IN THE SUPREME COURT OF FLORIDA

DAVID MILLER,

Appellant,

v. CASE NO. 93,792

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

The State generally accepts Miller's "Procedural Progress of the Case." However, Miller fails to acknowledge that the jury was instructed as to both premeditated murder and felony murder (10R 766), a fact the State deems significant in light of Miller's first issue alleging insufficiency of the evidence to prove premeditation. In addition, Miller's overly-sparse summary of the mitigation found by the circuit court requires some elaboration for the sake of clarity.

First, Miller does not mention statutory mitigation; the State will specifically note that Miller did not contend for, and the circuit court did not find, the presence of any statutory mitigators (2R 366-67).

Turning to specific nonstatutory mitigation addressed by the court, the State would note:

(1) In rejecting the proffered mitigator that the defendant did not intend to kill the victim, the court specifically found Miller's self serving statements at to his lack of intent to kill

"not credible in light of the expert and demonstrative evidence produced at trial which was uncontroverted" (2R 368).

(2) Although agreeing that the victim probably was quickly rendered unconscious and did not suffer for any lengthy period of time, the court found no evidence that Miller had done anything out of consideration of the victim's pain and suffering; the court therefore gave this proffered mitigator "very little weight" (2R 368).

(3) Although the court did find that Miller had turned himself in to the police, the court also found that Miller had turned himself in for his own protection and not for any altruistic reason. This mitigator was therefore only given "slight weight" (2R 368).

(4) The proffered mitigator that Miller would never be released if given a life sentence was probably factually true, but entitled to "very little weight" (2R 369).

(5) The court believed that Miller "is now truly sorry for his conduct" and gave this proffered mitigator "some weight" (2R 369).

(6) The court also agreed that the defendant had cooperated with the police, and gave this proffered mitigator "some weight" (2R 369).

(7) The court found that Miller's father "did abuse alcohol" and "on a few occasions" was "abusive primarily defendant's mother and sometimes to the children including defendant." However, the father was out of the home by the time Miller was 13. After that time, Miller's home life was filled with love and support from his mother and grandparents. Miller was bright and creative, and regularly taken to church. Moreover, his brother and sister, raised in the same home, have been law-abiding citizens and have professional careers. The court concluded that the "totality" of Miller's family background is not mitigating (2R 369-70).

(8) The proffered mitigator that Miller did not resist arrest was not given any independent weight essentially because it was already covered by mitigator (3), above, that Miller had turned himself in to the police (2R 370).

(9) Although the court found that Miller had abused alcohol and drugs as an adult, the court found no convincing evidence that Miller was intoxicated or high when he committed this crime. Further, Miller had rejected his family's repeated offers of

assistance and had chosen a life on the street. Therefore, this proffered mitigator was rejected (2R 370-71).

(10) Although some evidence had been introduced that Miller periodically had worked as a day laborer in labor pools, no evidence had been introduced to show Miller's work history or his attributes as a day laborer or, therefore, to show that Miller had been a good worker. Thus, this proffered mitigator was rejected (2R 371).

(11) As for the proffered mitigator that Miller had been "emotionally distraught" at the death of a cousin and older sister (2R 354), the court found it proven through the testimony of Miller's brother and sister that, as would be natural and expected, Miller had been upset by these deaths; however, the court found no evidence that these deaths--which had occurred years before this crime--had emotionally traumatized Miller. Thus, this proffered factor was given "little weight" by the court (2R 371-72).

(12) Although finding uncontroverted Dr. Krop's testimony that Miller has a frontal lobe deficit affecting inhibitions and impulse control, the court noted that Dr. Krop also had testified that Miller did not suffer from any major mental illnesses, that Miller was capable of making his own decisions, and that Miller's actions

in this case were by his own making or choice. The court gave this mitigator "modest weight" (2R 372).

(13) As for Miller's ability to adapt to long-term incarceration, the court noted that no testimony other than that of Dr. Krop had been offered to show Miller's adjustment to prison life in his previous long-term incarceration in North Carolina. This proffered mitigator was given "very little weight" (2R 372-73).

(14) The court agreed that Miller was loved by his family. However, even that family had to exercise "tough love" by evicting Miller from their homes based on his poor conduct. Further, theirs has been a one-way love; Miller has given little in return: he is a taker, not a giver. As for his good deeds, the only ones proffered occurred in the distant past; there was no evidence of any recent good deeds by Miller. This proffered mitigator was given "slight weight" (2R 373).

(15) Finally, while recognizing it can be mitigating that a defendant has adjusted well to incarceration, the court noted that Miller had failed to call any correctional officers or to offer any documentary evidence of Miller's behavior during his pre-trial detention. The court did acknowledge that Miller had behaved himself while in court for this case, but noted that, in the

court's experience, most defendants awaiting trial are well-behaved while in court. Therefore, this proffered mitigator was given only "slight weight" (2R 373-74).

The evidence presented at the guilt phase

Miller's statement of the facts, although reasonably accurate in general outline, omits significant facts relevant to the State's case and particularly to the issue of premeditation. Thus, the State will present the following facts, for the purpose of supplementing and clarifying the defendant's presentation.

First, the State would note that Linda Fullwood (the victim's girlfriend) testified that the $10 rock of crack cocaine she and Albert Floyd smoked several hours before the murder only had a 5 or 10 minute effect at most (7R 271-72). As for the facts of the murder, she testified that she awoke from her sleep because Floyd sounded like he was "gagging" or "getting choked;" when she looked up, a man was "beating Floyd with the pipe" (7R 274). When she said something, the man "struck me in the forehead." She threw up her arms to protect her face and he beat her on her side. Then, when she "couldn't hardly move no more," the man "went to beating Albert Floyd with the object, again" (7R 274-75). While he was "still . . . beating on Floyd," another person showed up and the man "turned and walked away" (7R 276). As a result of this attack,

Fullwood has twice had surgery on her arm; in addition, she had a concussion, two broken fingers and several fractured ribs (7R 278-79).

This person who confronted Miller during the attack--Jimmie Hall--testified that, after running to the scene because he heard a woman screaming, he saw Miller swing an iron pipe at the two prone victims at least three times (7R 305-08). Hall testified that Miller had both hands on the pipe and was swinging "[w]ith full force" (7R 316). Shown a photograph of the porch the victims had been sleeping on (State's Exhibit 6), Hall testified that the red splatter on the wall and even the ceiling of the porch was the victims' blood, slung off the pipe as Miller swung it at them (7R 318-19). Hall saw Miller hit the woman at least twice, and hit the man at least once afterwards before Hall spoke up and Miller turned to confront him (7R 309, 327). After being confronted, Miller turned towards Hall, held the pipe in a manner threatening to Hall, then turned and ran (7R 316).

Dr. Floro conducted the autopsy of Albert Floyd. Floyd received at least three major impacts to his head, any one of which would have been fatal (7R 348, 351, 355). One impact, to the right forehead, "pushed the skull bone into the brain because of the tremendous amount of force." Dr. Floro could "see brain matter

coming out" and could put his "finger inside and touch the brain" (7R 348-49). A second impact, to the left side of the forehead, also showed "brain matter and skull bone opening up" (7R 349). The third impact[1] caused two separate lacerations above and below the victim's left eye (7R 349-50). This impact, like the other two, fractured the skull bones and pushed them into the brain substance; in addition, this blow literally "burst" the victim's left eyeball (7R 350). Dr. Floro also observed "swelling on the face on both sides of the head and face area" (7R 351), and discovered that four of the victim's false teeth were fractured (7R 352).

The State would note that when Miller took police to the scene of the crime and "walked the detectives through the events at the scene," Initial Brief of Appellant at 11, Miller showed the police how he had swung the pipe at the two victims; he showed the police "full-blown" swings, raising the pipe over his head and swinging down to the victims (8R 536-37).

In his brief, Miller cites his testimony that he had drunk 40 ounces of malt liquor and had smoked crack cocaine before the murder. Initial Brief of Appellant at 11. He omits to note, however, that he admitted at trial that this consumption of

[1] Dr. Floro was not implying anything about the order in which the blows were delivered by referring to them as first, second and third (7R 355).

intoxicants had occurred over a 3-5 hour period which had ended at least 5-7 hours before the murder (9R 649-50). Further, by his own testimony, he had only smoked a "dime" or ten-dollar "rock" of cocaine, the effects of which wore off after 5 or 10 *minutes* (9R 651). In the 5-7 hours leading up to the murder, Miller had consumed no intoxicants of any kind (9R 651). In addition, Miller admitting telling officer Reddish that he was in control of himself and knew what he was doing at the time of the murder (9R 652-53).

The evidence presented at the penalty phase

The State generally accepts Miller's recounting of the evidence presented at the penalty phase, and will offer only a supplementation or clarification of those facts.

Miller states in his brief that his mother, Yvonne Jordan, testified that the deaths of his sister Valnese and his friend and cousin Boyd Howe had a "great effect" on him. Initial Brief of Appellant at 13-14. In fact, Ms. Jordan never claimed a "great" effect; in fact, she was not certain of any effect at all. When asked what effect the death of his sister Valnese had on the defendant, Ms. Jordan answered, "I *think* it had some effect. . . . Because they were close. All my children are close." (11R 834)(emphasis supplied). Asked about the effect Boyd Howe's death had on the defendant, Ms. Jordan answered, "I *think* that had some

effect, too, because they were close friends" (11R 835)(emphasis supplied).[2] The record contains no further elaboration or explanation by Ms. Jordan of any effect these deaths might have had on the defendant. Furthermore, Miller was not a child when these deaths occurred, contrary to what Miller states as fact in his brief (p. 13). Although the trial transcript does reflect that at one point Ms. Jordan testified that Valnese had died at age 14 and therefore when the defendant--who was a year younger--would have been 13 (11R 845), this cannot be correct; either Ms. Jordan miss-spoke or the court reporter erred in transcribing this testimony, because Ms. Jordan also twice testified that Valnese had died in 1990 (11R 831, 854), and further testified that Miller was "about 36" years old and residing *in prison* when Valnese died (11R 854-55). In addition, Ms. Jordan explicitly acknowledged on cross-examination that the defendant "clearly" was a grown man when Valnese had died (11R 855). It is clear from her testimony as a whole that Miller was in his mid-thirties, and not a teenager, when

[2] The State would note that one transcript citation allegedly supporting Miller's assertions about his mother's testimony (9R 925-26, cited at line two of page 14 of his initial brief) actually refers to the testimony of Miller's brother. Furthermore, an examination of those two pages of the transcript shows that Miller's brother did not testify that Howe's death had a "great effect' on Miller; in fact, there is no mention of Howe's death at that point in the transcript, let alone the effect of that death on Miller.

