IN THE SUPREME COURT OF FLORIDA

No. SC15-391

JAMES HERARD,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

****

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit of Florida (Case 062011CF005061A888 10)

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AMENDED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, James Herard, defendant at trial and will be referred to as the "Defendant" or "Herard". Appellee, the State of Florida, the prosecution below, will be referred to as the "State." References to the record on appeal will be by the symbol "ROA" followed by the appropriate volume and page number(s), to the transcripts will be by the symbol "T" followed by the appropriate volume and page number(s), to any supplemental record or transcripts will be by the symbols "SROA" or “SCT” followed by the appropriate volume: page number(s), and to Herard's initial brief will be by the symbol "IB".

STATEMENT OF THE CASE AND FACTS

On March 4, 2009, Herard, along with four other co-defendants, was indicted on twenty-one charges which included: two counts of first degree murder for the deaths of Eric Jean-Pierre and Kiem Huynh; five counts of attempted murder; eight counts of armed robbery; 2 counts of attempted robbery; aggravated battery; racketeering; conspiracy to commit racketeering; and directing a criminal gang. (ROA 1:1-15) The racketeering (“RICO”) charge involved the activities of the gang called the Bacc Street Crips and listed thirteen incidents of criminal activity. Herard filed a motion to

suppress his statements which was heard on November 20, 2013. (ROA 9-10:1419-1502) The trial court denied the motion in a written order on February 10, 2014. (ROA 5:815-23) Before trial, the State chose not to prosecute the two counts of attempted robbery, leaving nineteen charges.

The jury trial started on February 11, 2014. During jury selection a client of Herard's second counsel had a death warrant signed. At the State's request, the trial court struck the panel and recessed the case. Herard filed a motion to dismiss based on due process violations and the State's actions, which the trial court denied. (ROA 5:915-17; T. 42:1658-70) Jury selection began again on March 26, 2014. On May 16, 2014, the jury returned guilty verdicts on all counts except one armed robbery. The penalty phase began on June 3, 2014 and resulted in an eight to four recommendation for death on Count I and a life recommendation on Count II on June 4, 2014.

The trial court held a *Spencer*[1] hearing on September 12, 20, and 22, 2014. (ROA 26:1519-69) After receiving sentencing

[1] *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996).

memoranda from the State and defense, the trial court sentenced Herard to death on January 23, 2015. The court found three aggravators: contemporaneous and prior convictions of violent felonies; murder was cold, calculated, and premeditated; and the murder was committed by a criminal gang. The court found one statutory mitigator but found eightteen non-statutory mitigators which it gave all little weight.[2] On the remaining counts, the court sentenced Herard on the second murder charge to life without parole, life on the remaining counts, as well as the relevant enhancements charged.

This appeal followed.

FACTS

[2]Defendant was under the influence of mental or emotional disturbance; defendant was raised without a father; raised in poor financial circumstance with a mother who punished him severely; was physically abused; has loving relationship with mother; has good, respectful relationships with his aunts and uncles; helps those less fortunate; befriended ill man and assisted him; was helpful and encouraging with fellow inmates; wrote a novel in jail; talked two inmates out of committing suicide; was helpful and productive in jail; is deeply spiritual; consistently attended church in childhood; helped fellow inmates learn English and mathematics; worked to help his mother financially; was deprived of the attention and help needed to mature; only finished 9th grade; and began drinking at a young age.

Herard was a member of the Bacc Street Crips, a branch of the Crips gang located in Deepside in Lauderhill. He was the second in command of the gang and its enforcer, the person who would mete out punishment for any member who broke the rules. Jonathan Jackson was the leader of the group, the "OG." The gang was a structured organization and had various symbols attached to its membership, including wearing a blue bandana which signified their allegiance. The Bloods were the rival gang with the local Blood gangs being the gang's sworn enemies. Herard was committed to the gang and always had a blue bandana in his pocket. (T. 1895-98, 1932, 1936-40, 1953-56, 1940, 2194-98)

Between June and December 2008 Herard and his fellow gang members committed a number of armed robberies, assaults, and shootings, specifically targeting rival Blood gang members. Herard stayed at Jackson's townhouse along with other members of the gang as well as two women and some children. Herard kept a shotgun in the house and took it everywhere he went. (T. 1900-1902, 1953-55, 2194-98) Anna Grange ("Grange") was Herard's girlfriend and owned a white Toyota Camry which she let him drive. Its right rear door handle was broken on the outside. On more than one occasion, she

would see several of the men leave at night, dressed all in black, with Herard in possession of the shotgun. They would return later with money and property. (T. 2202-6, 2216-17)

Miguel Guerrero ("Guerrero") and Gary Metayer ("Metayer") were employees at the Dunkin Donuts store in Plantation. Metayer knew Herard from when both worked at another restaurant and was friendly with him, socializing with him on occasion. Metayer got Herard a job at the Plantation Dunkin Donuts and trained him. Herard worked there about two months until he was fired on June 8, 2008. After the firing, Herard told Metayer that he wanted to rob the store and texted him continuously during the day of June 20, 2008, asking questions about who was working and when the store was closing. (T. 2499, 2507-9, 2521-22)

When Guerrero and Metayer were closing the shop the night of June 20, when two men with a shotgun pushed them in through the back door. One man was short and the other was tall and slim armed with a shotgun. Both men wore hoodies and had bandanas on their face. Herard had the same body type as the man with the shotgun. The men ordered Metayer to empty the cash registers; the tall one hit Guerrero in the stomach and face and struck him with the shotgun.

They stole his phone, wallet, and Ipod as well as the cash from the office. (T. 2501-6, 2513-16) Herard visited Metayer sometime after the robbery and returned the phone he had stolen. Herard told him that he had sold all of Miguel's property. (T. 2529-32)

Denise Brown ("Brown") lived in Deepside in Lauderhill on October 13, 2008. Around 1:45 A.M. she was standing in the street with three other young women talking. While standing there she saw approximately seven men, dressed all in black, approach from another street and line up. One man, tall and slim, appeared to be holding a shotgun. Suddenly, she heard gunshots and saw the shotgun fire. One man ran into her friend's house to escape the shots; that man was Jacob Rivera who was injured in the shooting. The shooting damaged a car and the door to her friend's house. (T.1875-85, 1978-86, 1993)

Keith Williams participated in the Rivera shooting and was a member of the Bacc Street Crips and was beaten by rival Blood gang members. When he told Jackson, Jackson wanted him to kill the person who beat him. Herard, with the shotgun, accompanied Williams back to the place where the beating happened. Williams was supposed to shoot at the people standing in front of the house but

instead he fired into the air and ground. Herard then fired the shotgun. (T. 1890-91, 1899-1906, 1942-45) Police recovered two different sizes of shotgun shells, five shells altogether from two different shotguns. (T. 1980-86, 2122-24) Once they returned to Jackson's house, Herard slammed Williams into a wall and held him there while Jackson took a hot iron and burned Williams's chest a number of times with the flat face of the iron as punishment for not following his orders to kill. (T. 1908-10, 1945-49) The police later recovered an iron from the house and matched it to Williams's burn scars. (T. 44:1965-68, 1972-74) Later that evening, Herard was heard telling Jackson that the gang had to up the body count. (T. 1949)

There was another shooting in Lauderhill shortly after midnight on October 19, 2008 at the Mission Plaza, which was in Blood territory. Approximately nine or ten people were in front of the stores when a man staggered up, pulled out a shotgun, and opened fire on the group, firing multiple times. Three individuals were injured: Tremaine Williams, Chazdin Edwards, and James Mozie. (T. 2160-64) Police recovered a three shotgun shells and a blue bandana. The shotgun shells were fired from the same gun that was used to shoot Rivera. (T. 1999-2004, 2012, 2125-26, 2134-35) Tremaine Williams

was a member of the local Blood gang and Edward and Mozie were also engaged in criminal activities. (T. 2493-96)

Eric Jean-Pierre was shot with a shotgun and killed the night of November 14, 2008 on NW 21st Street in Lauderhill. His wallet was still on him. The same shotgun which had been used in the Rivera and Mission Plaza shootings was the murder weapon. (T. 2022-42, 2133-35)

On November 15, 2008 Demetrick Caldwell, wearing a red bandana around his neck, was walking on Sunset Strip in Lauderhill around 3 to 4 in the morning when he noticed a white Camry following him. The car pulled over by a corner store and a man exited. He went to the trunk of the car and pulled out a shotgun wrapped in a shirt. The car circled the block and followed Caldwell home. It stopped in the middle of the road as he tried to open the door to his grandmother's home. A man got out of the passenger seat with a shotgun, looked at Caldwell, and "cocked" the shotgun. As he saw the man approaching, Caldwell ran but fell and the man shot him twice. The shooter never said a word. Caldwell identified Herard as the shooter. (T. 2166-75) The same shotgun was used in this shooting as had been used in the previous three. (T. 2133-35)

