IN THE SUPREME COURT OF FLORIDA

CHARLES C. PETERSON,

Appellant,

v. CASE NO. SC06-252
L.T. No. CRC00-05107CFANO-1

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

_____

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

References to the record on appeal [record volumes 1-17] and the trial transcripts [record volumes 18-28] will be designated by the record volume number and appropriate page number. References to the "Addendum" record will be designated as (AR-Vol. #/page #). References to the supplemental record will be designated as (SR-Vol. #/page #).

## STATEMENT OF THE CASE AND FACTS
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On Christmas Eve, December 24, 1997, John Cardoso, an employee at a "Big Lots" store in St. Petersburg, was shot and killed by a masked gunman during an armed robbery. On March 21, 2000, the defendant, Charles Peterson, was indicted for the first-degree murder of Mr. Cardoso. (V1/1-2) The defendant's jury trial was held from July 19, 2005 through July 27, 2005. (V12/2075-2082)

The State's case included evidence of the Big Lots armed robbery/murder, and collateral crimes evidence of three other robberies committed by the defendant.

### The Big Lots Robbery/Murder

On Christmas Eve, 1997, customer Robert Davis was in the Big Lots store shortly before closing. Mr. Davis saw a black man pacing in the aisle in the back of the store. (V26/1371-1372) Mr. Davis watched the man for about five minutes. (V26/1373) Mr. Davis described the man as between 5'9" and 5'l0", of medium build, with a thin mustache. (V26/1373) When Mr. Davis left Big Lots, the man was still in the back of the store. (V26/1373) When viewing a third photopack, Mr. Davis identified the defendant as the man at the Big Lots on Christmas Eve, 1997. (V26/1376-1377) However, Mr. Davis could not make any positive

in-court identification. (V26/1378)

On Christmas Eve, 1997, the Big Lots store closed at 6:00 p.m., and assistant manager Karen Smith checked the front doors to make sure all the customers were gone and the doors were locked. (V25/1273; 1343) In addition to assistant manager Karen Smith, the following employees were still on duty: assistant manager Maria Soto, stocker Josh McBride, customer service representative Wanda Church, cashier Shirley Bellamy, and stock clerk John Cardoso. (V25/1272; V26/1341)

Assistant managers Smith and Soto were in the cash office when they heard a noisy ruckus, like banging furniture or firecrackers; Ms. Smith went to investigate and she was confronted by a masked gunman. (V25/1278-1279; V26/1344-1348) The assailant was African-American, about 5'6" tall, with pudgy cheeks and a small build; he wore latex gloves and a dark stocking mask, and brandished a small dark gun. (V25/1279-1280; V26/1350) The masked gunman was very derogatory; he used profanity, f--ker, demanded all the money, and repeatedly called the women "bitches." (V25/1281-1282; V26/1352) He put the gun to Karen's head, grabbed her arm, and marched Karen, Maria, and Shirley down the hallway. (V25/1284) He also put the gun in Maria Soto's back. (V26/1351) When they stopped at the break room, they saw John Cardoso's body. They stepped over John's

body and went into the break room. Then, the masked gunman took them back to the stock room and told them to get down on their hands and knees in a line. (V25/1285; V26/1351; 1369) According to Maria Soto, the man continuously threatened to kill them, to do what he had done to John. (V26/1352)

At that point, Josh came around the corner through the stock room doors. (V25/1286) The robber profanely demanded to know if there was anyone else in the store; he repeatedly told them to stay on their hands and knees and told them not to look at him. (V25/1287; V26/1353) Karen told the armed gunman that there was a cashier still up front; he grabbed Karen by her hair and neck and pulled her to her feet. The other employees were left kneeling in the stock room and they were told that they better not go anywhere because it didn't make any difference to him – he was already in trouble. (V25/1288) The masked gunman kept the gun pointed at Karen's head and forced her to call Wanda and get her to come to the back of the store. (V25/1289-1291) When Wanda walked back, the gunman took the gun away from Karen's head and pointed it at Wanda and told her to come with them to the cash office. (V25/1293) After Wanda put the tills in the cash office, he pointed the gun at Karen again and directed them back to the stock room; Josh, Maria and Shirley were still there. (V25/1294-1296) Shirley Bellamy's hands were bound with

plastic straps. (V26/1370)

