IN THE SUPREME COURT OF FLORIDA

RICHARD McCOY,

Appellant,

CASE NO. SC01-2113

v.

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Appellant, RICHARD McCOY, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

McCoy was indicted by a grand jury for first-degree murder of Shervie Elliot; burglary of the ABC liquors store with a firearm and robbery with a firearm. (R. I 8-10). The crimes were committed on June 13, 2000. The indictment also alleged that McCoy discharged the firearm resulting in death. (R. I 8).

At trial, the evidence showed:

Shervie Ann Elliot, a manager of the Edgewood ABC Liquors store was found shot dead in the storeroom. She had been shot three times. (XI 886). First, in the abdomen, second time in the neck which paralyzed her and a third time in the face. (XI 887, 893, 896, 896). The medical examiner established the order of the shots. (902). The victim had the combination to the combination safe. (IX 595). The store also has a time delay safe (IX 597). The victim also had a key to the time delay safe. (IX 598). The victim knew the alarm code. $415.00 was missing (IX 623). The murder weapon was a nine millimeter Luger. (X 721). The weapon was not recovered. (877)

Three of McCoy's fingerprint were found on a ABC receipt bag. (X 684-688). The receipt bag was located on the countertop. (IX 547). The regional manager, Theresa Johnson, explained the use of the ABC receipt bags. (IX 591). The daily sales receipts, credit card receipts and daily invoices are put into the receipt bag which is then placed inside a red mailbag and sent, via a ABC warehouse truck, to Orlando once a week. Seven of the receipt bags are delivered to each store once a week. (IX 594). Only the store managers handle the receipt bags. (IX 592-593,

643). The receipt bags are kept inside the office. (IX 593). In the thirteen years she worked at ABC, she never knew of a lost receipt bag. (IX 584,637). DeBrenda Dorsey, who worked the evening of June 12, 2000 at the ABC store with Shervie Ann Elliot, testified. (X 648). The office policy is that sales clerks are not allowed in the store office. (X 650,658). When she left that night the receipt bag was not laying on the counter. (X 653). The sales clerks do not handle the receipt bags. (X 658).

The ABC Liquors store on Edgewood Avenue was a "counter store" (IX 590). Customers do not get their own products (IX 590). The customers order at the counter and the sales clerks get the item for them. A locked door separates the public area from the rest of the store. (IX 590).

Zsa Zsa Marcel testified that she and the defendant started dating in January, 2000 (X 745). On June 14, 2000, the defendant told her that he robbed the Edgewood ABC Liquor store. (X 747-748). McCoy told her that he gained entry to the store by rushing the lady when she opened the door. (X 748). McCoy told her they had the lady open the safe. McCoy told her that while he was getting the money from the safe, he told the other guy to take the lady to another part of the store and then he heard seven gunshots. (X 748). He told her that the store was dim because the shades where down. (X 749). McCoy told her he got $4,000.00 from the robbery (X 749). She called the ABC Liquor store and informed them that McCoy had robbed the Edgewood store. She met with a detective at the Sheriff's

Office and agreed to record a conversation between herself and the defendant. (X 752). The detective gave her a purse with a transmitting device. (X 752). She called McCoy to pick her up and they drove to her home. (X 753-754). She then met the detective at her home and gave them the purse back. (X 755). The prosecutor played the audiotape of this conversation for the jury. (X. 758-766). The sheriffs also recorded two telephone conversations between her and McCoy. (X 767). The prosecutor played the tapes of these two conversations for the jury. (X 769-773). Marcel knew certain details regarding the crime that were not released to the media, such as the store being dimly lit. (872).

There were two videotapes from the ABC surveillance cameras. (XI 858). One of the cameras was concealed. (861). The videotape from this camera of the crime was played for the jury. (X 615-622) Theresa Johnson, the regional manager, narrated for the jury, identifying the victim and explaining the store.

The Defense presented the testimony of five witnesses including the defendant. The next door neighbor, Sherry Cross, testified that between 8:00 and 8:30 on the day of the murder she saw the defendant taking out some trash. (XI 910). She spoke with the defendant for five minutes between 8:00 and 8:30 (XI 918). On cross, she admitted that it could have been before 8:00 or after 8:30. (XI 926, 929). The Defense presented the testimony of the Director of Safety at the trucking company, Bill Wiese, via videotape. (XI 931). The trucking company has a satellite that tracks the drivers. (935). He checked the

records and determined that the Sherry Cross' truck was in Jacksonville at 8:00 on June 13 (935-936). Dorothy Small, another girlfriend of McCoy's testified. (953). John Bailey, who worked at the Krystal on Edgewood Avenue, testified that McCoy was a regular customer at Krystal. (965). He was not able to tell if McCoy had been there on that particular day. (974).

The defendant testified. (XI 998). McCoy testified that he did not rob the ABC store on Edgewood Avenue or kill Shervie Elliot. (XI 1000). He testified as to his whereabouts on the morning of June 13. (XII 1005). He testified that he left his girlfriend's house, Dorothy Small, at 6:45 and went to his father house to take a bath. (1005). He forget to take out the trash at Dorothy's house, so he returned at 8:00. (1005). When he was taking out the trash, he spoke with the neighbor, Sherry Cross, for about five or six minutes. (1007). He then put water in his car's radiator. (XII 1008). At 8:12, he was hungry, so he went to the Krystal on Edgewood Avenue. (1008). You turn left to go to Krystal but right to go to the ABC Liquors store. (1009). According to his testimony, he ordered his regular breakfast at Krystal. (1010). He called Dorothy Small at 9:00. He admitted he had a relationship with Zsa Zsa Marcel. According to his testimony, on June 10, Marcel robbed the Lee's Chicken. (1014). He admitted that the voice on the tape was his. (1014). He averred that he lied on the tape about being "in the place" (1015). He testified that he told Marcel that he robbed the ABC Liquors store to impress her. McCoy testified that he had four prior convictions. (1026). McCoy testified

that he ran across an ABC Liquor receipt bag on April 8, 2000. (1026, 1038). He testified that he spent Friday night, April 7, 2000, at the Day's Inn motel near Roosevelt with Gwendolyn Brown. (XII 1039). He pulled into the parking lot of the ABC Liquors store on Roosevelt to change a flat tire and he saw an unzipped bag with nothing in it. (1027). He testified that he picked it up and mailed the bag back to ABC. (1027,1037). He could not return the receipt bag to the store because they were closed. (1038) He changed the tire, went to post office and mailed the receipt to Orlando.

The State presented several rebuttal witnesses. Mark Backara, an investigator with the State Attorney's Office, testified as to the distance between 3218 Boulevard and 3059 Edgewood Avenue which is five miles and took six minutes to drive. (XII 1058, 1060). Sherry Cross was recalled. The State presented the testimony of Judy Roundtree to rebut defendant's testimony that he was at Days Inn on April 7 when he touched the receipt bag in the parking lot of the Roosevelt ABC Liquors. (XII 1095). She was the guest services manager of the Days Inn off Roosevelt Boulevard. (1096). She testified that no one by the name of Gwendoyln Brown registered at the Days Inn between April 6 and April 10, 2002. (XII 1097-1098). She testified that Room 112 was registered to Betty White on April 7, 2000 (1098). Defense counsel renewed his motion for judgment of acquittal, which the trial court denied. (XII 1104).

The trial court conducted a charge conference. (XII 1072-1093, 1105-1113). After closing arguments, the trial court instructed

the jury. (XII 1168-1197). The jury deliberated for 1 hour and 50 minutes. (XII 1198; XIII 1213). The jury found McCoy guilty by special verdict of both first degree premeditated murder and felony murder during the commission of a robbery. (XIII 1214;R. II 387). The jury also found McCoy guilty of robbery with a firearm that was discharged causing death. (T. XIII 1214; R. II 389).

The State provided notice of the five aggravators it intended to rely on in the penalty phase on June 1, 2001. (R. II 397). The listed aggravators were: under sentence of imprisonment; prior violent felony; murder was committed while the defendant was engaged in a robbery; pecuniary gain and cold, calculated and premeditated manner.

The penalty phase was held on June 28, 2001. (XVI 1289). The prosecutor introduced two prior judgments and sentences to establish the prior violent felony aggravator. (XVI 1299). Exhibit 1 was three counts of armed robbery, dated October 21, 1985. (XVI 1300). Exhibit 2 was a judgment and sentence for attempted armed robbery, dated May 26, 1989. (XVI 1300). The State presented the testimony of Richard Hughes, McCoy's probation officer, via videotape. (XVI 1301). In July 1999, he was assigned the supervision of McCoy. Hughes testified that McCoy was on conditional release. (1303). He testified that McCoy was to be on conditional release until March 1, 2004. (XVI 1304). He also testified that he had no problems with McCoy and that McCoy was very cooperative. (XVI 1304). The prosecutor then presented three victim impact witnesses: the victim's

sister, Linda Wiley, who testified that the victim was a good mother and hard working; the victim's boss, Theresa Johnson, who testified that she was an excellent example of a hard-working, dedicated, single mother; and her son, Breon Elliott, who testified that she was a good mother who had raised him alone. (XVI 1308-1315).

The defendant presented the testimony of six witnesses. The defendant's mother, Josie McCoy, who testified as to the defendant's abusive childhood. A sister, Dottie McCoy, testified. McCoy's youngest sister, Barbara McCoy, testified.[1] Richard Hughes, McCoy's probation officer, testified. Paul Gillians, who the defendant helped during a fire, testified. Diane Peterson and Trina Rivers also testified. Defense counsel introduced McCoy's school records.[2] The defendant did not testify at the penalty phase. (XV 1426).

The prosecutor argued, in closing of the penalty phase, that five aggravators were proven. (1439). The prosecutor noted that the defendant had been convicted of three armed robberies and one attempted armed robbery. (1439). The prosecutor argued that the prior violent felony aggravator is the "heaviest" of all aggravators. The jury recommended death by a vote of 7 to 5. (R. III 433).

The State submitted a written sentencing memorandum in support of a death sentence. (R. III 439-457). The prosecutor sought seven aggravators: (1) prior violent felonies for

[1] The defendant was 35 years old. (XVI 1316)

[2] According to the school records, McCoy's I.Q. was 76

multiple armed robberies in 1985 and a 1989 attempted armed robbery;[3] (2) under sentence of imprisonment; (3) cold, calculated and premeditated; (4) pecuniary gain; (5) murder was committed while engaged in kidnapping; (6) murder was committed while engaged in robbery; and (7) avoid arrest. The prosecutor acknowledged that the defendant had established the mitigator that he came from a broken home "spotted with poverty" but argued that it should be given little weight because the defendant's family was loving. (R. 455).

Defense counsel submitted a written sentencing memorandum in support of a life sentence. (R III 458-467; R. III supplemental 475-480). Defense counsel acknowledged that the prior violent felony aggravator had been proven beyond a reasonable doubt but argued that it should be given little weight because of the defendant's age and because no one was hurt in the prior robberies. Defense counsel acknowledged that the under sentence of imprisonment aggravator had been proven beyond a reasonable doubt. (R III 460). Defense counsel argued that neither the felony murder aggravator nor the pecuniary gain aggravator had been proven. Defense counsel noted that these two aggravtors would be merged and the defendant would be sentenced separately for the armed robbery count. Defense counsel also argued that the cold, calculated and premeditated aggravator had been proven beyond a reasonable doubt. He asserted that the killing may

[3] This case involved three counts of armed robbery. McCoy and a co-perpetrator first robbed a convenience store at gunpoint and, later in same day, the defendant robbed a Pay Less store on Edgewood Avenue where he and a co-perpetrator ordered the two victims into a backroom at gun point.

have occurred as a result of the victim resisting or the defendant panicking, citing *Buckner v. State*, 714 So.2d 384 (Fla. 1998) and *Mahn v. State,* 714 So.2d 391 (Fla. 1998). Defense counsel noted that, in the prior robbery, McCoy moved the victims to a backroom but did not kill them. (R. III 461). Defense counsel proposed twenty-five mitigators. (R. III 462). He asserted that the death sentence was disproportionate, relying on *Larkins v. State*, 739 So.2d 90 (Fla. 1999) but, as defense counsel acknowledged, this case involved an additional aggravator not present in *Larkins.* (R. III 465). He also asserted that because of the close vote on the recommendation, the recommendation should not be followed. (R. III 466). The supplemental defense memorandum responded to the kidnapping aggravator (R. III 475).

The trial court held a *Spencer*[4] hearing on July 23, 2001 and July 31, 2001. The trial court found four statutory aggravators: (1) prior violent felonies which were three armed robberies and an attempted armed robbery; (2) under sentence of imprisonment because McCoy was on conditional release; (3) cold, calculated and premeditated and avoid arrest which the trial court merged; (4) committed while engaged in the commission of armed robbery and pecuniary gain which the trial court merged. (R. III 489-493). The trial court found no statutory mitigators. The trial court found nineteen non-statutory mitigators each of which he gave some weight. The nineteen mitigators were: (1) the defendant suffered an abusive

[4] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

childhood; (2) the defendant suffered an emotionally deprived childhood; (3) the defendant suffered an economically deprived childhood; (4) the defendant's mother had relationships with different abusive and non-abusive males; (5) the defendant suffered from unstable living conditions in his childhood; (6) the defendant's parents' divorce devastated him at age 10; (7) the defendant received poor and inadequate medical care, particularly when he suffered from a high fever; (8) the defendant is a caring son to his mother, providing her food, renting movies for her, and spending time with her; (9) the defendant had a good relationship with his father; (10) the defendant was a caring brother to his sisters, Barbara McCoy and Dorothy McCoy Robertson; (11) the defendant was a caring parent, before his incarceration, to his two sons, Andre (age 17) and Kenny (age 15); (12) as a child, the Defendant did poorly in school; (13) as a child, the defendant did not receive the psychological counseling recommended by school officials; (14) there is no evidence that the defendant has ever been violent or abusive in his personal relationships with family members or friends; (15) the defendant is a member of the Muslim faith; (16) the defendant successfully held down a job as a welder; (17) the defendant performed laudable humanitarian deeds for Paul Gillians, Diane Peterson, and Trina Rivers; (18) the defendant demonstrated good behavior during the trial after the verdict was rendered; (19) for the 11 months that he was on conditional release prior to the commission of this robbery and murder, the defendant apparently did well and complied with the

requirements of conditional release and (20) the defendant will die in prison regardless of the sentence imposed by this Court. (R. III 493-494). The trial court found that the aggravators outweighed the mitigators.

SUMMARY OF ARGUMENT

ISSUE I -

McCoy asserts that the trial court abused its discretion by admitting a tape that was partially inaudible. The State respectfully disagrees. Tape recordings, although partially inaudible, are admissible if the audible parts are relevant and authenticated. A tape recording containing an admission to the crime by the defendant is highly relevant. The tape was authenticated by a participant in the conversation. Thus, the trial court properly admitted the tape.

ISSUE II -

McCoy asserts that the trial court erred in allowing the jury to use a transcript prepared by the prosecutor as an aid because the transcript was inaccurate. The State respectfully disagrees. First, this issue is not preserved. Defense counsel did not prepare his own version of the disputed transcript. If a defendant disputes the accuracy of the prosecution's version, he must prepare his own transcript to preserve the issue for appeal. Moreover, the trial court properly instructed the jury that the evidence was the actual tape, not the transcripts. The trial court informed the jury that the transcript were merely a demonstrative aid. Thus, the trial court properly allowed the jury to use the transcripts as an aid.

ISSUE III -

McCoy contends that the trial court erred by denying the motion for judgment of acquittal. McCoy asserts that the State did not rebut his defense that the fingerprints were placed on

the ABC receipt bag at another time and place than the time of the crime. The State respectfully disagrees. This is a direct evidence case. There is both a partial confession and a "silent" eyewitness. The State is not required to rebut a reasonable hypothesis of innocence in a direct evidence case. Furthermore, the State did rebut McCoy's hypothesis that his fingerprints got on the receipt bag when he picked the bag up in the parking lot of another ABC store by presenting the testimony of ABC employees describing the handling of these bags. The receipt bags were not left in parking lots. Moreover, fingerprints, alone, when they are located on an item that is inaccessible to the public, are sufficient evidence of guilt to sustain a conviction. However, in this case there is additional evidence including a partial confession. The evidence is sufficient to sustain a conviction and therefore, the trial court properly denied the judgment of acquittal.

ISSUE IV -

McCoy asserts that the trial court erred in failing to *sua sponte* declare that a witness who would collect a reward for her testimony is incompetent to testify. McCoy also claims presenting the testimony of a witness who will receive a reward violates the federal bribery statute and the rules of professional conduct. The State respectfully disagrees. All witnesses are presumed competent according to Florida's Evidence Code. Florida statutes permit witnesses who will collect rewards to testify. The trial court properly considered the issue of a reward a matter of cross-examination rather than a

per se bar to the witness' testimony. Moreover, the federal bribery statute does not apply. Every federal circuit has held that a prosecutor promising leniency in exchange for truthful testimony is not a violation of the bribery statute. Thus, the trial court properly allowed the testimony.

ISSUE V -

McCoy asserts that the trial court improperly limited cross-examination of a State's witness regarding her phone charges and an uncharged robbery. The State respectfully disagrees. As the trial court properly found, the phone charges do not establish any bias against the defendant. The uncharged robbery is not proper impeachment. The error, if any, was harmless. The jury already knew that this witness had a prior conviction. Thus, the trial court properly limited the cross-examination of the witness.

