support of Life Sentence aptly describes his employment history as "sporadic." The defendant's supervisor at the Shell convenience store, near his house, where he worked for a relatively short time said he was a reliable and trusted employee. The mother of a patient at Florida Elks Children's Hospital testified that the defendant provided care for her son, and they developed a friendship with the defendant. Other work performed by the defendant, as described in the evidence, could be classified as odd jobs for friends or neighbors and volunteer charitable work.
>
> The ability to work and earn a living is a mitigating circumstance. Considering that the standard of proof is not high, this Court is reasonably convinced that this mitigator was proven, but gives it little weight.

(R860). The sentencing court did not abuse its discretion in assigning little weight to Anderson's self-described sporadic employment history.

With respect to Anderson's potential for rehabilitation, the sentencing court stated:

> Paragraphs 9 and 10 of Fred Anderson, Jr.'s Memorandum in Support of Life Sentence are consolidated for the purposes of discussion. The defense presented evidence, and reasonably convinced this Court, that the defendant has not created any problems or controversy while in custody for this offense and has attended several Bible study courses while in the county jail. Further, he could use his experience as a leader of a church youth group and his ability to cook for large groups to be productive in prison. This Court considers this a single nonstatutory mitigating factor and gives it little weight.

(R860). As with Anderson's "employment history," the sentencing court did not abuse its discretion in assigning little weight to Anderson's potential for rehabilitation. Because there is no abuse of discretion, there is no basis for reversal. Anderson's sentence of death should not be disturbed[15].

V. THE COURT PROPERLY ALLOWED EXPERT TESTIMONY WITH RESPECT TO BLOOD PATTERN ANALYSIS

On pages 47-51 of his brief, Anderson argues that it was error for the trial court to allow Deputy Farley Caudill to testify as an expert in the field of blood pattern

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[15]Anderson apparently relies on *Nibert v. State,* 574 So. 2d 1059 (Fla. 1990) as authority for reversal. *Nibert* is inapplicable to the facts of this case, and, in any event, *Trease* sets out the state of the law, and is controlling.

analysis. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State,* 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State,* 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State,* 701 So. 2d 845 (Fla. 1997); *Jent v. State,* 408 So. 2d 1024 (Fla. 1981); *General Elec. Co. v. Joiner,* 522 U.S. 136 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

In addressing a post-conviction claim concerning the qualifications of another blood stain analyst, this Court stated:

> . . . assuming for the sake of argument that Bunker's testimony did contain serious discrepancies that could not have been discovered during trial, we are convinced that these discrepancies did not have any impact on the outcome of the case in light of the overwhelming evidence presented at trial in support of Correll's guilt. Moreover, Bunker's testimony was not crucial to the State's case and merely corroborated the medical examiner's testimony. Correll's argument that Bunker's testimony greatly affected the outcome of the case because it was the only evidence presented in support of the State's "single-killer" theory is meritless because there was overwhelming evidence of Correll's guilt regardless of whether other perpetrators were involved in the murders.

Correll v. State, 698 So. 2d 522, 524 (Fla. 1997) [footnotes omitted]. While the State does not concede that there was any error in determining that Deputy Caudill was an expert in blood stain analysis, it is clear that, as in *Correll*, the evidence against Anderson (who was literally caught in the act) presented an unchallengeable case of guilt, and, even if it was error to allow the expert testimony in question, any error was

harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

Moreover, it was not error to allow Deputy Caudill to testify as an expert in the field of blood stain analysis. As this Court has held:

> The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge whose decision will not be reversed absent a clear showing of error. *Ramirez v. State,* 542 So. 2d 352, 355 (Fla. 1989). An expert is permitted to express an opinion on matters in which the witness has expertise when the opinion is in response to facts disclosed to the expert at or before the trial. § 90.704, *Fla. Stat*. (1993). Section 90.702 requires that before an expert may testify in the form of an opinion, two preliminary factual determinations must be made by the court under section 90.105. First, the court must determine whether the subject matter is proper for expert testimony, *i.e*., that it will assist the trier of fact in understanding the evidence or in determining a fact in issue. **Second, the court must determine whether the witness is adequately qualified to express an opinion on the matter**. Charles W. Ehrhardt, *Florida Evidence* § 702.1 (1994 ed.).
>
> At trial, before deciding this issue, the trial court allowed Dr. Steiner's testimony to be proffered. After the proffer, it admitted the testimony and reasoned:
>
>> First, I'm going to, first of all -- the doctor's qualified as a forensic pathologist. The next question is should he be able to render an opinion which is at issue at this point.
>>
>> Gentlemen, the issue here deals with whether or not the position of the body is something for which a medical examiner normally reaches conclusions. And frankly, it is, when capable of doing so, and it's clear that Dr. Steiner is using a number of items, factors: The photos, the bleeding, the position of the body, the blood spatter, lack of bruises, trajectory, the damage to the ear, the damage to the nose, among a number of factors, and the, the issue really is