The masked gunman told Karen to unlock the back door, which she did; the gunman held onto her arm and he kept the gun pointed at her head. When they went back to the well-lit cash office, Karen was alone with the gunman. (V25/1294-1295) The gunman forced her back out to the store in order to get a backpack to hold the money; he kept telling her to hurry up, you bitch, put the money in the bag, and he repeatedly demanded that she not look at him. (V25/1297) The masked gunman demanded the money from the tills; he did not want the G – d--- change, but he wanted the "rolled" money from the safe and the money from the "little blue box" in the safe. (V25/1298) The gunman told Karen not to move and he went back and forth to check on the other employees. (V25/1298-1299) After she'd finished filling the bag with money, he then took Karen and Shirley and Josh back to the employee lounge, where John was, and made them lay down on the floor. (V25/1300) The man kept using profanity and telling the employees not to look at him. (V25/1301) After about 15 – 20 minutes, Maria went to the front and entered her combination for the robbery. (V25/1301) Wanda went to the parking lot and called the police. (V25/1301) Karen was still in the break room, along with Shirley, Josh, and John, when the police arrived. (V25/1302) Karen Smith identified the

defendant, Charles Peterson, as the robber, both from a photopack and in person at trial. (V25/1304; 1306; 1309; 1312) Prior to viewing the photopack, Karen saw the defendant's picture on television, but she didn't know his name and didn't know if it was the same picture. (V25/1307) Before trial, Karen was 90% sure of her identification; after being in the same room with him at trial, Karen was 100% certain. (V25/1304)

Maria Soto was unable to identify anyone in the photopack. (V26/1358; 1365) Maria noted that the defendant was wearing the same clothing in court that the robber had worn: a white shirt and no tie. (V26/1362) Her identification was based on the clothing because she was unable to see the robber's face. (V26/1362; 1364) Shirley Bellamy was unable to make an identification. (V26/1369)

The victim, John Cardoso, was shot in the back. The .25 caliber bullet pierced his left ribs, perforated his aorta, both lungs, and eventually lodged in his liver. (V26/1384-1385) The bullet trajectory went from back to front, left to right, and downwards. (V26/1385) The gunshot residue was consistent with a gunshot from less than a foot away. (V26/1386)

The evidence seized during execution of search warrants included: cut pantyhose (V24/1114-1119, located in a dresser in the defendant's father's home); three latex gloves (V24/1129;

1133-1138, located in a kitchen drawer in the defendant's sister's home); pieces of pantyhose (V24/1129; 1139, located in the defendant's motorcycle), and a pair of black pantyhose (V24/1130; 1143-1152, located in driver's side door of the defendant's vehicle).

**The Collateral Crimes**

The Williams rule evidence related to the defendant's three other robberies.

The Family Dollar store in Tampa was robbed at gunpoint on February 14, 1997. After the store closed, a masked gunman wearing a dark spandex mask confronted store employees Mary Palmisano and Alice Rabideau. (V23/965-967) The man was black and about 5'6" tall. (V23/972) The gunman kept screaming at the women not to look at him, he used profanity, called them "bitches," made both women get down on the floor, and he tied them up with either phone cords or extension cords. (V23/973-974) The man demanded the "big money" and put the gun to Mrs. Palmisano's head. (V23/977) The armed gunman had trouble leaving since the back door was locked and, therefore, he had to get the keys from Mrs. Palmisano in order to get out the back door. (V23/974) DNA evidence from the crime matched the DNA profile of the defendant. (V23/991; V23/1025; 1028; 1071)