ISSUE VI -

McCoy asserts that the trial court improperly found the murder to be cold, calculated and premeditated. McCoy further claims that the cold, calculated and premeditated jury instruction was unconstitutionally vague. The State respectfully disagrees. The trial court properly found the murder to be cold, calculated and premeditated. The videotape shows that the victim did not resist. She opened the combination safe for the defendant. She then opened the time delay safe and the cash registers. Moreover, the number, order and location of the shots establish heightened premeditation. McCoy shot a paralyzed victim. The second shot paralyzed the victim. McCoy then fired a third shot

in her face while she was on the floor. This was not a robbery gone bad; rather, it was a murder that went exactly as planned. This Court has upheld the cold, calculated and premeditated jury instruction against a vagueness challenge. Thus, the trial court properly found the murder to be cold, calculated and premeditated and properly instructed the jury.

ISSUE VII -

McCoy asserts that Florida's death penalty statute is unconstitutional on various grounds. The State respectfully disagrees. This Court has repeatedly rejected these various challenges. McCoy offers no compelling reasoning for receding from any of these cases. Hence, Florida's death penalty statute is constitutional.

ISSUE VIII -

McCoy's death sentence is proportionate. This Court has found death appropriate where there were less than the four aggravators present here. No statutory mitigators were found in this case and the non-statutory mitigation was not compelling. Moreover, this Court has also found the death penalty to be the appropriate punishment where facts of the murder were similar to this murder. The defendant engaged in an armed robbery which included a cold, calculated, and premeditated plan to kill and had a prior criminal history of multiple robberies. Indeed, he was currently on conditional release for a prior robbery. Thus, the death penalty is proportionate.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION BY ADMITTING THE AUDIOTAPE? (Restated)

McCoy asserts that the trial court abused its discretion by admitting a tape that was partially inaudible. The State respectfully disagrees. Tape recordings, although partially inaudible, are admissible if the audible parts are relevant and authenticated. A tape recording containing an admission to the crime by the defendant is highly relevant. The tape was authenticated by a participant in the conversation. Thus, the trial court properly admitted the tape.

The trial court's ruling

Defense counsel filed a pretrial motion in limine to exclude the audiotape due to their partial inaudibility. (R. I 47-48). The trial court held a hearing on the motion (R. V 866). Defense counsel argued that large portions of the tape were inaudible and the transcript was inaccurate. The prosecutor explained that the tape was of a wire worn by a prosecution witness, Zsa Zsa Marcel. (V. 869). The prosecutor explained that the first part of the tape was hard to hear because the car engine was running and the car radio was playing. (870). Defense counsel noted the audibility of the tape depended on the quality of the equipment, the trial court had good equipment but, if played on poor equipment, much more of the tape was inaudible. (V 872-873). The trial court listened to the tape. (V. 875). The defendant said that he did not think they had anything on him or they would have arrested him. (881). McCoy

discusses the statute of limitation in response to her concern about a life of crime. McCoy denied shooting the woman. (885). Defense counsel argued that too much of the tape was inaudible for it to be admissible and that the tape was inaudible both before the confession to being inside the ABC Liquors store and after which deprived the statement of context. (V. 893,897). The trial court ruled that the tape was admissible with certain conditions regarding the transcript. (898). The trial court concluded that the tape would be of benefit to the trier of fact. (898). The trial court noted that, of course, defense counsel could argue that the transcript was inaccurate to the jury and agreed to instruct the jury that it is the tape itself that is evidence, not the transcript. (899). The prosecutor proposed a jury instruction regarding the use of the transcript. (899). The instruction explained that the transcript was solely an aid and that it was the tape that was the actual evidence and that if there was any conflict between the two, the jury should rely on the tape. (R. II 289). The trial court instructed the jury that the transcript was an aid, not evidence during the trial. (T. X 757). At trial, prior to the prosecutor playing the audiotapes for the jury, defense counsel renewed his objection. (X 741). Zsa Zsa Marcel testified that the audiotape was a fair and accurate depiction of her conversation with the defendant.(X 755). She testified that she helped prepare the transcript. (X 756)

Preservation

This issue is preserved. Defense counsel filed a pretrial motion and renewed his objection prior to the tape being played for the jury. *Pomeranz v. State*, 703 So.2d 465, 469-470 (Fla. 1997)(finding issue of admissibility not preserved even though the defendant had filed a motion in limine contesting the admissibility of the evidence because defendant failed to renew his objection to the admission of the evidence during trial, citing *Correll v. State*, 523 So.2d 562, 566 (Fla.1988)(stating even when a prior motion in limine has been denied, the failure to object at the time collateral evidence is introduced waives the issue for appellate review).

The standard of review[5]

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[5] A standard of review is deference that an appellate court pays to the trial court's ruling. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 468 (1988). There are three main standards of review: *de novo*, abuse of discretion and competent substantial evidence test. *State v. Glatzmayer*, 789 So.2d 297, 301 n.7 (Fla. 2001)(explaining the three main standard of review, *citing* Philip J. Padovano, Florida Appellate Practice § 9.1- 9.6 (2d ed. 1997)).

Legal questions are reviewed *de novo*. Under the *de novo* standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own determination of the legal issue. Under the *de novo* standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. The reason for *de novo* review of legal questions is obvious enough: appellate courts are in a better position than trial courts to resolve legal questions because appellate courts are not encumbered by the "vital, but time-consuming, process of hearing evidence". Moreover, appellate courts see many legal issues repeatedly giving them a greater familiarity with these issues. Additionally, appellate courts have the advantage of sitting in panels where we can deliberate about legal issues which allows the appellate judges to discuss issues with each other which the trial court must decide alone. Indeed, an appellate court's "principal mission" is resolving questions of law and to refine, clarify and develop legal doctrines. *Elder v. Holloway*, 984 F.2d 991 (9th Cir. 1993)(Kozinski, J., dissenting from the denial of a suggestion for rehearing en banc), adopted by *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994).

Questions of fact in Florida are reviewed by the competent, substantial evidence test. Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. In Florida, appellate courts do not reweigh the factual findings of the lower tribunal, if there is any evidence to support those findings, the findings will be affirmed. The equivalent federal fact standard of review is known as the clearly erroneous standard. When it comes to facts, trial courts have an institutional advantage. Trial courts can observe witnesses, hear their testimony, and see and touch the physical evidence. An appellate courts review of questions of fact is therefore very limited. *Elder v. Holloway*, 984 F.2d 991 (9th Cir. 1993)(Kozinski, J., dissenting from the

The standard of review for admissibility of evidence is abuse of discretion. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

Merits

Tape recordings, although partially inaudible, are admissible if the audible parts are relevant and authenticated. *Martinez v. State*,761 So.2d 1074,1083 (Fla. 2000), citing *Odom v. State*, 403 So.2d 936, 940 (Fla. 1981). Such recordings are admissible unless the inaudible and intelligible portions are so

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denial of a suggestion for rehearing en banc), adopted by *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994).

Other issues are reviewed for an abuse of discretion. Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling, reversing only when the trial court ruling's was "arbitrary, fanciful or unreasonable." *Canakaris v. Canakais*, 382 So.2d 1197, 1203 (Fla. 1980). Courts often state that the standard of review is abuse of discretion because the issue is a "mixed question of law and fact" However, there is no such concept as a "mixed question of law and fact". Or more accurately, every issue in every case is a mixed question of law and facts. Facts outside a legal framework are irrelevant. The abuse of discretion standard of review is properly applied to all matters that an appellate court decides should be left to the discretion of the trial court. *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 2545, 101 L.Ed.2d 490 (1988).

substantial as to deprive the audible portions of relevance. *Martinez*, 761 So.2d at 1083.

Obviously, a tape of the defendant confessing to the robbery is relevant. Apart from a videotape of the actual crime, it is difficult to conceive of more relevant evidence in a criminal trial than the defendant discussing the crime on tape. Contrary to McCoy's assertion that the tape was not authenticated as being accurate, Zsa Zsa Marcel testified that the audiotape was a fair and accurate depiction of her conversation with the defendant. (X 755).

In *United States v. Pope*, 132 F.3d 684, 688 (11th Cir. 1998), the Eleventh Circuit held that audiotapes which contained an admission by the defendant that he had committed the crimes with which he was charged was admissible. Pope contended that the tapes were inadmissible because the inaudible sections of the tapes rendered them unreliable. The Court explained that it is only if the inaudible or unintelligible portions are so substantial as to render the whole recording untrustworthy that the tape should be excluded. After listening to the tapes itself, the Eleventh Circuit determined that the trial court did not abuse its discretion in admitting the tapes.

McCoy's reliance on *Carter v. State*, 254 So.2d 230 (Fla. 1st DCA 1971) and *Springer v. State*, 429 So.2d 808 (Fla. 4th DCA 1983), is misplaced. Both cases held that the admission of almost totally inaudible tape was reversible error. In *Carter*, something was wrong with the recording device and a great deal of background noise obliterating much of the conversation. The

State made several copies of the tape attempting to filter out the background noise; however, only the original recording was admitted into evidence. Here, by contrast, the inaudible portions are explained by the conditions under which the tape was made. Defense counsel admitted that audibility of the tape depended on the quality of the equipment, not the tape itself. *Springer* involved almost total inaudibility rather than partial inaudibility.

Harmless Error

The error, if any, was harmless. Marcel testified at trial regarding to content of the conversation. *Holland v. State*, 773 So.2d 1065, 1072-3 (Fla. 2000)(holding that the trial court erred in admitting the videotape because inaudible portions of the tape which encompassed most, if not all, of defendant's statements, were so substantial as to deprive the remainder of relevance and explaining that audible portion were the questions by the interrogating detective improperly allowed the jury to speculate regarding defendant' answers, but finding error harmless because the interrogating detective testified regarding the interrogation). Moreover, McCoy testified at trial and admitted that he made the statement about being at the ABC Liquors store and admitted that he told Marcel that he robbed the store. His explanation was that he was trying to impress her. Thus, the error, if any, was harmless.

ISSUE II

DID TRIAL COURT ABUSE ITS DISCRETION IN ALLOWING THE JURY TO USE THE TRANSCRIPTS PREPARED BY THE PROSECUTOR AS AN AID? (Restated)

McCoy asserts that the trial court erred in allowing the jury to use a transcript prepared by the prosecutor as an aid because the transcript was inaccurate. The State respectfully disagrees. First, this issue is not preserved. Defense counsel did not prepare his own version of the disputed transcript. If a defendant disputes the accuracy of the prosecution's version, he must prepare his own transcript to preserve the issue for appeal. Moreover, the trial court properly instructed the jury that the evidence was the actual tape, not the transcripts. The trial court informed the jury that the transcript were merely a demonstrative aid. Thus, the trial court properly allowed the jury to use the transcripts as anaid.

The trial court's ruling

Defense counsel filed a pretrial motion in limine to exclude the audiotape due to their partial inaudibility. (R. I 47-48). The trial court held a hearing on the motion (R. V 866). Defense counsel argued that large portions of the tape were inaudible and the transcript was inaccurate. The prosecutor explained that the tape was of a wire worn by a prosecution witness, Zsa Zsa Marcel. (V. 869). The prosecutor explained that the first part of the tape was hard to hear because the car engine was running and the car radio was playing. (870). Defense counsel noted the audibility of the tape depended on the quality of the equipment, the trial court had good equipment

but, if played on poor equipment, much more of the tape was inaudible. (V 872-873). The trial court listened to the tape. (V. 875). The defendant said that he did not think they had anything on him or they would have arrested him. (881). McCoy discusses the statute of limitation in response to her concern about a life of crime. McCoy denied shooting the woman. (885). Defense counsel argued that too much of the tape was inaudible for it to be admissible and that the tape was inaudible both before the confession to being inside the ABC Liquors store and after which deprived the statement of context. (V. 893,897). The trial court ruled that the tape was admissible with certain conditions regarding the transcript. (898). The trial court concluded that the tape would be of benefit to the trier of fact. (898). The trial court noted that, of course, defense counsel could argue that the transcript was inaccurate to the jury and agreed to instruct the jury that it is the tape itself that is evidence, not the transcript. (899). The prosecutor proposed a jury instruction regarding the use of the transcript. (899). The instruction explained that the transcript was solely an aid and that it was the tape that was the actual evidence and that if there was any conflict between the two, the jury should rely on the tape. (R. II 289). The trial court instructed the jury that the transcript was an aid, not evidence during the trial. (T. X 757). At trial, prior to the prosecutor playing the audiotapes for the jury, defense counsel renewed his objection. (X 741). Zsa Zsa Marcel testified that the audiotape was a fair and accurate depiction of her conversation with the

defendant.(X 755). She testified that she helped prepare the transcript. (X 756).

Preservation

This issue is not preserved. Defense counsel did not prepare his own version of the disputed transcript. If a defendant disputes the accuracy of the prosecution's version, he must prepare his own transcript to preserve the issue for appeal. Cf. *United States v. Rosenthal*, 793 F.2d 1214, 1237-1238 (11th Cir. 1986)(explaining that if an official transcript which satisfies both parties cannot be produced, then each party should produce its own version of a transcript or its version of the disputed portions because if the government's translation was inaccurate, it was petitioner's burden to challenge its accuracy by presenting another translation, so that the jury could choose which version to believe citing *United States v. Llinas*, 603 F.2d 506, 509 (5th Cir. 1979) and finding no merit to claim that government's transcript was inaccurate because the defendant did not offer a transcript containing a different version of the conversation); *Garrett v. State*, 639 S.W.2d 18, 20 (Tx. App. 1982)(holding that transcripts are admissible relying on *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976) and finding no error where portions of the tape recording were inaudible because defendant had opportunity to submit his own version but chose not to do so). McCoy needed to prepare his own version of the disputed tape to preserve this issue for appeal.

Standard of Review

The standard of review is abuse of discretion. *United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988)(use of demonstrative devices, such as charts, to aid the jury is well within the court's discretion); *Hunt v. State*, 746 So.2d 559, 561 (Fla. 1st DCA 1999)(using abuse of discretion standard in permitting use of the transcript as an aid and holding that where the trial court instructed the jury that the transcripts were merely an aid, not the actual evidence, it was not error).

Merits

A transcript of a recorded conversation is not the evidence; rather, it is merely an aid to the jury. *Martinez v. State*, 761 So.2d 1074 (Fla. 2000). In *Martinez v. State*, 761 So.2d 1074 (Fla. 2000), this Court explained that when there is no stipulation as to the accuracy of the transcripts, trial courts should give a cautionary instruction to the jury regarding the limited use to be made of the transcript. This Court suggested the following instruction:

> This transcript is not admitted and won't be admitted into evidence. The evidence is what's on the tape recording. If there's a conflict between what the transcript says and what you hear the tape says, the evidence is the tape, not the transcript and if you're--if you hear a conflict, what's on the tape is what the evidence is.

Martinez, 761 So.2d at 1086 *quoting Macht*, 642 So.2d at 1138. Here, the trial court properly instructed the jury that the transcript was an aid, not evidence during the trial. (T. X 757)[6].

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[6] The committee proposed a new instruction governing the use of transcripts as this Court suggested in footnote 7 of *Martinez*. *In re: Standard Jury Instructions In Criminal Cases--Submission 2001-1*, 2002 WL 926073 (Fla. May 9, 2002).

McCoy argues that the trial court did not attempt to get the parties to stipulate to the transcript but the fact that defense counsel filed a motion claiming that the transcript was inaccurate was proof that he would not agree to stipulate to the prosecutor's transcript. While the caselaw encourages trial courts to obtain stipulations to transcripts, that is simply not realistic in hotly disputed capital cases. Moreover, while not "ideal" or the most "preferred method" using transcripts that are not stipulated to by defense counsel, is not error. *Martinez*, 761 So.2d at 1085.

Moreover, while the court reporter is required to transcribe the contents of the tapes as they are played at trial, the court

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The new instruction on the use of transcripts, adopted by this Court, provides:

> You are about to hear recorded conversations. These recorded conversations are proper evidence and you may consider them just as any other evidence. You are also being furnished transcripts of the recorded conversations. The recordings are the evidence and the transcripts are provided to you only as a guide to help you follow as you listen to the recordings. The transcripts are not evidence of what was actually said or who said it. If you notice any difference between what you hear on the recordings and what you read in the transcripts, you must rely on what you hear not what you read.

While not exactly the same language, the trial court's instruction in this case is substantially the same as the new standard instruction. The new instruction was adopted on May 2002 and this trial was held in May, 2001. Thus, the new instruction was not available at the time of the trial. Moreover, as the *Martinez* Court noted, the failure to give a transcript instruction is not fundamental error. *Martinez*, 761 So.2d at 1088.

reporter's transcript of the tape does not establish the inaccuracy of the transcript or the tape's audibility. *Martinez*, 761 So.2d at 1087, citing *Lawrence v. State*, 632 So.2d 1099, 1100 (Fla. 1st DCA 1994). McCoy does not explain which words in the prosecutor's version are inaccurate or what he believes to be a correct translation of those words would be.

McCoy asserts that the transcript was not authenticated. IB at 24. Marcel testified that she helped prepare a transcript of the tape (X 756). This is sufficient authentication. If defense counsel wished to cross-examine her regarding the circumstances of the preparation of the transcript, he was free to do so. IB at 28. There is no requirement that the person who prepares the transcript also authenticate it. *Hunt v. State*, 746 So.2d 559, 561(Fla. 1st DCA 1999).

McCoy claims that the trial court stamped the transcript with a "badge of reliability" by informing the jury that the prosecutor's office prepared the transcript. However, contrary to this claim, if the trial court had not informed that the transcript was prepared by the prosecutor's office, the jury naturally would have thought that the transcript was an "official" transcript. The trial court merely told the jury the truth. Defense counsel had the opportunity to argue that one of the parties prepared the transcript. Moreover, McCoy does not explain what other options the trial court had.

Harmless Error

The error, if any, is harmless. McCoy testified at trial and admitted to making the most damaging statement on the tape. He

admitted that he stated that he was at the ABC Liquors store. His explanation was that he was trying to impress Marcel.