> whether or not his testimony and his conclusions are proper, and frankly, that is a weight issue, not an admissibility issue.
>
> He initially says during questioning by Mr. Morgan [the defense attorney] that he had training in blood spatter. In his deposition he says, no, he doesn't have training in blood spatter; he's not a blood spatter expert. What that means is he doesn't have, as I understand it, he doesn't have formalized training, but he has training on the scene in seeing these things whenever he goes to a crime scene and it's a factor he applies.
>
> Clearly, he's not a blood spatter expert, but he does have expertise with regard to forensic pathology and one of the issues, as he testified to in forensic pathology, is cause of death and circumstances surrounding the death, and based upon that, I will allow his opinion. It will be up to the jury to determine whether it's a proper opinion, and certainly cross-examination will be a factor in that issue.

We believe that the trial judge's ruling does not represent a "clear showing of error." **Although there may be a difference of opinion regarding the weight to be given to Dr. Steiner's testimony concerning the position of the victim before death, its admissibility was within the trial judge's discretion.** *See Dragon v. Grant*, 429 So. 2d 1329, 1330 (Fla. 5th DCA 1983); *see also Johnston v. State*, 497 So. 2d 863, 870 (Fla. 1986) (holding that where officer possessed working knowledge of Luminol testing, his testimony concerning the Luminol test he performed on defendant's clothes was not inadmissible on ground that he was never qualified as an expert in blood detection). Therefore, we find that the trial court did not err in denying appellant's motion in limine.

Terry v. State, 668 So. 2d 954, 961 (Fla. 1996)(emphasis added). The sentencing court did not abuse its discretion in finding that Deputy Caudill was qualified as an expert in

the field of blood stain analysis, given that he had received formal instruction in blood stain analysis, and has also taught that subject to other law enforcement officers. (R1606; 1609). Clearly, Deputy Caudill has knowledge of the subject of blood stain analysis beyond that of the average person and is qualified as an expert by virtue of his training and experience.[16] *Terry, supra*. In deciding the same issue, this Court has held:

> As his next evidentiary error, Cheshire alleges that the trial court improperly qualified a man named Allen Miller as an expert in blood-spatter evidence. It appears Miller's qualifications consisted of a single forty-hour course, three prior qualifications as an expert and his own field experience. While we agree that these qualifications are open to reasonable question, we nevertheless believe that the trial court did not abuse its discretion in allowing this expert testimony. Any deficiencies in an expert's qualifications, experience and testimony may be aired on cross-examination, provided there is some reasonable basis to qualify the expert. We believe such a basis existed on this record.

Cheshire v. State, 568 So.2d 908, 913, (Fla. 1990). There is no basis for reversal, and Anderson's conviction should be affirmed in all respects.[17]

VI. THE DENIAL OF THE MOTION TO SUPPRESS

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[16]The criticisms of Deputy Caudill set out in Anderson's brief go to the weight of the testimony, not its admissibility. All of these matters were brought out before the jury. As set out above, the case against Anderson was virtually unassailable, and any error in the admission of this testimony was harmless.

[17]It is true that Deputy Caudill had never before testified as an expert in blood spatter analysis because no case in which he did such work had ever before gone to trial. (R1610). That fact does not render him unqualified to render an opinion.

On pages 52-59 of his brief, Anderson argues that he is entitled to a new trial based upon the admission, **in rebuttal at the penalty phase**, of his inculpatory statement. Under settled law, "[a] trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. *McNamara v. State*, 357 So. 2d 410, 412 (Fla. 1978)." *Rolling v. State,* 695 So. 2d 278 (Fla. 1997). More significantly to this case, a defendant seeking relief based upon the denial of a motion to suppress a statement must preserve the issue by objection at trial when the statement is offered. *See, Rounds v. State*, 382 So.2d 775 (Fla. 3rd DCA 1980) ("... the defendant failed to preserve for appellate review the admissibility of the defendant's statements to the police as he did not object at trial to the admission of such statements subsequent to the denial of his pretrial motion to suppress.") *Jones v. State*, 360 So. 2d 1293 (Fla. 3d DCA 1978); *Tennant v. State,* 205 So. 2d 324 (Fla. 1st DCA 1967); *see Clark v. State,* 363 So. 2d 331 (Fla. 1978); *Rolling v. State,* 695 So.2d 278, 288 n. 6 (Fla. 1997) ("Rolling objected to the admission of these statements prior to opening statements and repeated his objection each time the evidence was introduced. Thus, this claim was properly preserved for our review.").