Valnese died, and it is misleading for Miller to contend otherwise in his brief.[3] Miller also was not a child when his friend Boyd Howe died. Howe died, according to Ms. Jordan, "[s]omewhere in '91 or '92," again, while Miller (by now 37 or 38) was still in prison (he was there from 1986 through 1993) (11R 855).

Miller asserts in his brief that his mother, sister and brother all testified that his father was an "alcoholic." (Initial Brief of Appellant at 14-16). In fact, while all of these witnesses agreed that the father drank, none of these witnesses ever testified that he was an "alcoholic" or even that he drank "heavily."[4]

As for the father's alleged abuse, Ms. Jordan testified the father would "beat [the children] with a belt," sometimes for a good reason, sometimes for no reason (11R 841). He did not single

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[3] In addition to Ms. Jordan's testimony, Miller's *younger* sister and brother (11R 851, 882) both testified they were in college when Valnese died (11R 868, 927). Their *older* brother obviously was not a child at this time.

[4] All Ms. Jordan said about her first husband's drinking was that he was "he had a job, but on the weekend he would drink" (11R 839). She did not say how much he drank or even that he drank every weekend. Although Miller's sister Sharon Berringer said her father "had a drinking problem," she was unable to describe (or at least, did not when asked) the frequency of his drinking (11R 864). Finally, the defendant's brother testified that "we would go out with my father and sit in the truck with him and I would see him drink" (11R 927). He never said how much or how often his father drank, and provided no elaboration of the one sentence quoted above.

out the defendant, but disciplined all the children the same (11R 841). None of the children was ever hospitalized for any whipping they got (11R 852). Miller's sister Sharon Barringer described their father as "a man that didn't show much emotions" (11R 864). Although she witnessed two incidents (and only two incidents, 11R 884) in which he was physically abusive to her mother, she "didn't hear too much argument, . . . most time it was behind closed doors or we were outside playing" (11R 867). He would discipline the children by whipping them with an electrical cord "maybe once every eight months, six months, something like that" (11R 886).

After Ms. Jordan divorced her first husband, when the defendant was twelve or thirteen, she and the children lived with her parents, who were supportive and loving, and who cared for the children while she was at work; the defendant had a large extended family all around him (11R 853-54). Ms. Jordan testified that she made sure the defendant had a good education, went to church, and got emotional support, love and a good moral upbringing from her and her parents (11R 855-56). He seemed to be a happy child (11R 860). He was also one of the "smartest children I had;" he had done chores, completed high school and had given her no trouble when he was growing up (11R 833-34). Ms. Jordan testified that her daughter Sharon is a police officer and her son Leonard is an

engineer; unlike the defendant, neither of these two has committed murder (11R 852). The “biggest change” in the defendant when he drinks is that he is a lot more talkative (11R 857). She never knew him to be violent (11R 861). However, she had twice made the defendant leave her home after he became an adult (once after he got back from the Navy, and again after he got out of prison in 1993), because he refused to follow her rules (11R 858-60).

Following Miller’s release from prison in 1993, his sister Sharon had talked to him, “always trying to get him off the drugs and alcohol, but as you know when a person is on drugs and alcohol it takes themselves to make a difference” (11R 878). Although he acted differently when drinking, Sharon had never seen the defendant act violently, either when he was drinking or when he was sober (11R 881-82). She agreed with her mother that the defendant was very intelligent (11R 882-83), and that the mother had tried to raise her children well, nurturing and loving them and giving them education and religious training (11R 888). When Miller got out of the Navy, he lived with his mother for about a year, working in construction and doing “quite well” (11R 889). However, he decided he could no longer live under her rules and regulations, and left (11R 889). He again lived with his mother for almost a year after he got out of prison in 1993, and again left for the same reason

(11R 890). Sharon offered to let him come live with her if he would give up drinking, but he refused (11R 891).

The defendant's brother, Leonard Miller, a product engineer living in North Carolina, testified that he and the defendant had a good brother relationship (11R 923-24). After the defendant returned from serving in the Navy, he was "totally different." He was "more apt to talk back or to get up and talk about people, more talkative, you know, wanting to go out and go to clubs and just more aggressive to me" (11R 930). The defendant moved out of his mother's house "because of his desire to drink and do other things" (11R 930-31). Leonard never knew his brother to be violent, however, until he went to jail the first time (11R 932). While the defendant was in prison the first time, Leonard talked to him about turning away from crime and not murdering anyone else (11R 931-32). Leonard acknowledged that neither he nor Sharon had murdered anyone, and that they all had a loving and supporting mother and grandparents (11R 932-34).

Dr. Krop testified that Miller is competent and sane; he "clearly knew right from wrong" (11R 903). Miller does not have anti-social personality disorder (11 903), but does have "mixed personality disorder (11R 900), which is "not considered a major mental illness" (11R 899). Miller is "avoidant, schizoid and

paranoid," meaning he is "suspicious" and "aloof," viewing himself "as different," but not to the point where he is out of touch with reality (11R 900-01). Miller is articulate and does well on intelligence tests (11R 906). The only tests Miller showed any "deficits" in "were those that mentioned frontal lobe functions" (11R 907). The frontal lobe is the part of the brain which controls start-stop behavior or inhibition (11R 906). Miller has a history of alcohol abuse which apparently began while he was in the Navy (11R 908). When released from incarceration, he did not follow up with treatment for his problems (11R 908). Dr Krop testified:

> [A]lcohol . . . affects a person's inhibition and impulse control and judgment. When you have a person who already has these personality traits, such as schizoid traits and paranoid traits, when you have a person who has difficulty organically controlling his impulses and then you add to that a substance which also exacerbates or makes it more difficult to control your behavior you have a pretty seriously disturbed individual *when all of those are combined*.
>
> It's hard to say at any one time which of those disorders are contributing to a given behavior. But certainly *when all three of them are interacting with each other* you have a pretty seriously disturbed individual who has very impaired judgment, usually, and who engages in behavior that probably a, quote, normal person would not engage in. (11R 908-09)(emphasis supplied).

On cross-examination, Dr. Krop acknowledged that Miller had made a choice when he decided to administer three skull-crushing blows to the victim's head (11R 912-13). When asked if his opinion was based upon the defendant having been under the influence of either drugs or alcohol at the time of the murder, Dr. Krop answered:

> *It's my opinion that he was influenced by alcohol*. I can't say, as I indicated earlier, I can't portion out how much of his behavior is alcohol related, personality related, organic related, choice related. Certainly it never rose to the extent of, as I indicated earlier, that I felt that he didn't know the difference between right from wrong.
>
> But given his report *he told me that he had consumed about four quarts of beer and smoked about a dime's worth of crack cocaine that particular evening*. And then during the day he said he was drinking but he couldn't really say how much, so *certainly my opinion is based to a large degree on his self report*. (11R 914-15)(emphasis supplied).

Dr. Krop did acknowledge that the effects of a $10 rock of cocaine would wear off in 10-15 minutes (11R 917). Further, he acknowledged that, since he had no corroboration of what Miller had been drinking that night, his knowledge of Miller's supposed intoxication was based not merely to a "large degree," but "*exclusively*" on what the defendant had told him (11R 915-16). Significantly, Dr. Krop had formed an opinion that Miller was under the influence of intoxicants without knowing just when Miller had

consumed them, admitting that “what [Miller] told me was just that evening, so I did not get a specific time” (11R 917). Once he was informed that Miller had testified during the guilt phase that his drinking and smoking had ended more than six hours before the murder, however, Dr. Krop then asserted for the first time that he had not meant to imply that his opinion was dependent upon the defendant having actually been intoxicated at the time of the crime (11R 917). In fact, Dr. Krop now did not even “think that [Miller] was intoxicated” and certainly was not so intoxicated that he could not “engage in goal directed or choice behaviors” at the time of the murder (11R 919). What was important, Dr. Krop maintained now, was the “motivational level of [Miller’s] need to get high;” that is, “his whole motive in being involved in this situation was to get money to support his alcohol and drug habit, so that has as much of an influence as the actual chemical effects of the alcohol” (11R 917-19).

Miller testified on his own behalf, describing his family as “a very honorable and respectable family, loving,” the one problem being that he never heard the word love from either of his parents (11R 936). He knew now “all the hard work” his mother did “to raise four kids on her own,” so he felt “like I can’t use anything that happened in my childhood as an excuse” (11R 936). He

apologized to Linda Fullwood and to the family of Albert Floyd (11R 937). He acknowledged on cross examination that in 1986 he had apologized to the family of Ervin Oliver (who Miller had murdered on February 6, 1986) (11R 937-38).

SUMMARY OF THE ARGUMENT

1. The evidence was sufficient to support a finding of premeditated murder. Although the State would question the need for a special standard for appellate review of circumstantial evidence, the evidence is sufficient regardless of the standard of appellate review. Miller patently understates the evidence. The State did not establish merely that Miller had struck three blows; the state offered unrebutted testimony that Miller had struck the victim *at least* three times in the head with an iron pipe, that he had struck the unresisting victim with "full force" and with "full-blown" swings, that these blows were each forceful enough to crush the victim's skull to the point that brain matter could be observed coming out, that one of these blows literally "burst" the victim's left eyeball, and that any one of these three blows would have been fatal. In addition, Miller's assault on the victim's companion, although committed after she had awakened and was capable of using her arms to ward off the blows, was so severe that she suffered a concussion, two broken fingers, several fractured ribs, and has had to have multiple surgeries on her arm. In these circumstances, the jury was entitled to reject Miller's self-serving testimony that he was only trying to knock the victim unconscious and to conclude that Miller's preemptive strike was intended to kill the victim.

Moreover, the jury was also instructed on felony murder. Miller does not allege that the evidence is insufficient to prove felony murder, and given Miller's own admission that his attack was a preemptive strike for his robbery of the victim, the evidence obviously is sufficient to prove felony murder. Thus, proof of premeditation is unnecessary to Miller's first degree murder conviction; that conviction may be affirmed under a felony-murder theory.