ISSUE III

DID THE TRIAL COURT ERR BY DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL? (Restated)

McCoy contends that the trial court erred by denying the motion for judgment of acquittal. McCoy asserts that the State did not rebut his defense that the fingerprints were placed on the ABC receipt bag at another time and place than the time of the crime. The State respectfully disagrees. This is a direct evidence case. There is both a partial confession and a "silent" eyewitness. The State is not required to rebut a reasonable hypothesis of innocence in a direct evidence case. Furthermore, the State did rebut McCoy's hypothesis that his fingerprints got on the receipt bag when he picked the bag up in the parking lot of another ABC store by presenting the testimony of ABC employees describing the handling of these bags. The receipt bags were not left in parking lots. Moreover, fingerprints, alone, when they are located on an item that is inaccessible to the public, are sufficient evidence of guilt to sustain a conviction. However, in this case there is additional evidence including a partial confession. The evidence is sufficient to sustain a conviction and therefore, the trial court properly denied the judgment of acquittal.

The trial court's ruling

After the State rested, defense counsel moved for a judgment of acquittal. (XI 908). Defense counsel argued that there was insufficient evidence of premeditation. Defense counsel asserted that the State failed to rebut the reasonable hypothesis that the killing resulted from a struggle. Defense

counsel also asserted that there was insufficient evidence of robbery. Defense counsel claimed that there was insufficient evidence of identity as well. The trial court denied the motion. (XI 909). At the close of all the evidence, defense counsel renewed his judgment of acquittal arguing that the testimony now explained the defendant's fingerprints. (XII 1104). Defense counsel argued that it was a circumstantial evidence case that was insufficient to send to the jury. The trial court denied the motion. (XII 1104).

Preservation

This issue is preserved. Defense counsel made a motion for judgment of acquittal on the same grounds raised on appeal. Although not required, he renewed his motion at the close of all the evidence. *Morris v. State*, 721 So.2d 725(Fla. 1998)(holding a defendant was not required to renew a motion for judgment of acquittal at close of all evidence in order to preserve denial of motion on appeal; rather, the issue is preserved if the defendant makes a motion at close of State's case).[7] Thus, the issue is preserved.

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[7] Actually, here, McCoy was required to renew his judgment of acquittal motion because his hypothesis of innocence was not presented until the defense case. While the State's failure to prove an essential element of the offense may be fundamental error, the State's failure to rebut a reasonable hypothesis is not fundamental error. In other words, hypothesis may not be presented for the first time on appeal. Hypothesis are usually fact based and appellate courts are not the appropriate forum to develop facts. If the hypothesis is presented for the first time on appeal, the State loses its one opportunity to rebut the hypothesis. Reasonable hypothesis of innocence must be presented in the trial court to give the prosecutor notice of the defense and an opportunity to rebut it.

The standard of review

The standard of review of a motion for a judgment of acquittal is *de novo*. *Pagan v. State*, 27 Fla. L. Weekly S299, 2002 WL 500315, *5 (Fla. April 4, 2002)(stating that the *de novo* standard of review applies to appellate review for a motion for judgment of acquittal); *Jones v. State*, 790 So.2d 1194 (Fla. 1st DCA 2001)(en banc)(holding that the standard of review of a motion for a judgment of acquittal is *de novo* and receding from prior cases which had held that the standard was abuse of discretion). However, an appellate court does not review the jury's verdict under this standard; it merely reviews the judge's decision to send the case to the jury.[8]

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[8] Both the *Pagan* Court and the First District in *Jones* seems to suggest that appellate courts review the jury's verdict under the competent, substantial standard of review as well as reviewing the trial court's ruling on the motion for judgment of acquittal under the *de novo* standard of review. The *Pagan* Court stated: "[g]enerally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence." The *Jones* Court states: "a jury verdict, like all other findings of fact is subject to review on appeal by the competent, substantial evidence test." *Jones*, 790 So.2d 1196, n.3. However, Florida appellate courts do not review jury's verdict; they review only the trial court's decision on the judgment of acquittal. In *Tibbs I*, the Florida Supreme Court reversed based on the weight of the evidence. *Tibbs v. State*, 337 So.2d 788 (1976)(*Tibbs I*). However, the *Tibbs II* Court later made it clear that Florida appellate courts should not review the jury's verdict. *Tibbs v. State*, 397 So.2d 1120 (1981))(*Tibbs II*). The *Tibbs* II Court explained that appellate court's only function is to determine sufficiency as a matter of law. *Tibbs II*, 397 So.2d at 1123 n.10. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal. *Tibbs*, 397 So.2d at 1123. Only the trial courts in Florida have the power to sit as an additional juror and grant a new trial based on the weight of evidence. Fla. R.Crim. P. 3.600(a)(2). The difference is not solely a matter

Merits

The test is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Pagan v. State*, 2002 WL 500315, *5 (Fla. April 4, 2002)(stating if a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction); *Bradley v. State*, 787 So.2d 732, 738 (Fla. 2001)(same). An appellate court must consider the evidence and all reasonable inferences from the evidence in a light most favorable to the State. *Jones v. State*, 790 So.2d 1194, 1197 (Fla. 1st DCA 2001)(en banc); *Pagan v. State*, 2002 WL 500315, *5 (Fla. April 4, 2002)(stating appellate court views the evidence in the light most favorable to the State); *Bradley v. State*, 787 So.2d 732, 738 (Fla. 2001)(same). Furthermore, even erroneous admitted

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of words; it is of constitutional significance. *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982)(explaining the difference between a verdict that is against the weight of the evidence and one that is not supported by sufficient evidence and holding that a verdict that is against the weight of the evidence may be retried without violating double jeopardy; whereas, a verdict that is not legally sufficient evidence operates as an acquittal and double jeopardy precludes a retrial). There is no standard of review for the jury's verdict because Florida appellate courts do not review the jury's verdict. The federal constitutional test is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Expressing the legal test in this manner, *i.e.*, any rational juror, rather than using the term "competent, substantial" would avoid this confusion. Moreover, it would directly align Florida's test for sufficiency with the constitutionally mandated test.

evidence is considered. *Lewis v. State*, 754 So.2d 897, 902 (Fla. 1st DCA 2000)(explaining that the appellate court considers all the evidence whether or not it was erroneously admitted citing *Lockhart v. Nelson*, 488 U.S. 33, 40-41, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988)); *Barton v. State*, 704 So.2d 569, 573 (Fla. 1st DCA 1997)(expressly relying on evidence found to be improperly admitted in rejecting an insufficiency of the evidence claim). The Court must consider the evidence as a whole, not as pieces in isolation. *United States v. Rahman*, 189 F.3d 88, 122-123 (2d Cir. 1999). The appellate court cannot reweigh the "pros and cons" of conflicting evidence. *Dusseau v. Metropolitan Dade County*, 794 So.2d 1270, 1276 (Fla. 2001). Even contradictory testimony from the State's own witnesses does not warrant a judgment of acquittal because the witnesses' credibility are questions solely for the jury. *Donaldson v. State*, 722 So.2d 177, 182 (Fla. 1998)(rejecting a claim that the evidence was insufficient because the State's primary witnesses offered contradictory evidence where one testified that the defendant was armed with a firearm and the other state witness testified that the defendant was not armed). An appellate court does not weigh the evidence or assess the credibility of witnesses.

Looney v. State, 803 So.2d 656, 673 & n.20 (Fla. 2001)(stating that an appellate court should not retry a case or reweigh conflicting evidence and that "[i]t is not within the province of this Court to pass on the credibility of a witness presented at trial); *Donaldson v. State*,722 So.2d 177, 182 (Fla. 1998).

FINGERPRINTS

Fingerprints alone, on an item inaccessible to the public, are sufficient to sustain a conviction. In *Sorey v. State*, 419 So.2d 810 (Fla. 3d DCA 1982), the Third District held that the evidence was sufficient to affirm a conviction for armed robbery of a Burger King. Sorey's fingerprints were found on a Burger King gift certificate envelope, generally kept in the store's safe, which was in the non-public part of the restaurant. The envelope was found inside a bag fifty feet from the Burger King recovered by the police after a chase. The manager testified that, to the best of his knowledge, the envelopes were inaccessible to the public. Sorey contended that the circumstantial fingerprint evidence was insufficient to sustain the conviction. Sorey's hypothesis was that a manager of Burger King removed the envelope from the safe, brought it out to the public area with him during a break and Sorey touched the envelope then. The *Sorey* Court explained that this hypothesis of innocence, *i.e.*, that prints were made at a time other than the time of the crime, is reasonable as a matter of law where the fingerprints are found in a place or on an item which is accessible to the general public. However, when the State proves that the fingerprint was found in a place or on an item inaccessible to the general public, such proof, standing alone, is legally sufficient.

Here, as in *Sorey*, the fingerprints, standing alone, are sufficient evidence to sustain these convictions. The receipt bag, here, like the envelope in *Sorey*, was inaccessible to the

general public. Where, as here, the item on which the fingerprints are found was inaccessible to the public, the fingerprint evidence is sufficient. Here, as in *Sorey*, the testimony of the ABC employees established that the general practice was to keep the receipt bags out of the public area of the store. McCoy's three fingerprints found on the ABC receipt bag, standing alone, are sufficient evidence to sustain these convictions.

McCoy's reliance on *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982); *Shores v. State*, 756 So.2d 114, 116 (Fla. 4th DCA 2000); *Leonard v. State*, 731 So.2d 712 (Fla. 2d DCA), *rev. denied*, 735 So.2d 1286 (Fla. 1999); *Mutcherson v. State*, 696 So.2d 420 (Fla. 2d DCA 1997); *C.E. v. State*, 665 So.2d 1097, 1098 (Fla. 4th DCA 1996); and *Rhoden v. State*, 227 So.2d 349 (Fla. 1st DCA 1969) is misplaced. All of cases McCoy relies on are readily distinguishable as cases were the items were accessible to the public or recently had been. The knife, wrapper and grocery bag in *Jaramillo*, the box of ammunition in *Shores*, the candy wrapper in *Leonard*, the gumball machine in *Mutcherson*, the van in *C.E.* and the U-Haul trailer in *Rhoden* were all recently in a place accessible to the general public.[9]

[9] Actually, Judge Altenbernd found the fingerprint evidence sufficient to support the convictions in *Mutcherson* although the gum ball machines were in a public location because the defendant's fingerprints were found on three separate gum ball machines in three separate burglarized stores and in unusual locations on the machines. *Mutcherson v. State*, 696 So.2d 420 (Fla. 2d DCA 1997).

In *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982), this Court held that defendant's fingerprints found at murder scene were insufficient to support conviction where prosecution failed to establish that defendant's fingerprints could only have been placed on items at time murder was committed. The police discovered the bodies of the two victims, who had been shot, in the dining-living room area in their home. The male victim's hands had been tied behind his back with cord, and the female victim's hands had been handcuffed. The fingerprints on the handcuffs did not belong to Jaramillo. Jaramillo's latent fingerprints were found on three items: (1) a grocery bag in the dining room; (2) packaging for a knife; and (3) the knife on the dining room table. The print technician stated that he had no way of determining when the fingerprints were placed on these items. Jaramillo moved for judgment of acquittal arguing that the State's entire case was based on the fingerprints and it failed to carry its burden of proving that the prints were left at the murder scene at the time of the crimes and at no other time. Jaramillo's reasonable hypothesis of innocence was that he was friends with the victim's nephew who lived in the house and, four days prior to the murder, he was at the victim's home, helping the nephew stack boxes and he used the knife at that time. This Court concluded that the evidence was insufficient as a matter of law to sustain the conviction.

Here, unlike *Jaramillo*, McCoy could not have placed his fingerprints on the receipt bag in the office at any other time than at the time of the robbery. While Jaramillo's fingerprints

were in a non-public place, *i.e.*, the dining room of a private home, Jaramillo had been a guest in that home on earlier occasions. McCoy had no equivalent explanation and he had no reason to be in the office and could not have gained access at any other time than at the time of the robbery. McCoy was not a former employee of ABC Liquors, as the testimony established. Furthermore, the fingerprints, coupled with videotape and audiotape, is sufficient to sustain the convictions. See *Darling v. State*, 808 So.2d 145, 157 (Fla. 2002)(distinguishing *Jaramillo* where there was other compelling evidence of identity in addition to fingerprint evidence).

SUFFICIENCY OF THE EVIDENCE

There are two different tests for the sufficiency of the evidence depending on whether the evidence is direct or circumstantial. If the evidence is direct, the conviction may be sustained based on the direct evidence alone regardless of the defense. However, a special test for the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. *Jaramillo v. State*, 417 So.2d 257, 257 (Fla. 1982). Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.[10]

[10] Of course, in the age of DNA, the distinction between direct and circumstantial evidence is silly. The distinction developed at common law when direct evidence cases were the strong cases and circumstantial cases were the weak cases. This caused courts to treat the two types of evidence differently and develop the rule that circumstantial evidence must exclude any

DIRECT EVIDENCE

The State has an eyewitness to this crime - the videotape. The videotape of the crime is a silent witness to the crime.

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hypothesis of innocence. William Wills, An Essay on the Principles of Circumstantial Evidence 171 (Philadelphia, T. & J.W. Johnson, 1853). Due to scientific advances, these days, circumstantial evidence cases are the strongest cases. Both DNA and fingerprints are considered circumstantial evidence. *Bedoya v. State*, 779 So.2d 574, 577 (Fla. 5th DCA 2001)(noting that fingerprint and DNA evidence are generally considered a species of circumstantial evidence). Circumstantial evidence cases involving either DNA or fingerprints are now the strongest cases. John Henry Wigmore, 2 Evidence in Trials at Common Law s 414, at 483 (1979) (arguing that, according to scientific principles, fingerprints have the highest degree of certainty); *People v. Wesley*, 140 Misc.2d 306, 533 N.Y.S.2d 643, 644 (N.Y.Sup.Ct. 1988)(observing that DNA evidence has been called the "single greatest advance in the search for the truth . . . since the advent of cross-examination."); *Roberson v. State*, 16 S.W.3d 156, 169 (Tx. App. Ct. 2000)(holding testimony of even one DNA expert that there is a genetic match and the statistical probability that anyone else was the source of that semen are 1 in 500 million is legally sufficient to support a guilty verdict).

The United States Supreme Court abolished the common law distinction in *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954). Most states have abolished the distinction as well. Cf. *State v. Adcock*, 310 S.E.2d 587, 602-08 (N.C. 1983); *State v. Jenks*, 574 N.E.2d 492, 496-503 (Ohio 1991); *State v. Gosby*, 539 P.2d 680, 684-86 (Wash. 1975). Florida, has abandoned giving any jury instruction based on the distinction but inexplicably has retained the distinction in the sufficiency of the evidence analysis. *In re: Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594, 595 (Fla. 1981). The rule requiring the State to rebut the defendant's reasonable hypothesis should not apply to cases where there is DNA or fingerprint evidence. Quite simply, DNA beats an eyewitness. There is no logic in requiring the State to rebut a hypothesis of innocence in a case with DNA results of one in two trillion but not requiring the State to rebut any hypothesis where there is an eyewitness. This court should retain the special test for sufficiency only in circumstantial evidence cases that do not involve fingerprints or DNA.

Videotapes, like photographs, are silent witnesses.[11] Indeed, a videotape of the actual crime is considered by courts to be more credible than an eyewitness. *Donati v. Commonwealth*, 560 S.E.2d 455, 457 (Va. App. 2002)(noting that videotapes, like photographs, when properly authenticated, may be admitted as a so-called "silent witness" or as a witness which "speaks for itself" and concluding that corroborating evidence was not required in a case with a videotape where corroboration is normally required with human eyewitnesses). This case is a direct evidence case with an eyewitness. The videotape, which is not particularly clear, is akin to an eyewitness with poor eyesight.[12]

Additionally, there is a partial confession. McCoy admitted to the robbery of the ABC store on the audiotape of the conversation with his girlfriend. McCoy testified that the voice on the audiotape was his and admitted, in front of the jury, that he made the statement that he was at the ABC Liquors

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[11] Charles W. Ehrhardt, Florida Evidence, § 401.2, at 119 (2002 ed); *Dolan v. State*, 743 So.2d 544, 546 (Fla. 4th DCA 1999)(holding of store video surveillance tape of crime was admissible under the silent witness theory even though, as is "typical of security camera videotapes," the picture quality was poor because the perpetrator's general physical characteristics were discernable); *Wagner v. State*, 707 So.2d 827, 831 (Fla. 1st DCA 1998)(holding videotape of sell of cocaine was properly admitted under the "silent witness theory"); *Hannewacker v. City of Jacksonville Beach*, 419 So.2d 308, 311 (Fla. 1982)(observing that a properly admitted photograph can act as a silent witness).

[12] The videotape rebuts any alternative hypothesis that any co-perpetrator was the shooter because the videotape shows that there was no co-perpetrator.

store. McCoy confessed to the robbery. A confession is direct, not circumstantial, evidence of guilt. *Perry v. State*, 801 So.2d 78, 84, n.6 (Fla. 2001)(noting that a confession is direct, not circumstantial, evidence of guilt and explaining that where a defendant at first confesses to law enforcement officials but recants at trial, the case is still a direct evidence case). This is a direct evidence case due to the videotape of the crime and the partial confession on audiotape.

The State is not required to rebut a reasonable hypothesis of innocence in a direct evidence case, it is only in a circumstantial evidence case that the State is required to meet this additional burden. *Pagan v. State*, 2002 WL 500315, *5, 27 Fla. L. Weekly S299 (Fla. 2002)(because the case involves both direct and circumstantial evidence, it is unnecessary to apply the special test applicable to circumstantial evidence which requires the State to also exclude the defendant's reasonable hypothesis of innocence, the special test is only applicable if the case is wholly circumstantial). Because this is a direct evidence case, the State does not have to rebut McCoy’s hypothesis.