Corey Marchand ("Marchand") and his friend were at the Dunkin Donuts in Sunrise on November 24, 2008 watching a basketball game. MD Miah was the clerk working that night. While they were there, three masked men entered, one heavy-set and the other two skinny, and ordered Marchand, his friend, and the clerk to the floor. The heavier man had a pistol and one of the others had a shotgun. The shotgun wielding robber punched the clerk in the face and hit him with the gun while demanding money from the cash register. After robbing them, the other robbers took Marchand and his friend behind the counter and put them on the floor again before leaving. (T. 46:2183-91, 2192-93)

Two days later on November 26, 2008 84 year old Henry Bornstein ("Bornstein") was having coffee with friends at the Dunkin Donuts in Delray Beach around 9:30 in the evening when he noticed people began to run inside. Someone said they were being held up and everyone started to get on the floor. Bornstein could not move easily because he had a new knee and hip and had trouble getting down. He turned to look upward and made eye contact with a masked man carrying a fancy shotgun. The man shot Bornstein twice in the chest and once in the face; the shot to the face took off his jaw and

left him with no chin, gums, teeth, and no sense of taste. The men took his wallet which contained his identification and credit cards. Those items were later found in Jackson's house during a search warrant. (T. 47:2342-49; 46:2268-69; 58:1655-80(Ex. 29)) Paul Baratta ("Baratta") was pulling up to the Delray Dunkin Donuts in his car when he saw four or five hooded men dressed in black leaving the shop. He slowed to allow them to move when one man, masked, left the group and moved in front of his car. The man was right next to the car when Baratta saw a three inch diameter flash and heard an explosion. Glass and pellets crashed through the windshield, hitting him in the face despite his hand going to cover it. He lay on the seat for a few moments then got out, discovering that he was totally blind. (T. 47:2339-42)

Later the same night, November 26, Deny Jean Louis ("Louis") was working the night shift at the 7-11 in Pompano Beach when four to six masked men came in with a long gun. The men ordered Louis and everyone else inside to the floor. Two of the men jumped over the counter and took money out of the register. (T. 47:2292-96)

The next day, Thanksgiving, November 27, 2008, Jagdishbhai Patel ("Patel") was working at the Dunkin Donuts in Tamarac with

his daughter. She was out front with the customers while he worked in the back. He heard an explosion and his daughter ran over to him saying someone was shooting. They ran out the back door and fled. The register would only open with a pin number. (T. 47:2299-2305)

Frank Dennis ("Dennis") was at the Tamarac Dunkin Donuts on Thanksgiving when he heard a loud bang and saw group of people by the front door struggling and looking scared. He saw a man fall and then two masked men, one with a shotgun, ran inside. Dennis and the others were ordered to the floor and searched. (47:2307-10)

Long Huynh ("Huynh") and Chau Le ("Le"), along with Huynh's two brothers stopped at the Dunkin Donuts in Tamarac Thanksgiving night. A masked thief with a gun came in after they had arrived and ordered them to the floor. Huynh's brother already had his coffee and was at the door, opening it with his back, when he was shot; he died after nine days. Le was trying to hide her purse, which was light gray and white, while she was on the floor; the purse contained her Iphone, checks, identification, and about $3000-$4000 in cash. She saw a man with a mask and gun. Her purse was jerked off her shoulder and taken. (T. 47:2317-25) The purse, checks, and cards were recovered in Jackson's house. (T. 44:1950-58;

46:2205-08) Kiem Huynh died as a result of a shotgun wound in his back made by pellets. (T. 47:2328-34) The surveillance videos showed a white car with a broken handle approaching the shop just before the robbery. There was a footprint on the counter near the register.

The police recovered 20 gauge Winchester yellow shotgun shells from both the Delray and Tamarac Dunkin Donuts. A police analyst determined that the same gun was used in both of those crimes. When these shells were compared to the results from the previous four shootings, all the recovered 20 gauge shells were fired from the same shotgun. (T. 46:2228-36)

On December 2, 2008 Richard Sills ("Sills") was walking his six month old dog with his friend Taiwan Gaye ("Gaye") when he saw two men exit a white Toyota with a broken door handle. He saw the same two again shortly thereafter but they were wearing masks. The men came up to Sills, put him in a choke hold, and demanded the dog; Sills thought one of the men had a small chrome pistol. Just as one man took the dog, the police drove up. The men took off across the street, taking their masks off as they fled and Sills chased after the two men. Gaye saw Herard's face as the mask came over. Both saw the police catch the men. (T. 42:1736-46,1780-89)

Detectives Ervina Mosley and Erica Williams from Lauderhill Police Department saw the white Toyota driving slowly through the streets and saw the two men exit it, one of them wearing a blue skull cap. The officers saw the men pull down the masks and confront Sills and Gaye. The officers separately pursued Herard and his co-defendant as they ran and took them into custody. (T. 43:1758-1769, 1802-13) Herard had a blue skull cap, a mask, and a blue bandana in his possession when arrested. (T. 43: 1817-18) Herard made a comment when taken into custody saying it was a sweet dog and he had to get it. (*Id.* at 1814) Later, Grange came to the station for the White Toyota. (*Id.* at 1829)

Herard gave statements to a number of detectives after he was arrested, with the DVDs of three of those them introduced into evidence. He admitted the shootings but denied actually shooting Jean-Pierre, saying that Tharone Bell pulled the trigger while Herard drove the car; the killing was to give Bell a body in their on-going competition. To Dets. Mosely and Williams Herard admitted trying to take the dog, but denied having a gun saying he had a "Samsung 22." (T. 43:1775, 1814) To Dets. Ransone and Visners, Herard admitted trying to kill Caldwell because Caldwell was wearing a red bandana

like Bloods do. He admitted the shootings on November 14 and 15, 2008. He described to the officers how they celebrated after the shootings. Herard said he planned and practiced the Sunrise Dunkin Donuts robbery. He said he was a Crip with the Bacc Street Crips. (T. 45:2092-2104; 49:2546-66) Although not in a formal statement, Herard admitted the Plantion Dunkin Donuts robbery to Det. Enrique. (T. 47:2352-55) Dets. Goodwin and Rubin heard Herard's question about Sunrise Delray as he came down the stairs at Lauderhill. Both officers heard Herard tell how beautiful it was when he shot the jaw off the man in Delray. (T. 47:2384-85, 2396-97; 49:2477-86)

The penalty phase trial occurred on June 3 and 4, 2014. The State called Det. Hardy. Gilbert Raiford, a social worker, testified that Herard had written a 700 page novel. Dr. Myriam Glemaud, a psychologist, testified that she examined Herard's records and had a clinical interview with him; she saw no history of mental illness. (SROA 2025-2111) Herard also put on five family members. (SROA 2112-66)

SUMMARY OF THE ARGUMENT

I The trial court did not err when it struck the jury panel in

February 2008 when Herard's penalty phase counsel unable to continue with the trial due to his being lead counsel on another case where a death warrant had just been signed.

II The trial court's refusal to suppress Herard's statements to the police was supported by competent, substantial evidence showing that he knowingly and voluntarily waived his rights to counsel and silence.

III Herard waived this issue by inadequately briefing and arguing it. Further, the evidence was properly admitted since it was relevant to the charges before the jury.

IV The trial court did not abuse its discretion in not allowing Herard's expert witness testify since his theory on false confessions could be pass the *Daubert* test.

V Herard's death sentence is constitutional and proper.

ARGUMENT

ISSUE I

THE TRIAL COURT'S DENIAL OF HERARD'S MOTION TO DISMISS WAS JUSTIFIED BY THE ABSENCE OF ONE OF HIS COUNSEL AFTER THE TRIAL BEGAN. (Restated)

In his first issue Herard asserts that the trial court committed

reversible error when it denied his motion to dismiss based on the trial court's striking of the original unsworn jury panel. He argues that the State sought the panel's dismissal because the prosecutors did not like the composition of it; they were allegedly gaming the system in order to get a better jury. The State maintains that the trial court appropriately struck the panel since one of Herard's trial counsel was suddenly unavailable to represent him at trial. The trial court did not find the State acted nefariously nor with bad faith and Herard cannot demonstrate otherwise. This Court should affirm.