In his brief, Anderson leaves this Court with the impression that the State

introduced an involuntary custodial statement during the guilt phase of his capital trial.[18] However, the true facts are that the statement at issue was not offered until the last witness at the end of the penalty phase of Anderson's trial. The State called Sergeant James Jicha of the Mount Dora Police Department as a **rebuttal** witness at the penalty phase proceeding, and, at that time, presented testimony as to Anderson's statement given on the afternoon of March 20, 1999. (R2585). At no time did Anderson assert that the statement was involuntary, and, because that is so, the issue contained in his brief is not preserved for review. *Rolling, supra; Rounds, supra.* The claim contained in Anderson's brief is, at best, disingenuous.

Moreover, even assuming *arguendo* that the statement was taken in violation of Anderson's *Miranda* rights, use of the statement in rebuttal is permissible. *Mincey v. Arizona*, 437 U.S. 385, 397-398, (1978)(holding that while statements of a defendant taken in violation of *Miranda* may be excluded from the government's case-in-chief, a *Miranda* violation alone does not prevent the use thereof for impeachment if the

[18]Anderson's brief is unclear, but, in the conclusion, he asks this Court to grant a **new trial** based upon the issue contained in Point VI. If his intent was not to convey the impression that the inculpatory statement was used at the guilt phase, there would be no reason to ask for a new guilt phase proceeding. In fact, the statement at issue came in during the State's rebuttal in the penalty phase. Because the statement issue relates solely to the penalty phase, guilt stage relief is unavailable because no "error" took place at that point in the trial.

defendant testifies); *Bryan v. State,* 748 So. 2d 1003, 1008 (Fla. 1999).

Finally, even if the substantive issue of the denial of the motion to suppress was properly before the Court, it would not be a basis for relief because Anderson's claims have no factual basis. The transcript of Anderson's statement leaves no doubt that Anderson, who is college educated, (R2121), knowingly, voluntarily, and intelligently waived his *Miranda* rights and gave a statement to law enforcement. (R1354-56). Contrary to the impression given in Anderson's brief, law enforcement went to great lengths to ensure that Anderson understood his rights and did, in fact, wish to make a statement. (R1328, 1340, 1341, 1354-56). There is no basis for reversal based upon this unpreserved and disingenuous issue.

Finally, putting aside the foregoing defects with the issue contained in Anderson's brief, the fact remains that "erroneous" admission of the custodial statement is, at most, harmless error in light of Anderson's unchallenged admissions when he was taken into custody at the crime scene. (R1398, 1404). Even if it were possible to construct an issue out of these facts, the most that would remain would be harmless error because the facts contained in the statement at issue were, in substance, before the jury through an unchallenged statement. No basis for reversal exists.

VII. THE ADMISSION OF PHOTOGRAPHS

On pages 60-63 of his brief, Anderson asserts that he is entitled to a new trial

based upon the admission of three photographs of his surviving victim.[19] "The test for the admissibility of photographic evidence is relevance, not necessity. *See Gudinas v. State*, 693 So. 2d 953, 963 (Fla. 1997). A trial court's ruling on the admission of photographic evidence will not be disturbed absent a clear showing of an abuse of discretion. *Id.". Mansfield v. State,* 758 So. 2d 636, 648 (Fla. 2000). The admissibility of photographs is within the sound discretion of the trial court. *King v. State*, 623 So. 2d 486, 488 (Fla. 1993); *Thompson v. State*, 565 So. 2d 1311, 1314-15 (Fla. 1990); *Engle v. State*, 438 So. 2d 803, 809 (Fla. 1983). Photographs are properly admitted to explain the nature and location of the victim's wounds and the cause of death. *Burns v. State*, 609 So. 2d 600 (Fla. 1992).