In *Orme v. State*, 677 So.2d 258 (Fla. 1996), the Florida Supreme Court held that the State was not required to rebut the reasonable hypothesis of innocence because the case was not wholly circumstantial. The badly beaten body of the victim was found in motel room number 15. Semen and blood found on the victim’s underwear were a DNA match of Orme’s. Orme’s fingerprints were in the motel room. Several witnesses placed

Orme at the motel that night. Orme wrote a note at the hospital with the motel number on it. Orme admitted to the police that he was in the motel room that night. Orme's reasonable hypothesis of innocence was that an unknown assailant killed the victim during his absence. This Court, after explaining the difference between direct and circumstantial evidence, decided that the case against Orme was not entirely circumstantial. This Court characterized Orme's hypothesis as "strained", noting that Orme admitted arguing with the victim and robbing her. This Court reasoned that the State's theory was the most plausible and affirmed the convictions. *Orme*, 677 So.2d at 261-262.

Here, as in *Orme*, evidence such as a videotape of part of the crime cannot be deemed entirely circumstantial. Moreover, as in *Orme*, McCoy's hypothesis is "strained". McCoy admitted being at the ABC store and robbing the victim in the audiotape but blamed the murder on a non-existent co-perpetrator. This case is not entirely circumstantial.[13]

REASONABLE HYPOTHESIS

[13] The *Orme* court seemed to have recognized there was no principled distinction between direct and circumstantial evidence in this day of DNA. There actually was no direct evidence in *Orme*. There was neither an eyewitness nor a confession. The eyewitness was not an eyewitness to the crime. The eyewitness could only testify as to Orme's presence in the area. This is not a true eyewitness. The eyewitness' testimony required an inference that Orme was the perpetrator. Here, by contrast, there is an eyewitness to the robbery, albeit a silent one. The videotape is a true eyewitness to part of the crime.

Furthermore, even in circumstantial evidence cases, the State is only required to rebut a reasonable hypothesis. *Henderson v. State*, 679 So.2d 805 (Fla. 3d DCA 1996)(explaining that the State is not required to exclude any unreasonable hypothesis). McCoy's hypothesis of innocence is not reasonable. McCoy's explanation of his fingerprint being on the bag, far from being a hypothesis of "innocence", is so incredible that the explanation is, itself, substantive evidence of guilt. A defendant's wholly implausible explanation may be considered as substantive evidence of guilt.[14] The State is not required to rebut McCoy's hypothesis because it is not reasonable. Unreasonable hypothesis of innocence rebut themselves.

McCoy contends that the ABC receipt bag contained his fingerprint because a couple of months prior to the crime on April 8, he found a ABC receipt bag and mailed it back to ABC. This is not reasonable. A four time convicted felon does not make a likely Good Samaritan. (1026). The parable of the Good Samaritan involved a wounded man, not an empty plastic bag. Luke 10:25-37. Even the Good Samaritan of biblical fame would be unlikely to take the time and trouble to return an object of

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[14] *United States v. McDowell*, 250 F.3d 1354, 1367 (11th Cir. 2001)(observing that a defendant's "wholly implausible" explanation may be considered as substantive evidence of the defendant's guilt); *United States v. Morales*, 868 F.2d 1562, 1574 (11th Cir. 1989)(concluding that the defendant's explanation of his involvement was so unbelievable that it was "positive evidence in favor of the government."); *United States v. Eley*, 723 F.2d 1522, 1525 (11th Cir. 1984)(noting that when a defendant voluntarily and intentionally offers an explanation, the "wholly incredible" explanation may form a sufficient basis to allow the jury to find that the defendant had the requisite guilty knowledge).

such marginal value. People do not mail empty plastic bags back to their owners. Furthermore, the hypothesis is unreasonable because it does not account for the location of the receipt bag. The testimony was that there are 168 ABC Liquors stores, each of which used seven receipt bags. So, there are 1,176 such receipt bags. McCoy's tale required the jury to believe that not only was he a Good Samaritan when it came to empty receipts bags, but that the exact same bag he returned just happened to be the exact same receipt bag that was located in the store with the dead victim. The odds are less than one in a thousand. Additionally, the time period makes the hypothesis unreasonable. If McCoy touched the receipt bag once, two months ago, the fingerprints of other ABC employees who had handled the receipt bag in the interim would overlay his. McCoy's fingerprint would not have been identifiable.

In ***Lewis v. State***, 777 So.2d 456 (Fla. 4th DCA 2001), the Fourth District held that the fingerprint evidence was sufficient. Lewis was convicted of burglary of a dwelling. Lewis' fingerprints were found on a Tupperware container inside the victim's home. The victims used the container to collect spare change and kept the container on the top of the dresser in the bedroom. The container was found empty on the floor. The victims did not know Lewis and he had no permission to be in their home. The fingerprint examiner testified that although fingerprints can last indefinitely on an object that is not cleaned, if an item is handled a number of times, then prints would be overlayed by other prints and could not be identified.

The fingerprint, identified as Lewis', did not have any overlays on them. The victims' testimony that they used the container frequently over the year meant that if Lewis had touched the container in the years before the victims' purchased it, their fingerprints would have smudged his. Moreover, the container clearly had been moved during the burglary. The burglar would have had to handle the container to remove the coins. The ***Lewis*** Court found that the State had presented evidence inconsistent with the hypothesis. Accordingly, the court found the fingerprint evidence alone sufficient.

Moreover, the State did rebut McCoy's hypothesis. The State rebutted this claim by presenting numerous ABC employees who testified as to the handling of these receipt bags. The receipt bags were not left in parking lots. The receipt bags were kept in the office where only the store managers were permitted to enter. Moreover, the State rebutted his testimony by presenting the guest manager of the Days Inn to testify room 112 was register to Betty White on April 7, 2000, not any one named Gwendoyln Brown. (XII 1097-1098). This testimony rebutted McCoy's hypothesis.

Harmless error

The denial of a motion for judgment of acquittal based in insufficiency of the evidence of identity is not subject to harmless error analysis.

ISSUE IV

DID THE TRIAL COURT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO PRESENT THE TESTIMONY OF A WITNESS WHO WOULD RECEIVE A REWARD UPON CONVICTION? (Restated)

McCoy asserts that the trial court erred in failing to *sua sponte* declare that a witness who would collect a reward for her testimony is incompetent to testify. McCoy also claims presenting the testimony of a witness who will receive a reward violates the federal bribery statute and the rules of professional conduct. The State respectfully disagrees. All witnesses are presumed competent according to Florida's Evidence Code. Florida statutes permit witnesses who will collect rewards to testify. The trial court properly considered the issue of a reward a matter of cross-examination rather than a *per se* bar to the witness' testimony. Moreover, the federal bribery statute does not apply. Every federal circuit has held that a prosecutor promising leniency in exchange for truthful testimony is not a violation of the bribery statute. Thus, the trial court properly allowed the testimony.

The trial court's ruling

At trial, defense counsel moved to prohibit Zsa Zsa Marcel's testimony based on the prosecutor's refusal to investigate. (X 741). The trial court again denied the motion. (X 741). Zsa Zsa Marcel testified. (X 742). Marcel testified that she learned that there was a reward for the arrest and conviction of the person who committed the ABC robbery and murder. (T. X 774). Defense counsel cross-examined Marcel about her failure to inform any one until several days after the defendant told her that he had robbed the ABC. (X 788-790). Defense counsel pointed out that she did not tell anyone until after the television broadcast announcing the reward. (X 791) Defense

counsel highlighted that the witness repeatedly called ABC and the Sheriff's Office about the reward. (X 793). Defense counsel inquired whether her being paid the reward was contingent on a conviction and the witness, after being instructed to answer by the judge, responded yes. (T. X 794-795). The reward was $10,000 which was more than the witness made in a year. (T. X 795). The witness was receiving food stamps. (T. X 795).[15] Defense counsel did not object to the competency of this witness and the trial court never ruled on her competency.

Preservation

The reward issue is not preserved. Defense counsel did not file a motion to prohibit the testimony of Marcel on this basis or object prior to her testimony. The two motions filed, a motion to disqualify the prosecutor and a motion to prohibit the testimony of Marcel, concerned the Lee's Chicken robbery, not any possible reward. (R. II 343-345; 347-350). Prior to Marcel's testimony, defense counsel renewed these motions but did not request that the trial court find that she was incompetent as a witness due to the reward. (X 741). Furthermore, neither of the motions mention the federal bribery

[15] The prosecutor admitted in opening statement that Zsa Zsa Marcel contacted the ABC on the very same night that ABC announced the reward of $10,000 (IX 474). Defense counsel informed the jury in his opening statement, that while Marcel said that defendant admitted the crime to her one day after murder, she waited until one week later, one or two hours after the reward was announced on television, to tell ABC what she knew. (IX 487-488). Defense counsel also pointed out to the jury that she has an interest in the outcome of the case and that she had never made $10,000 dollars in a year.

statute or the rules of professional conduct. This issue is not preserved.

The standard of review

The standard of review is abuse of discretion. *United States v. Allen J.*, 127 F.3d 1292, 1294 (10th Cir. 1997)(observing that district courts have broad discretion in determining the competency of a witness to testify and their decisions will not be reversed in the absence of an abuse of discretion); *United States v. Blankenship*, 923 F.2d 1110, 1116 (5th Cir. 1991) (explaining that the trial court has "complete" discretion to decide whether a witness is competent to testify). A trial court not *sua sponte* examining a witnesses to determine her competency is not fundamental error. *Cf. Rutherford v. Moore*, 774 So.2d 637, 646 (Fla. 2000). This error must be preserved and it was not.

Merits

The general rule of competency statute, § 90.601, Florida Statutes, provides:

> Every person is competent to be a witness, except as otherwise provided by statute.

All witnesses are presumed to be competent. CHARLES W. EHRHARDT, FLORIDA EVIDENCE, 408 (2002 ed.). The grounds for disqualification of a witness must be based upon a statutory provision. CHARLES W. EHRHARDT, FLORIDA EVIDENCE, 407 (2002 ed.). The only statutory provision covering this situation specifically allows a witness who will receive a reward to testify.

The Florida rewards for informants statute, § 896.107(4), provides:

> Payment of a reward does not affect the admissibility of testimony in any court proceeding.

Thus, a witness, who will receive a reward, is competent to testify in Florida.[16]

The United States Supreme Court has noted that a witness who is to receive a reward on conviction of an offender is a competent witness. *United States v. Murphy*, 41 U.S. 203, 209, 10 L.Ed. 937 (1842). In *Murphy*, Justice Story noted that a person who is to receive a reward upon the conviction of the offender is universally recognized as a competent witness, whether the reward be offered by the public or by private persons. He explained the public policy grounds for this rule were the public interest and the principle upon which such rewards are given. The public has an interest in the suppression of crime and the conviction of guilty criminals. It is with a view to stir up greater vigilance in apprehending, that rewards are given; and it would defeat the object of the legislature to narrow the means of conviction and to exclude such testimony. *See also Hoffa v. United States*, 385 U.S. 293, 311, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966)(holding that a government informant who has a motive to lie because he was paid and charges against

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[16] The federal rules of evidence have an analogous rule. The federal general rule of competency, Rule 601, provides:

> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

him were dropped did not render his testimony constitutionally inadmissible and observing that the veracity of a witness is to be tested by cross-examination and the credibility of his testimony is to be determined by the jury). Numerous State Supreme Courts have addressed this issue and held likewise.[17] Thus, a witness is competent to testify regardless of the fact that they will receive a reward.[18]

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[17] See *Union v. State*, 66 S.E. 24,26 (Ga. App. Ct. 1909)(concluding that the fact that a witness in a criminal case is to be paid a reward in the event of the conviction may affect his credibility, but does not render him incompetent); *Hollingsworth v. State*, 14 S.W. 41 (Ark. 1890)(holding that a witness receiving a substantial reward does not disqualify the witnesses' testimony but is proper subject of cross examination citing 1 Whart. Ev. §§ 408, 561, 566; 1 Greenl. Ev. § 450, and Whart. Crim. Ev. § 485); *State v. Rush*, 8 S.W. 221 (Mo. 1888)(holding the fact that a witness is to receive a reward in the event of conviction may affect his credibility, but does not disqualify him as a witness); *Commonwealth v. Ohio & P.R. Co.*, 1856 WL 6921, *7 (Pa. 1865)(observing that a witness being entitled to a reward on the conviction does not disqualify the witness citing Greenleaf, sec. 412); *Baxter v. People*, 1846 WL 3865, *7 (Ill. 1846)(holding witness who received rewards from the state was competent to testify); *Salisbury v. State*, 1826 WL 64, *2 (Conn. 1826)(noting that a witness receiving a reward, upon conviction, does not incapacitate the witness citing Rex v. Teasdale & al. 3 Esp. Rep. 68).

[18] Florida Courts have not directly addressed rewards but have addressed the related area of consignment arrangements and contingency fees. See *Taylor v. State*, 634 So.2d 1075 (Fla. 1994)(holding a contingent-fee agreement where there was supervision did not violate due process); *but see State v. Glosson*, 462 So.2d 1082 (Fla. 1985)(holding a contingent-fee agreement under which the informant would receive ten percent of all civil forfeitures in exchange for his testimony violated due process); *Soohoo v. State*, 737 So.2d 1108 (Fla. 4th DCA 1999)(holding consignment arrangement violate due process and constituted outrageous government conduct). However, such arrangements differ from rewards. Contingent fee arrangements often involve "making" new crimes. There can be no claim that

Federal bribery statute

McCoy, seemingly recognizing that witnesses who receive rewards are competent to testify under Florida law, argues that the prosecutor presenting the testimony of a witness who will receive a reward violates the federal bribery of witnesses statute.[19] First, of course, the prosecutor did not violate the statute. The prosecutor is not paying the reward; rather, ABC liquors is.

McCoy's reliance on *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), is seriously misplaced. The Tenth Circuit went en banc and receded from this decision. *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999)(en banc)(holding that

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the government manufactured this crime. And in this case, the government was not paying the reward, so any claim of outrageous government misconduct necessarily fails because there is no government action, only private action. Moreover, the legislature has enacted a statute permitting a witness who will receive a reward to testify.

[19] The federal bribery of public officials and witnesses statute, 18 U.S.C. § 201(c)(2), provides:

> Whoever--
>
> directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;
>
> shall be fined under this title or imprisoned for not more than two years, or both.

§ 201(c)(2) does not apply to an Assistant United States Attorney offering an accomplice leniency in exchange for truthful testimony). The Eleventh Circuit has found no merit to such claims.[20] Furthermore, the Eleventh Circuit has limited the statute to presenting false testimony. *United States v. Moody*, 977 F.2d 1420, 1425 (11th Cir.1992)(observing that the bribery statute "obviously proscribes a bribe for false testimony; persons of ordinary intelligence would come to no other conclusion"). Every other federal circuit has also addressed the issue and every one has rejected such claims.[21]

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[20] *United States v. Lowery*, 166 F.3d 1119, 1123 (11th Cir. 1999)(joining the "cavalcade" or "stampede" of courts that have considered and rejected *Singleton* claims and holding that agreements in which the government trades sentencing recommendations or other official action or consideration for cooperation, including testimony, do not violate 18 U.S.C. § 201(c)(2)); *United States v. Diaz*, 190 F.3d 1247, 1259 (11th Cir. 1999)(holding that there is no merit to defendant's *Singleton* claim).

[21] *United States v. Lara*, 181 F.3d 183, 198 (1st Cir. 1999)(holding the bribery statute does not apply at all to the federal sovereign qua prosecutor because statutes of general purport do not apply to the United States unless Congress makes the application clear and indisputable); *United States v. Stephenson*, 183 F.3d 110, 118 (2d Cir. 1999)(concluding that statute does not apply to the United States or to any Assistant United States Attorney acting within his or her official capacity); *United States v. Hunte*, 193 F.3d 173 (3d Cir. 1999)(holding that § 201(c)(2) does not prohibit the government from promising leniency to cooperating witnesses in exchange for truthful testimony relying upon *Nardone v. United States*, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314 (1937), in which the issue was whether government agents were covered by a statute that allowed "no person" to engage in wiretapping, in which the Supreme Court described a canon of statutory construction that provides that a statute does not apply to the government or affect governmental rights unless the text of the statute expressly includes the government and noting that the canon

applies in two situations: (1) if such a reading would deprive the sovereign of a recognized or established prerogative title or interest or (2) where a reading which would work an obvious absurdity and concluding that this situation falls within both categories described in *Nardone*); *United States v. Richardson*, 195 F.3d 192, 194-197 (4th Cir. 1999)(relying on *Nardone* and noting the conflict with a number of statutes authorizing and encouraging the United States, in its capacity as prosecutor, to offer leniency and immunity in return for testimony such as 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) and the immunity statute); *United States v. Haese*, 162 F.3d 359, 366-68 (5th Cir.1998)(characterizing the *Singleton* decision as "unsound, not to mention nonsensical"); *United States v. Ware*, 161 F.3d 414, 418-25 (6th Cir.1998)(limiting the reach of § 201(c)(2) by the canon of statutory interpretation that a statute does not include the government unless the text of the statute expressly includes the government citing *Nardone v. United States*, 302 U.S. 379, 383, 58 S.Ct. 275, 82 L.Ed. 314 (1937) and that this situation is covered by both of the classes in *Nardone*); *United States v. Condon*, 170 F.3d 687 (7th Cir.1999)(noting any such interpretation of the bribery statue would conflict with numerous other federal statutes);*United States v. Johnson*, 169 F.3d 1092, 1098 (8th Cir. 1999)(explaining that the bribery statute cannot be considered in isolation since courts and prosecutors are authorized to consider substantial assistance in the sentencing process under 18 U.S.C. § 3553(e) and under the Guidelines §§ 5K1.1 U.S.S.G.); *United States v. Mattarolo,* 191 F.3d 1082, 1089 (9th Cir. 1999)(ruling that the government's promise of leniency to a cooperating witness does not violate federal bribery statute); *United States v. Smith*, 196 F.3d 1034, 1038-39 (9th Cir.1999)(holding that § 201(c)(2) does not prohibit the government from conferring benefits upon cooperating witnesses in exchange for testimony and explaining that Congress would have legislated more expressly if it had intended for 18 U.S.C. § 201(c)(2) to prohibit the government from conferring immunity, leniency, and other traditionally permissible benefits upon cooperating witnesses); *United States v. Ramsey*, 165 F.3d 980, 986-7 (D.C. Cir. 1999)(rejecting a *Singleton* claim and noting that the statutory definition of "whoever" does not expressly include the United States and noting that the prosecutorial prerogative to recommend leniency in exchange for truthful testimony arises from English common law and that the practice has been repeatedly upheld by the United States Supreme Court citing The Whiskey Cases (*United States v. Ford*), 99 U.S. 594, 599-601, 604, 25 L.Ed. 399 (1878) and noting that both the United States Code and the Sentencing

Indeed, the Seventh Circuit had rejected such claims nearly thirty years ago. *United States v. Barrett*, 505 F.2d 1091, 1100-03 (7th Cir.1974)(holding that 18 U.S.C. § 201(h), the predecessor to § 201(c)(2), does not require the exclusion of evidence obtained by a promise of immunity). Many of the circuits also have specifically rejected this argument in a cases involving substantial cash payments to the witness by the

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Guidelines contemplate the prosecutor's use of a plea agreement in exchange for truthful testimony against a defendant and doubting that a *sub silentio* change of this magnitude to the well-established prosecutorial practice of granting leniency in exchange for testimony which would be virtually unprecedented was intended and that the legislative history of the statute gives no support to this argument).

government.[22] Hence, paying a reward to a witness does not violate the federal bribery statute.