Herard's first chair was Mitch Polay ("Polay") who was appointed to represent him on April 1, 2009. (ROA 1:22-23) Kevin Kulik ("Kulik") was appointed second chair to handle the penalty phase on July 13, 2010. (ROA 1:132) Jury selection began on February 11, 2014 and both attorneys participated in the process. On Friday, February 14 the State informed the trial court that a death warrant had been signed on Robert L. Henry SC# 14-398 who was also represented by Kulik as his lead attorney. The State also informed the court that the Florida Supreme Court would require Kulik to represent Henry through the warrant litigation until the sentence was carried out. Kulik wished to continue with the trial. The court recessed the trial

until the following Tuesday. (ROA 5:915-17; T. 42:1658-70)

The following Monday Kulik appeared before Judge Siegel on the Henry case. With him was Melodee Smith, who had represented Henry only in the clemency proceeding. Kulik asked the court to allow Smith to represent Henry while Kulik continued doing the Herard trial. The State objected, noting this Court would not allow Kulik to withdraw. *See Van Poyck v. State*, 116 So. 3d 268 (Fla. 2013) (Mem) Judge Siegel denied Kulik's motion to withdraw. Kulik filed an emergency writ of certiorari with this Court which issued an order to show cause to the State on the same day. *Id.*

The Herard trial reconvened on Tuesday morning without Kulik's presence. The trial court learned that Judge Siegel had refused to release Kulik. The court contacted John Cotrone who had represented Heard for the first year until he moved to withdraw in 2010. Controne would not accept appointment, saying that he would be committing malpractice to step into an on-going jury trial after four days of jury selection knowing nothing of the developments of the preceding three and a half years. Polay acknowledged that it was inappropriate to continue without penalty phase counsel present and Kulik was that counsel so, therefore, it was appropriate for the court

to strike the panel. The State did not want to proceed without penalty phase counsel fearing a reversal on appeal under those circumstances. Such was the situation when the trial court decided to strike the panel and reset the trial. Meanwhile, this Court dismissed the writ when it received the State's response which said the jury panel had been dismissed. *Id.*

Underlying Herard's stance in his motion to dismiss and in this appeal are two baseless assumptions: that the State was acting in bad faith by trying to gain a tactical advantage by having the panel struck and that this Court would have allowed Kulik to ditch Henry, who was under a warrant and facing execution in a month, in order to continue jury selection for Herard. Kulik argued that the State gained a large tactical advantage by being able to observe its strategy for jury selection. (T. 42:1662) While not minimizing strategizing in jury selection, the ultimate goal for the defense is to choose jurors who might be sympathetic to the defendant and who are unlikely to vote for death. Also of note is that the State Attorneys notifying Kulik about the warrant and appearing on the Henry case in Judge Siegel's court were attorneys from the appellate division, which is separate from the capital trial prosecutors (they all still work for Satz – maybe

say they were different attorneys from the trial prosecutors?). The appellate attorneys would be actively engaged in the litigation in Henry's case. Herard is assuming that the State's objection to Kulik withdrawing was done only to gain tactical step up in Herard's case. In reality, the trial prosecutors were trying to balance the constitutional rights of two capital defendants; Henry who was under an active warrant and Herard who was in trial but whose jury had yet to be selected and sworn. The appellate attorneys were concerned with Henry's constitutional rights to have a counsel familiar with all aspects of the prior litigation and any issues which had to be litigated. Likewise, the State was concerned that the same attorney, Kulik, was the one most familiar with Herard's penalty phase investigation and issues and not wanting to deprive Herard of his counsel in the middle of trial. Also, the State was trying to avoid retrying a large and complicated case. *Van Poyck* supports the determination that Kulik's representation of Henry for the active death warrant took precedence over Herard's trial. The record contains no evidence of any bad faith actions by the State which is why the trial court determined none existed.

Herard is also assuming that this Court would have let Kulik

continue on with Herard's trial simply because it asked the State to respond to a petition in a case involving a death sentenced prisoner under a death warrant. Predicting that an appellate court will grant relief just because it wishes to hear from both parties is unreasonable. The trial court was absolutely correct when it stated:

> THE COURT: Mr. Kulik, what you're asking me to do is put my mind in the mind of the Supreme Court, indicating but for the Court's striking the jury, they would have granted your relief.
>
> That's an absolute impossibility for this Court to do.
>
> ...
>
> But again, I'm not a part of the Supreme Court.
>
> I don't know their thinking.

(T. 42:1667-68) Clearly, the trial court did not err in striking the existing panel after it determined, based on the case as it stood, that counsel had been (become?) unavailable to continue the trial.

The court did not violate Herard's constitutional rights when it dismissed the first jury venire; its actions were in response to an impossible and untenable situation where a person facing a possible death sentence suddenly lost one of his attorneys during jury selection, the trial had started, but jeopardy had not attached. Jeopardy attaches when the jury is sworn. See *Crist v. Bretz*, 437 U.S.

28, 98 S. Ct. 2156, 57 L.Ed.2d 24 (1978); *Serfass v. United States*, 420 U.S. 377, 95 S. Ct. 1055, 43 L.Ed.2d 265 (1975); *Brown v. State*, 367 So. 2d 616 (Fla.1979).

The court similarly did not violate Herard's constitutional right to due process either. Florida courts first entertained the possibility of a due process violation occurring before the jury was sworn in *Koenig v. State*, 497 So. 2d 875 (Fla. 3rd DCA 1986) when Judge Schwartz observed in his concurrance:

> I add the observation that this conclusion may not mean that the defendant is wholly without constitutional remedy. Almost without question, Koenig was deliberately deprived of a recognized, protectable, 'valued' right to be tried by a regularly constituted jury in whose selection he had participated and the composition of which he obviously approved. [c.o.] Particularly since, as is also self-evident, the reason that this occurred was based solely upon the perceived undesirability of the jury itself, thus implicating and contravening the very reason for the existence of the right, the trial court's action may have deprived the appellant of his generalized fifth and fourteenth amendment rights to due process. [c.o.] Since no due process claim has ever been asserted either below or here, I do not—and I agree that the court should not—directly address the very difficult issues raised by such a contention.

Id. at 884–85. In *Fassi v. State*, 591 So. 2d 977 (Fla. 5th DCA 1991) the defendant claimed that the State violated his double jeopardy and due process rights when it nolle prossed the charges just before the

jury was sworn because a witness was ill. The *Fassi* court stated that it agreed with Judge Schwartz's reasoning and stated that such violations were possible if the State acted in bad faith. It determined that the record, especially since voir dire was not part of it, could not support a conclusion that the State acted in bad faith. *Id.* at 981.

An appellate court decided that the defendant's due process rights were violated when the State dismissed the charges *immediately* before the jury panel was sworn in *State v. Goodman*, 696 So. 2d 940 (Fla. 4th DCA 1997). There the prosecutor had tried to use a peremptory challenge to excuse an African-American juror and the defense made a motion pursuant to *State v. Neal*, 457 So. 2d 481 (Fla. 1984) which the trial court granted. With that jury juror on the panel, the State, immediately before the jury was to be sworn, dismissed the charges, giving no reason for so doing. The State immediately refiled those same charges. The defense filed a motion to dismiss based on a due process violation since the State used its power to nolle pross to unconstitutionally avoid the *Neal* objection. The appellate court stated:

> It is clear to us that the trial court found that the nol pros was done solely to avoid the jury just selected, and that the jury just selected included a member whom the state

> had sought to excuse peremptorily in violation of the rule against invidious racial discrimination in the exercise of peremptory challenges. We conclude that it is a denial of due process for the state to nol pros in order to avoid having a jury so constituted.
> ...
> ... Just as the state may not use its discretion to peremptorily strike prospective jurors because of their race, so also it may not use its discretion to nol pros to achieve the same end. While the trial court may not have found in this effort bad faith by the prosecutor, we have no trouble in finding a violation of due process. Allowing the state to proceed in this way would have the intolerable effect of permitting the state to avoid the *Neil–Slappy* holdings by simply nol prossing when its invidiously discriminatory purpose is found out.

Goodman, 696 So. 2d at 942–43. Here, the State was not trying to avoid a constitutional violation, it was, in fact, attempting to balance the rights of two capital defendants requiring the services of the same counsel. Both defendants had rights under the fifth and sixth amendment; Henry's active death warrant was given precedence over Herard's trial which could be postponed especially because his jury was not sworn. *Goodman* does not support Herard's claim of a due process violation.

In *State v. Hurd*, 739 So. 2d 1226 (Fla. 2nd DCA 1999) the prosecutor dismissed the charges after the trial court denied its motion to continue because the crucial witness had not appeared

although subpoenaed and had not responded to telephone calls. The State later refiled charges and the defense filed a motion to dismiss based upon a due process violation arguing that the State refiled charges solely to avoid the court's denial of its motion to continue. The appellate court found that the prosecutor's action was not motivated by an improper purpose, unlike that in *Goodman*. The facts of this case are similar to those in *Hurd* in that there is no evidence in the record to support a finding that the State's action in asking the trial court to strike the panel was improper given that Herard was missing his penalty phase counsel. Additionally, a dismissal of the charges would be inappropriate where the trial court was merely trying to balance Herard's competing constitutional rights. This Court should affirm.

ISSUE II

THE TRIAL COURT'S FINDING THAT HERARD'S WAIVERS OF RIGHTS WAS KNOWING AND INTELLIGENT WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND ITS DENIAL OF HERARD'S MOTION TO SUPPRESS WAS CORRECT UNDER THE LAW. (Restated)

Herard asserts that the trial court erred when it denied his motion to suppress the statements he made to various police

agencies, arguing that the statements were not voluntary because he was promised leniency if he made a statement. He also contends that he invoked his *Miranda* rights and did not re-initiate contact with the police; he further argues that the police were required to give him another full warnings and waiver of his rights before the interview proceeded if he did re-initiate contact. He also claims that because no attorney was provided him after he demanded one, he was effectively denied his right to counsel which any subsequent *Miranda* warnings could not cure. Herard misconstrues the facts and the law in his argument. The record shows Herard knowingly, intellegently, and voluntarily waived his right to remain silent. The trial court's factual findings were supported by the record and its legal conclusion that Herard re-initiated the interview and that his waivers were knowing and voluntary are legally correct. The State asks this court to affirm the trial court's ruling.