2. Miller has never contended the existence of any statutory mitigators in this case; as for the few proffered *non*statutory mitigators the trial court rejected, the State's position is that substantial and competent evidence supports the trial court's conclusions. First, Miller did not prove that he did not intend to kill the victim; on the contrary, the State proved that he *did* intend to kill the victim. Second, although no one contends that Miller's real father was a model father, the trial court did not abuse its discretion in determining that Miller had failed to establish that his childhood was sufficiently "abusive" to rise to the level of nonstatutory mitigation. Given the love, support, and moral guidance Miller enjoyed from his mother and grandparents and the professional success Miller's siblings have achieved, the trial court correctly determined that the "totality" of Miller's family

background is not mitigating. Finally, this Court has held that whether abuse of drugs or alcohol is a mitigating factor depends upon all the circumstances of the case; given the family's repeated offers of assistance, Miller's choice of a life on the streets notwithstanding the proffered support of the family, and the fact that Miller was not intoxicated or high at the time of the crime, the trial court was justified in rejecting the proffered mitigator of abuse of drugs and alcohol.

3. Much of Miller's argument as to proportionality rests upon a claim that this killing was unintentional. The evidence, however, demonstrates that the killing was intentional. Moreover, the trial court found two statutory aggravators (robbery and prior violent felony conviction) and *no* statutory mitigators. Miller's prior violent felonies are among the most serious: murder and aggravated battery. Thus, in addition to murdering Albert Floyd to facilitate the commission of a robbery, Miller seriously injured Linda Fullwood, and had previously murdered Ervin Oliver. The death penalty is appropriate in this kind of case.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR AT ALL--OR AT LEAST NOT REVERSIBLY--IN DENYING MILLER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE PREMEDITATION THEORY OF FIRST DEGREE MURDER

In his first issue, Miller contends that, because the evidence was insufficient to prove premeditation, the trial court erred in denying his motion for judgment of acquittal as to the premeditation theory for first degree murder. Miller relies on Florida's judicially-created special circumstantial-evidence standard of appellate review, arguing that if "the State's proof fails to exclude a reasonable hypotheses (sic) that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Initial brief of Appellant at 22, citing Kormondy v. State, 703 So.2d 454, 459 (Fla. 1997). Although the State disagrees with Miller's contention that the evidence fails to meet the circumstantial-evidence standard, the State would suggest that it is now time for this Court to abandon its special "reasonable-hypothesis" standard for review of circumstantial evidence. This standard of review has been rejected in the federal courts and in the overwhelming majority of the state courts of our nation. This Court long ago eliminated the reasonable-hypothesis circumstantial-evidence jury instruction on

the ground that it was both unnecessary and confusing to jurors; the State would concur and would further suggest that the reasonable-hypothesis standard of appellate review also causes confusion as to what evidence should be considered and what light that evidence should be viewed in, and, as well, places the appellate court in the posture of a thirteenth juror reweighing, rather than the reviewing, the evidence presented to the jury.

A. THE SPECIAL REASONABLE-HYPOTHESIS STANDARD OF APPELLATE REVIEW OF CIRCUMSTANTIAL EVIDENCE SHOULD BE ABANDONED AND REPLACED WITH THE REASONABLE-DOUBT RATIONAL-TRIER-OF-FACT STANDARD OF APPELLATE REVIEW FOR SUFFICIENCY OF EVIDENCE ENUNCIATED BY THE UNITED STATES SUPREME COURT IN JACKSON V. VIRGINIA.

Prior to 1981, Florida juries were given special instructions on circumstantial evidence in criminal cases, to the effect that when the evidence is circumstantial, the evidence must exclude every other reasonable hypothesis other than the guilt of the defendant. In 1981, however, this reasonable-hypothesis circumstantial-evidence instruction was eliminated from the standard criminal jury instructions. Use by Trial Courts of Standard Jury Instructions in Criminal Cases, Matter of, 431 So.2d 594 (Fla. 1981). This Court found "the circumstantial evidence instruction unnecessary," id at 595, noting that the "special treatment afforded circumstantial evidence has previously been eliminated in our civil standard jury instructions and in the

federal courts," citing Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed.150 (1954). This Court noted that, in Holland, the United States Supreme Court had rejected the view that an instruction on the burden of proof beyond a reasonable doubt is inadequate absent an accompanying instruction on circumstantial evidence, stating:

> [T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect ...

431 So.2d at 595, quoting Holland, supra, 348 U.S. at 139-40. In this Court's opinion, jury instructions on reasonable doubt and burden of proof are sufficient to guide the jury, and a special jury instruction for weighing circumstantial evidence is unnecessary. 431 So.2d at 595. Since 1981, this Court has consistently adhered to this view. Branch v. State, 685 So.2d 1250, 1253 (Fla. 1996).

In rejecting the need for a reasonable-hypothesis jury instruction in circumstantial evidence cases, this Court joined the majority of states that have abolished the used of this special circumstantial-evidence jury instruction in the years since Holland was decided. See State v. Grippon, 489 S.E.2d 462 (1997)(Toal, J., concurring)("Relying on Holland v. United States, [supra], the

federal courts and a majority of state courts have abandoned the 'reasonable hypothesis' language in favor of an approach that does not differentiate between direct and circumstantial evidence, but simply provides that a defendant's guilt must be proven beyond a reasonable doubt.").

Unlike the overwhelming majority of states, however, this State still retains the reasonable-hypothesis-of-innocence standard for *appellate review* of circumstantial evidence. It is clear that this special standard for appellate review of circumstantial evidence is not constitutionally required. In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979), the United States Supreme Court enunciated a single constitutional standard of appellate review for testing the sufficiency of the evidence: cautioning that the test was not whether the reviewing court itself believes that the evidence at trial established guilt beyond a reasonable doubt, the Supreme Court stated: "the relevant question is, whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 318-19. The Supreme Court explicitly declined to adopt a rule that, in circumstantial evidence cases, "the prosecution [is]

under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt." Id. at 326.

In the years since Jackson was decided, many states have abandoned the reasonable-hypothesis standard for appellate review of the sufficiency of the evidence in circumstantial-evidence cases, and have adopted the Jackson v. Virginia (or comparable) reasonable-doubt standard for review of all criminal cases. In fact, a total of forty states have rejected the reasonable-hypothesis analytical construct in appellate review of criminal convictions. A list of these states and supporting case law is attached to this Brief as Appendix A.

It is worth noting that these 40 states include a few that retain the reasonable-hypothesis *jury instruction*, but do not have a special standard for *appellate review* of circumstantial evidence, instead applying a Jackson v. Virginia type reasonable-doubt rational-trier-of-fact standard to all cases on appeal. See, e.g., People v. Towler, 641 P.2d 1253 (California 1982) (although circumstantial evidence instruction is given to jury, the relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt); State v. Poellinger, 451 N.W.2d 752 (Wisconsin, 1990) (although the trier of fact in a circumstantial evidence case must be convinced that

the evidence is sufficient to exclude every reasonable hypothesis of the defendant's innocence, such is not the test on appeal; the appellate standard for review of evidentiary sufficiency is the same whether the evidence is direct or circumstantial, and is whether the court, viewing the evidence in the light most favorable to the state, can conclude that the jury, acting reasonably, could find the defendant guilty beyond a reasonable doubt; if more than one reasonable inference could be drawn from the evidence, the inference which supports the finding is the one that must be adopted; citing Jackson v. Virginia); State v. Jacobson, 419 N.W.2d 899 (North Dakota 1988) (at trial level, the state must exclude every reasonable hypothesis of innocence to the jury's satisfaction; on appeal, the defendant must show that the evidence, viewed in the light most favorable to the verdict, reveals *no* reasonable inference of *guilt)*.

In contrast to these states, which have retained the special reasonable-hypothesis jury instruction but do not apply a special standard of appellate review, in this State, as noted above, the reasonable-hypothesis jury instruction has been eliminated as unnecessary but this Court still reviews a circumstantial evidence case using a special reasonable-hypothesis standard of review for sufficiency of circumstantial evidence. In fact, Florida may well

be the only remaining state to have abolished the reasonable-hypothesis jury instruction but to still apply the reasonable-hypothesis standard on appellate review. Other states that initially abolished the special jury instruction while retaining the special standard of appellate review have now rejected the special reasonable-hypothesis standard altogether, recognizing that the abrogation of the special circumstantial-evidence jury instruction eliminates "the very basis and authorization for the use of the 'reasonable hypothesis' construct in reviewing sufficiency of the evidence in circumstantial evidence cases." Geesa v. State, 820 S.W.2d 154 (Texas 1991). In Geesa, the Texas Court of Criminal Appeals, sitting en banc, stated:

> It is this dichotomy in the law which necessitates our abrogation of the "reasonable hypothesis analytical construct." . . . Given the fact that a jury is to be guided by the charge in reaching their [sic] verdict, and given the fact that juries are no longer instructed on the law of circumstantial evidence, it no longer makes sense for appellate courts to use the circumstantial evidence "construct" to review the jury's verdict and to determine, thereby, whether the jurors acted "rationally." *To do so evaluates the jurors' rationality by a different standard than that by which they were instructed to reach their verdict*.

Id. at 159. (Footnote omitted; emphasis supplied.) The State would make the same argument here. If the reasonable-hypothesis standard

of review imposes a higher burden on the state than the reasonable-doubt standard, then this Court is reviewing the jury's decision by a different standard than the one by which the jury was instructed to reach its decision.[5]

Aside from the fundamental analytical inconsistency of reviewing the evidence on appeal pursuant to a different and more stringent standard than presented to the jury, the State would contend that, as other state courts have found, the reasonable-hypothesis standard of appellate review is potentially confusing, and inevitably leads to appellate reweighing of the evidence. As noted in Geesa, supra, in applying the special circumstantial-evidence standard on appellate review, some courts "have viewed the evidence in the light most favorable to the verdict, while others have viewed the evidence in light of the presumption of innocence." Id. at 160. Courts have also differed in their interpretations of precisely what evidence is to be considered in reviewing for any reasonable hypothesis of innocence. Ibid. Other potential differences in interpretation arise in relation to the deference to be given to the jury's evaluation of any hypothesis of innocence;

[5] If, on the other hand, the reasonable-hypothesis standard does *not* impose a higher burden on the state than the reasonable-doubt standard, then it is difficult to understand the need for a special reasonable-hypothesis standard of appellate review.

for example, should the appellate court review the evidence *de novo* or presume the correctness of the jury's decision? Should the appellate court determine for itself whether or not the evidence "excludes" every reasonable hypothesis save that of guilt, or determine only whether or not evidence tending to contradict a theory of innocence has been presented to the jury? Should the reviewing Court affirm so long as reasonable minds could differ as to a proof of an ultimate fact, or reverse if reasonable minds could differ as to proof of an ultimate fact?