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[22] *United States v. Levenite*, 277 F.3d 454,458- 463 (4th Cir. 2002)(rejecting both a due process and bribery statute claim where a witness was paid a lump sum cash bonus of up to $100,000.00 for his testimony by the FBI because the federal statute authorizes such payments, citing 21 U.S.C. § 886(a) (authorizing payments in connection with drug enforcement of "such sum or sums of money as [the Attorney General] may deem appropriate, without reference to any moieties or rewards to which such person may otherwise be entitled by law") and 18 U.S.C. § 3059B (authorizing payment of reward "to any individual who assists the Department of Justice in performing its functions") and because the government did not suborned perjury but recognizing that certain safeguards should be made including that the arrangement must be disclosed, the defense must be allowed to cross-examine the witness on the payments, the jury should be instructed on the matter and corroborating evidence should exist); *United States v. Tsai*, 14 Fed.Appx. 834 (9th Cir. 2001)(unpublished opinion)(holding payment of $19,000 and the restitution break of $253,000 to a witness did not violate due process or the federal bribery statute citing *United States v. Cuellar*, 96 F.3d 1179, 1183 (9th Cir. 1996)(holding payment of $580,000 to an informant did not violate the defendant's due process rights or constitute outrageous government conduct));*United States v. Febus*, 218 F.3d 784, 796 (7th Cir. 2000)(finding no violation of the federal bribery statute where the jury knew about the government's payments to the witnesses and observing that when the government pays informants for their testimony, such arrangements are not outrageous; rather, the jury may consider them as evidence relating to the informant's credibility citing *United States v. Miller*, 891 F.2d 1265, 1268 (7th Cir. 1989)); *United States v. Barnett*, 197 F.3d 138,144-145 (5th Cir. 1999)(finding no violation of the federal bribery statute where witness was paid $7500 and observing that compensated witnesses and witnesses promised a reduced sentence are indistinguishable in principle and should be dealt with in the same way which is the safeguards of full disclosure, cross-examination and special jury instructions); *United States v. Albanese*, 195 F.3d 389, 394-395 (8th Cir.1999)(holding that the government paying a witness in excess of $60,000 does not violate the federal bribery statute, reasoning that other federal statutes authorize the federal government to pay witnesses and noting that this fact was known to the jury and fully explored at trial).

Moreover, even if the federal bribery statute were interpreted in this “unsound, not to mention nonsensical” manner, it would not invalidate the defendant’s conviction. The “remedy” would be to prosecute ABC Liquors for violation of the federal bribery statute. *United States v. Ramsey*, 165 F.3d 980, 991 (D.C. Cir. 1999)(explaining that even if federal prosecutors were covered by the federal bribery statute and a violation occurred, the remedy would not be the exclusion of the witness’ testimony because Congress prescribed a fine or imprisonment for a violation of section 201(c)(2) and where Congress has provided exclusive remedies for its violation, a court would 'encroach upon the prerogatives' of Congress if it authorized a remedy not provided for by statute). McCoy needs to bring this alleged violation of the federal bribery statute to the attention of the United States Attorney’s Office, not this Court. This Court has no jurisdiction to enforce federal criminal statutes. 18 U.S.C. § 3231 (providing the federal courts have "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."). In sum, the prosecutor did not violate the federal bribery statute.

Rules of professional conduct

McCoy next asserts that a prosecutor presenting the testimony of a witness who will receive a reward violates the rules of professional conduct. The rule of professional conduct governing fairness to opposing party and counsel, Rule 4-3.4(b), provides:

A lawyer shall not:

> fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

The commentary to the rule notes that the common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying. Here, of course, the prosecutor did not "offer an inducement to a witness", ABC Liquors did. The prosecutor merely presented the testimony of a witness who was promised a reward by a third party. Moreover, the Eleventh Circuit has expressed serious doubt that a prosecutor presenting the testimony of a witness with whom the prosecutor has promised leniency violates this rule. *United States v. Lowery*, 166 F.3d 1119, 1124 (11th Cir. 1999)(expressing doubt but declining to decide the issue). Other Circuits have directly held that a prosecutor presenting the testimony of a witness that the prosecutor has made a deal with does not violate the rules of professional conduct.[23] Moreover, the rules of professional conduct are standards of behavior, not rules of exclusion. That is the function of the Evidence Code. If a lawyer violates the

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[23] *United States v. Hill*, 197 F.3d 436, 447 (10th Cir. 1999)(holding prosecutors' conduct in promising leniency to witness, in exchange for her testimony, did not violate Colorado's rules of professional conduct 3.4(b)and explaining that even if the prosecutors' conduct violated the rule, the violation would not result in the exclusion of the witness' testimony); *United States v. Condon*, 170 F.3d 687, 689 (7th Cir.), *cert. denied*, 526 U.S. 1126, 119 S.Ct. 1784, 143 L.Ed.2d 812 (1999).

rules, the appropriate remedy is a disciplinary proceeding, not the exclusion of evidence. Cf. *United States v. Condon*, 170 F.3d 687, 689 (7th Cir.), *cert. denied*, 526 U.S. 1126, 119 S.Ct. 1784, 143 L.Ed.2d 812 (1999).

McCoy's reliance on *Golden Door Jewelry Creations, Inc. v. Lloyd's Underwriters Non-Marine Ass'n*, 865 F.Supp. 1516, 1524-26 (S.D. Fla. 1994), *aff'd in relevant part*, 117 F.3d 1328, 1335 n. 2 (11th Cir.1997) is misplaced. The Eleventh Circuit found no abuse of discretion in the trial court's imposition of the sanction of barring Lloyds from using the testimony of paid witnesses for violating Rule 4-3.4(b) of the Rules of Professional Conduct. *Golden Door* is a civil case. In the criminal context, the Eleventh Circuit has expressed serious doubt that a prosecutor violates this rule even when he is the one who is promising the witness a thing of value. *United States v. Lowery*, 166 F.3d 1119, 1124 (11th Cir. 1999). Furthermore, ABC Liquors is not a party in this case. ABC Liquors has no financial stake in the outcome of this trial. ABC Liquors is paying to identify the perpetrator, not a particular person. ABC Liquors and the prosecutor, unlike parties in civil litigation, are disinterested. Parties in civil case are not disinterested. The rule against an attorney or a party paying fact witnesses does not apply to disinterested third parties such ABC Liquors. Nor does the rule apply to prosecutors.

Harmless error

The error, if any, is harmless. Even if the witness' testimony was excluded, the State still had sufficient evidence

of identity to convict. McCoy's fingerprints were located on an item inaccessible to the public. This item was moved during the crime. This is scientific evidence of McCoy's identity and guilt. Furthermore, McCoy admitted on the stand that he had told Marcel that he robbed the ABC Liquors albeit to "impress" her. Thus, the error was harmless.

ISSUE V

DID THE TRIAL COURT PROPERLY PROHIBIT CROSS-EXAMINATION OF A STATE'S WITNESS REGARDING HER PHONE CALL CHARGES AND ALLEGED PRIOR ROBBERY? (Restated)

McCoy asserts that the trial court improperly limited cross-examination of a State's witness regarding her phone charges and an uncharged robbery. The State respectfully disagrees. As the trial court properly found, the phone charges do not establish any bias against the defendant. The uncharged robbery is not proper impeachment. The error, if any, was harmless. The jury already knew that this witness had a prior conviction. Thus, the trial court properly limited the cross-examination of the witness.

The trial court's ruling

The prosecutor filed a motion in limine to limit the cross-examination of Zsa Zsa Marcel regarding her phone calls to Louisiana charged to the account of Coley McCoy, the defendant's father. (R. II 340). The State argued that because no criminal conviction or charges resulted from the conduct, the testimony was merely specific acts of bad character which is not proper impeachment and that the phone calls were a collateral matter. (R. II 340). The trial court conducted a hearing on the State's

motions in limine on May 18, 2001. (R. V. 970). The prosecutor argued that the phone calls, charged to the defendant's father, were a collateral matter and because no criminal charges were filed against her, it was not proper impeachment. (R. V 980). Defense counsel explained that the defendant's father brought him phone bills showing $800.00 dollars in phone charges in a month for calls to the New Orleans area. (V. 982-983). The defendant and his father shared household expenses. (V. 985). Defense counsel asserted that the unauthorized phone charges showed that Marcel did not really care for the defendant. (V. 983-985). The trial court granted the State's motion in limine because, while Marcel's phone charges showed an effort to stick the defendant's father with several hundred dollars in phone calls, the conduct did not show bias toward the defendant who was in jail at the time and not paying household expenses. (V. 986). While the trial court expressed a willingness to bend the rules of evidence in a capital case in the defendant's favor, the trial court was not willing to completely throw the rules "out the window." (V. 987). The trial court ruled that it would not to admit evidence the only intent of which was to show the bad character of the witness. (V 988). The trial court granted the motion in limine. (R. II 342)

The defendant filed a motion to compel investigation of the state's main witness in this case, Zsa Zsa Marcel's involvement in an unrelated robbery. (R. II 347-350). Marcel had confessed to McCoy that she had robbed Lee's Chicken. (II 347). Defense counsel asserted that the prosecutor refused to investigate

Marcel's involvement in the robbery until after McCoy's murder prosecution and was a deliberate attempt to prohibit defense counsel from impeaching her with pending charges. Defense counsel, relying upon *State v. Montgomery*, 467 So.2d 387 (Fla. 3d DCA 1985)[24], requested that the trial court dismiss the charges against McCoy or prohibit Marcel from testifying at McCoy's trial. (II 349)

The trial court also discussed this motion at the hearing. (R. V 988). The detective investigating the Lee's Chicken robbery conducted a photo lineup with Zsa Zsa Marcel's photograph in it. (V 989). The victims of the Lee's Chicken robbery could not identify Marcel as the perpetrator. Defense counsel sent his investigator to interview an employee of Lee's Chicken. The employee informed him that the perpetrator was a woman with a bad scar on her neck. (V. 990). Two other victims of the Lee's Chicken robbery thought that the photograph that the investigator showed them may have been the perpetrator but they wanted to see Marcel in person and view her neck before they would be willing to positively identify her as the perpetrator. (V 990-1). Defense counsel requested that Marcel be presented to the victims. Defense counsel asserted that this established

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[24] In *State v. Montgomery*, 467 So.2d 387 (Fla. 3d DCA 1985), the Third District granted a writ of prohibition. A defense witness refused to testify unless the prosecutor agreed to grant him immunity. The prosecutor declined. The trial court entered an order granting the witness immunity and the Third District reversed that order. A trial court may dismiss the charges against a defendant when prosecutorial misconduct results in a distortion of the fact-finding process. However, Montgomery "utterly" failed to make any showing of the requisite prosecutorial misconduct.

that Marcel had a motive to lie because if she could finger McCoy as the perpetrator of the ABC Liquors murder, he would become a non-credible witness against her in any prosecution of the Lee's Chicken robbery. (V. 992). Defense counsel also claimed that the prosecution was distorting the fact-finding process by refusing to investigate Marcel's involvement in the Lee's Chicken robbery. (V. 992-993). Defense counsel requested that another State Attorney be assigned to prosecute due to the conflict of interest. (994). The prosecutor denied any deliberate distortion, explaining that he took Marcel to the sheriff's office to have her photograph taken and to be interviewed. (996). There simply was not enough evidence to charge her. (997). The trial court pointed out that the PD's investigator poisoned the well by showing a single photograph of Marcel to the victims. (998). The trial court denied the motion, finding no prosecutorial misconduct. (1004). The trial court found that the prosecutor's actions were reasonable. (1004).

At trial, defense counsel asked Marcel if she was afraid that McCoy would turn her in for a crime. The prosecutor objected. (XI 816). Defense counsel offered to proffer the evidence. (817). The jury was excused and defense counsel proffered questions designed to she that Marcel was afraid McCoy would turn her in for the Lee's Chicken robbery. (818). Marcel denied telling McCoy that she robbed Lee's Chicken. (819). Defense counsel noted that Marcel wore a turtle neck to cover the scar on her neck. Defense counsel had two of the victims of the robbery in the courthouse in an attempt to identify Marcel as

the perpetrator of the robbery. (819). The two victims wanted to be able to see Marcel's neck because the perpetrator was a African- American female with a scar on her neck. According to defense counsel, one of the employees who lives in the same apartment complex warned Marcel and she wore a wig and a turtleneck. Defense counsel requested that the trial court compel Marcel to show her neck to the two employees and the jury. (822). The prosecutor objected to the compelled line-up as a fishing expedition and that defense counsel was now trying to try a separate case. (823). The trial court characterized the request as bizarre and was struggling with the relevance of the request. (824). The trial court was concerned that this secondary trial on an unrelated robbery would create a mistrial but was open to requiring the witness to return after the defendant took the stand and testified that Marcel confessed to perpetrating the Lee's Chicken robbery to him. The trial court decided to keep her under subpoena until the defense could establish that Marcel confessed to McCoy and the prosecutor could research the issue. (828-829). Marcel returned, not wearing a turtleneck. The eyewitnesses to the robbery were in the courtroom hall. The trial court noted, in a moment of levity, that the problem with really good lawyers was that they come up with really good problems. (XI 842). The trial court did not think he could require Marcel to show her neck to the eyewitnesses but allowed defense counsel to request her to do so (843-844). After the defense presented its case, defense counsel asked the trial court compel Marcel to show her neck to

the eyewitnesses. (XI 989). One of prosecutors noted that the victims could not identify anyone. (991). The prosecutor also noted that the defense could establish this theory of bias by having the defendant testify that Marcel confessed to committing the Lee's Chicken robbery rather than in this manner. (XI 993). The trial court ruled that he did not have the authority to compel witnesses to do anything other than testify. (994). The trial court was willing to send a bailiff into the hall and explained to counsel that he could have the eyewitnesses look at Marcel who was also in the hall and granted defense counsel a recess to do so. (996). However, the eyewitnesses did not want to do so and left the courtroom. (996).

McCoy testified that Marcel confessed that she committed a crime to him. (XII 1012-1014). Defense counsel, in his closing argument, explained this theory of bias to the jury. (XII 1141-1142).

Preservation

This issue is preserved. Defense counsel properly proffered the testimony he sought to prove bias. *Lucas v. State*, 568 So.2d 18, 22 (Fla. 1990)(noting that a proffer necessary to preserve claim that trial court improperly excluded testimony).

The standard of review

The standard of review for the admission of impeachment testimony is abuse of discretion. *Moore v. State*, 701 So.2d 545, 549 (Fla. 1997)(noting that limitation of cross-examination is subject to an abuse of discretion standard).

Merits

The who may impeach statute, § 90.608(2), Florida Statutes, (2000), provides:

> Any party, including the party calling the witness, may attack the credibility of a witness by:
>
> * * *
>
> Showing that the witness is biased.

The character of witness as impeachment statute, § 90.609 Florida Statutes, (2000), provides:

> A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, except that:
>
> (1) The evidence may refer only to character relating to truthfulness.
> (2) Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

The conviction of certain crimes as impeachment statute, § 90.610(1), Florida Statutes, (2000), provides:.

> A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, character of witness as impeachment statute, § 90.609,

The character of a witness may be impeached by evidence of reputation for truthfulness or by evidence of criminal convictions but the credibility of a witness may not be attacked by proof that the witness has committed specific acts of misconduct. ***Baker v. State***, 804 So.2d 564, 567 (Fla. 1st DCA 2002)(explaining that pursuant to the Evidence Code the character of a witness may be impeached by evidence of reputation for truthfulness or by evidence of criminal

convictions but the credibility of a witness may not be attacked by proof that the witness has committed specific acts of misconduct, citing *Fernandez v. State*, 730 So.2d 277, 282 (Fla.1999)); see generally Charles W. Ehrhardt, Florida Evidence § 608.1; § 608.5 (2002 Ed.). Although the Confrontation Clause guarantees the accused the right to be confronted with the witnesses against him, trial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); see also *Moore v. State*, 701 So.2d 545, 549 (Fla. 1997).