On May 12, 1998, the Phar-Mor drug store was robbed after

closing. (V26/1426-1432) Co-manager Glendene Day was confronted by an African-American man who was about 5'6" tall, medium build, wore a black nylon mask, latex gloves, and carried a black gun. (V26/1432-1434) The man grabbed Ms. Day, put the gun to her head, demanded that she not look at him, and wanted to know how many employees were in the store. (V26/1435) He instructed Ms. Day to call the other employees to the back room and he then directed all three women to get down on the ground. (V26/1437; 1439) He used nearby black electrical tape to try and tie the three employees. When he ran out of tape, he used plastic strapping. (V26/1437-1438; 1471) The man made Ms. Day go with him to the front of the store and get the money. (V26/1440) He stuffed the money into a nearby manila envelope. (V26/1441) After he got the money, he took Ms. Day to the back of the store, bound her hands with box strapping and left her with the other employees before leaving out a locked door. (V26/1445-1449) The victims could not identify the masked gunman. (V26/1456; 1474)

The Phar-Mor store surveillance from May 12, 1998 at 10:12 p.m. – 11:36 p.m. was authenticated. (V23/1236) Jane Gosha, the defendant's former girlfriend, and Ron Hillman, Jane's brother and a friend of the defendant, both identified the defendant, Charles Peterson, as the man in the Phar-Mor surveillance

videotape. (V25/1256; V26/1422) Peterson's black Hilfiger t-shirt was visible on the videotape and it was among the clothing photographed in Willie Peterson's house. (V25/1254; 1265) Sometime between 1996 and 1998, when Jane Gosha lived with the defendant, she discovered both a large amount of cash and a gun. (V25/1243-1247)

The McCrory's robbery occurred in August of 1998. Although McCrory's normally closes at 6:00 p.m., it remained open until 8:00 p.m. on Saturday night. (V27/1577) Shortly before 6:00 p.m. on Saturday, supervisor Ann Weber was confronted by a man wearing a stocking over his face. (V27/1571) The man had high, pudgy cheekbones and he was carrying what appeared to be a reddish-brown semi-automatic gun. (V27/1571) The man told Ms. Weber not to look at him or he would kill her. (V27/1572) The man demanded money. (V27/1572) She put the money bags on the floor and the man called her a "bitch". (V27/1573) The man also took money in deposit bags that contained checks, credit card slips, deposit slips, and a pick-up receipt. (V27/1575)

Although a cashier at the front of the store was ringing the bell for assistance, the man made Ms. Weber get down on the floor. (V27/1578) Ms. Weber heard the man rummaging around, and she then heard the back door open and close. (V27/1578)

During the execution of a search warrant at Willie

Peterson's home, the police recovered a green bank bag belonging to McCrory's. (V17/1558; V27/1582) The bag contained a pellet gun and a white plastic bag from McCrory's, with approximately 30 checks and store receipts, a bank deposit slip for Nations Bank, a receipt dated August 29, 1998, and a $20 bill. (V17/1563—1566; V27/1584-1587) The defendant's fingerprint was on a receipt and on a check. (V27/1598)

Ann Weber identified the defendant from a photopack and informed the law enforcement officer that she was "90%" sure of her selection. (V27/1580) At trial, Ann Weber also made an in-court identification of Peterson. (V27/1588) On July 27, 2005, the jury returned a verdict of guilty as charged. (V12/2082; 2127)

On July 29, 2005, the jury reconvened for the penalty phase. (V12/2128) The State and defense stipulated that the defendant was previously convicted of eight (8) prior felonies (V12/2131-2133), and also stipulated that, on December 24, 1997, the defendant was under sentence of imprisonment (life parole). (V12/2134-2135) The jury recommended the death penalty by a vote of eight to four. (V12/2129) A Spencer hearing was held on September 23, 2005. On October 3, 2005, the defense filed a Motion Concerning Penalty Phase Proceedings. On November 7, 2005, the trial court held a hearing on this motion and ruled

that the Defendant was not entitled to a new penalty phase.