In reviewing a trial court's ruling on a motion to suppress, an appellate court must accord a presumption of correctness to the trial court's findings of historical fact, reversing only if the findings are not supported by competent, substantial evidence, but reviews de novo "whether the application of the law to the historical facts establishes

an adequate basis for the trial court's ruling." *Connor v. State*, 803 So.2d 598, 608 (Fla.2001). The trial court's ruling on the voluntariness of a confession should not be disturbed unless it is clearly erroneous. *Escobar v. State*, 699 So. 2d 988, 993-994 (Fla. 1997); *Davis v. State*, 594 So. 2d 264, 266 (Fla. 1992). Where the evidence is conflicting, the trial court's finding will not be disturbed. *Thomas v. State*, 456 So. 2d 454 (Fla. 1984); *Calvert v. State*, 730 So. 2d 316, 318 (Fla. 5th DCA 1999). See *Wuornos v. State*, 644 So. 2d 1000 (Fla. 1994) (finding even though defendant's former lover encouraged defendant to confess, partly out of fear of prosecution as accomplice, as a whole, defendant's will not overborne by any official misconduct).

Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed.2d 694 (1966) requires the police to specifically inform a defendant in custody of his rights to counsel and silence before the defendant's statement can be admitted into evidence. A suspect's waiver of *Miranda* rights is valid only if it is "made voluntarily, knowingly[,] and intelligently." *Miranda*, 384 U.S. at 444. There are two essential elements of a valid waiver:

First, the relinquishment of the right must have been

> voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal[s] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979)). "The 'totality of the circumstances' to be considered in determining whether a waiver of *Miranda* warnings is valid based on [this] two-pronged approach . . . may include factors that are also considered in determining whether the confession itself is voluntary." *Ramirez v. State*, 739 So. 2d 568, 575 (Fla. 1999).

"When, as here, a defendant challenges the voluntariness of his or her confession, the burden is on the State to establish by a preponderance of the evidence that the confession was freely and voluntarily given." *DeConingh v. State*, 433 So. 2d 501 (Fla. 1983). In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there was coercive police conduct. *Chavez v. Sawyer*, 832 So. 2d 730, 749

(Fla. 2002), *citing Colorado v. Connelly*, 479 U.S. 157 (1986). The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained. *Lukehart v. State*, 776 So. 2d 906, 917 (Fla. 2000); *Jennings v. State*, 718 So. 2d 144, 150 (Fla. 1998); *Traylor v. State*, 596 So. 2d 957, 964 (Fla. 1992).

The State need prove a waiver of Miranda rights only by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). While a court's analysis of the waiver issue begins with a presumption that "a defendant did not waive his rights," *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979), "litigation over voluntariness tends to end with the finding of a valid waiver," *Missouri v. Seibert*, 542 U.S. 600, 609, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually

strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." *Butler*, 441 U.S. at 373.

A suspect's request to cut off questioning until counsel can be obtained must be “scrupulously honored” by the police. *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975). This Court has stated:

> Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present, although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel.

Traylor, 596 So. 2d at 966 (footnote omitted). See also *Sapp v. State*, 690 So. 2d 581, 584 (Fla.1997) (“[O]nce an individual has invoked the *Miranda* right to counsel, a valid waiver of this right can be found only if the individual is the one responsible for reinitiating contact with the police.”).

In denying the motion to suppress the trial court found:

> State's Exhibit [sic] 3 was entered into evidence as the Defendant's rights waiver form which was signed at the Lauderhill Police Department and a video of Defendant waiving his rights and being questioned was entered into evidence as State's Exhibit 4. This Court viewed the aforementioned video in which Lauderhill Detective Ericka Williams read Defendant his Miranda warnings prior to questioning him in connection with a robbery involving his

theft of a dog. At the point where she asked Defendant if he understood his rights and was willing to speak to her without an attorney, he stated “1 don't agree to that.” Detective Williams told him that was “fine” and was collecting her paperwork to leave the room when Defendant then asked “how long do l have to wait for an attorney?” There was then a brief conversation that Defendant would be “booked” and he then stated around the 54:00 minute mark on the video, “do I have to wait for an attorney? l want to talk." He then said something to the effect of “I’m too smart for that. I'm good, never mind. 1 want to sign the paper.” Detective Williams then asked “do you want to talk to us?” and Defendant replied “yes.” At that point, Defendant gave a statement in reference to the robbery and theft of the dog.

...

In analyzing the totality of the circumstances of Defendant's rights waiver and reinitiation of discussions with law enforcement in the instant case, this Court now considers the actions by law enforcement at the Lauderhill Police Department. Detective Williams read out loud to Defendant all of the rights in the rights waiver form. Defendant initially chose to invoke his rights but then became impatient at the thought of having to wait for an attorney. It was then that he unequivocally reinitiated with Detective Williams, all of which is depicted on States Exhibit 4. It is abundantly clear to this Court from watching the video that Defendant knowingly, intelligently and voluntarily waived his rights.

....Much like defendants McKenzie and Bradshaw, Defendant, just after invoking his right to counsel, immediately began asking the detective a number of questions. This Court finds that Defendant reinitated a conversation with Detective Williams and thus, his waiver was valid and his confession is not subject to suppression.

Detective Goodwin was the first to testify regarding Defendant’s interrogation at the Broward Sheriffs Office. He testified that he became involved in the investigation of a series of robberies and murders at various Dunkin

Donuts on Thanksgiving Day, 2008. He stated that he had been summoned to the Lauderhill Police Department sometime after 9:00 p.m. on December 2nd. Lauderhill had James Herard, Calvin Witherspoon and Jonathan Jackson in custody for the robbery involving the theft of a dog. The car that the three codefendants occupied at the time of the robbery fit the description of the car reportedly utilized in the Dunkin Donuts robberies/murders in Broward and Palm Beach Counties. Both Detective Goodwin and Detective Hardy testified that the car was a white Toyota Camry with its right rear door handle missing. Detective Goodwin also explained to the Court that this same car was seen in video surveillance from businesses around various Dunkin Donuts.

When Lauderhill Detective Williams finished questioning the Defendant he was then transported to the Broward Sheriffs Office via a Sunrise Police Department patrol car and was questioned by a variety of detectives throughout the early morning and afternoon of December 3, 2008.

A videotaped statement of James Herard, approximately 12 hours in length, was admitted into evidence as States Exhibits 1 and 2 and had previously been viewed in open court in connection with a motion filed by codefendant Tharod Bell. ln the video, Defendant Herard is first seen eating McDonald's food, drinking a soda and then laying on the floor of the interview room. A detective entered and reread Defendant his Miranda warnings and he again agreed to speak with law enforcement. Shortly thereafter Defendant asked to speak to his cousin. The detective dialed the phone for him, put it in speaker mode, and the cousin told Defendant to speak to the detective. The detective and Defendant spoke for a short time then the detective left and Defendant laid on the floor and took a nap. Perhaps an hour later that detective's supervisor came in and made small talk with Defendant and left. The Defendant then laid on the floor again and took another nap. The detective returns again with Detective Link and Defendant told them he wanted to

call his girlfriend. The detectives obliged, called her with the phone in speaker phone mode, but she did not answer. Defendant and the detectives spoke some more and then at 7:29 a.m. they offered Defendant another break. At 7:51 a.m. Defendant told them he needed to use the bathroom and he was taken to the bathroom at 7:56 a.m. He returned to the interview room at 8:01 a.m. where he slept for another 1 1/2 hours.

At 10:05 a.m. Defendant is knocking on the interview door but no one answered. He is then seen on the video urinating in his McDonald's cup. The detective returns at 11:11 a.m. They spoke for a brief period of time and Defendant kept asking to use the phone to call his girlfriend. The detective left again and at 11:20 a.m. the Defendant is again seen urinating into the McDonald's cup. Shortly thereafter Detectives Berenna and Goodwin come in. They speak with the Defendant for some time and at 12:35 p.m. detectives from Lauderhill come in and the other detectives leave. At 12:48 p.m. Detective Berenna reenters the interview room. A few minutes later at 13:04 p.m. Defendant is moved to another room and then brought back again. About 45 minutes later at 13:50 p.m. detectives from the gang unit come in and photograph the Defendant. At 14:02 p.m. some of the other detectives return and at 14:10 p.m. Defendant confesses to the shootings in Delray Beach and Tarnarac and also confesses to numerous other crimes. Then at 14:45 p.m. the Defendant calls his girlfriend using the detectives cell phone, which again is in speaker mode. At 15:10 p.m. the Defendant calls his cousin and a few minutes later he is escorted to the bathroom again- The video concludes around 15:29 p.m. when Defendant is taken to booking.