While a prosecution witness is subject to cross-examination regarding pending or threatened criminal charges, a prosecution witness may not be cross-examined about such matters when no charges are pending or threatened. Charles W. Ehrhardt, Florida Evidence § 608.5 n.8 (2002 Ed.). Indeed, McCoy's theory was not that Marcel had any reason to curry favor with the prosecution. Rather, McCoy's theory was that Marcel was lying because she had confessed to McCoy that she had committed the Lee's Chicken robbery and that by accusing McCoy of this crime, she made him an incredible witness against her in that crime. McCoy was allowed to present this theory through his own testimony. Just as the prosecutor may not impeach the defendant with uncharged

conduct, defense counsel may not impeach a state witness with uncharged conduct.[25]

In *White v. State*, 817 So.2d 799 (Fla. 2002), this Court found no abuse of discretion in the trial court's limiting the admission of collateral evidence concerning the factual details of the prosecution witness's unrelated crime. The State's key witness pled guilty to an unrelated murder in Maryland in 1990. The Maryland murder occurred twelve years after the murder at issue. The trial court, recognizing the evidence rules are relaxed in the penalty phase, allowed the defense to inquire into the type of felony but not the factual details. White argued that the facts of the Maryland murder showed that the witness killed people and then blamed a co-defendant which impeached the witness' testimony regarding his minimal involvement in the murder at issue. This Court concluded that this ruling did not prevent effective and thorough impeachment and therefore the trial court did not abuse its discretion. The *White* Court also noted that inquiry into prior convictions is normally limited to the existence of the conviction and the number of such convictions. *White*, 817 So.2d at 807.

Here, as in *White*, the trial court did not prevent effective and thorough impeachment and therefore, the trial court did not

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[25] *Wilt v. State*, 410 So.2d 924 (Fla. 3d DCA 1982)(holding that it is reversible error for the prosecutor to ask a testifying defendant about the uncharged possession of a firearm by a convicted felon because such impeachment is not material to issues being tried and served only to establish criminal propensity); *Dawkins v. State*, 605 So.2d 1329 (Fla. 2d DCA 1992)(same).

abuse its discretion. The trial court allowed defense counsel to present this theory of bias to the jury through McCoy's testimony, just not by creating a second trial with Marcel as the accused. Moreover, the trial court did not rule that he would not admit this evidence, only that he would not compel a line-up or compel Marcel to show her neck to the eyewitnesses or the jury. If the eyewitnesses had been willing and able to identify Marcel, the trial court seemed open to allowing defense counsel to present this testimony.

McCoy's reliance on *Henry v. State*, 688 So.2d 963, 965-66 (Fla. 1st DCA 1997) and *Lutherman v. State*, 348 So.2d 624, 625 (Fla. 3d DCA 1977) is misplaced. Florida law does not allow cross-examination of a witness that creates a trial within a trial. *Slocum v. State*, 757 So.2d 1246, 1250-1251 (Fla. 4th DCA 2000)(holding that a trial court, in first-degree murder prosecution, properly refused to permit cross-examination of officer concerning interrogation process in unrelated homicide because the details of the other homicide case were not relevant to case at bar and such impeachment about an unrelated case would create a trial within a trial). Here, this cross-examination would have created the proverbial trial within a trial, involving numerous eyewitnesses to the Lee's Chicken robbery, questions of identification based on scars, and issues relating to impermissibly suggestive line-ups because the investigator had shown only one photograph, that of Marcel, to the eyewitnesses. Such cross-examination would have required the trial court to conduct a robbery trial with Marcel as the

accused within McCoy's murder trial. This is a classic example of the reason for disallowing extrinsic impeachment of collateral matters. *Correia v. State*, 654 So.2d 952 (Fla. 4th DCA 1995) (reversing conviction for aggravated assault due to improper cross-examination of defendant's alibi witness on collateral matters relating to cable service which resulted in a trial within a trial and was a classic example of the reason for disallowing extrinsic impeachment of collateral matters). Moreover, this would have required the trial court to compel Marcel to show her neck to the eyewitnesses. *Simmons v. State*, 683 So.2d 1101, 1104-5 (Fla. 1st DCA 1996)(holding trial court did not abuse its discretion in denying defendant's request for psychiatric evaluation of the prosecution's mentally retarded witness). Furthermore, when defense counsel attempts to impeach on a collateral matter, he must "take" the answer as given. Marcel denied telling McCoy that she robbed Lee's Chicken. (819). Defense counsel was limited to this denial.

The phone call charges do not show bias against the defendant or even the defendant's father. This does not establish bias against anyone, it merely establishes bad character for not paying bills. Moreover, the phone call charges are trivial. *Dennis v. State*, 817 So.2d 741, 758 (Fla. 2002)(noting that while a party is free to demonstrate the bias of a witness, when the evidence is of dubious probative value in that regard, it is properly excluded). Thus, the trial court properly limited cross-examination.

Harmless error

Any error in the trial court's limiting cross-examination was harmless. Marcel was thoroughly impeached on a wide variety of matters including her prior conviction. (X 744). The jury already knew that she had a prior conviction. The impeachment value of being a felon was already established. Furthermore, the trial court read a stipulation to the jury regarding four misdemeanor warrants outstanding in Louisiana. (X 776). So, the jury also was aware that she had four warrants outstanding in Louisiana. Establishing that she was a possible suspect in an armed robbery would have been cumulative to the prior conviction and the four warrants. Moreover, the trial court permitted defense counsel wide latitude in cross-examining this witness. For example, the defendant was permitted to call Clarence Williams to testify that Marcel's reputation for truthfulness in her home town in Louisiana was poor. (T. XI 983). She and Williams had lived together and had a child together. (986). He testified, somewhat confusingly, that she was dishonest and untrustworthy. (987-988). Often, this type of evidence is excluded. *Larzelere v. State*, 676 So.2d 394, 399-400 (Fla. 1996)(affirming trial court's exclusion testimony of two witnesses who would have testified as to key prosecution witness' unsavory reputation for truth and veracity in a capital case). Moreover, her explanation of the delay in reporting McCoy's confession and not being motivated by the reward was incredible and would not have been believed by the jury. Marcel was throughly impeached by her prior conviction and by other means. Hence, the error, if any, was completely harmless.

ISSUE VI

DID THE TRIAL COURT ERR IN FINDING THE COLD, CALCULATED AND PREMEDITATED AGGRAVATOR AND IS THE COLD, CALCULATED AND PREMEDITATED AGGRAVATOR VAGUE? (Restated)

McCoy asserts that the trial court improperly found the murder to be cold, calculated and premeditated. McCoy further claims that the cold, calculated and premeditated jury instruction was unconstitutionally vague. The State respectfully disagrees. The trial court properly found the murder to be cold, calculated and premeditated. The videotape shows that the victim did not resist. She opened the combination safe for the defendant. She then opened the time delay safe and the cash registers. Moreover, the number, order and location of the shots establish heightened premeditation. McCoy shot a paralyzed victim. The second shot paralyzed the victim. McCoy then fired a third shot in her face while she was on the floor. This was not a robbery gone bad; rather, it was a murder that went exactly as planned. This Court has upheld the cold, calculated and premeditated jury instruction against a vagueness challenge. Thus, the trial court properly found the murder to be cold, calculated and premeditated and properly instructed the jury.

The trial court's ruling

Defense counsel filed a pretrial motion to prohibit jury instructions on the cold, calculated and premeditated aggravator because the aggravator was impermissibly vague and fails to genuinely narrow the class of murders eligible for death. (R. I 73). McCoy argued, prior to penalty phase, that the cold, calculated and premeditated aggravator was impermissibly vague

and fails to genuinely narrow the class of murders eligible for death. (XV 1242). Defense counsel, citing *Buckner v. State*, 714 So.2d 384 (Fla.1998)[26] and *Mahn v. State,* 714 So.2d 391 (Fla.1998)[27], also argued that the facts did not support giving a cold, calculated and premeditated instruction. (XV 1243-1249). The prosecutor, citing *Jennings v. State*, 718 So.2d 144 (Fla. 1998)[28] and *Alston v. State*, 723 So.2d 148, 160 (Fla.1998)[29], argued that the facts supported the cold, calculated and premeditated aggravator. (XV 1251-1254). The trial court ruled that the evidence supported the giving of the cold, calculated and premeditated instruction because the murder had the appearance of a killing carried out as a matter of course. (XV 1257). The trial court also ruled that the cold, calculated and premeditated instruction was not vague. (XV 1258).

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[26] In *Buckner v. State*,714 So.2d 384, 389 (Fla. 1998), this Court struck the cold, calculated and premeditated aggravator because of the lack of heightened premeditation where the defendant was angry with the victim for dancing with his girlfriend at a bar

[27] In *Mahn v. State,* 714 So.2d 391 (Fla.1998), this Court struck the cold, calculated and premeditated aggravator finding no advanced planning or preconceived design to kill in case where the defendant killed his father's girlfriend and son out of hate for a father who had deserted him.

[28] *Jennings v. State*, 718 So.2d 144 (Fla. 1998) which also involved the murder of employees during a robbery was factually similar to the instant murder/robbery

[29] In *Alston v. State*, 723 So.2d 148, 160 (Fla.1998), this Court found the heightened premeditation required to sustain the cold, calculated and premeditated aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder.

The trial court's sentencing order regarding the cold, calculated and premeditated aggravator reflect the following findings:

> The State established beyond a reasonable doubt that the murder was the product of cool and calm reflection and not prompted by emotional frenzy, panic, or a fit of rage. The evidence at trial fully supports the State's argument that the victim in this case complied with the Defendant's every demand during the 13-minute robbery as captured on the videotape in the ABC Liquors premises. The videotape does not show any resistance by the victim at all. Apparently, at the Defendant's demand, the victim turned off the store alarm after the two had entered the store at gunpoint. She turned off the only visible VCR, leaving the cameras to record, unbeknownst to the Defendant, the actions from the time the victim and the Defendant entered the store until he left after murdering the victim. She led the Defendant to the combination safe in the office and opened it. She led the Defendant to the time-delay safe in the lobby and activated it. The Defendant took money from each of these safes. The victim also led the Defendant to the cash registers and drop safes which contained no money.
>
> After taking all of the store's money on hand, the Defendant forced the victim into the storeroom. The storeroom contained no money, cash registers, or safes. Within a very few seconds, the Defendant shot Ms. Elliott three times, once from a distance and two shots within inches from the victim's arm and head. The victim was holding only her keys when she was murdered. The circumstances preceding Ms. Elliott's execution and the efficiency with which the Defendant carried out this murder proved that the Defendant's actions were the product of cool and calm reflection and not prompted by emotional frenzy, panic, or a fit of rage.
>
> The evidence further demonstrates that the victim's death was the result of a careful plan or prearranged design. Throughout the robbery, the Defendant carefully and efficiently extracted all of the money from the store. The videotape shows no hesitation in the Defendant's actions or movements. The Defendant wore no disguise and thought he had disabled the only visual monitoring system in the store. After taking all apparent money in the store, the Defendant led the victim to the back storeroom where he quickly executed her. This evidence proves that the Defendant had a careful plan or prearranged design to murder the only witness to this crime.

> The State's evidence further shows the heightened level of premeditation needed to support this aggravating circumstance. The sequence of the shots which took the victim's life tell volumes of the Defendant's plan. The first shot, fired at some distance from the victim, was sufficient to bring her to the ground and disable her. The second shot went through the victim's arm as she apparently held her arm up to protect herself from the gunman. The bullet passed through her arm and through her head. According to the medical examiner, this would have been sufficient to paralyze the victim. The third shot was fired at point-blank range into the victim's head. This execution-style murder was not an afterthought or one done in panic or rage. It is sufficient evidence that the Defendant had a careful plan or prearranged design to commit the murder of this victim before firing the shots.
>
> Finally, there is no evidence that the Defendant's actions were in any way morally or legally justified. The Defense makes no suggestion that there is any moral or legal justification for this murder, and none can be found in the evidence.

(R. III 490-492).

Preservation

The jury instruction issue is not preserved. While McCoy filed a pretrial motion and objected in the trial court prior to the penalty phase, McCoy never proposed alternative jury instructions. *Scott v. State*, 808 So.2d 166 (Fla. 2002)(concluding that jury instruction issue was preserved where defense counsel, rather than submitting an alternative instruction in writing, read the requested language from a prior Florida Supreme Court opinion). Here, defense counsel did not orally or in writing propose an alternative instruction. If defense counsel thinks that the current cold, calculated and premeditated instruction is vague, it is incumbent upon him to propose one that he believes is not vague. The judge should not be put in the position of having to guess what definition "cold" "calculated" or "premeditated" would please defense counsel.

Additionally, without an alternative instruction before him, the trial court really has no option but to give the standard instruction. Any jury instructions must be a correct statement of the law. Without a proposed alternative in front of him, the trial court cannot make this determination. If defense counsel objects to the standard instruction, then he should find one from another jurisdiction or draft one from the language of death penalty opinions. The trial court should not have to do defense counsel work for him. Moreover, the prosecutor might have agreed to defense counsel's alternative cold, calculated and premeditated instruction, thereby rendering the entire issue moot. This issue is not preserved because defense counsel did not propose a complete alternative cold, calculated and premeditated instruction.[30]

The standard of review

The standard of review is clearly erroneous. A trial court's ruling on an aggravating circumstance will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record. Competent substantial evidence is tantamount to legally sufficient evidence, and this Court assesses the record evidence

[30] Defense counsel submitted two proposed jury instructions involving the cold, calculated and premeditated aggravator. (R. III 414,415). However, these were not complete alternative cold, calculated and premeditated instruction that he considered not vague. Rather, counsel wanted this language in addition to the standard, not as a substitute for the current jury instruction. (XV 1283). They seem to be two separate arguments. The trial court denied the request. (XV 1284). Defense counsel renewed this objection. (1428)

for its sufficiency only, not its weight. *Almeida v. State*, 748 So.2d 922, 932 (Fla. 1999). Thus, the standard of review for whether there is sufficient evidence to support the trial court's finding that the murder was committed in a cold, calculated and premeditated manner is competent substantial evidence.

Whether an aggravating circumstance is unconstitutionally vague is a question of law reviewed *de novo*. *United States v. Allen*, 247 F.3d 741, 786 (8th Cir. 2001)(noting that an appellate court reviews challenges to the constitutionality of a particular aggravating factor *de novo* citing *Ross v. Ward*, 165 F.3d 793, 800 (10th Cir.), *cert. denied*, 528 U.S. 887, 120 S.Ct. 208, 145 L.Ed.2d 175 (1999)).

Thus, whether the cold, calculated and premeditated aggravator is vague is reviewed *de novo*.

Merits

The cold, calculated, premeditated aggravator can be demonstrated by circumstances such as the advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. *Bell v. State*, 699 So.2d 674, 677 (Fla. 1997).

All these factors are present in the instant murder. McCoy entered the store with a gun. The videotape establishes that the victim did not resist or provoke the defendant. This killing was carried out as a matter of course. McCoy gained entrance to the store by waiting until the manager opened the door, he had the victim turn off the alarm, turn off the surveillance

equipment, open one safe and then another, check the cash registers and the receipts bags for cash and then murdered the manager - all in short order. The murder itself took less than one minute. This manifests a plan, carried out with ruthless efficiency, to check all possible locations for cash and then murder the manager.

In *Farina v. State*, 801 So.2d 44, 54 (Fla. 2001), this Court affirmed a trial court's finding of the cold, calculated and premeditated aggravator for killing an employee during a robbery. The Court noted that cold, calculated and premeditated can be indicated by such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. This Court noted that the perpetrators purchased bullets for their gun before the robbery; the employees were confined to small area and none of the employees offered resistance. Accordingly, this Court found competent, substantial evidence to support the finding that the murder was cold, calculated, and premeditated.

In *Jennings v. State*, 718 So.2d 144, 151-153 (Fla. 1998), this Court affirmed a trial court's finding of the cold, calculated and premeditated aggravator for killing of employees during robbery of a Cracker Barrel Restaurant. The trial court had explained in its order that the perpetrators gained entry, forced an employee to open the safe, put all three victims on the floor, taped their hands behind them, marched them into the freezer, cleaned out the safe, cut the throats of the three victims, and fled out the back door in the space of

approximately ten minutes. The trial court noted that rapidity of these actions manifested “a plan that was carried out with ruthless efficiency”. This Court found all four elements of cold, calculated and premeditated to be established. This Court observed that the “most salient fact of these murders is the ruthless efficiency with which the murders were carried out in conjunction with the robbery.” This Court concluded that the “methodic succession of events” showed that the murders were not committed in an emotional frenzy, panic or a fit of rage. The execution-style murders combined with the advance procurement of the murder weapon were additional factors that support the elements of a calculated plan and heightened premeditation. The evidence did not suggest a "robbery gone bad." *Jennings*, 718 So.2d at 152.

Here, the entire robbery - gaining entry to the store via the victim, turning off the alarm with a code, turning off the surveillance camera, opening of two safes, checking the cash registers and the receipt bag took seventeen minutes and the murder itself took less than one minute. At 8:32, McCoy forced the victim into storeroom. McCoy then shot the victim three times and at 8:33 he left the storeroom. The “methodic succession of events” , as in *Jennings*, showed that the murders were not committed in an emotional frenzy, panic or a fit of rage. This was not a robbery gone bad; rather it was a robbery and murder “carried out with ruthless efficiency”.

The videotape shows that the victim did not resist. She turned off the alarm as directed. She turned off the

surveillance equipment. She opened the combination safe for the defendant. She then opened the time delay safe and the cash registers. There was no sign of a struggle in the store room. McCoy was not in a panic. The videotape shows that McCoy was not in a panic when he exited the storeroom after shooting the victim. He was walking, not running.