On January 6, 2006, the trial court issued a comprehensive sentencing order, setting forth detailed findings of fact and conclusions of law. (V13/2334-2350) The trial court found three aggravating factors: (1) under sentence of imprisonment at the time of the murder (great weight); (2) previous felony convictions (great weight); and (3) committed during the commission of a robbery (significant, but not great weight). (V13/2337-2340) The trial court found the following mitigating circumstances: (1) the defendant's mental condition (little weight); (2) low IQ (little weight); (3) family relationship (some weight); (4) work history (some weight); (5) exemplary discipline record in jail/prison (little weight). (V13/2340—2347) The trial court rejected two proposed statutory mitigators: ability to conform conduct to the requirements of the law and age. (V13/2341—2343) The trial court also found that the jury did not rely upon any impermissible aggravating factors of lack of remorse or failure to testify. (V13/2347—2348) The trial court's sentencing order states, in pertinent part:

**I. Aggravating Factors**

> Three aggravating factors exist in this case. As referred to above and as explained below, the court finds that each factor is established beyond a reasonable doubt by overwhelming and/or unrebutted

evidence.

**A. The Defendant was under a sentence of imprisonment at the time of the murder. § 921.141(5)(a), Fla. Stat.**

It is undisputed that at the time of the murder in this case, the Defendant was under active supervision on life parole for three 1981 robberies. He was placed on parole in those cases in 1992. Parole constitutes a sentence of imprisonment for the purposes of § 921.141(5)(a), Fla. Stat. *Jackson v. State*, 530 So. 2d 269 (Fla. 1988). This aggravating factor was established beyond a reasonable doubt by documents entered into evidence during the State's case in chief and stipulation of the parties.

The court gives great weight to the aggravating factor that the Defendant was under a sentence of imprisonment at the time of the murder. In fact, the sentence of imprisonment was for three robbery offenses of a similar nature to the Defendant's entire criminal history.

**B. The Defendant had previous convictions for violent felony offenses. § 921.141(5)(b), Fla. Stat.**

It is undisputed that the Defendant has thirteen prior violent felony convictions resulting in a total of nine life sentences[2]. Based upon the stipulation of the parties, judgments and sentences entered into evidence, and victim testimony, it was established that since 1981, the Defendant has thirteen violent felony convictions including multiple armed robberies and sexual batteries. The evidence also established beyond a reasonable doubt

[2] The Defendant was on active parole on three of those life sentences at the time of the murder in this case.

that each of these convictions involved the type of life threatening crime contemplated by this aggravator in which the perpetrator came in direct contact with a human victim. *Lewis v. State*, 398 So. 2d 432 (Fla.

1981). The evidence also established that these violent felonies occurred prior to the murder of Mr. Cardoso. *Hess v. State*, 794 So. 2d 1249, 1265 (Fla. 2001). The Defendant's violent criminal history extended over the course of nineteen years, but unfortunately did not end with the tragic murder of Mr. Cardoso. Even after Mr. Cardoso's murder, the Defendant continued his pattern of violence by committing additional robberies.

Two of the Defendant's prior victims testified during the guilt or penalty phases of the trial regarding the circumstances of the crimes that were committed against them. Their testimony is summarized as follows:

**i. Mary Palmisano**

On February 28, 2001, the Defendant was sentenced to six life sentences and two five year terms for two counts of false imprisonment, two counts of armed robbery with a firearm, and four counts of sexual battery with a deadly weapon. Each of these convictions arose from the sexual batteries and robbery of Mary Palmisano and Alice Rabidue on Valentine's Day, February 14, 1997.

Ms. Palmisano testified during the guilt phase of the trial regarding the violent nature of the robbery and false imprisonment. She and Ms. Rabidue worked at a Family Dollar Store and had just closed the store for the evening. They were accosted by the Defendant, who was disguised by a mask on his face and carrying a firearm. The Defendant threatened the women, ordered them to lie on the floor, repeatedly referring to them as "bitches" and demanding to know where the "big money" was.