The photographs at issue were taken three days following the offense at issue, and depict the multiple injuries sustained by the surviving victim, Marisha Scott. (R1595). These photographs show the extent of Ms. Scott's injuries, are relevant to the intent issue (as to which the State had the burden), and were properly admitted. There is no basis for reversal.

Moreover, there is no basis for reversal because the injuries depicted in the still

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[19]Anderson was convicted of Attempted First Degree Murder in connection with this offense. His brief does not specify whether the claimed error goes to this conviction, the First Degree Murder conviction, or both.

photographs are also depicted in a video tape interview of Ms. Scott during which she identified Anderson as the person who shot her. (R1595, 1596). Even if the still photos should not have been admitted, the same subject matter was placed before the jury without objection through the videotape. At most, the still photos were cumulative of evidence that was before the jury without objection. There is no basis for relief.

Finally, this claim is not a basis for relief because any error was harmless beyond a reasonable doubt. *State v. DiGuilio, supra.* The State's case can accurately be described as overwhelming, and included Anderson being literally caught inside the bank holding the money in one hand and the surveillance VCR in the other. (R1360). Anderson confessed on the spot, was identified by the surviving victim, and was shown in the act on the surveillance video. (R2011). It makes no sense at all to argue that three photographs of the survivor prejudiced Anderson's rights in any fashion. With or without the photographs, Anderson would have been convicted -- there is no basis for reversal.

VIII. THE "CUMULATIVE ERROR" CLAIM

On pages 64-66 of his brief, Anderson sets out what he claims are "errors" that, because of their "cumulative effect," denied him a fair trial. The first identified claim is based upon a comment made by a forensic serologist, and the second is based upon a statement made during the State's closing argument. As to the first matter, it is subject

to review under the abuse of discretion standard since the trial court gave a curative instruction rather than granting a mistrial. *Cedno v. State,* 545 So. 2d 495 (Fla. 3d DCA 1989). As to the second, the defendant's objection was overruled but the prosecutor was instructed not to make, and did not repeat, the objected-to argument -- because that is so, there is no adverse ruling to review.

The first sub-claim is purportedly based upon an answer to a question, during re-direct examination, by the State's forensic serologist which reads as follows:

> Forensic means -- it's taking science and applying it to law and in the courtroom setting and **I tried to preserve as much of the** [blood] **sample as possible so that additional testing could be done, if need be, by the Defense, if they wanted to hire their own laboratory and do further testing on it, they could.** But as a forensic serologist, I'm trying to get the most information out of the stain, while yet preserving the stain.

(R1767). This answer came **after** the following, which took place during Anderson's cross-examination of the witness:

> Q. You made a cutting on the shirt or the other clothing wherever you found blood, correct?
>
> A. I did.
>
> Q. You did not leave any blood behind on any of the clothing, correct?
>
> A. I would say not necessarily on that, because I might not have taken the full cutting. From a forensic standpoint, you always try to leave a sample, preserve enough sample so that if any additional testing would ever want to be done, there would be that opportunity, in such case, **for the**

Defense.

(R1761). Anderson sought no curative instruction based upon that answer, and did not complain until a similar statement was made during re-direct examination of the witness, which was elicited to clarify why the witness had not consumed (through testing) all of the blood stains found on a particular piece of evidence. (R1762-1766). In any event, the statement at issue is an accurate statement of the facts, and does not in some way shift the burden of proof to Anderson. The most that the statement did was make clear that the opportunity for Defense testing was preserved as a routine part of the forensic examination. That accurate statement is not a basis for relief, and, in any event, the Court instructed the jury:

> Ladies and gentlemen, the last witness's testimony, there was a suggestion that the circumstance might arise where a Defense expert might come in and examine some of the evidence, and I just want you to disregard that suggestion, and remind you that it is not required that the Defense prove anything, I think we have even mentioned this instruction previously in this trial, let me go over it briefly.
>
> To overcome the defendant's presumption of innocence, the State has the burden of proving the crime with which the defendant was committed and the defendant is the person who committed the crime. The defendant is not required to present evidence or present anything.

(R1774-5).[20]

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[20]Anderson had initially asked for a curative instruction (R1770), but then changed his mind and asked for a mistrial, which was denied. (R1772).