While Herard did in fact tell multiple lies on the video, towards the end of the video he began to "come clean." Herard inculpated himself and stated that he is now facing "at least 100 years" for his crimes and described the roles that some of his codefendants played.

... This Court watched State's Exhibits 1 and 2 in their entirety and found no coercive conduct by

> investigating detectives. He was not threatened or coerced, nor was he deprived of any of his basic needs including, food, rest and an opportunity to use the bathroom.
>
> Defendant was booked and taken to the Broward County Jail on the afternoon of December 3, 2008. Defendant attended magistrate court the next morning and with the aid of an assistant public defender, he executed an "invocation of Fifth Amendment Rights" form. Later that same day (December 4, 2008) Detective Visners of the Sunrise Police Department visited him in jail at approximately 6:00 p.m. Detective Visners testified that he readministered Defendants Miranda rights to him. That signed rights waiver was entered into evidence as State's Exhibit 5. Detective Visners explained to the Court that there was no video recording capability in the jail interview room. He attempted to audio record the interview, however he testified that Defendant objected to that and he honored Defendant's request. Detective Visners told the Court that Defendant understood his rights and willingly agreed to speak with him.
>
> ...
>
> ln sum, this Court finds that Defendant knowingly, intelligently, and voluntarily waived his right to counsel during all three aforementioned interviews. He was not coerced nor deprived of any of his basic needs during questioning. Furthermore, this Court finds under *Sapp*, *Id.* that Defendant's anticipatory invocation of his *Miranda* rights form signed on the morning of December 4, 2008 is inapplicable to his 6:00 p.m. interview for the aforementioned reasons.

(ROA 6:815-823). The record contains competent, substantial evidence to support them.

The court held an evidentiary hearing on the motion to suppress on November 20, 2013. In addition to the three detectives

who testified, the State admitted into evidence the waiver forms completed by Herard for the various police agencies as well as the DVDs of his recorded statements. Herard filled out a waiver of his *Miranda* rights when interviewed at the Lauderhill Police Department. (ROA 58:1582) The interview was videotaped and admitted into evidence at the suppression hearing. (ROA 5:815) On that video, Herard initially refused to sign the waiver. However, when the detectives were readying to leave, "scrupulously honor[ing]" his desire not to speak with them, he stopped them. Shortly thereafter, he says he wants to talk and will sign the waiver form, which he does. (Ex. 3 & 4) The detective then asked if he wanted to talk and he said yes. She did not re-read the advisement and waiver form since she had done that a little before. Herard clearly re-initiated the interview by stopping her leaving and saying he wanted to talk. Further, given the short period of time between the advisement and his agreeing to speak, the detective had no duty to completely re-advise him. Under this Court's case law, this situation did not violate *Miranda*.

A defendant is free to initiate contact with the police to give a statement after he has invoked his rights. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981); *McKenzie*

v. State, 125 So. 3d 906, 910 (Fla. 4th DCA 2013). This Court has set out the standard for analysis of such a situation to determine if the statement is admissible:

> However, even when an accused has invoked the right to silence or right to counsel, if the accused initiates further conversation, is reminded of his rights, and knowingly and voluntarily waives those rights, any incriminating statements made during this conversation may be properly admitted. See *Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46, 103 S. Ct. 2830, 77 L.Ed.2d 405 (1983).

Welch v. State, 992 So. 2d 206, 214 (Fla. 2008); *Shelly v. State*, 262 So. 3d 1, 11 (Fla. 2018). The defendant in *Bradshaw* invoked his rights and requested an attorney. The interview ceased. Later, Bradshaw asked an officer what was going to happen to him. The officer reminded him that he did not have to speak to him, after which a conversation ensued in which the officer again reminded him of his rights but Bradshaw admitted the crime. *Bradshaw*, 462 U.S. at 1042. In *Shelly* this Court found that the defendant re-initiated communication when he asked the detective to call his mother. *Shelly*, 262 So. 3d at 15. Here, Herard did not want to wait for an attorney to arrive; he wanted to talk. The detective made sure Herard wanted to talk, reminding him of his rights by implying that he did not have to do so. He said he did and then proceeded to sign the

waiver form. The facts here clearly meet the *Welch* standard. Under the totality of the circumstances, the trial court's determination that Herard himself re-initiated the discussion comported with both the record and the law.

Similarly, Herard's comments upon noticing the various police agencies present as he went to be transported were not a violation of *Miranda* since he initiated them and had also already waived his rights. Herard noticed that the Delray police were not present and asked where they were, thereby acknowledging his link to that robbery as well as those in the other areas. (ROA 9:1430) While the trial court did not specifically address these statements, they were admissible.

Once Herard was transported to the Public Safety building, detectives from Broward Sheriff's Office and Sunrise Police Department interviewed him; the tape of the interview was admitted for the suppression motion. Herard completed waiver forms for each of those agencies. (ROA 58:1570-71) The DVDs of the interview were before the trial court and provided competent, substantial evidence to support its findings underlying his decision that the statements were voluntary. Herard was given food and drink and had at least six

hours to sleep during the 13 hours of the time he was in the interview room. The detectives allowed him to speak to his cousin and tried to call his girlfriend multiple times. He is taken to the bathroom a couple of times as well. There was no coercive behavior by the police. See *Chavez*, 832 So. 2d at 749 (Statement was voluntary when defendant was in custody 54 hours and was questioned over several days but was given food, breaks, and rest).

Herard argues that the detective promised him leniency if he confessed. No such promise was ever made. Detective Trevor Goodwin, with the Broward Sheriff's Office, conducted one of the interviews. He asked Herard if he had asked any other agency for an attorney and Herard said no. (ROA 9:1448) He denied ever telling Herard that he would get leniency if he talked. (ROA 9:1451) He did say it would be better for him if he talked after Herard admitted the Tamarac shooting. (ROA 9:1450) A review of the recorded interview supports his testimony. A detective mentioned a life sentence approximately three times throughout the entire interview. He said the difference between a robbery and murder was 20 years compared to a life sentence. (CST 53) Later he told Herard that he wanted the shooter and that it did not make sense for Herard to risk life in prison

just to avoid being a snitch. (CST 101) Still later he asked Herard what 19 year old would not prefer 10 years as opposed to life. (CST 218) Goodwin did, however, specifically tell Herard twice that he could not make him any promises, at the beginning of the interview and then about midway through it. (CST 101-102) The record shows no coercive police conduct nor does it show any promises designed to elicit a statement. See *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S. Ct. 1420, 22 L.Ed.2d 684 (1969) (holding that where interrogating officer had falsely told defendant that his cousin-who had been in defendant's company on night of alleged crime-had confessed to crime, police misrepresentation of facts "while relevant" was "insufficient ... to make [an] otherwise voluntary confession inadmissible"); *Johnson v. State*, 921 So. 2d 490, 505 (Fla.2005) (stating that the "[Florida Supreme Court] and the United States Supreme Court have held that police officers are permitted to falsely inform suspects regarding the evidence they have against them").

Detective Shawn Visners from the Sunrise Police Department was the last to interview Herard. On December 4, 2008 at the Broward Sheriff's Office he questioned him about the robbery of the Dunkin Donuts. He began by fully Mirandizing Herard and having

him sign the waiver form. (ROA 58:1571, 9:1472-73) Visners testified that Herard understood his rights, asked no questions, did not want the conversation recorded, and was quite animated throughout the interview. (ROA 9:1473-75) Again, the record clearly shows that Herard's statement and waiver were knowing and voluntary.

Herard also contends that since he "invoked his right to counsel" (IB p. 84) by filing a form invocation at his first appearance on December 4, 2008, for the robbery of the dog in Lauderhill, that invocation made the statement he gave Det. Visners inadmissible since Visners was "prohibited" from communicating with him. Herard is mistaken since the right to both counsel and silence are charge/crime specific and Herard agreed to speak with Visners. (ROA 9;1472-73) See *McNeil v. Wisconsin*, 501 U.S. 171, 175-82 (1991) (The assertion of the Sixth Amendment right to counsel, which is case specific, does not apply an assertion of the *Miranda* "Fifth Amendment" right.); *Ibar v. State*, 938 So. 2d 451, 469-70 (Fla. 2006) (Sixth Amendment right to counsel is "offense specific" and applies only to the offense with which the defendant has been charged, not to other non-charged offenses.); *Owen v. State*, 986 So. 2d 534. 544-45 (Fla. 2008).

In conclusion, competent, substantial evidence supported the trial court's findings that Herard's statements were uncoerced and were freely and voluntarily given. That court properly applied *Miranda* and its progeny in its analysis, taking in the totality of the circumstances around the statements. This Court should affirm the denial of the motion to suppress.