When the phone rang, the Defendant forced Ms. Palmisano to answer. The caller was her husband, and the Defendant held a gun to her head while he listened in on her conversation. He tied each woman up with cords from the store and robbed them of the day's proceeds before taking the keys and fleeing from the store's locked rear exit. The judgments and sentences

from this incident were introduced into evidence by stipulation in the penalty phase and further established that the Defendant committed multiple sexual batteries on each victim.

**ii. Dale Smithson**

On December 10, 1981, the Defendant was convicted and sentenced to prison for a series of violent crimes including a burglary and assault, an aggravated assault with a firearm, and three additional armed robberies committed with a firearm. One of these convictions arose from the armed robbery of Dale Smithson in May 1981.

Mr. Smithson testified that he was working as a gas station attendant when he encountered the Defendant hiding in a storage room after closing time. The Defendant was disguised by sunglasses and a hat. He held a small handgun to the back of the victim's head, threatened to shoot him, and ordered him to explain how to open the cash register. The Defendant then forced the victim to lie on the ground and tied him up with cloth he had brought to the gas station. After stealing money from the cash register, the Defendant stole money from the victim's back pocket and took his wallet, which he ultimately threw on the victim's back.

The court gives great weight to the statutory aggravating factor that the Defendant had previous convictions for violent felony offenses, thirteen in all.

**C. The Defendant committed the murder during the commission of a robbery. § 941.141(5)(d), Fla. Stat.**

While the Defense argued misidentification in the guilt phase of trial, it is undisputed that the murder of Mr. Cardoso arose during the robbery of a Big Lots. Evidence during the guilt phase of the trial established that the Defendant entered the Big Lots shortly before closing and hid until the store closed. Then, disguised by a dark nylon mask and gloves and carrying a pistol, he accosted the employees who remained after closing. He held the pistol to various

employees' heads as he threatened them and shouted orders. He forced the employees to lie face down in a break room at the rear of the store, ordering them not to look at his face and to follow his orders. He threatened to kill them if they did not follow his orders. He forced the employees to twice walk past Mr. Cardoso as he lie bleeding to death on the floor. He tied one employee's hands behind her back and forced another employee to return to the cash room where he stole approximately $10,000.00. Finally, the Defendant fled the store carrying a bag of money and the pistol.

This aggravating factor was found beyond a reasonable doubt by the jury, and the court is not persuaded by the Defense argument that this aggravator is unconstitutional. Furthermore, the Florida Supreme Court has expressly rejected this argument. *Blanco v. State*, 706 So. 2d 7, 1 1(Fla. 1997); *Hudson v. State*, 708 So. 2d 256 (Fla. 1998); *Francis v. State*, 808 So. 2d 110, 136 (Fla. 2001). Issues relevant to this argument are also addressed in the discussion entitled "Lack of Premeditation — Non-Statutory."

The court is mindful that the matter of the Defendant having committed the murder during the commission of the robbery has been, to some extent, considered by the jury in the guilt phase of the trial. Because it has already been considered to some degree, the court now gives significant but not great weight to this statutory aggravating factor.

**II. Mitigating Factors**

The Defense argued that a number of mitigating factors exist in this case, both statutory and non-statutory. Several of these factors were presented to the jury and the court during the penalty phase of the trial. Other factors were presented to the court in the Defense's Sentencing Memorandum and Memorandum of Law in Support of Jury Override Sentence. The court notes that several of these factors overlap or are repetitive. The court is mindful that it is essential to consider all mitigating factors, but finds that they are most properly analyzed and categorized as

follows:

**A. Capacity - The Defendant's ability to conform his conduct to the requirements of law or appreciate the criminality of his actions was substantially impaired. § 921.141(6)(f), Fla. Stat.**

The Defendant presented testimony on this point from Dr. Maher and Dr. McClain during the penalty phase of the trial. Each doctor had an opportunity to interview the Defendant.