If the reviewing court itself determines the reasonableness of any defense hypothesis of innocence, then it is difficult to see how the appellate court can refrain from weighing the evidence, contrary to Tibbs v. State, 397 So.2d 1120 (Fla. 1981) (holding that "[l]egal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal"). Other courts have held that the reasonable-hypothesis standard of appellate review inherently leads to appellate reweighing of the evidence. See, e.g., State v. Jenks, 574 N.E.2d 492, 497 (Ohio 1991)(noting that, because the reasonable-hypothesis standard of appellate review requires the reviewing court to "weigh two competing theories," it necessarily involves reweighing the evidence, contrary to the maxim that appellate courts are not to

reweigh the evidence); Geesa, supra at 159 (appellate review for the existence of an outstanding reasonable hypothesis of innocence "effectively repudiates the jury's prerogative to weigh the evidence, to judge the credibility of the witnesses, and to choose between conflicting theories of the case," and "effectively places the reviewing court in the posture of a 'thirteenth juror.'"); State v. Grim, 854 S.W.2d 403 (Missouri 1993)(en banc)(abandoned special circumstantial-evidence standard of appellate review because it was confusing and placed the appellate court in posture of thirteenth juror).

In fact, the reasonable-hypothesis standard of appellate review can turn the Jackson v. Virginia "on its head." State v. Jenks, supra at 499. Rather than asking whether any reasonable juror could have found the defendant guilty, the reviewing court may well ask whether any reasonable juror could have found the defendant *not guilty*. Ibid. Such a standard of review would come very close to requiring the state to prove its case beyond all doubt in a circumstantial evidence case, instead of beyond a reasonable doubt, even though the jury is required only to find guilt beyond a reasonable doubt and is so instructed.

Underlying the special reasonable-hypothesis standard of appellate review of circumstantial evidence is a premise that

circumstantial evidence is inferior to direct evidence. The United States Supreme Court rejected this premise years ago, noting in Holland, supra:

> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

The great majority of states agree that circumstantial evidence is not inferior evidence, and indeed, may be more credible and satisfying than direct evidence. See State v. Lott, 555 N.E.2d 293 (Ohio 1990)(circumstantial evidence may be "more satisfying and persuasive than direct evidence). Direct evidence is merely eyewitness testimony; an eyewitness, however, can lie or be confused or honestly mistaken.[6] Circumstantial evidence can include some of the most persuasive and irrefutable evidence possible; there simply is no reason to regard circumstantial

[6] The eyewitness, for example, may be a drunk, mentally retarded person who has made inconsistent and contradictory statements about the crime. Green v. State, 688 So.2d 301 (Fla. 1996).

evidence as second-class evidence.[7] There certainly is no reason to diminish as a matter of law the weight assigned to circumstantial evidence. See, e.g., State v. Thornton, 493 P.2d 902 (Arizona 1972) (no distinction as to the weight assigned to direct versus circumstantial evidence); People v. Bennett, 515 P.2d 466 (Colorado 1973) (same status afforded to direct and circumstantial evidence); State v. Marshall, no. 17058 (Connecticut, January 12, 1999) (probative force of the evidence is not diminished by fact that it consists, in whole or in part, of circumstantial rather than direct evidence); Corder v. State, 467 N.E.2d 409 (Indiana 1984) (circumstantial evidence is no different from other evidence for sufficiency purposes); State v. Schmidt, 588 N.W.2d 416 (Iowa 1998) (circumstantial and direct evidence are equally probative); State v. White, 587 P.2d 1259 (Kansas 1978) (probative values of direct and circumstantial evidence are intrinsically similar and there is no logically sound reason for drawing a distinction as to the weight to be assigned to each); People v. Johnson, 357 N.W.2d 675 (Michigan 1984) (there is no reason to treat circumstantial evidence differently than direct evidence); State v. Cunningham, 880 P.2d 431 (Oregon 1994) (no

[7] "It has been said that witnesses may lie but that circumstances never do." Lowe v. State, 105 So. 829 (Fla. 1925).

distinction between direct and circumstantial evidence as to the degree of proof required to sustain a conviction); Commonwealth v. Murphy, 613 A.2d 1215 (Pennsylvania 1992) (both direct and circumstantial evidence can be considered equally when assessing the sufficiency of the evidence); State v. Caruolo, 524 A.2d 575 (Rhode Island 1987) (reasonable hypothesis rule rejected along with its implication that circumstantial is less probative of guilt than direct evidence); State v. Gosby, 539 P.2d 680 (Washington 1975) ("whether direct evidence or circumstantial evidence is more trustworthy and probative depends upon the particular facts of the case and no generalizations realistically can be made that one class of evidence is per se more reliable than is the other class of evidence"); Lobatos v. State, 875 P.2d 716 (Wyoming 1994) (circumstantial evidence stands equally with direct evidence and is tested for sufficiency under the same standard).

The overwhelming majority of states have rejected the reasonable-hypothesis standard of appellate review of circumstantial-evidence cases. The State would respectfully contend that the time has come for Florida to join these states and the federal courts in rejecting the necessity for a special standard of review in circumstantial evidence cases. The relevant inquiry in all cases should be whether, after viewing the evidence

in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. Jackson v. Virginia, supra. The evidence in this case clearly meets that standard.

B. EVEN UNDER THE SPECIAL REASONABLE-HYPOTHESIS STANDARD OF APPELLATE REVIEW, THE EVIDENCE IS SUFFICIENT TO SUPPORT THE TRIAL COURT'S DENIAL OF MILLER'S MOTION FOR DIRECTED VERDICT AND TO SUPPORT A FINDING THAT MILLER IS GUILTY OF PREMEDITATED MURDER

Miller contends the evidence is insufficient to prove a premeditation theory for first degree murder because it "failed to *exclude* the reasonable hypothesis that this was a killing caused by an accidental extreme use of force due to an impulsive act." Initial Brief of Appellant at 22. Thus, Miller argues, the "evidence in this case fails to prove premeditation." Id. at 25.

Premeditation of course involves "a prior intention to do the act in question." Lowe v. State, supra note 7, 105 So. at 831. Without such prior intention on the part of the killer, the killing is not premeditated murder. It is well settled, however, that it is not necessary "that this intention should have been conceived for any particular period of time. . . . It is sufficient if the prisoner deliberately determined to kill before inflicting the mortal wound. If there was such purpose deliberately formed, the interval, if only a moment before its execution, is immaterial."

Ibid. "Premeditation need only exist for such time as will allow the accused to be conscious of the nature of the act the accused is about to commit and the probable result of the act." Buckner v. State, 714 So.2d 384 (Fla. 1998).

Inherently, premeditation cannot be proved by third-party direct evidence. A defendant's "mental conception lies beyond the scrutiny of exact observation" by others. Lowe, supra. The defendant is the only eyewitness to his own mental processes; therefore, only the defendant's own statements can provide direct evidence of premeditation. Thus, if the defendant does not confess, "circumstantial evidence [is] the only medium of proof available" to the State by which it can prove premeditation. Ryan v. State, 92 So. 571, 572 (Fla. 1922). It is well settled, however, that the "character of the homicide and the element of premeditation may by proved by circumstantial evidence; the jury being privilege to infer the existence of premeditation and the unlawful character of the homicide from the evidence submitted as they may infer the existence of any other material element in a criminal charge." Ibid. See also, Barnhill v. State, 48 So. 251, 257 (Fla. 1908) ("The human mind acts with celerity which it is sometimes impossible to measure. Whether a premeditated design to

kill was formed must be determined by the jury from all the circumstances of the case.").

Furthermore, the jury is not required to accept the defendant's statements or testimony about the crime, even though they may provide the only direct evidence of his intent. It is within the jury's province to determine the credibility of witnesses, Fierstos v. Cullum, 351 So.2d 370, 371 (Fla. 2d DCA 1977), and the jury is no more required to believe a non-credible defendant than it is required to believe any non-credible witness. Barnhill v. State, supra (the testimony was in conflict, but the jury did not believe the defendant's version of the events); Ryan v. State, supra (jury reasonably inferred that the defendant's account was "more or less a fabrication"); Woods v. State, 24 Fla. L. Weekly S183, S184 (Fla. April 15, 1999) ("circumstantial evidence rule does not require the jury to believe the defendant's version of the facts where the State has produced conflicting evidence"); Pietri v. State, 644 So.2d 1347 (Fla. 1994) (jury was not required to believe defendant's testimony that he accidentally shot the victim).

If, when Miller argues that the State's evidence must *exclude* all reasonable hypotheses of innocence, he means that the State's evidence must exclude *all possibility* of any reasonable conclusion

save that of guilt, then, the State would contend, he is misstating the law of Florida. Such a standard would, in effect, require the State to prove a defendant's guilt beyond *all doubt* in a circumstantial-evidence case, and that cannot--or at least should not--be the law of Florida. It is true that, under present law, when the State seeks to prove premeditation by circumstantial evidence, the evidence must be consistent with guilt and inconsistent with every other reasonable inference. Cochran v. State, 547 So.2d 928 (Fla. 1989). However, it is also true that:

> [T]he question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal. [Cits.] The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. [Cit.]

Cochran v. State, supra at 930. Furthermore, when reviewing a motion for judgment of acquittal:

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. [Cit.] The state is not required to "rebut conclusively every possible

> variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.

State v. Law, 559 So.2d 187, 189 (Fla. 1989). Furthermore,

> If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury.

Taylor v. State, 583 So.2d 323, 328 (Fla. 1991).