Moreover, the number, order and location of the shots establish heightened premeditation. The second shot paralyzed the victim. McCoy shot a paralyzed victim. McCoy then fired a third shot in her face while she was on the floor. The paralyzed victim could not have been struggling with McCoy when he shot her. There is only one reason to shoot a paralyzed victim - to kill them.

McCoy asserts that if the murder was premeditated, he would have worn gloves and would have shot the victim from the back rather than the front. IB at 54-55. One can execute someone just as easily from the front as from the back. An execution-style killing involves shooting a person in the head from point blank range. It matters not whether it is to the face, the temple, the top of the head or the back of the head. It is still an execution. McCoy asserts that the evidence used to establish the cold, calculated and premeditated aggravator was circumstantial. However, an aggravator may properly be proven by circumstantial evidence. ***Eutzy v. State***, 458 So.2d 755, 757-758 (Fla. 1984)(observing that while it is axiomatic that every aggravating factor must be proven beyond a reasonable doubt, the State may use circumstantial evidence to meet this burden of

proof). This is not a robbery “gone bad”; rather, it is a murder that went exactly as planned. The trial court properly found that the murder to be cold, calculated and premeditated.

VAGUENESS

McCoy asserts that the standard cold, calculated and premeditated jury instruction is unconstitutionally vague. The cold, calculated and premeditated jury instructions given in this case provided:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> "Cold" means the murder was the product of calm and cool reflection.
>
> "Calculated" means having a careful plan or prearranged design to commit murder. As I have previously defined for you a killing is “premeditated" if it occurs after the defendant consciously decides to kill. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> However, in order for this aggravating circumstance to apply, a heightened level of premeditation demonstrated by a substantial period of reflection, is required. A “pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

(R. III 471).

In *Jackson v. State*, 648 So.2d 85 (Fla. 1994), this Court held that the then-current instruction on the cold, calculated and premeditated aggravator was unconstitutionally vague. The then-current standard instruction simply mirrored the words of the statute: “the crime for which the defendant is to be sentenced

was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." This Court developed a new standard instruction. The *Jackson* Court explained that to establish the cold, calculated and premeditated aggravator, the State must show that the killing was the product of cool and calm reflection and not an act prompted by an emotional frenzy, panic, or a fit of rage (cold); that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification. *Jackson*, 648 So.2d at 89. The new instruction was adopted in *Standard Jury Instructions in Criminal Cases*, 665 So.2d 212, 213-214 (Fla.1995).

The cold, calculated and premeditated jury instructions given in this case defined "cold", "calculated" and explained that a heightened level of premeditation demonstrated by a substantial period of reflection is required. (R. III 471). The jury instructions given tracked the standard jury instruction on the cold, calculated and premeditated aggravator approved by this Court. *Standard Jury Instructions in Criminal Cases* No. 96-1, 690 So.2d 1263 (Fla. 1997). McCoy seems to believe that the terms "cold" and "calculated" are vague because they are subjective terms describing emotions. IB at 58. However, the two terms were further defined for the jury. The jury was informed that "cold" means the murder was the product of calm and cool reflection and "calculated" means having a careful plan

or prearranged design to commit murder. McCoy also asserts that the aggravator has become a “catch-all” aggravator that applies to all first degree murders. IB at 57. However, the heightened level of premeditation requirement refutes this assertion. The jury was instructed that a “substantial period of reflection” was required for this aggravator to apply. This Court has repeatedly rejected vagueness challenges to the standard cold, calculated and premeditated jury instruction.[31] Contrary to McCoy’s assertion, the Eleventh Circuit has also repeatedly rejected a vagueness challenge to Florida’s cold, calculated and premeditated aggravator.[32] Thus, the trial court properly instructed the jury on the cold, calculated and premeditated aggravator.

Harmless error

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[31] *Donaldson v. State*, 722 So.2d 177, 187, n.12 (Fla. 1998)(finding no merit to a vagueness challenge to the standard cold, calculated and premeditated approved in *Standard Jury Instructions in Criminal Cases*, 665 So.2d 212, 213-214 (Fla.1995)); *Walker v. State*, 707 So.2d 300, 316 (Fla. 1997)(affirming the CCP instruction which used the same definition of cold approved in *Jackson v. State*, 648 So.2d 85 (Fla.1994)); *Standard Jury Instructions in Criminal Cases*, 665 So.2d 212, 213-214 (Fla.1995)(approving the standard jury instruction on the CCP aggravator).

[32] *Henderson v. Dugger*, 925 F.2d 1309, 1317 (11th Cir. 1991)(finding the cold, calculated and premeditated aggravator not to be vague because the Florida Supreme Court has adopted narrowing construction of the aggravating circumstances requiring a greater degree of premeditation than is required to obtain a first degree murder conviction); *Harich v. Wainwright*, 813 F.2d 1082, 1102 (11th Cir. 1987)(holding the cold, calculated and premeditated aggravator is a facially valid aggravating circumstance because it genuinely narrows the class of persons eligible for the death penalty because it requires a "heightened" level of premeditation pursuant to caselaw).

This Court has held that the cold, calculated and premeditated aggravator is valid where the facts of the case establish that the killing was cold, calculated and premeditated under any definition, even though the CCP instruction given to the jury was unconstitutionally vague. *Jennings v. State*, 782 So.2d 853, 862 (Fla. 2001), citing, *Monlyn v. State*, 705 So.2d 1, 5-6 (Fla.1997).

The shooting of paralyzed victim with a third bullet is cold, calculated and premeditated under any definition.

Furthermore, the error, if any, in finding the murder to be cold, calculated and premeditated is harmless. There are three remaining aggravators in this case including the prior violent felony aggravator which involved similar crimes. The prior violent felony aggravator is one of the most serious aggravators. Thus, death is the appropriate penalty even if the evidence of the cold, calculated and premeditated aggravator is insufficient.

ISSUE VII

IS FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL? (Restated)

McCoy asserts that Florida's death penalty statute is unconstitutional on various grounds. The State respectfully disagrees. This Court has repeatedly rejected these various challenges. McCoy offers no compelling reasoning for receding from any of these cases. Hence, Florida's death penalty statute is constitutional.

The trial court's ruling

Defense counsel filed numerous standard motions regarding the constitutionality of the death penalty statute. Defense counsel filed a motion to declare the death penalty statute unconstitutional based on the treatment of mitigators which the trial court denied. (R. I 79-82). Defense counsel filed a motion based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), arguing that it required notice of aggravators and a unanimous jury recommendation. (R. II 272-282). The trial court denied the motion. (R. II 283).

The standard of review

The standard of review is *de novo*. A trial court's decision regarding the constitutionality of a statute is reviewed *de novo* because it presents a pure question of law. *Dickerson v. State*, 783 So.2d 1144, 1146 (Fla. 5th DCA 2001)(citing *Dep't of Ins. v. Keys Title & Abstract Co.*, 741 So.2d 599, 601 (Fla. 1st DCA 1999), *rev. denied,* 770 So.2d 158 (Fla.2000)).

Merits

McCoy attacks Florida's death penalty statute on numerous grounds.

ARBITRARY

McCoy argues that the lack of objectivity and consistency in this Court's interpretation of capital sentencing law has resulted in arbitrary and capricious application of the death penalty statute which violates the Eighth Amendment. McCoy fails to specifically identify what rulings from this Court are arbitrary. *Greenwood v. State*, 754 So.2d 158, 160 (Fla. 1st DCA 2000)(declining to address the constitutionality of a statute

because the arguments were not properly presented on appeal where appellate counsel addressed this issue in one sentence, followed by a smorgasbord of case citations and were not properly preserved in the trial court either). The United States Supreme Court has upheld Florida's death penalty statute against an Eighth Amendment challenge. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). This Court has held likewise. *Cheshire v. State*, 568 So.2d 908, 913 (Fla. 1990)(rejecting claim that Florida's death penalty scheme is arbitrary and capricious citing *Proffitt*). Developments in the law are not a basis for claiming inconsistency in the law that violate the Eighth Amendment. *Mills v. Moore*, 786 So.2d 532 (Fla. 2001)(holding that subsequent case law was not basis for claiming arbitrary application).

Mitigating circumstances

McCoy contends that the statutory mitigating circumstances emphasizes certain mitigators over non-statutory mitigators. IB at 61. There is no cure for this in the sense that it is not possible for statutory mitigators to be an exhaustive list. All possible mitigators cannot be listed in the statute. Moreover, the jury instructions properly informed the jury that non-statutory mitigation is to be considered. *Songer v. State*, 365 So.2d 696 (Fla. 1978)(holding Florida's death penalty statute does not restrict the mitigating evidence to the factors enumerated in the statute). This Court has held that the "catch-all" standard jury instruction on nonstatutory mitigation when coupled with counsel's right to argue mitigation is

sufficient to advise the jury on nonstatutory mitigating circumstances. *Booker v. State*, 773 So.2d 1079, 1091 (Fla. 2000); *Elledge v. State*, 706 So.2d 1340, 1346 (Fla. 1997).

AGGRAVATORS NOT ALLEGED IN THE INDICTMENT

McCoy complains that his constitutional right to notice was violated when the indictment did not list the aggravators relying on *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978). The State is not constitutionally required to identify the aggravating factor it will rely on. *Silagy v. Peters*, 905 F.2d 986, 996-997 (7th Cir. 1990)(holding that Illinois death penalty statute did not violate due process by not requiring pre-trial notice); *Spinkelink v. Wainwright*, 442 U.S. 1301, 1305-6, 99 S.Ct. 2091, 60 L.Ed.2d 649 (1979)(Rehnquist, sitting as Circuit Justice, denying application for stay, reasoning that it was not likely that four members of the Court would find a claim that a capital defendant was entitled to notice of aggravating circumstances pursuant to *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978), legally sufficient to persuade them to vote to grant certiorari). The notice that a capital defendant is constitutionally entitled to is notice that death is a possible penalty prior to sentencing, not the particular aggravating circumstances in the charging document. *Lankford v. Idaho*, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991)(holding that a capital defendant lacks notice where trial court *sua sponte* imposed death and after a sentencing hearing were death was not discussed and the prosecutor filed a written notice that he did

not intend to seek death); *Hays v. Alabama*, 85 F.3d 1492,1501 (11th Cir. 1996)(holding that two days notice that judge was considering an override of jury's life recommendation is sufficient notice that death is a possible penalty). Nor does Florida law require such notice. Spencer v. State, 27 Fla. L. Weekly S323 (Fla. 2002)(rejecting claim that indictment must contain the specific aggravating circumstances the State would seek to establish); Tafero v. State, 403 So.2d 355 (Fla. 1981). Additionally, even if pre-trial notice were required, there is no constitutional requirement that notice be provided via the charging document. Indeed, the constitution does not require the State to charge via indictment. *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884).[33]

McCoy, while not constitutional entitled to such notice, in fact, had notice of the specific aggravators prior to the penalty phase. The State provided notice of the five aggravators it intended to rely on June 1, 2001. (R. II 397). The penalty phase was held on June 28, 2001. (XVI 1289). McCoy had a notice prior to the penalty phase. Additionally, prior to the *Spencer* hearing, the State submitted an eighteen page written sentencing memoranda in support of a death sentence which detailed all of

[33] Charging documents were the critical means of notice prior to modern discovery practices. They were the sole notice a defendant received regarding the State's case. However, it is impossible in this day of extensive discovery to image a defendant lacking the basic notice that the due process clause requires. A capital defendant receives a list of all the witnesses the State will call to testify, all physical evidence, any reports and has an opportunity to depose all the State's witnesses. Charging documents are no longer vital to prevent trial by ambush or to provide notice.

the aggravators as well as the State's arguments supporting them. (R. III 439-457). The written memo was served on the defendant on July 23, 2001. Thus, McCoy had actual notice of the aggravators.

DUE PROCESS NOTICE

McCoy asserts that the murder statute, the penalty statute and the death penalty statute are so indefinite as to deprive him of due process notice of the charges against him. IB at 62. This one sentence attack on three separate statutes is not sufficient to raise an issue on appeal. *Greenwood v. State*, 754 So.2d 158, 160 (Fla. 1st DCA 2000)(declining to address the constitutionality of a statute because the arguments were not properly presented on appeal where appellate counsel addressed this issue in one sentence, followed by a smorgasbord of case citations). This Court has repeatedly rejected a degree of homicide attack on the murder statute. *Alford v. State*, 307 So.2d 433, 436 (Fla. 1975)(rejecting contention that the Legislature failed to adequately distinguish between felony murder in the first degree and felony murder in the second degree, in that these provisions are so ambiguous that the same act may constitute either first degree or second degree murder citing *State v. Dixon*, 283 So.2d 1 (Fla. 1973)).

BURDEN OF PROVING MITIGATORS

McCoy next claims that the statute impermissibly shifts burden to him to prove that mitigators outweighed aggravators. This Court has repeatedly rejected this claim. *Teffeteller v. Dugger*,

734 So.2d 1009,1024, (Fla. 1999)(explaining that when viewed as a whole, the instructions given by the court did not shift the burden of proof to the defendant citing *Preston v. State*, 531 So.2d 154, 160 (Fla.1988) and *Arango v. State*, 411 So.2d 172, 174 (Fla.1982)).

UNCONSTITUTIONAL AS APPLIED

McCoy asserts this Court's caselaw regarding the weighing of aggravating and mitigating circumstances is unconstitutionally inconsistent. This one sentence attack is not sufficient to raise an issue on appeal. *Greenwood v. State*, 754 So.2d 158, 160 (Fla. 1st DCA 2000)(declining to address the constitutionality of a statute because the arguments were not properly presented on appeal where appellate counsel addressed this issue in one sentence, followed by a smorgasbord of case citations). McCoy fails to identify any particular opinions that he considers inconsistent. Furthermore, proportionality review is not required by the federal constitution.

Proportionality review of the kind at issue is not required by the federal constitution. *Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996)(citing *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984)).

AUTOMATIC AGGRAVATOR

McCoy asserts the felony murder aggravator is an unconstitutional automatic aggravator. This Court has repeatedly rejected the claim that the felony murder aggravator is an automatic aggravator. *Francis v. State*, 808 So.2d 110, 136(Fla. 2001)(noting claim that the murder in the course of a

felony aggravator is unconstitutional because it automatically expands the class of persons eligible for the death penalty has been repeatedly rejected by this Court, citing *Hudson v. State*, 708 So.2d 256, 262 (Fla. 1998), and *Blanco v. State*, 706 So.2d 7,11 (Fla. 1997)). McCoy also asserts that this creates a type of *Enmund/Tison*[34] problem because a defendant who is not the actual shooter but who is convicted of felony murder receives an automatic aggravator but an actual shooter convicted of premeditated murder does not. McCoy may not challenge the statue on that basis that because he was the actual shooter and indeed, the sole perpetrator in this case.

LACK OF WRITTEN FINDINGS

McCoy next claims that not requiring the jury to list the aggravating factors that it finds permits the trial court to consider aggravators that the jury may not have found. Florida law

does not require written findings from the jury in either the guilt or penalty phase. *Fotopoulos v. State*, 608 So.2d 784, 794 n.7 (Fla. 1992)(finding claim that the lack of a special verdict from the jury on aggravating and mitigating circumstances violates the Eighth Amendment lacking in merit); *Steverson v. State*, 787 So.2d 165, 167 (Fla. 2d DCA 2001)(noting that a general verdict of guilt of first-degree murder arising from an alternative theory of premeditation or felony murder is valid citing *Kearse v. State*, 662 So.2d 677, 682 (Fla.1995) and

[34] *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

O'Callaghan v. State, 429 So.2d 691, 695 (Fla.1983). To the extent that McCoy is claiming that *Apprendi* requires such written findings, the State notes that while *Apprendi* required the jury to be instructed on biased purpose, it did not require written findings of biased purpose. *Cox v. State*, 2002 WL 1027308 (Fla. 2002)(rejecting claim that pursuant to *Apprendi* the jury constitutionally must make specific written findings).

LETHAL INJECTION

McCoy contends that the execution of death sentence statute, § 922.10, Florida Statutes (2001), is unconstitutional.[35] This Court has repeatedly rejected claims that lethal injection is unconstitutional. *Johnson v. State*, 804 So.2d 1218, 1225 (Fla. 2001)(citing *Provenzano v. State*, 760 So.2d 137 (Fla.)(finding that lethal injection is not unconstitutional method of execution), *cert. denied*, 530 U.S. 1255, 120 S.Ct. 2709, 147 L.Ed.2d 978 (2000) and Bryan v. State, 753 So.2d 1244 (Fla.) (same), *cert. denied*, 528 U.S. 1185, 120 S.Ct. 1236, 145 L.Ed.2d 1132 (2000)); *Sims v. State*, 754 So.2d 657, 670 (Fla. 2000)(holding that the lack of specific details about the chemicals to be used in lethal injection does not violate the Eighth Amendment prohibition against cruel and unusual

[35] The execution of death sentence statute, § 922.10, Florida Statutes (2001), provides in pertinent part:

> A death sentence shall be executed by electrocution or lethal injection in accordance with s. 922.105.

punishment). Other State Supreme Courts have held likewise.[36] Indeed, when the Georgia Supreme Court declared that electrocution violated the State constitutional prohibition against cruel and unusual punishment, it directed all future executions be by lethal injection. *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001). McCoy offers no rationale for receding from these holdings or any alternative to lethal injection.