ISSUE III

THE TRIAL COURT DID NOT ERR IN ALLOWING THE INTRODUCTION OF ITEMS SEIZED PURSUANT TO A SEARCH WARRANT. (Restated)

Herard contends that the trial court committed fundamental error when it allowed into evidence items seized from Jonathan Jackson's house which allegedly had no relation to the crimes charged. While stating that multiple items were introduced, he only specifies a composition notebook. Herard simply asserts in conclusory statements that reference arguments defense counsel made before the trial court. He fails to develop the argument in his brief and fails to explain how any error is fundamental. Consequently, he waived the issue on appeal. See *Rose v. State*, 985 So. 2d 500, 509 (Fla.2008) ("Rose has merely stated a conclusion and referred to arguments made below. Thus, we consider the issue

waived for appellate review."); see also *Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (stating that a failure to fully brief and argue points on appeal constitutes a waiver of these claims.); see also *Victorino v. State*, 23 So. 3d 87, 103 (Fla. 2009) ("We have previously stated that [t]he purpose of an appellate brief is to present arguments in support of the points on appeal." (Citing *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990)); *Scott v. State*, 66 So. 3d 923 (Fla. 2011). Additionally, the issue is without merit and the State asks this Court to affirm.

Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of that discretion.

> An appellate court will not disturb a trial court's determination that evidence is relevant and admissible absent an abuse of discretion. See *Victorino v. State*, 23 So. 3d 87, 98 (Fla. 2009). Relevant evidence is generally admissible unless precluded by a specific rule of exclusion. *Id.* (citing § 90.402, Fla. Stat. (2004)).

McGirth v. State, 48 So. 3d 777, 786-87 (Fla. 2010). In *Lynch v. State*, 2 So. 3d 47, 80 (Fla. 2008) this Court reiterated that a court abuses its discretion where "'the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is

abused only where no reasonable man would take the view adopted by the trial court.' *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980))." As provided in *Williams v. State*, 967 So. 2d 735, 753 (Fla. 2007): "The Evidence Code provides that "[a]ll relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2006).

The State admitted into evidence a number of items seized from Jackson's house which included: a composition notebook; a spiral notebook; two letters; a ledger; a computer printout; shotgun shells; and a banana clip. (T. 46:2245-49, 2253-76) Sherry Slagle-Grant from the Broward County Sheriff's CSI unit testified that she seized them pursuant to a search warrant. (T. 46: 2245-46) Herard's counsel objected to the letters, ledger, two notebooks, and the computer printout on grounds of relevancy, hearsay, and lack of authentication. The trial court overruled them, pointing to Count III, the RICO charge. (*Id.* at 2250-52, 2258-59) The items came into evidence with a composite photographic exhibit of them labeled Ex. 29. (T. 58:1655-80) The paper items had gang references on them to the Bakk Street Crips ("BSC") as well as two other gangs. There were meeting minutes with Herard's name on the sheet with "BSC" along

with the names of other members, including witnesses who had testified and co-defendants. The ledger too had those names and their payments to the group. The computer printout showed the gang hierarchy. (T. 46:2264, 58:1647, 1655-80)

The trial court did not abuse its discretion in admitting this evidence. Herard was charged with RICO violations in Count III. The statute for that charge reads:

> (1) It is unlawful for any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.
> (2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.
> (3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.
> (4) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (1), subsection (2), or subsection (3).

Fla. Stat. Ann. § 895.03 (West). Clearly, these papers which documented the existence of an organized gang, with membership,

dues, and meetings, was relevant to the State's proving that "an enterprise" existed which committed the required criminal acts. The trial court committed no error.

Further, no fundamental error exists either.

> An error so fundamental as to require reversal "must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960). Fundamental error must amount to a denial of due process, and consequently, should be found to apply where prejudice follows. *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998); see also *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003).

Calloway v. State, 210 So. 3d 1160, 1191 (Fla. 2017). The surveillance photographs, eyewitness testimony, gang witness testimony, and Herard's statements guaranteed his conviction of the crimes charged. If any error occurred, it was harmless. This Court should affirm.

ISSUE IV

THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO ALLOW THE DEFENSE TO CALL AN EXPERT WITNESS IN FALSE CONFESSIONS. (Restated)

Herard argues that the trial court's refusal to allow him to present an expert on false confessions from using the Reid technique was reversible error. Herard fails to fully brief and argue this issue

so it should be deemed waived. He merely outlines the arguments made in the trial court, but fails to argue why the court's action was error or how it affected the defense's case. See *Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (stating that a failure to fully brief and argue points on appeal constitutes a waiver of these claims.); see also *Victorino v. State*, 23 So. 3d 87, 103 (Fla. 2009) ("We have previously stated that [t]he purpose of an appellate brief is to present arguments in support of the points on appeal." (Citing *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990)). Further, Herard issue is without merit since the trial court properly applied the relevant law in keeping out the expert's testimony. This Court should affirm.

Admission of evidence is within the court's discretion and its ruling will be affirmed unless there has been an abuse of discretion. *Williams v. State*, 967 So. 2d 735, 748 (Fla. 2007); *San Martin v. State*, 717 So. 2d 462, 470-471 (Fla. 1998)(A trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed.); *Ray v. State*, 755 So. 2d 604 (Fla. 2000); *Zack v. State*, 753 So. 2d 9 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997)."Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable,

which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *White v. State*, 817 So. 2d 799, 806 (Fla. 2002); *Trease v. State*, 768 So. 2d 1050, 1053, n.2 (Fla. 2000); *Huff v. State*, 569 So. 2d 1247 (Fla. 1990). The State submits that Herard has not demonstrated an abuse of discretion in the instant case. As provided in *Williams v. State*, 967 So. 2d 735, 753 (Fla. 2007): "The Evidence Code provides that "[a]ll relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2006).

Detectives Williams, Goodwin, Hardy, and Visners each interviewed Herard at some point between December 2 to 4, 2008. Each got a statement from Herard about the various crimes they were investigating for their jurisdictions. However, only Goodwin was questioned, extensively, by defense counsel regarding the Reid technique[3] and his use of it over the course of his on again and off again interview of Herard. The prosecution asked further questions

[3]The Reid technique is an interrogation method involving nine steps which includes: confronting the defendant with the evidence; overcoming defendant's objections; and minimizing defendant's culpability.

about it on its re-direct examination. (T. 48:2417-29, 2465-67)

Defense counsel sought to have Gregory DeClue testify to educate the jury about the Reid method and its "inherent problems"; the State objected. (T. 50:2597) Defense counsel stated that the expert was not going to opine on the truthfulness of Herard's confession, just educate the jury about the technique. The court had the defense proffer DeClue's testimony. (T. 51:2670-86) After hearing extensive argument on the issue, the trial court ruled that DeCLue could not testify. (T. 51:2693-2702) The court stated that Herard would have to testify that he had been coerced and the statement was false for DeClue's testimony to be relevant. (T. 50:2597-3634) The court then went through a number of cases which dealt with false confessions and, essentially, adopted their findings that the theory of false confessions was not reliable since it was not based on the scientific method in that it could not be scientifically tested, was not peer reviewed, and was not generally accepted in the scientific community.[4] The court noted that the vast majority of false

[4]The court cited two out of state cases where the courts had found expert testimony based on research and literature about false confessions was unreliable and, therefore, inadmissible. *People v. Kowalski*, 492 Mich. 105 (2012); *U.S. v,*

confessions involved young or mentally ill defendants in situations where the police used improper interview techniques like threatening the defendant, promising leniency, or denying his rights. The court noted that Herard's interview with Goodwin and Hardy lasted about six hours and he was provided with phone calls, food, drink, breaks, and was allowed to sleep. The court summed up by stating:

> Dr. DeClue did not have an opportunity to review all of the facts and circumstances that surrounded this particular confession or statement.
>
> He is not, from what the Defense tells me, going to render an opinion with regard to whether or not Mr. Herard's confession or statement was voluntary or coerced.
>
> And to simply give a couple of techniques out of context, without a direct application to this case, renders him, I should say, yes, I should, renders him unable, in this case, to render an opinion which would be of any help to the jury.
>
> Under 90.403, if minimal, in parens, if any, probative value is far outweighed by the unfair prejudice to the State's right to a fair trial, the great risk of misleading the jury and the jury may assign undue weight to such testimony, in the *Jac* case, I can tell you they did have an instruction with regard to suspects can make false

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Jacques, 784 F. Supp. 2d 59 (USDC Mass. 2011)(finding expert unqualified to be expert on false confessions. Testimony would be improper opinion that defendant was not guilty and not assist jury). It also cited two Florida cases saying *Daubert* required such a theory be based on the scientific method and scientifically reliable. *Vitiello v. State*, 281 So. 3d 554 (Fla. 5th DCA 2019); *Perez v. Bell South*, 138 So. 3d 492 (Fla. 3rd DCA 2014).

> confessions.
> ...
>
> > [citing *Beltran v. State*, 700 So. 2d 132 (Fla. 4th DCA 1997)] "We question whether such testimony would amount to no more than an expert's assessment that the confession is involuntary is ever admissible.
> > And if it was admissible, under any set of circumstances, it was clearly not an abuse of discretion [to not allow it]."