Applying these principles to this case, it is clear that the State submitted sufficient evidence to allow reasonable jurors to reject Miller's hypotheses of innocence and to find beyond a reasonable doubt that Miller intentionally and premeditatedly killed Albert Floyd. In the first place, the "reasonable" hypothesis of innocence Miller proffers on appeal (that the killing was "an accidental extreme use of force due to an impulsive act") is in fact not reasonable at all. This is not a case in which a defendant claims a gun went off accidentally; Miller attacked his victim with an iron pipe, striking him not just once, but at least three times, and not lightly, but hard enough to burst his eyeball and to crush his skull. Does appellate counsel really mean for us to believe that this admittedly "extreme use of force" was an accident?

Even Miller did not claim at trial that he struck the victim by accident. He admitted intentionally striking the victim; what he contended was that he only meant to knock the victim out and not to kill him. The jury, however, was plainly entitled to reject Miller's self-serving statements and testimony as unworthy of belief in light of all the circumstances of the case. Miller himself showed police how he had administered "full-blown" swings, raising the pipe over his head and swinging down to the victim's head (8R 536-37). Jimmie Hall testified that not only did Miller have both hands on the pipe and was swinging it "with full force" (7R 316), but the pipe was so dripping with the victims' blood that, with every swing, blood was "slung up on the wall and onto the ceiling" (7R 318-19). The medical examiner testified that Miller hit Albert Floyd in the head *at least* three times. And the damage he did--crushing the victim's skull in three places, bursting his eyeball, and fracturing four of his teeth--is totally inconsistent with any claim that Miller only intended to knock out, not kill, the victim. And he did not attack only Floyd; when Linda Fullwood woke up and said something, Miller attacked her too. And even though, unlike Floyd, she was awake and able to throw her hands up to defend herself, and even though Miller was interrupted by the appearance of Jimmie Hall during his attack on Fullwood,

Miller still severely injured her; she suffered a concussion, two broken fingers, several fractured ribs, and injuries to her arm severe enough to have required multiple surgeries. These simply are not the kinds of injuries caused by one who intended merely to knock someone out and "accidentally" used just a bit too much force. Because competent evidence existed from which reasonable jurors could infer premeditation to the exclusion of all other inferences, the trial court did not err in allowing the state's premeditation theory of first degree murder to go to the jury. State v. Law, supra; Taylor v. State, supra.

Kirkland v. State, 684 So.2d 732 (Fla. 1996) and Coolen v. State, 696 So.2d 738 (Fla. 1997), on which Miller relies most heavily, are distinguishable. Kirkland lived in the same house as the victim. There was evidence of some friction between Kirkland and the victim. On the day of the murder, Kirkland and the victim were in the house alone. No one witnessed the murder or the events leading up to the killing, and no other evidence was presented to explain why the killing had occurred and whether or not the victim had said or done anything to provoke or otherwise anger or threaten

the defendant.[8] Coolen involved a barroom stabbing following an argument over a beer.

In this case, there was no argument between the victim and Miller and no sort of provocation by the victim; the victim was sound asleep when he was attacked. Nor had there been any previous hostility between the two; Miller did not know the victim. Obviously, a sleeping Albert Floyd, unlike the victims in Kirkland and Coolen, *had* to be totally harmless and could not have posed any threat whatever to Miller so long as Miller left him alone. Although Miller's appellate counsel suggests in argument as to issue II that Miller may have panicked when confronted by Floyd's companion, Initial Brief of Appellant at 30-31, it is clear from the evidence that Miller had administered two skull-crushing blows to Floyd before Linda Fullwood ever woke up. As either of these two blows would have been fatal, and were administered to a sleeping Albert Floyd before Miller realized anyone else was around, they could not have been the result of any panic. Miller's intention clearly was to kill Floyd and to take his money; his only miscalculation was not to realize that Floyd had a companion who would sound an alarm and bring Jimmie Hall to the scene,

[8] This Court also found it significant that Kirkland had an IQ in the 60's. Miller, by contrast, is at least of average intelligence.

interrupting Miller's plan to rob Floyd and disappear, leaving no witness. The jury was certainly entitled to so conclude, and to reject the defendant's theory of the case. Viewing the evidence in the light most favorable to the jury's verdict, Cochran v. State, supra, the evidence is sufficient to support a finding of first-degree, premeditated murder.

C. NO REVERSIBLE ERROR CAN BE SHOWN IN ANY EVENT, BECAUSE THIS CASE WAS PRESENTED TO THE JURY UNDER A FELONY MURDER THEORY AS WELL AS A PREMEDITATED MURDER THEORY; SINCE MILLER DOES NOT EVEN CONTEND THE EVIDENCE IS INSUFFICIENT TO PROVE FELONY MURDER, ANY INSUFFICIENCY OF THE EVIDENCE TO PROVE PREMEDITATION IS HARMLESS AS MILLER'S FIRST DEGREE MURDER CONVICTION MAY BE AFFIRMED UNDER A FELONY MURDER THEORY.

As noted previously, the jury in this case was instructed as to both premeditated murder and felony murder (10R 766). Miller makes no contention that the evidence is insufficient to support a conviction for felony murder, and such contention would in fact be frivolous. By his own admission, Miller attacked Albert Floyd with an iron pipe in furtherance of his plan to rob him. Although he was interrupted before he had a chance to complete the robbery, the jury was entitled under Florida law to find Miller guilty of felony murder if death occurred during the commission of robbery or attempted robbery. § 782.04(2) Fla. Stat. 1997. The evidence supports beyond any reasonable doubt a conclusion that Miller killed the victim during an attempted robbery, and the jury

properly convicted him of first-degree murder on this theory even if this Court were to conclude that the evidence was insufficient to support premeditated murder. Any error in instructing the jury on premeditated murder was harmless as a matter of law. Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); Mungin v. State, 689 So.2d 1026 (Fla. 1995).

D. AT THIS JUNCTURE, THE BURDEN IS NOT ON THE STATE; IT IS ON THE DEFENDANT. MILLER HAS FAILED TO CARRY HIS BURDEN AND HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR.

At trial, the burden was on the State to prove, to the satisfaction of the jury beyond any reasonable doubt, that Miller was guilty of first degree murder. That was indeed a high burden, but the State met that burden and obtained a judgment that Miller is guilty of first degree murder. That judgment comes to this Court with a presumption of correctness. Alston v. State, 723 So.2d 148, 158 (Fla. 1998). On appeal, it is no longer the State's burden to prove the defendant guilty; instead, it is now Miller's burden as the appellant to overcome the presumption of correctness that attaches to the verdict and to demonstrate its invalidity as a matter of law. Miller has failed to meet that burden, and there is no merit to his first issue.

ISSUE II

THE TRIAL COURT ACTED PROPERLY AND WITHIN ITS PURVIEW UNDER THE LAW IN ITS CONSIDERATION AND EVALUATION OF ALL PROFFERED MITIGATING CIRCUMSTANCES

Miller argues here that the trial court's evaluation of mitigation was unconstitutional because the trial court rejected three of his fifteen proffered nonstatutory mitigating circumstances. He argues that the trial court's "exclusion" of these mitigating factors from the "weighing process" renders his death sentence unconstitutional. Initial Brief of Appellant at 26.

At the outset, the State would note that a trial court's rejection of proffered mitigators after full consideration does not constitute an "exclusion" of those factors from the weighing process. In this case, the it is clear (and Miller does not contend otherwise) that the trial court fully considered and expressly evaluated in its written sentencing order each of Miller's proffered nonstatutory mitigating circumstances. In conducting this evaluation, the trial court is not required to find that every proposed mitigator is in fact mitigating; instead, the trial court must "determine whether [the proffered mitigator] is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). As this Court has noted, there are

"no hard and fast rules about what must be found in mitigation in any particular case . . . . Because each case is unique, determining what evidence might mitigate each individual's sentence must remain with the trial court's discretion." Lucas v. State, 568 So.2d 18 (Fla. 1990). So long as the trial court conducts a "thoughtful and comprehensive analysis," Walker v. State, 707 So.2d 300, 319 (Fla. 1997), of the defendant's proffered mitigators, the trial court's "determination of lack of mitigation will stand absent a palpable abuse of discretion." Foster v. State, 654 So.2d 112 (Fla. 1995). Accord, e.g., Bonifay v. State, 680 So.2d 413 (Fla. 1996) (decision as to whether a mitigating circumstance has been established, and the weight to be given to it if is established, are matters within the trial court's discretion); Wyatt v. State, 641 So.2d 355 (Fla. 1994) (decision whether any mitigating circumstances had been established was within trial court's discretion); Arbelaez v. State, 626 So.2d 169 (Fla. 1993) (trial court has broad discretion in determining applicability of mitigating circumstances).[9]

[9] These cases are fully consistent with constitutional standards requiring "individualized sentencing." The premise explicitly underlying the United States Supreme Court's decisions in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), which struck down unanimity requirements as to juries' mitigation findings, is that reasonable persons could

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

A. MILLER'S INTENT TO KILL

Miller first contends the trial court erred in rejecting this proffered mitigator. The State has addressed the sufficiency of the evidence to support a finding of premeditated murder in its argument as to Issue I, and relies upon that argument here. The evidence, as the State argued above, is sufficient to demonstrate beyond any reasonable doubt that the killing was intentional.

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

Moreover, the State would contend that, even assuming, arguendo, that this Court were to determine that the evidence was insufficient to support a conviction for premeditated murder because it failed to "exclude" either Miller's contention that the killing was unintentional, or perhaps some other theory of non-premeditation not even raised by Miller, the trial court was still correct in rejecting this proffered mitigator. At the penalty phase, it was the *defendant's* burden to establish mitigation by "the greater weight of the evidence." Chandler v. State, 702 So.2d 186 (Fla. 1997). Miller has not established by the greater weight of the evidence that the killing was unintentional. Therefore, trial court's determination that this mitigator "has not been proven" was clearly correct. Certainly, no palpable abuse of discretion has been shown.

B. MILLER'S ALLEGEDLY ABUSIVE CHILDHOOD

Miller contends the trial court erred in rejecting Miller's allegedly abusive childhood as a mitigating circumstance after finding it to be factually established. Although, as noted in the Appellee's Statement of Facts, no witness testified that Miller's father was an alcoholic or could provide any information about how much he did drink, the trial court nevertheless did find that the "father apparently did abuse alcohol" (2R 370). The trial court

also found that “on a few occasions [Miller’s father] was abusive primarily to defendant’s mother and sometimes to the children including the defendant” (2R 370). The trial court found, however, that although “some aspects” of Miller’s childhood might be slightly mitigating, the “totality” of Miller’s family background is not mitigating.