Assuming that the complained-of answer was somehow improper, and the State does not concede that it was, the curative instruction given by the Court was more than sufficient to cure any error, and the Court did not abuse its discretion in selecting that remedy. *Cedno, supra.* The Court did not abuse its discretion in denying the motion for a mistrial, and, because that is so, there is no basis for reversal. *Goodwin v. State,* 751 So. 2d 537, 546 (Fla. 1999); *Thomas v. State,* 748 So. 2d 970, 980 (Fla. 1999); *Hamilton v. State,* 703 So. 2d 1038, 1041 (Fla. 1997).

The second "cumulative error" alleged by Anderson occurred during the State's closing argument, when the prosecutor argued:

> Ladies and gentlemen, my job is not to satisfy the defendant's curiosity, or his attorney's curiosity, or the Judge's curiosity, or even your curiosity about these details. I've got one job, one job here today. If you folks have questions that you just have to have to know the answer to, after this trial is over, my office is up on the fourth floor, you are welcome to come up there and ask me about any of these little details.

(R2213). Anderson objected, and the Court stated:

> I'll overrule the objection but I don't think you need to tell them to come up to your office and talk to you afterwards. I think that is improper --

(R2213). Anderson asked for no curative instruction, did not move for a mistrial, and the argument was not repeated.

This issue is not preserved because no motion for mistrial was made. This Court has clearly held:

> As we explained in *Spencer v. State*, 645 So. 2d 377 (Fla. 1994), defense counsel may conclude upon objection that a curative instruction will not cure the error and choose not to request one: "Thus, a defendant need not request a curative instruction in order to preserve an improper comment issue for appeal. **The issue is preserved if the defendant makes a timely specific objection and moves for a mistrial.**" *Id.* at 383.

James v. State, 695 So. 2d 1229, 1234 (Fla. 1997) [emphasis added]; *Kearse v. State,* 770 So. 2d 1119, 1130 (Fla. 2000) (same). Because there was no motion for mistrial, nothing is preserved for review by this Court.

Alternatively, this issue is not a basis for relief because the complained-of argument is not so egregious as to have contributed to Anderson's conviction. Even assuming that the argument was improper, the evidence against Anderson was overwhelming. Because that is the state of the record, any error associated with this comment was harmless beyond a reasonable doubt. *State v. DuGuilio, supra.* Anderson's conviction should be affirmed in all respects.

IX. THE *APPRENDI* CLAIM

On pages 67-73 of his brief, Anderson argues that he is entitled to relief based on the United States Supreme Court decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). The arguments contained in Anderson's brief were not raised in the trial court, despite the fact that *Apprendi* was decided on June 26, 2000, well before the motions

which Anderson claims raised the issues contained herein were filed.[21] Because that is so, the claims contained in Anderson's brief were not properly preserved below, and are not available to him for the first time on appeal. *White v. State,* 446 So. 2d 1031, 1034-35 (Fla. 1984) ("In the absence of fundamental error, we will not consider an issue raised for the first time on appeal."); *see also, Davis v. State,* 661 So. 2d 1193 (Fla. 1995); *State v. Rhoden*, 448 So. 2d 1013 (Fla. 1984); *Steinhorst v. State,* 412 So. 2d 332 (Fla. 1982).

Alternatively and secondarily, the *Apprendi*-based claims are not grounds for relief because *Apprendi* does not apply to capital sentencing proceedings, as this Court has expressly held. In *Mills v. Moore,* this Court stated:

> The majority opinion in *Apprendi* forecloses Mills' claim because *Apprendi* preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, *Apprendi* is inapplicable to this case.

Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001). This Court rejected a similar claim in *Mann v. Moore*, 794 So. 2d 595 (Fla. 2001), and, in *Card v. State*, stated:

> The United States Supreme Court indicated that *Apprendi* does not affect capital sentencing schemes, *see Apprendi*, 530 U.S. at 496-97, 120 S.Ct. 2348; *Mills v. State*, 786 So. 2d 547, 549 (Fla. 2001), and this Court consistently had held that a capital jury may recommend a death sentence by a bare majority vote. *See Thompson v. State*, 648 So. 2d 692, 698 (Fla. 1994).

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[21] Anderson's first motions challenging the death penalty act were filed in September of 2000. (R92-93).

Card v. State, 26 Fla. L. Weekly S670, 675 n. 13 (Fla., Oct. 11, 2001), *revised op*., 27 Fla. L. Weekly S25, 30 (Fla. Dec. 20, 2001). *See also, Hertz v. State,* 26 Fla. L. Weekly S725 (Fla., Nov. 1, 2001); *Looney v. State,* 26 Fla. L. Weekly S733 (Fla., Nov. 1, 2001). The *Apprendi* decision is inapplicable, and there is no basis for relief.