(T. 51:2700-1)

The trial court did not abuse its discretion in its ruling since it was supported by the record. DeClue had worked as a private and police psychologist. He had written a book on false confessions and interview techniques. He said that some false confessions had been where the Reid techniques were used, although he acknowledged that there was a dispute about whether it had been used or misused in those cases. (T: 51:2676) He admitted that he did not know if the Reid technique had been used in any of the Innocence's Projects cases with false confessions. (*Id.* at 2678) DeClue had conducted no controlled studies of the prevalence of false confessions when the Reid technique was used, he only had anecdotal instances of some false confessions, some of which had Reid interrogation. His and others studies of it were not based on the scientific method nor were

their conclusions generally accepted. His testimony did not meet the standards set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 136, 113 S. Ct. 2786 (1993).

Florida uses the *Daubert* standard in assessing the admissibilty of expert testimony. Section 90.702, Florida Statutes (2016), codifies the *Daubert* standard and governs the admissibility of expert testimony.

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

§ 90.702, Fla. Stat. (2016). Under this, the trial court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–93.

Daubert says that expert testimony is admissible if it is relevant and reliable. *Id.* at 589. Such testimony is only relevant if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 591. To satisfy this requirement, the proffered testimony must be "tied to the facts of the case [so] that it will aid the jury in resolving a factual dispute." *Id.* The reliability inquiry "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592–93. Factors that help show whether a particular methodology is reliable include whether the expert's theory: (1) can be or has been tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error or standards controlling its operation; and (4) is generally accepted in the relevant scientific community. *Vitiello v. State*, 281 So. 3d 554,560 (Fla. 5th DCA 2019) (quoting *Pipitone v. Biomatrix*, 288 F. 3d 239, 244 (5th Cir. 2002)). After determining the methods and principles underlying the testimony are reliable, the trial court must assess whether those methods and principles were reliably applied to the facts of the case. § 90.702(3), Fla. Stat. (2016).

Here, the trial court found that the false confession theory was not reliable, either in its foundational data or in its application to this case. The proffered testimony was just the personal opinion of the expert and would likely lead the jury to conclude that the expert thought Herard's statement was false. The court the applied section 90.704, which reads:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Fla. Stat. Ann. § 90.704 (West). The court determined that the testimony as more prejudicial than probative.

> We question whether such testimony, which amounts to no more than an expert's assessment that the confession is involuntary, is ever admissible. Cf. *Johnson v. State*, 438 So. 2d 774, 777 (Fla.1983); *Bullard v. State*, 650 So. 2d 631, 632 (Fla. 4th DCA 1995). Nevertheless, even if such testimony might be admissible in some cases, we find that the trial court did not abuse its discretion in refusing to hear it in this case.

Beltran v. State, 700 So. 2d 132, 133 (Fla. 4th DCA 1997). The court's

decision was not an abuse of discretion and this Court should affirm.

ISSUE V

THE COURT'S IMPOSITION OF A DEATH SENTENCE WAS PROPER UNDER FLORIDA LAW AND THE UNITED STATES CONSTITUTION.

In his final issue, Herard claims that the imposition of his death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and should be stricken. He argues that the sentencing scheme in Florida at the time of his trial was unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016), so that the only remedies for that error is a life sentence or a new penalty phase trial. Herard argues that *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), set out the correct standards that should be used in death penalty cases and urges this Court to retract its decision to the contrary in *State v. Poole*, 297 So. 3d 487 (Fla. 2020). Herard goes on to argue that the Florida death penalty sentencing structure and this Court's case law interpreting it violate the 8th amendment because the jury does not actually determine the sentence and its role is too truncated to withstand Constitutional scrutiny. Herard also argues that the instructions given in his penalty phase trial were unconstitutional since they did not require

the jury to making the findings set out in *Hurst v. State* beyond a reasonable doubt. Lastly, he challenges the constitutionality of Florida's aggravators, saying that they fail to sufficiently narrow the class of individuals subject to the death penalty. The standard of review for a claim of fundamental error is *de novo*. See *State v. Knight*, 286 So. 3d 147, 151. None of those claims have any merit and Herard's death sentence is constitutionally valid.

In sentencing Herard to death, the trial court found three aggravators of: (1) defendant was previously convicted of another capital felony involving the use or threat of violence to the person under section 921.141(5)(b); (2) CCP under section 921.141(5)(i) ; and (3) defendant is a criminal gang member under section 921.141(5)(n). (ROA 1281-86). While Herard generically challenged the constitutionality of the prior capital felony and CCP, he did not challenge the gang aggravator, consequently the matter is unpreserved on that point. *See Caylor v. State*, 78 So. 3d 482, 496 (Fla. 2011) (finding procedurally barred a constitutional challenge to an aggravator as "an argument attacking the constitutionality of an aggravating factor must be specifically raised at trial to be pursued on appeal." *Hutchinson v. State*, 882 So. 2d 943, 957 (Fla. 2004)).

Sixth Amendment – It is Herard's position that his sentence is unconstitutional as he was sentenced under a statute which was declared unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016). While he acknowledges that this Court rejected the suggestion chapter 2017-1, Laws of Florida created a substantive right to resentencing in *Asay v. State*, 224 So. 3d 695, 703 (Fla. 2017) and *Lambrix v. State*, 227 So. 3d 112 (Fla. 2017), Herard pleads for relief under *Hurst*.

In *Poole*, this Court receded in part from *Hurst v. State* and explained where this Court erroneously expanded the application of *Hurst v. Florida*.

> This Court clearly erred in *Hurst v. State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances. Neither *Hurst v. Florida*, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury make the section 941.121(3)(b) selection finding or that the jury recommend a sentence of death.

State v. Poole, 45 Fla. L. Weekly S41 (Fla. Jan. 23, 2020). This Court remanded the matter to the trial court to reimpose the death sentence, finding that the guilt phase jury's unanimous finding of contemporary felonies satisfied the requirement that it make a

unanimous finding of aggravation rendering the defendant death eligible. *Id.*

The United States Supreme Court has never held that the sufficiency of the aggravating factors, the weighing of the aggravating factors and mitigating circumstances, or the jury recommendation are elements that must be proven beyond a reasonable doubt under the Sixth Amendment before a trial court may impose the death penalty on a criminal defendant. In fact, the Court has expressly rejected such contentions. *McKinney v. Arizona*, 140 S. Ct. 702, 707-08 (2020) ("Under *Ring* [*v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002),] and *Hurst* [*v. Florida*], a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.").

Accordingly, Appellant's entire argument is predicated on an erroneous interpretation of the Sixth Amendment's requirements. The Sixth Amendment only requires that the *facts* which make a

criminal defendant eligible for the death penalty be found beyond a reasonable doubt. Neither the sufficiency of the aggravating factors, nor the weighing of the aggravating factors and mitigating circumstances are facts, as explained by the United States Supreme Court. *McKinney*, 140 S. Ct. at 707-08.

Florida's new death penalty statute sets out specific steps the jury must take before recommending a death sentence for a criminal defendant. If the jury:

> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

§ 921.141(2)(b), Fla. Stat. (2020).

The statute's requirements thus differ from the Sixth Amendment's requirements because the statute requires the jury to make non-factual selection findings before recommending a death sentence. The statute's text reflects this as it identifies the unanimous finding of at least one aggravating factor as the eligibility requirement for the imposition of the death penalty. Put another way, the statute identifies the existence of an aggravating factor as a fact that must be unanimously found by the jury before the death penalty may be imposed. The additional statutory requirements, sufficiency and weighing, are selection findings that pertain to the jury recommendation, not the Sixth Amendment.

Appellant's argument conflates the selection findings under section 921.141 with the factual findings required by the Sixth Amendment in an effort to convince this Court to adopt a position expressly rejected by the United States Supreme Court in *McKinney*, 140 S. Ct. at 707-08. Furthermore, this Court has explicitly, and correctly, rejected Appellant's argument that the sufficiency and weight of the aggravating factors are determinations that must be made beyond a reasonable doubt. *Santiago-Gonzalez v. State*, 301 So.

3d 157 (2020) (quoting *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019)).

In *Santiago-Gonzalez*, the defendant argued that his death sentence was invalid because the trial court did not find that the aggravating factors outweighed the mitigating circumstances beyond a reasonable doubt. *Id.* at 15. This Court found the defendant's argument without merit because "we have already receded from the holding that the additional *Hurst v. State* findings are elements." *Id.* quoting *Poole*, 297 So. 3d 487 (2020).

In this case, Herard was convicted of multiple contemporaneous felonies by his guilt phase jury. Like *Poole*, Herard's convictions rendered him death eligible and his sentence constitutional under the proper understanding of *Hurst v. Florida*. See also *McKinney*. This Court should affirm the death sentence in this matter.