Ring v. Arizona

McCoy contends that *Ring v. Arizona*, 122 S.Ct. 2428 (2002) precludes the judge from being the ultimate sentencer. In *Ring*, the United States Supreme Court, overruled *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), and held that because aggravating factors operate as the functional equivalent of an element, the Sixth Amendment requires that they be found by a jury rather than a judge. However, the holding in *Ring* does not extend to all facts or to the ultimate decision. Even in the wake of *Ring*, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. *Ring* is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. *Ring*, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital

[36] *Moore v. State*, 771 N.E.2d 46, 56 (Ind. 2002)(concluding that death by lethal injection does not involve unnecessary and wanton infliction of pain or conflict with societal norms); *State v. Webb* 750 A.2d 448 (Conn. 2000)(holding lethal injection is not cruel and unusual punishment under Federal or State Constitution); *State v. Spears*, 908 P.2d 1062, 1076 (Ariz. 1996).

case is limited to “an aggravating factor” and does not extend to mitigation or to the ultimate life-or-death decision which may continue to be made by the judge). This is because it is the finding of one aggravator that increases the penalty to death. *Ring*, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of “an aggravating circumstance” that exposes the defendant to a greater punishment than that authorized by the jury’s verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, *i.e.*, one aggravator, at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)(observing “[t]o render a defendant eligible for the death penalty in a homicide case, we have 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.”). *Ring* only requires that the jury make a finding of ONE aggravating circumstance, not all aggravators or any mitigators nor any weighing. So, once a jury has found one aggravator, the constitution is satisfied, the judge may do the rest. The trial judge may make additional findings in aggravation or mitigation, perform any weighing and may be the ultimate decision maker.[37]

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[37] The *Ring* Court noted in a footnote that Arizona was one of only five states that committed both capital sentencing factfinding and the ultimate sentencing decision entirely to judges. The other four states are Colorado, Idaho, Montana and Nebraska. See Colo.Rev.Stat. § 16-11-103 (2001) (three-judge panel); Idaho Code § 19-2515 (Supp.2001); Mont.Code Ann. § 46-18-301 (1997); Neb.Rev.Stat. § 29-2520 (1995). The court noted that Florida was one of four states that have “hybrid

Florida's death penalty statute does not violate *Ring*. In Florida, a jury recommends a sentence after hearing evidence during penalty phase. Basically, in Florida, a defendant is provided two chances at life. The first chance is with a jury. If the jury recommends death, the defendant then gets a second chance at the *Spencer* hearing to convince the judge to impose life. Providing a second bite at the life apple does not violate the right to a jury trial. It is only if the jury recommends life and the judge imposes death, that a possible violation of the Sixth Amendment right to a jury trial occurs.

Here, Judge Dearing did not override the jury's recommendation. The jury recommended death. McCoy cannot raise a valid *Ring* claim. Only a capital defendant in a jury override case can legitimately raise a *Ring* challenge to Florida's death penalty scheme. *Ring* is based on the Sixth Amendment right to a jury trial. McCoy had a jury at sentencing. A jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a

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systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." The other three states are Alabama, Delaware and Indiana. See Ala.Code §§ 13A-5-46, 13A-5-47 (1994); Del.Code Ann., Tit. 11, § 4209 (1995); Ind.Code Ann. § 35-50-2-9 (Supp.2001) *Ring*, 122 S.Ct. 2428, 2442, n.5.

The applicability of *Ring* to Florida's death penalty statute is currently pending in the Florida Supreme Court in two cases. *Bottoson v. Moore*, 2002 WL 1472231 (Fla. July 8, 2002)(granting stay of execution and setting briefing and oral argument schedule); *King v. Moore*, 2002 WL 1472232 (Fla. July 8, 2002)(same).

reasonable doubt. McCoy had a jury and that jury had to find at least one aggravating circumstances prior to recommending death. There can be no possible violation of the Sixth Amendment in his particular case.

Furthermore, two of the four aggravators found in this case are exempt from the holding in *Ring*. Certain aggravators are exempt from the holding in *Ring*. All recidivist aggravators may be found solely by the judge. *Ring* was an expansion of the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). However, *Apprendi* explicitly exempted recidivist factual findings from its holding. *Apprendi*, 530 at 490, 120 S.Ct. at 2362-63 (holding, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt). Any aggravator that depends on the fact of a prior conviction is exempted from *Ring*. A trial court, sitting alone, may make factual findings regarding recidivism.[38] Two of the four aggravators found in this case, the prior violent felony aggravator and the under sentence of imprisonment aggravator, are recidivist aggravators. Recidivist aggravators may be found by the judge alone even in the wake of *Ring*. *Ring*, at n.4

[38] *Walker v. State*, 790 So.2d 1200, 1201 (Fla. 5th DCA 2001)(noting that Florida courts, consistent with *Apprendi's* language excluding recidivism from its holding, have uniformly held that an habitual offender sentence is not subject to *Apprendi*); *McGregor v. State*, 789 So.2d 976, 978 (Fla. 2001)(rejecting a claim that the jury must find certain facts relating to the prison releasee reoffender statute because it is a recidivist statute to which *Apprendi* does not apply)..

(noting that none of the aggravators at issue related to past convictions and that therefore the holding in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which allowed the judge to find the fact of prior conviction even if it increases the sentence beyond the statutory maximum was not being challenged)[39]. Therefore, recidivist aggravators may be found by the judge sitting alone even in the wake of *Ring*.

Moreover, one of the aggravators was found by the jury prior to the penalty phase. The committed while the defendant was engaged in the armed robbery aggravator was found by the jury during the guilt phase. The jury convicted McCoy by special verdict form of felony murder with armed robbery being the underlying felony. Moreover, the jury also convicted McCoy of armed robbery with a firearm and discharging that firearm causing death in count II. Thus, this aggravator was found twice by the jury during the guilt phase. Constitutionally, once the jury returned this verdict the judge could have declined to hold a penalty phase and directly proceeded to the *Spencer* hearing. *Ring* does not require jury findings regarding

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[39] The *Apprendi* majority noted that it is arguable that *Almendarez-Torres* was "incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Apprendi* at 489, 120 S.Ct. 2348. However, contrary to this observation, exempting recidivism from the holding in *Apprendi* is logical. The Sixth Amendment guarantees the right to a jury trial, not two. Any defendant, who is a recidivist, has already had a jury find the underlying facts of conviction at the higher standard of proof. The judge, in a recidivist sentencing situation, is merely taken judicial notice of the prior jury's verdict. A defendant is entitled to one jury trial, not two.

aggravators at any particular stage. Thus, the procedure used to sentence McCoy to death does not violate *Ring*.

Furthermore, unanimity is not required. The United States Supreme Court first applied the Sixth Amendment right to a jury trial to the States in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). However, the United States Supreme Court has declined to constitutionalize a "jury" to mean twelve persons or unanimous verdicts. In *Williams v. Florida*, 399 U.S. 78, 103, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Court held that a six member jury in felony case did not violate the Sixth Amendment right to a jury trial. The *Williams* Court referred to the twelve person requirement as a "historical accident" that was "unrelated to the great purposes which gave rise to the jury in the first place." *Williams*, 399 U.S. at 89-90, 90 S.Ct. at 1900. Two years later, in *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), and *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), the United States Supreme Court held that conviction by less than unanimous verdicts did not violate the right to a jury trial. However, in *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), the United Supreme Court, while agreeing with the Louisiana Supreme Court that the question was a "close" one, required unanimity in a jury of six. Hence, the only constitutional requirement of unanimity is that a jury of six must be unanimous. Here, seven of the jurors agreed that death was appropriate.

Additionally, in those states that require an unanimous jury decision, the jury's decision is the final decision. Florida, by contrast, has two decision makers. Florida, while only requiring a simple majority vote by the jury, also requires the judge to agree with the jury's recommendation. We have two separate actors that must agree on death. If the jury recommends life, the judge, under *Tedder*,[40] must give great deference to the jury's life recommendation and under *Ring* may well be completely bound by that life decision. However, if the jury recommends death, the judge is completely free to ignore that death recommendation and impose life instead.[41] The requirement of unanimity is a procedural device to insure reliability and certainty, but the judge, as a second decision maker, fulfills this exact same function in Florida. To be

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[40] *Tedder v. State*, 322 So.2d 908 (Fla. 1975),

[41] While some cases state that a judge is required to give deference to a jury's recommendation of death as well as life, this is not accurate. Cf. *Muhammad v. State*, 782 So.2d 343, 362 (Fla. 2001)(limiting statement that the jury's recommendation should be given "great weight" to a jury's recommendation of a life sentence and explaining that the judge is required to make an independent determination regardless of the jury's recommendation). The trial court is, in fact, not required to give any deference to a jury's recommendation of death. Double jeopardy would preclude ANY review of a judge's decision to impose life. *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981)(holding double jeopardy applies to capital sentencing because penalty phase resembles trial on issue of guilt or innocence); *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)(holding double jeopardy clause prohibited sentencing respondent to death after life sentence was set aside on appeal, notwithstanding that failure to initially impose death penalty was based on misconstruction of capital sentencing law). The trial court is completely free to ignore a jury recommendation of death.

sentenced to death in Florida, seven laymen and a judge with vast criminal experience must agree. Simple majority vote is quite reasonable when there is a second actor involved that must independently agree with the first actor and perfectly constitutional. Hence, Florida's death penalty statute is not unconstitutional on any of the asserted grounds.

ISSUE VIII

WHETHER THE DEATH SENTENCE IS PROPORTIONATE? (Restated)

McCoy's death sentence is proportionate. This Court has found death appropriate where there were less than the four aggravators present here. No statutory mitigators were found in this case and the non-statutory mitigation was not compelling. Moreover, this Court has also found the death penalty to be the appropriate punishment where facts of the murder were similar to this murder. The defendant engaged in an armed robbery which included a cold, calculated, and premeditated plan to kill and had a prior criminal history of multiple robberies. Indeed, he was currently on conditional release for a prior robbery. Thus, the death penalty is proportionate.

The trial court's ruling

The trial court found four statutory aggravators: (1) prior violent felonies which were three armed robberies and an attempted armed robbery; (2) under sentence of imprisonment because McCoy was on conditional release; (3) cold, calculated and premeditated and avoid arrest which the trial court merged; (4) committed while engaged in the commission of armed robbery and pecuniary gain which the trial court merged. (R. III 489-

493). The trial court found no statutory mitigators. The trial court found twenty non-statutory mitigators each of which he gave some weight[42] (R. III 493-494).

The standard of review

The standard of review of whether the death penalty is proportionate is *de novo*.[43] Proportionality review is a task of

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[42] The nineteen mitigators were: (1) the defendant suffered an abusive childhood; (2) the defendant suffered an emotionally deprived childhood; (3) the defendant suffered an economically deprived childhood; (4) the defendant's mother had relationships with different abusive and non-abusive males; (5) the defendant suffered from unstable living conditions in his childhood; (6) the defendant's parents' divorce devastated him at age 10; (7) the defendant received poor and inadequate medical care, particularly when he suffered from a high fever; (8) the defendant is a caring son to his mother, providing her food, renting movies for her, and spending time with her; (9) the defendant had a good relationship with his father; (10) the defendant was a caring brother to his sisters, Barbara McCoy and Dorothy McCoy Robertson; (11) the defendant was a caring parent, before his incarceration, to his two sons, Andre (age 17) and Kenny (age 15); (12) as a child, the Defendant did poorly in school; (13) as a child, the defendant did not receive the psychological counseling recommended by school officials; (14) there is no evidence that the defendant has ever been violent or abusive in his personal relationships with family members or friends; (15) the defendant is a member of the Muslim faith; (16) the defendant successfully held down a job as a welder; (17) the defendant performed laudable humanitarian deeds for Paul Gillians, Diane Peterson, and Trina Rivers; (18) the defendant demonstrated good behavior during the trial after the verdict was rendered; (19) for the 11 months that he was on conditional release prior to the commission of this robbery and murder, the defendant apparently did well and complied with the requirements of conditional release and (20) the defendant will die in prison regardless of the sentence imposed by this Court.

[43] *State v. Middlebrooks*, 995 S.W.2d 550, 561, n.10 (Tenn. 1999)(noting that proportionality review is *de novo*);*State v. Wyrostek*, 873 P.2d 260, 266 (N. Mex. 1994)(observing that the determination of whether a death sentence is disproportionate or excessive is a question of law); *State v. Hoffman*, 851 P.2d 934, 943 (Idaho 1993)(stating that when making a proportionality

this Court. However, this Court does not reweigh the mitigating factors against the aggravating factors in a proportionality review, that is the function of the trial court. For purposes of proportionality review, this Court accepts the trial court's weighing of the aggravating and mitigating evidence. *Bates v. State*, 750 So.2d 6, 12 (Fla. 1999).

Merits

This Court reviews the propriety of all death sentences. To ensure uniformity, this Court compares the instant case to all other capital cases. *Foster v. State*, 778 So.2d 906, 921 (Fla. 2000). Proportionality review considers the totality of circumstances in a case and compares the case with other capital cases. *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990). Proportionality review entails a qualitative review of the underlying factual basis for each aggravator and mitigator rather than a quantitative analysis. *Morris v. State*, 811 So. 2d 661, 668 (Fla. 2002). While McCoy does not directly challenge the proportionality of his death sentence, this Court addresses this issue in every death case regardless of whether it is specifically raised. *Philmore v. State*, 2002 WL 1065944, *17 (Fla. 2002)(noting that although proportionality was not raised as an issue, this Court has an independent obligation to review each death case to determine whether death is the appropriate punishment).

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review, state supreme court makes a *de novo* determination of whether the sentence is proportional after an independent review of the record).

The death sentence in this case is proportionate. There are four aggravators in this case. This case involves one of the most serious aggravators - a prior violent felony. *Bryant v. State*,785 So.2d 422, 436 (Fla. 2001)(observing that prior violent felony convictions constitute "strong" aggravation). McCoy has three prior armed robbery convictions and an attempted robbery conviction. In one of the prior robberies, McCoy robbed a Pay Less store on Edgewood Avenue where he and a co-perpetrator ordered the two victims into a back room at gun point. The factual similarities between that prior and the instant robbery show a propensity for armed robbery, an escalating pattern of violence and lack of rehabilitation. McCoy has a pattern of armed robberies which McCoy chose to escalate in this case to murder. McCoy has been afforded two chances to rehabilitate himself and instead he chooses to engage in violent criminal behavior. McCoy has a significant history of engaging in exactly this type of criminal activity and was currently on conditional release for attempted robbery. One of the other aggravators, the cold, calculated and premeditated aggravator, is also one of the "most serious aggravators set out in the statutory sentencing scheme." *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1999). This was an armed robbery which included a cold, calculated, and premeditated plan to kill the manager.

In *Bryant v. State*, 785 So.2d 422 (Fla. 2001), this Court held that the death penalty was proportionate for a murder which occurred during a robbery of a market where the victim was shot three times at close range. The trial court found three

aggravating circumstances: (1) prior violent felony; (2) the murder was committed during a robbery; and (3) avoid arrest, and no statutory mitigators and only one nonstatutory mitigator, remorse, which it gave very little weight. Bryant had prior violent felony convictions for sexual battery, robbery with a weapon, and aggravated assault with a mask. *Bryant*, 785 So.2d at 436. Bryant argued that death was a disproportionate sentence because the killing resulted from an impulsive act, which occurred when Bryant found himself in an unexpected wrestling match for the weapon with the victim, and the only reason he shot the victim was because the victim was attempting to get the gun from him. This Court rejected that argument relying upon *Mendoza v. State*, 700 So.2d 670, 679 (Fla. 1997), and the fact that there were three aggravators. *Bryant*, 785 So.2d at 437.[44]

Here, as in *Bryant*, the victim was shot three times during an armed robbery of a store. In this case, the two final shots were at close range. Here, there are four aggravators, two of which were merged with other aggravators, not the three aggravators in *Bryant*. Here, in addition to the same aggravators found in *Bryant,* there are two other aggravators, *i.e.* the cold, calculated and premeditated aggravator and the under sentence of imprisonment aggravators. McCoy, like Bryant, has a significant, violent, criminal history. While there is

[44] Justice Anstead dissented from the finding of proportionality in *Mendoza* because the murder was "an unplanned, reactive murder" that occurred in a shootout initiated by the victim. The victim in *Mendoza* shot three times at the robbers. Here, by contrast, the victim had keys in her hands, not a gun and was a female who weighed 200 pounds. (XI 851,886).

more mitigation in this case than in *Bryant*, it is not particularly compelling. There is no mental mitigation or extreme childhood abuse. Thus, here, as in *Bryant*, the penalty is proportionate. *See also Melton v. State*, 638 So.2d 927 (Fla. 1994)(affirming death penalty shooting of victim in the head during robbery of pawn shop where defendant claimed victim rushed him where trial court found two aggravators (1) prior violent felonies of murder and robbery; and (2) pecuniary gain and two nonstatutory mitigators which were assigned little weight: (1) good conduct while awaiting trial, and (2) a difficult family background).

Finally, the prior violent felony aggravator distinguishes this case from *Caruthers v. State*, 465 So.2d 496 (Fla. 1985)(vacating death sentence for killing convenience store clerk where sole aggravator was murder committed during robbery and mitigating evidence included no history of prior criminal activity) and *Terry v. State*, 668 So.2d 954, 965 (Fla. 1996)(vacating death sentence where prior violent felony aggravator was based on the conduct of the co-perpetrator). *Mendoza v. State*, 700 So.2d 670, 679 (Fla. 1997)(affirming death sentence where victim was shot multiple times during attempted robbery and distinguishing *Terry* and *Jackson* because Mendoza's prior conviction was for an entirely separate crime). Moreover, the shooting of the paralyzed victim with a third shot distinguishes this case from *Terry* where the victim was only shot once. Thus, the death penalty is proportionate.

CONCLUSION

The State respectfully requests that this Honorable Court affirm appellant's convictions and death sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Lester Makofka, Esq., 24 North Market Street, Suite 402, Jacksonville, FL 32202 this 5th day of August, 2002.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

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