To the extent that additional discussion of this claim is required, this Court, in *Mills*, explained the statutory maximum sentence to which a defendant convicted of first degree murder was subject:

> [Mills] argues that the statute in effect at the time of the initial trial made the maximum penalty for his crime life imprisonment. Only after the jury verdict and further sentencing proceedings, Mills argues, could death be a possible sentence. This particular scheme, Mills argues, puts the sentence of death outside of the maximum penalty available and triggers *Apprendi* protection.
>
> With regard to the statute in effect at the time of trial, Mills cites section 775.082(1), *Florida Statutes* (1979), which provided:
>
>> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.
>
> § 775.082(1) *Fla. Stat*. (1979). Mills argues that this statute makes life imprisonment the maximum penalty available. Mills argues that the statute allowing the judge to override the jury's recommendation makes it clear that the maximum possible penalty is life imprisonment unless and until the judge holds a separate hearing and finds that the defendant is death

> eligible.
>
> The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is read *in pari materia* with section 921.141, *Florida Statutes*, **there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death**. (FN4) Both sections 775.082 and 921.141 clearly refer to a "capital felony." *Black's Law Dictionary* defines "capital" as "punishable by execution; involving the death penalty." *Black's Law Dictionary* 200 (7th ed.1999). *Merriam Webster's Collegiate Dictionary* defines "capital" as "punishable by death ... involving execution." *Merriam Webster's Collegiate Dictionary* 169 (10th ed. 1998). Therefore, a "capital felony" is by definition a felony that may be punishable by death. The maximum possible penalty described in the capital sentencing scheme is clearly death.
>
> (FN4.) Section 921.141, *Florida Statutes* (1979), provides:
>
>> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082.
>>
>> ....
>>
>> (3) ... Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death....

Mills v. Moore, 786 So. 2d 532, 537-38 (Fla. 2001). [emphasis added]. Under Florida law, as announced by this Court, a defendant convicted of a capital felony enters the penalty phase (or, in the phraseology of the United States Supreme Court, the selection

phase) **eligible** for the death penalty.[22] Because that is so, a death sentence is not an "enhancement" of the sentence -- it is a sentence that a defendant convicted of a capital felony is eligible to receive, and which can be imposed after the required penalty phase proceedings are conducted, the advisory verdict is rendered, and the sentencing court considers that advisory sentence in accordance with Florida law.

The decisions of the United States Supreme Court interpreting Florida's death penalty act are in accord with the foregoing discussion -- a Florida capital defendant is "death eligible" based upon the jury's verdict of guilty of the capital felony (*i.e.,* first-degree murder). Unlike the statutory schemes in some states, Florida's statute determines the eligibility of a defendant to receive a death sentence at the guilt-innocence stage of the capital trial, not during the penalty (or selection) phase. *See, Proffitt v. Florida,* 428 U.S. 242 (1976).

In distinguishing between the eligibility and selection phases of a capital prosecution, the United States Supreme Court has stated:

> **The eligibility decision fits the crime within a defined classification.** Eligibility factors almost of necessity require an answer to a question with

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[22]The version of § 775.082(1), *Fla. Stat.*(1999) in effect at the time of Anderson's trial refers to a sentence of death first, and then to a sentence of life without parole. If the 1979 statute at issue in *Mills* made death an available sentence, and this Court held that it did, then the 1999 statute applicable to Anderson leaves no doubt that death is **not** an "enhanced sentence" under *Apprendi.*

> a factual nexus to the crime or the defendant so as to "make rationally reviewable the process for imposing a sentence of death." *Arave, supra*, 507 U.S., at 471, 113 S.Ct., at 1540 (internal quotation marks omitted). **The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability.** The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time. *See Romano v. Oklahoma*, 512 U.S., at 6, 114 S.Ct., at 2009 (referring to "two somewhat contradictory tasks").

Tuilaepa v. California, 512 U.S. 967, 973 (1994). [emphasis added]. The distinction between the analytical basis of the two stages of a capital prosecution is significant, and, under Florida law, no argument can be made that a capital defendant does not enter the "selection" phase eligible for a death sentence.[23] Even if *Apprendi* is somehow applicable to capital sentencing, and even if the procedurally barred claim is available to Anderson, there is no basis for relief because of the manner in which Florida's death penalty statute operates.[24]

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[23] That the capital sentencing statutes in other states may not function in this way is not the issue, and is of no moment here -- Florida's statute answers the "eligibility" question at the **guilt** phase of a capital trial.