Eighth Amendment - Herard next takes issue with the jury's role in the penalty phase and sentencing, hinting that the Constitution requires the jury to sentence a defendant rather than render a recommendation. Because the jury acts as "the conscious of the community," the jury should play a critical role in determining whether or not to impose a death sentence Herard contends. Citing

cases which discuss using contemporary standards of decency on punishment and legal consensus among the states, Heard argues that Florida's death penalty scheme, and his trial, violate the Eighth Amendment. Herard is incorrect.

The United States Supreme Court found the Florida scheme constitutional in *Proffitt v. Florida*, 428 U.S. 242, 247-253 (1976). The Court specifically stated that there was no requirement for the sentence to be imposed by a jury. *Spaziano v. Florida*, 468 U.S. 447, 460-63, 104 S. Ct. 3154 (1984); *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055 (1989).[5] However, contrary to Herard's assertions, the jury does play a critical role in determining whether a death sentence is appropriate.

> In Florida, the jury sits as the initial and primary adjudicator of the factors bearing on the death penalty. After unanimously determining guilt at trial, a Florida jury hears evidence of aggravating and mitigating circumstances. See Fla. Stat. § 921.141(1) (2010). At the conclusion of this separate sentencing hearing, the jury may recommend a death sentence only if it finds that the State has proved one or more aggravating factors beyond a reasonable doubt and only after weighing the aggravating and mitigating factors. § 921.141(2).
> .....

[5] That portion of *Spaziano* and *Hildwin* was not overruled by *Hurst v. Florida.*

> Under the Florida system, the jury plays a critically important role.

Hurst v. Florida, 577 U.S. 92, 105, 136 S. Ct. 616, 625–26 (2016) (Alito dissenting). The jury's advisory sentence is entitled to "great weight" in the trial court's determination, *Tedder v. State*, 322 So. 2d 908, 910 (Fla.1975), but the court has an independent obligation to determine the appropriate punishment, *Ross v. State*, 386 So. 2d 1191, 1197 (Fla.1980). Herard's jury played just such a role and its role was not minimized by the court or the attorneys when they correctly stated the law regarding what the jury had to do in the penalty phase trial. There was no Eighth Amendment error in Herard's trial and sentencing.

Adequate Narrowing - Herard presses that his death sentence is unconstitutional as there are sixteen[6] aggravators listed in the statute when eight had been identified in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972) (IB 102). Contrary to his position, the constitutionality of Florida's capital sentencing has been upheld

[6] The statute under which Herard was sentenced contained only fifteen aggravators, a through o in section 921.141(5), Fla. Stat. (2008).

against claims of failure to properly narrow the class of defendants eligible for the death penalty. Similarly, two of the aggravators which were applied to Herard have been upheld as constitutional and the third, "gang member,"[7] was not challenged below and is constitutional by its very terms. This Court should affirm.

The Supreme Court in *Furman* required states to adopt safeguards protecting against arbitrary and capricious impositions of the death sentence. *See Proffitt v. Florida*, 428 U.S. 242, 252–53 (1976). Toward that end, Florida enacted section 921.141, Fla. Stat. which this Court upheld as constitutional in *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973) because the statutory scheme "controlled and channeled" the sentencing discretion and rendered it a "matter of reasoned judgment." Focusing on the decision of death eligibility, the Supreme Court held that "To render a defendant eligible for the death

[7] As noted above, Herard failed to challenge the constitutionality of this aggravator below. In his sentencing memo he merely asserted the weight of this aggravator, if found, should be reduced as the evidence supporting it came from "unreliable sources" including his own confession. Hence, this Court should find the matter unpreserved. *Hutchinson v. State*, 882 So. 2d 943, 957 (Fla. 2004) (stating "an argument attacking the constitutionality of an aggravating factor must be specifically raised at trial to be pursued on appeal.")

penalty in a homicide case, [the Supreme Court has] indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994).

In *Zant v. Stephens*, 462 U.S. 862, 877 (1983), the Supreme Court opined that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." A capital sentencing scheme passes constitutional muster if it rationally narrows the class of death-eligible defendants and permits the sentencer to consider any mitigating evidence relevant to its determination. *See Johnson v. State*, 969 So. 2d 938, 962 (Fla. 2007). This Court has stated in *Francis v. State*, 808 So. 2d 110, 138 (Fla. 2001) that "to be constitutional, an aggravating circumstance must 'not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder.'" (*quoting Tuilaepa v. California*, 512 U.S. 967, 972, (1994)).

A review of the aggravators listed in Florida's statute show that each one narrows the class of death-eligible defendants by focusing

on their criminal history/status,[8] how the murder was committed,[9] whether the murder was committed during other felonies, and the unique status of the victim.[10] The fact that there are multiple factors does not establish that every person convicted of first-degree murder is automatically eligible for death. A defendant's first offense may be first-degree murder, but that alone does not make him death eligible. A defendant who kills during a carjacking may be convicted of felony murder but would not qualify automatically for the "during the course of a felony" aggravator. A person who kills his victim execution style may not qualify for the HAC aggravator unless there is evidence of physical or mental torture of the victim. *See Ibar v. State*, 938 So. 2d 451, 475 (Fla. 2006) (affirming HAC in execution style killings committed after victims held bound and on the floor for 14-minutes as defendants searched house and then methodically

[8] For example, prior felony convictions, murder committed while under sentence of imprisonment, or while in a criminal gang.

[9] For example, whether is was committed in a heinous, atrocious, or cruel manner or in a cold, calculated, and premeditated fashion.

[10] For example, police officers, young children, vulnerable or elderly persons.

shot each victim in turn); *Rimmer v. State*, 825 So. 2d 304, 327 (Fla. 2002) (rejecting HAC aggravator where victims shot execution style after defendant asked if they knew him); *Robinson v. State*, 574 So. 2d 108, 112 (Fla.1991) (holding that the trial court erred in finding HAC because the fatal shot to the victim "was not accompanied by additional acts setting it apart from the norm of capital felonies, and there was no evidence that it was committed 'to cause the victim unnecessary and prolonged suffering'"). Death-eligibility is not automatic upon conviction of first-degree premeditated murder. This Court should affirm.

Moreover, specific to Herard, this Court has found repeatedly that the aggravators of "defendant was previously convicted of another capital felony" under section 921.141(5)(b) and "during the course of a felony" under section 921.141(5)(d) constitutionally narrow the class of defendants eligible for the death penalty. *See e.g., Middleton v. State*, 220 So. 3d 1152, 1183–84 (Fla. 2017) (finding section 921.141(5)(d) constitutional); *Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012) (same); *Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1997) (same); *Stewart v. State*, 588 So. 2d 972, 973 (Fla. 1991) (1992) finding section 921.141(5)(b) constitutional); *Engle v. Dugger*, 576 So.

2d 696, 704 (Fla.1991)(same); *Squires v. State*, 450 So. 2d 208, 212 (Fla. 1984) (same). The aggravators narrow the class as not every defendant convicted of first-degree murder has committed "another capital felony," "felony involving the use or threat of violence to the person," or a felony during the course of the murder. As such, these facts narrow the class and are constitutional.

Likewise, the CCP aggravator has been upheld. *See Lynch v. State*, 841 So. 2d 362, 374 (Fla. 2003) (noting repeated rejection of claim that CCP aggravator is unconstitutional); *Fotopoulos v. State*, 608 So. 2d 784, 794 (Fla. 1992); *Klokoc v. State*, 589 So. 2d 219, 222 (Fla.1991); *Brown v. State*, 565 So. 2d 304 (Fla. 1990). With this aggravator, the focus is on the cool reflection, calculated planning, and heightened premeditation. While a defendant may commit premeditated first-degree murder, not every defendant will a murder in a cold, planned, and premeditated manner after a substantial period of reflection and without any "pretense of moral or legal justification." *See Salazar v. State*, 991 So. 2d 364, 377 (Fla. 2008)(finding CCP established based on evidence of planning, cool reflection, and heightened premeditation); *Davis v. State*, 121 So. 3d 462, 497 (Fla. 2013)(striking CCP aggravator even though defendant

went armed to victim's home there was no competent substantial evidence of a careful plan or prearranged design to kill).

As each aggravator applied to the defendant narrows the class, his sentence is constitutional. Finally, this Court has previously rejected the *Furman* claim raised by Herard. See *Blanco v. State*, 706 So. 2d 7, 11 (Fla.1997) (rejecting the argument that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the death penalty). Again, in this case, the jury found Herard guilty of an additional murder, five counts of attempted murder, seven counts of armed robbery, 2 counts of attempted robbery, and aggravated battery which further weakens his claim that the murder conviction alone qualified him for death. *Johnson v. State*, 969 So. 2d 938 (Fla. 2007). Herard's trial and sentence are constitutional.

CONCLUSION

Based on the foregoing arguments and authority, the State respectfully submits that this Court affirm the denial of relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Richard Rosenbaum at Richard@RLRosenbaum.com this 19th day of August, 2021.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this foregoing Answer Brief is 14-point Bookman Old Style, in compliance with Rule 9.045, Florida Rules of Appellate Procedure. I further certify that the document contains 13,936 words from the Preliminary Statement to the Conclusion.

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