It should be noted that the only evidence of any “abuse” was the testimony of Miller’s mother and sister to the effect that the father administered corporal punishment to the children either with a belt or an electrical cord, once every 6-8 months, sometimes for good reason, sometimes not. One could disapprove of this treatment, however, without necessarily characterizing Miller’s childhood as “abusive.” There was no testimony that any childhood whipping actually inflicted physical injuries to Miller, and no testimony of any other kind of physical abuse. Moreover, as the trial court noted, the father was out of the home by the time Miller was 13, and he was raised in the home of his maternal grandparents--a home filled with “much love and support” (2R 370). The record clearly supports the trial court’s finding that Miller “was regularly taken to church and Sunday school,” and was “bright and creative.” It is also clear from the record that, as the trial court found, Miller’s brother and sister, who were raised in the

same circumstances, “have been law abiding citizens and have earned professional careers” (2R 370). All in all, Miller enjoyed the support of “a very close, loving and supportive family” (2R 370).

On this record, the trial court’s rejection of this proffered mitigator is not a “palpable abuse of discretion.” Foster v. State, supra. See Kight v. State, 512 So.2d 922, 933 (Fla. 1987) (no error in trial court’s failure to find Kight’s abusive childhood as non-statutory mitigating factor); Jones v. State, 652 So.2d 346, 351 (Fla. 1995) (where defendant’s mother was unable to care for him but left him in the care of relatives who could, trial “court did not abuse its discretion by refusing to find in mitigation that Jones had been abandoned by an alcoholic mother”); Sochor v. State, 619 So.2d 285, 293 (Fla. 1993) (deciding whether family history establishes mitigating circumstances is within the trial court’s discretion; no abuse of discretion where trial judge considered the testimony of physical abuse by Sochor’s father and other evidence of family and personal history and determined it did not rise to the level of a mitigating circumstance); Valle v. State, 581 So.2d 40, 48-49 (Fla. 1991) (trial court properly weighed and rejected evidence of dysfunctional family and abusive childhood as mitigating factors).

There was no testimony or other evidence establishing that this murder was measurably influenced by any abuse Miller suffered in his childhood. Lara v. State, 464 So.2d 1173, 1180 (Fla. 1985)(allegedly abusive childhood properly rejected where defendant's actions in committing murder were not "significantly influenced by his childhood experience"). At most, Miller's childhood "may provide slight mitigation" (2R 370), and any possible error in according no weight to his childhood has to be harmless. Damren v. State, 696 So.2d 709, 714 (fn. 18) (Fla. 1997); Wickham v. State, 593 So.2d 191 (Fla. 1991); Cook v. State, 581 So.2d 141 (Fla. 1991); Zeigler v. State, 580 So.2d 127, 130-31 (Fla. 1991); Rogers v. State, 511 So.2d 526 (Fla. 1987).

C. MILLER'S ABUSE OF ALCOHOL AND ILLEGAL DRUGS

Miller proffered as a mitigating circumstance that he has an alcohol and/or drug problem (2R 353). The trial court rejected this proposed nonstatutory mitigator on several grounds. First of all, although it was shown that Miller had abused alcohol and drugs during the course of his *adult* life, he had rejected repeated offers of assistance from his family. He was simply unwilling to seek help or attempt to give up his use of alcohol and drugs. Instead, he left his mother's home because he was unwilling to follow her rules and chose a life on the street. Moreover, although Miller had admitted using drugs and alcohol the night of the murder, there was "no convincing evidence" that Miller was "intoxicated or under the influence of drugs or alcohol at the time of this attempted robbery and murder" (2R 370-71).

Miller argues that the trial court's rejection of this proposed mitigator was erroneous because "[a]lcohol and drug abuse problems are mitigating circumstances as a matter of law." Initial Brief of Appellant at 33. However, although of course the rejection of clearly established mitigation may certainly be erroneous, the cases cited by Miller do not establish that drug and alcohol abuse is *per se* mitigating, although rejection of such

proffered mitigation may very well constitute an abuse of discretion in a particular case, depending on the evidence.

In Johnson v. State, 608 So.2d 4 (Fla. 1992), this Court reviewed a trial court's rejection of a proposed drug-abuse mitigator in which the trial court had found:

> There is evidence tending to show that the defendant was under the influence of drugs at the time of the alleged offenses. *There is also evidence to show that the defendant had been a regular drug user.* However, the evidence also shows that he clearly was not under extreme mental or emotional disturbance because of the use of these drugs base on observations of him after and before the murders. Based on his actions and physical events that took place during the course of the commission of these crimes, it is clear that the defendant knew and understood his actions and that his actions although they may have been enhanced by the use of drugs, were not such as to place him under the influence to the extent of causing any extreme mental or emotional disturbance. . .
>
> *The defendant in this case used drugs on a large scale whether he needed to or not.* He apparently depended on drugs to attain a state of euphoria. However, this desire to feel good perhaps reached a point where his inhibitions were or may have been lowered cannot be said to be a contributing factor in committing the crimes in this case. Euphoria notwithstanding, the defendant knew what he was doing and was able to distinguish right from wrong as well as the criminality of his conduct. It is the Court's opinion that there is not mitigating circumstances under this condition.

608 So.2d at 12. This Court affirmed the trial court's rejection of proposed mitigation, stating:

> While voluntary intoxication or drug use might be a mitigator, whether it actually is depends upon the particular facts of a case. Here, the evidence showed less and less drug influence on Johnson's actions as the night's events progressed and support the trial court's findings. There was too much purposeful conduct for the court to have given any significant weight to Johnson's alleged drug intoxication, a self-imposed disability that the facts show not to have been a mitigator in this case.

608 So.2d at 13.

As in Johnson, the evidence in this case is replete with purposeful conduct by Miller, from identifying what appeared to be an easy target, to obtaining a steel pipe, to delivering well-placed, skull-crushing blows to the head his intended victim with that pipe, to attacking the victim's companion when she appeared from under the covers, to retreating when confronted by Jimmie Hall, to disposing of the pipe, to returning to the place where he stayed and immediately changing clothes so he could not be identified, to remaining hidden for over a full day, and to leaving town when he overheard people talking about the crime.

Miller contends, however, that Mahn v. State, 714 So.2d 391 (Fla. 1998); Clark v. State, 609 So.2d 513 (Fla. 1992); and Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985) support his contention

that evidence of alcohol or drug abuse must always be found mitigating -- as a matter of law. Of course, if these cases hold what Miller says they do, they would be in conflict with Johnson v. State, supra. But they do not; they simply demonstrate that the rejection of mitigation can be an abuse of discretion, depending on the evidence. It should be noted that, unlike Mahn and Clark, Miller did not begin drinking "at a very young age," Mahn, supra at 401, or at the "age of six." Clark, supra at 516. It is undisputed that Miller did not begin drinking until he was an adult; he did not have a drinking problem in high school or as a young child. Moreover, Miller's alcohol abuse was not coupled with "lifelong mental and emotional instability" as was Mahn's, 714 So.2d at 400, nor with any major mental illness, according to the testimony of his own expert witness. Nor has Miller ever been sexually abused like Clark. 609 So.2d at 516. Nor did Miller commit his crime as the result of a heated domestic dispute in which the victim realized he was "having difficulty controlling his emotions," as did Ross. 474 So.2d at 1174.

It is true that Dr. Krop testified that, when Miller's "impulse control" and his "schizoid" and "paranoid" personality traits were *combined* with alcohol, he had "very impaired judgment," but, as the trial court recognized, there is no convincing evidence

in the record that Miller was under the influence of alcohol or drugs at the time of the crime. By Miller's own testimony, the effect of the crack cocaine he had smoked lasted five or ten minutes at the most, and he had not had anything to drink since at least 5 to 7 hours before the murder. Moreover, the amount Miller had drunk had been consumed over a three to five hour period. Given the rate at which alcohol metabolizes in the bloodstream, it is obvious that Miller was not intoxicated or even under the influence of alcohol at the time he committed the crime. See Banks v. State, 700 So.2d 363, 368 (Fla. 1997) ("although [Banks] had ingested a considerable quantity of alcohol before the murders, appellant's actions both before and during the murders and *the length of time over which the alcohol was consumed* support the trial court's finding that there was insufficient evidence to establish that appellant was under the influence of alcohol when he assaulted and killed Melody Cooper" (emphasis supplied)). And although, as noted above, a history of alcohol usage can be mitigating even if the defendant is sober at the time of the crime, Dr. Krop's credibility on this point was diminished when he so obviously backtracked after learning that Miller was not intoxicated at the time of the crime by claiming, belatedly, that even if Miller was sober, the murder was still mitigated because

Miller's "motive in being involved in this situation was to get money to support his alcohol and drug habit." Not only did this testimony demonstrate Dr. Krop's unfamiliarity with the facts of the crime when he initially developed his expert opinion, see Foster v. State, 679 So.2d 747, 755 (Fla. 1996)(even uncontroverted expert opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case); Walls v. State, 641 So.2d 381, 390-91 (Fla. 1994)(expert opinion testimony "gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking"), but his ultimate conclusion -- Miller committed the murder for money -- was a statutory aggravator, not a mitigating circumstance. The trial court did not abuse its discretion in rejecting Dr. Krop's opinion that Miller's motive was a mitigating circumstance.[10]

Considering all the circumstances of this case, the trial court did not abuse its discretion in concluding that Miller was not intoxicated at the time of the crime and that his chosen adult lifestyle of drinking and using drugs simply does not mitigate the

[10] The trial court did not completely reject Dr. Krop's testimony; as noted in the Statement of the Case, the trial court did credit and give mitigating weight to Dr. Krop's testimony that Miller has a frontal lobe deficit affecting inhibitions and impulse control.

brutal murder he committed. Garcia v. State, 644 So.2d 59, 63 (Fla. 1994); Preston v. State, 607 So.2d 404, 412 (Fla. 1992). Further, in light of the totality of all the facts and circumstances of this case, and the trial court's careful and thoughtful review of the aggravating factors and all of Miller's proffered mitigating circumstances, any error in failing to give minimal weight to this proffered mitigating circumstance was harmless. Wickham, Cook and Zeigler, supra.