[24] Anderson's argument that aggravators are "elements of the crime" has been expressly rejected by this Court. *Hunter v. State,* 660 So. 2d 244, 254 (Fla. 1995); *Hildwin v. State,* 531 So. 2d 124, 128 (Fla. 1988), *aff'd,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989).Likewise, the argument that a unanimous jury sentence recommendation is required has been rejected. *Evans v. State,* 26 Fla. L. Weekly S675 (Fla. 2001); *Sexton v. State*, 775 So. 2d 923 (Fla. 2000); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975). These sub-claims are not a basis for

Moreover, even if *Apprendi* is somehow applicable to Florida's capital sentencing scheme, that result would not help Anderson. Two of the aggravating circumstances found by the sentencing court fall within the "prior conviction" class of aggravating circumstances, and, as such, are outside any possible reach of the *Apprendi* decision. In other words, no matter how *Apprendi* might at some point be interpreted, the prior violent felony aggravator and the under sentence of imprisonment aggravator fall outside the scope of *Apprendi*, and, under the facts of this case, are sufficient to support a sentence of death even if the other two aggravators are not considered.[25]

To the extent that Anderson claims that he is entitled to "notice" of the aggravating circumstances upon which the State intends to rely, that claim has been consistently rejected by this Court, and Anderson has suggested no basis for revisiting settled Florida law. In rejecting this claim years ago, this Court stated:

> The aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in section 921.141(5), *Florida Statutes* (1987). Therefore, there is no reason to require the State to notify

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relief, and, in any event, are procedurally barred for the same reasons that the *Apprendi* claim is procedurally barred.

[25] *Apprendi* expressly **excluded** prior convictions from the matters that must be found by a jury before "sentence enhancement" is allowable. The State does not concede that a sentence of death, in Florida, is an "enhanced sentence" as that term is used in *Apprendi*. See note 22, above.

> defendants of the aggravating factors that it intends to prove. *Hitchcock v. State*, 413 So. 2d 741, 746 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982). Vining's claim that Florida's death penalty statute is unconstitutional is also without merit and has been consistently rejected by this Court. *See Thompson v. State*, 619 So. 2d 261, 267 (Fla.), *cert. denied*, --- U.S. ----, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993), and cases cited therein.

Vining v. State, 637 So. 2d 921, 927 (Fla. 1994); *see also, Mann v. Moore,* 794 So. 2d 595 (Fla. 2001); *Medina v. State*, 466 So. 2d 1046, 1048 n. 2 (Fla. 1985) (State need not provide notice concerning aggravators). This claim is not a basis for relief, and Anderson's sentence should not be disturbed.

Likewise, Anderson's claim that the jury instruction on the weighing of the aggravating and mitigating circumstances shifted the burden of proof is based upon *Apprendi v. New Jersey*, and is, therefore, procedurally barred and without merit because *Apprendi* is inapplicable. Moreover, even discounting the *Apprendi* component of this claim, it has long been rejected by this Court. *Hunter v. State,* 660 So. 2d 244, 253 (Fla. 1995); *Fotopoulos v. State,* 608 So.2d 784, 794 n. 7(Fla. 1992); *Francois v. State,* 423 So. 2d 357, 360 (Fla. 1982); *Arango v. State*, 411 So. 2d 172 (Fla.), *cert. denied*, 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982). There is no basis for relief, and Anderson's conviction should be affirmed
in all respects.

This Court is well aware that, as of the filing of this brief, *certiorari* is pending

in the case of *Ring v. Arizona,* 122 S.Ct. 865(2002), and that the executions of Amos King and Linroy Bottoson were stayed by the United States Supreme Court after both inmates filed last-minute *certiorari* petitions containing *Apprendi*-based claims. Regardless of the applicability of *Apprendi* to capital sentencing in general, and to Florida capital sentencing in particular, that claim is, in the context of this case, procedurally barred for the reasons set out above. This Court should address the procedural bar first, and should only consider the merits of this claim in the alternative, in order to protect the validity and integrity of Florida's long-settled procedural bar rules.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the State submits that Anderson's convictions and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **George D.E. Burden**, Assistant Public Defender, 112 Orange Ave., Suite A, Daytona Beach, FL 32114 on this ___ day of February, 2002.

____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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