ISSUE III

DEATH IS A PROPORTIONATE SENTENCE FOR MILLER

Miller's contention that a death sentence is disproportionate is based primarily upon his contention that "Miller committed an unintentional killing during an attempted robbery." Of course, even if that were an accurate description of Miller's crime, he would still be guilty of first-degree felony murder and two statutory aggravating circumstances would still be present. But Miller does not accurately describe his crime. It is clear that this was an intentional killing that -- as Miller does concede -- was committed during a robbery.

Miller also concedes that the prior violent felony aggravator was proved, but contends it should be given minimal weight because we do not know all the facts and circumstances of the crime for

which he was convicted in 1986. Of course, if the State had proved those facts and circumstances, Miller would probably have argued that the State was impermissibly making the prior murder a feature of the penalty phase. Finney v. State, 660 So.2d 674, 683 (Fla. 1995). What we do know in any event, however, is that the 1986 conviction was for second degree *murder* -- surely a weighty prior violent felony (common sense dictates the conclusion that a prior felony cannot be any more violent than murder). Furthermore, the 1986 murder is not the only prior violent felony; Miller also committed a very brutal aggravated battery upon Linda Fullwood, causing serious, painful, and long-term (if not permanent) injuries. See Banks v. State, supra, 700 So.2d at 366 ("The prior violent felony aggravator was particularly weighty because in addition to the contemporaneous murder of his wife, he was also convicted of two aggravated assaults which had occurred a year before."). Furthermore, unlike the contemporaneously committed prior violent felony at issue in Terry v. State, 668 So.2d 954, 965-66 (Fla. 1996)(cited by Miller in his brief), this assault was personally committed by Miller himself, not by a co-defendant. Furthermore, Miller seriously injured the victim of this felony, unlike Terry's codefendant, who merely pointed an unloaded gun at someone. Ibid.

The cases Miller cites simply are inapposite. Many of the cases he cites are single aggravator cases. This Court, of course, has "rarely approved a death sentence with a single aggravator." Wood v. State, 24 Fla. L. Weekly S183, S186 (Fla. April 15, 1999).[11] This case, however, is not a single-aggravator case; two valid statutory aggravators were found by the trial court. Miller also cites jury override cases; however, Miller's jury recommended a death sentence.[12] Miller's age also distinguishes his case from at least two of those on which he relies, as Miller was in his forties when he committed this murder.[13]

The death penalty imposed by the trial court is consistent with this Court's prior decisions in similar cases, and is the kind of case in which the death penalty is properly imposed. Shellito v. State, 701 So.2d 837 (Fla. 1997) (death sentence proportionate when two aggravators of robbery/pecuniary gain plus prior violent

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[11] The following cases relied on by Miller are single-aggravator cases: Jorgenson v. State 714 So.2d 423 ((Fla. 1998); Clark v. State, 609 So.2d 513 (Fla. 1992); Proffit v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); and Richardson v. State, 437 So.2d 1091 (Fla. 1983).

[12] Livingston v. State, 565 So.2d 1288 (Fla. 1988) and Fead v. State, 512 So.2d 176 (Fla. 1987) are both jury override cases.

[13] The defendants in Urbin v. State, 714 So.2d 411 (Fla. 1998) and Livingston v. State, supra were only 17 at the time of the crime.

felony weighed against mitigation including alcoholic father and psychological problems); Geralds v. State, 674 So.2d 96 (Fla. 1996) (death sentence proportionate when two aggravators weighed against one statutory and three nonstatutory mitigators); Finney v. State, 660 So.2d 674 (Fla. 1995) (death penalty for conviction for first degree felony murder with robbery as underlying felony was proportionately warranted); Hunter v. State, 660 So.2d 244 (Fla. 1995) (death penalty warranted where there were two aggravators -- prior violent felony conviction and capital felony committed during a robbery -- and ten nonstatutory mitigators); Gamble v. State, 659 So.2d 242 (Fla. 1995) (death sentence proportionate where there were two aggravators, one statutory mitigator and several nonstatutory mitigators); Hayes v. State, 581 So.2d 121 (Fla. 1991) (two aggravating factors weighed against mitigators of low age, low intelligence, learning disability and deprive environment); Freeman v. State, 563 So.2d 73 (Fla. 1990) (two aggravators weighed against low intelligence and abused childhood); Kight v. State, 512 So.2d 922 (Fla. 1987) (two aggravators versus evidence of mental retardation and deprived childhood).

Especially considering that *no* statutory mitigating circumstances were established (or even proffered), there is no merit to Miller's contention that a death sentence is

disproportionate punishment for someone who, after having murdered one person and serving a penitentiary sentence for that murder, thereafter murders another person merely for purposes of pecuniary gain and, while he is at it, seriously wounds another person during the same robbery. Miller's death sentence amply furthers all the valid penological justifications for a death sentence: retribution, deterrence and incapacitation. See Conner v. State, 251 Ga. 113, 303 S.E.2d 266 (1983)(identifying valid penological justifications for capital punishment). It is a proportionate sentence.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the State of Florida respectfully asks this Honorable Court to affirm the judgment of the court below in all respects.

Respectfully submitted

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 6th day of July, 1999.

_____
CURTIS M. FRENCH

Assistant Attorney General

APPENDIX

STATES WITHOUT SPECIAL CIRCUMSTANTIAL EVIDENCE RULE ON APPEAL

ALASKA: Abandoned circumstantial-evidence rule in 1996; jury not required to find that evidence rules out any conclusion consistent with innocence in order to convict; no distinction between circumstantial and direct evidence. Allen v. State, 420 P.2d 465 (1996).

ARIZONA: Both direct and circumstantial evidence may meet the "substantial" test; there is no distinction as to the weight to be assigned to each; on appeal, jury's verdict will be sustained if supported by "substantial" evidence; if reasonable persons fairly may differ as to whether evidence establishes a fact, that evidence must be deemed substantial. State v. Thornton, 493 P.2d 902 (1972).

CALIFORNIA: Although circumstantial evidence rule instruction is given to jury, relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. People v. Towler, 641 P.2d 1253 (1982).

COLORADO: Circumstantial evidence rule cast aside in 1973. People v. Bennett, 515 P.2d 466 (1973). Test for review of sufficiency of evidence is whether the prosecution's evidence, when reviewed in the light most favorable to the verdict, is substantial and sufficient to support a conclusion by a reasonable person that the defendant is guilty beyond a reasonable doubt; this test affords the same status to circumstantial evidence as to direct evidence, and an exclusively circumstantial case need not exclude every reasonable hypothesis other than guilt to withstand a motion for judgment of acquittal. People v. Christian, 632 P.2d 1031 (1981)

CONNECTICUT: Test for review of sufficiency of evidence has two parts; first, court must construe evidence in light most favorable to the state; second, court must determine whether upon the facts so construed and inferences reasonably drawn therefrom, jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. It does not diminish the probative force of the evidence that it consists, in whole or in part, of circumstantial rather than direct evidence. State v. Marshall, no. 17058, decided January 12, 1999.

DELAWARE: A jury is permitted to draw inferences from circumstantial evidence as from any other evidence submitted; circumstantial evidence adequate to support a finding of guilt

need not be inconsistent with other possible hypotheses. Ciccaglione v. State, 474 A.2d 126 (1984)

GEORGIA: Although Georgia retains the circumstantial evidence rule and requires the jury be so instructed in a circumstantial evidence case, whether the evidence excludes all reasonable hypotheses save that of the guilt of the accused is primarily a question for the trier of fact; on appeal, the test for review of sufficiency of evidence is the reasonable doubt standard of Jackson v. Virginia. Patillo v. State, 299 S.E.2d 710 (Ga. 1983); Youngblood v. State, 345 S.E.2d 634 (Ga. App. 1986).

HAWAII: No greater degree of certainty is required where conviction is based solely on circumstantial evidence rather than on direct evidence. State v. Bright, 638 P.2d 330 (1981).

IDAHO: Although jury in circumstantial evidence case should be instructed that such evidence must be sufficient to exclude every reasonable hypothesis other than the guilt of the defendant, this standard is not an appellate standard of review; on appeal, the court's review is limited to determining whether there was substantial and competent evidence supporting the verdict;. State v. Randles, 787 P.2d 1152 (1990).

ILLINOIS: Circumstantial evidence jury instruction eliminated in 1986; reasonable hypothesis of innocence standard of appellate review in circumstantial evidence cases rejected in 1989; standard of review now is rational-trier-of-fact/reasonable-doubt test in all criminal cases, whether the evidence is direct or circumstantial. People v. Pintos, 549 N.E.2d 344 (1989).

INDIANA: Test for review of sufficiency looks at evidence most favorable to the state along with all reasonable inferences drawn therefrom to determine whether there is substantial evidence of probative value to support the conclusion of the trier of fact; circumstantial evidence is no different from other evidence for sufficiency purposes. Corder v. State, 467 N.E.2d 409 (1984).

IOWA: Circumstantial and direct evidence is equally probative; fact-finder's determination is binding unless there is no substantial evidence to support the finding; evidence is substantial if, viewing the evidence in the light most favorable to the state, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Schmidt, 588 N.W.2d 416 (1998).

KANSAS: Probative values of direct and circumstantial evidence

are intrinsically similar and there is no logically sound reason for drawing a distinction as to the weight to be assigned to each; in cases based on circumstantial evidence, the test on appellate review is whether there is a basis in the evidence for a reasonable inference of guilt. State v. White, 587 P.2d 1259 (1978).

KENTUCKY: Long been the rule that circumstantial evidence is entitled to be measured by the same standards and its weight determined by the same methods applicable to other kinds of testimony. Bond v. Commonwealth, 78 S.W. 1 (1935). Conviction may be based upon circumstantial evidence which is of such character that reasonable minds would be justified in concluding that the defendant was guilty beyond a reasonable doubt. Smith v. Commonwealth, 645 S.W.2d 707 (1983).

LOUISIANA: Although statute provides that, when circumstantial evidence is used to convict, every reasonable hypothesis of innocence must be excluded, this statutory rule does not establish a stricter standard of review in circumstantial evidence cases; on appeal, evidence, whether direct or circumstantial, is reviewed in light most favorable to state, and must be sufficient under the Jackson v. Virginia standard to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. State v. Bullard, 700 So.2d 1051 (1997).

MAINE: Standard to be applied to determine whether evidence is sufficient to support jury's conviction is whether, based on that evidence viewed in the light most favorable to the prosecution, any trier of fact rationally could find beyond a reasonable doubt every element of the offense charged; a conviction may be grounded on circumstantial evidence and is not for that reason any less conclusive. State v. Ardolino, 697 A.2d 73 (1997)

MARYLAND: Same standard of sufficiency of evidence applies to all criminal cases, including those resting upon circumstantial evidence; test is whether, reviewing evidence in light most favorable to prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Hall v. State, 705 A.2d 50 (1998)

MASSACHUSETTS: In circumstantial evidence case, the relevant question is whether the evidence would permit a jury to find guilt, not whether the evidence requires such a finding. An inference drawn from circumstantial evidence need not be necessary or inescapable, it need only be reasonable and possible. It is for the jury to decide which of conflicting possible inferences from the evidence is where the truth lies.

The test for sufficiency is whether the evidence, considered in the light most favorable to the Commonwealth, was sufficient to satisfy a rational trier of fact of the essential elements of the crime beyond a reasonable doubt. Commonwealth v. Coonan, 705 N.E.2d 599 (1999); Commonwealth v. Bush, 691 N.E.2d 218 (1998)(jury reasonably could have concluded that defendant was the murderer even though no one actually saw him fire the two shots; premeditation could be inferred from use of a deadly weapon and firing four shots).

MICHIGAN: Circumstantial evidence rule disapproved; it is defective to the extent that it treats circumstantial evidence differently than direct evidence and to the extent that it requires the prosecution to specifically disprove all innocent theories; it should be sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce; evidence must be reviewed in light most favorable to the state, and is sufficient if a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. People v. Johnson, 357 N.W.2d 675 (1984)

MISSISSIPPI: Jury in circumstantial evidence case must believe the defendant guilty beyond all reasonable doubt and to the exclusion of every reasonable hypothesis other than that of guilt; however, jury's burden of proof must be distinguished from appellate court's standard of review; standard of appellate review is that a circumstantial evidence conviction will not be disturbed unless it is opposed by a decided preponderance of the evidence. Stokes v. State, 518 So.2d 1224 (1988)

MISSOURI: Abandoned circumstantial evidence rule in 1993, both as a standard of appellate review and as a jury instruction; court noted that circumstantial evidence rule as a jury instruction was confusing to jurors, and that a standard of appellate review placed appellate courts in posture of thirteenth juror and caused confusion as to what evidence should be considered and what light the evidence should be viewed in. State v. Grim, 854 S.W.2d 403 (Missouri 1993)(en banc).

MONTANA: Although in circumstantial evidence case the facts and circumstances in evidence should be consistent with each other and the guilt of the defendant, and inconsistent with any reasonable theory of the defendant's innocence, it is the jury's province to judge inconsistencies; when circumstantial evidence is susceptible of two interpretations, one supporting guilt and the other supporting innocence, the trier of fact determines which is most reasonable. The standard of review by the court is

whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Moore, 885 P.2d 457 (1994).

NEBRASKA: Regardless of whether evidence is direct, circumstantial, or a combination thereof, appellate standard is the same; appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, or reweigh the evidence. State v. Kula, 562 N.W.2d 717 (Nebraska 1997).

NEVADA: Circumstantial evidence is entitled to the same weight as that given to direct evidence in determining the sufficiency of the evidence to support a conviction. The test in all cases is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Walker v. State, 944 P.2d 762 (1997); Cunningham v. State, 944 P.2d 261 (1997).

NEW JERSEY: Rule has long been that the issue for a reviewing court is not whether the circumstantial evidence excludes every reasonable hypothesis except that of guilt; instead, it is whether the evidence before the trial court, viewed in its entirety, and giving the state the benefit of all legitimate inferences therefrom, is such that the jury could properly find, beyond a reasonable doubt, that the defendant is guilty. State v. Fiorello, 174 A.2d 900 (1961).

NEW MEXICO: An appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence; instead, test on appeal is that set out in Jackson v. Virginia. State v. Sutphin, 753 P.2d 1314 (1988)

NEW YORK: Standard required of fact finder, that circumstantial evidence must exclude to a moral certainty every reasonable hypothesis of innocence, does not pertain to appellate review. It is well settled that in reviewing legal sufficiency of evidence, direct or circumstantial, appellate court's inquiry is "whether any valid line of reasoning and permissible inferences could lead a rational fact finder to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People." People v. Potter, 682 N.Y.S.2d 238 (1998).

NORTH CAROLINA: Whether the evidence presented is direct or circumstantial or both, the test for sufficiency is the same; not

necessary in a circumstantial evidence case for evidence to rule out every hypothesis except that of guilt; test on appeal is whether evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. State v. Trull, 509 S.E.2d 178 (North Carolina 1998)

NORTH DAKOTA: We have repeatedly distinguished our review of circumstantial evidence from review of circumstantial evidence at the trial level. At the trial level, circumstantial evidence must be conclusive and must exclude every reasonable hypothesis of innocence; but on the appellate court level, the role of this court is merely to review the record to determine if there is competent evidence that allowed the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. Moreover, we do not substitute our judgment for that of the jury. On appeal, the defendant must show that the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt. State v. Jacobson, 419 N.W.2d 899 (1988).

OHIO: Rejected circumstantial evidence rule both as standard of review and as a jury instruction, in 1991; inquiry on appeal is, after viewing the evidence in the light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. State v. Jenks, 574 N.E.2d 492 (1991)

OREGON: Court reviews questions of sufficiency of the evidence in a criminal case by examining the evidence in the light most favorable to the state to determine whether a rational trier of fact, accepting reasonable inferences and reasonable credibility choices, could have found the essential elements of the crime beyond a reasonable doubt; for purposes of analyzing the sufficiency of the evidence, there is no distinction between direct and circumstantial evidence as to the degree of proof required. State v. Cunningham, 880 P.2d 431 (1994).

PENNSYLVANIA: In appellate review for sufficiency of evidence, court must determine whether, viewing all the evidence at trial, as well as the reasonable inferences to be drawn therefrom, in the light most favorable to the Commonwealth, the trier of fact could have found that each element of the offense was proven beyond a reasonable doubt; both direct and circumstantial evidence can be considered equally when assessing the sufficiency of the evidence. Commonwealth v. Murphy, 613 A.2d 1215 (1992).

RHODE ISLAND: Rejected reasonable hypothesis rule and its implication that circumstantial evidence is less probative of

guilt than direct evidence; jury instruction eliminated in 1979; rule rejected as to court review in 1983; the law now is that the state may rest its case entirely on circumstantial evidence; no distinction is to be drawn between circumstantial and direct evidence; only standard for review is reasonable doubt. State v. Caruolo, 524 A.2d 575 (1987)

SOUTH CAROLINA: Relying on Holland v. U.S., state supreme court recently recommended that trial courts discontinue giving the traditional circumstantial-evidence/reasonable-hypothesis jury instruction and begin giving an instruction that the law makes "absolutely" no distinction between the weight or value to be given to either direct or circumstantial evidence, and that no greater degree of certainty is required of circumstantial evidence than direct evidence. A concurring opinion acknowledged that "the special circumstantial evidence charge is an endangered species in the state courts of our nation and is extinct at the federal level." State v. Grippon, 489 S.E.2d 462 (1997). Under the old law or the new, in reviewing denial of directed verdict motion, appellate court must review the evidence in the light most favorable to the State; if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. Needs, 508 S.E.2d 857 (1998).

TEXAS: Abrogated circumstantial evidence jury instruction in 1983; rejected reasonable hypothesis of innocence standard of review of convictions based on circumstantial evidence in 1991; standard of appellate review is now that of Jackson v. Virginia in all criminal cases. Geesa v. State, 820 S.W.2d 154 (1991).

VERMONT: We reject the "exclude every reasonable hypothesis of innocence" test and emphasize that there is only one standard of proof for criminal convictions: proof beyond a reasonable doubt. This standard is the same regardless of whether the evidence is direct, circumstantial, or both. Circumstantial evidence will sustain a conviction if it is sufficient to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Miller, 502 A.2d 832 (1985); State v. Neale, 491 A.2d 1025 (1985).

WASHINGTON: A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that the trier of fact could draw from the evidence; evidence is sufficient if after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt;

circumstantial and direct evidence are equally reliable. State v. Bonisisio, 964 P.2d 1222 (App. 1998).

WEST VIRGINIA: Circumstantial evidence rule overturned in 1995, both as jury instruction and as standard of appellate review; now there is only one standard of proof in criminal cases and that is proof beyond a reasonable doubt; additional instruction on circumstantial evidence no longer required; appellate court can reverse only if no rational jury could have found the defendant guilty beyond a reasonable doubt; mere existence of other reasonable hypotheses is not enough to reverse a jury verdict in a circumstantial evidence case; the evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt; appellate review is not a device for this Court to replace a jury's finding with our own conclusion; jury verdict will not be set aside unless irrational, that is, only if the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. State v. Guthrie, 461 S.E.2d 163 (1995).

WISCONSIN: Although the trier of fact in a circumstantial evidence case must be convinced that the evidence is sufficient to exclude every reasonable hypothesis of the defendant's innocence, such is not the test on appeal; the appellate standard of review for sufficiency is the same whether the evidence is direct or circumstantial, and is whether the court, viewing the evidence in the light most favorable to the state, can conclude that the jury, acting reasonably, could find the defendant guilty beyond a reasonable doubt; if more than one reasonable inference could be drawn from the evidence, the inference which supports the finding is the one that must be adopted; citing Jackson v. Virginia, court states that an appellate court may reverse only if no trier of fact, acting reasonably, could have found the defendant guilty beyond a reasonable doubt. State v. Poellinger, 451 N.W.2d 752 (1990).

WYOMING: Appellate court views the evidence and appropriate inferences in the light most favorable to the state and determines whether any rational jury could have found beyond a reasonably doubt that the defendant committed the crime charged; court does not consider the conflicting evidence of the defendant, reweigh the evidence, or reexamine the credibility of witnesses; circumstantial evidence stands equally with direct evidence and is tested for sufficiency under this same standard. Lobatos v. State, 875 P.2d 716 (1994).