Dr. Maher is the physician and board certified forensic psychiatrist who reviewed various records from the Defendant's history and interviewed the Defendant. He testified in his deposition and during the sentencing hearing that he believed the Defendant's capacity to conform his conduct to the requirements of law and his-capacity to appreciate the criminality of his conduct were [sic] substantially impaired as a result of his borderline intellectual capacity and his immaturity. Dr. Maher stated that the Defendant had an intellectual capacity which was below average but above the retarded range, with an IQ somewhere between 75 and 85. Other than the IQ test results themselves, however, the evidentiary support for Dr. Maher's opinion was tenuous.

In contrast to Dr. Maher's opinion are the facts of the Defendant's criminal history. The murder of Mr. Cardoso, ***Williams3*** rule crimes, and prior violent felonies were not impulsive crimes committed by the Defendant in the heat of passion. Rather, they were carefully planned events utilizing increasingly sophisticated preparation. The Defendant thoroughly prepared for each crime by learning the hours and days of each business' operation, scoping out available exits and security, and attending to the number of personnel. He committed the crimes at times and on days, such as Christmas Eve and Valentine's Day that minimized the risk of being caught but maximized profit.

These were crimes committed to obtain money, not out of heightened emotion. Clearly, the Defendant was

able to successfully prepare for and plan each robbery over time and delay acting on his plan until the appropriate moment. The evidence established that the Defendant was in total control of his actions, and his ability to delay his criminally violent actions until circumstances were most favorable is indicative of a more heightened, rather that diminished capacity.

Dr. Maher's opinion that the Defendant was unable to appreciate the criminality of his actions is equally inconsistent with the evidence presented in both the guilt and penalty phases of the trial. The Defendant had been previously prosecuted for and convicted of similar robberies and sentenced to life in prison. In engaging

[3] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

in this new series of criminal actions the Defendant went to great lengths to prevent his identification, wearing gloves and a mask, threatening to kill witnesses who resisted or attempted to look at him, and using items from the crime scene to carry stolen money and to bind victims. By using items from the crime scene, he was able to prevent any forensic association between himself and evidence left at the scene. As Dr. Maher acknowledged the Defendant clearly understood that his actions were criminal, but was allegedly unable to consciously appreciate as a "human being" the extreme suffering he was inflicting on his victims.

Dr. Maher suggested that the Defendant lacked the full emotional capacity of an adult and was functioning at the emotional level of fourteen to sixteen year old. Dr. Maher could offer no objective evidence to support this conclusion, and could point to no environmental cause for the Defendant's arrested emotional development other than that the Defendant had to overcome his limited intelligence at school and overcome that he was a "poor black man in the community."

Dr. McClain is another forensic psychologist who

tested the Defendant's IQ. She testified that the Defendant's IQ was in the borderline range. However, she did not testify that the Defendant's IQ prevented him from conforming his conduct to the requirements of law or appreciating the criminality of his actions.

The court notes that the Defendant was thirty-eight years old at the time of the murder, had already spent nearly a decade in prison, maintained consistent employment for seven years following his release from prison, and had committed a series of sophisticated and calculated robberies.

Dr. Maher conceded that the Defendant understood that his behavior was criminal. As previously explained, Dr. Maher's opinion that the Defendant had a diminished ability to understand and appreciate the wrongfulness of his behavior is inconsistent with the evidence presented during the guilt and penalty phases of the trial. Overall, the court finds that the Defendant has failed to establish that his ability to conform his conduct to the requirements of law or appreciate the criminality of his action was impaired and therefore gives this statutory factor no weight. However, the court will include consideration of the Defendant's mental condition as a non-statutory mitigator below:

**B. Age at the Time of the Crime – The Defendant functions at the emotional level of a fourteen to sixteen year old. § 921.141(6)(g), Fla. Stat.**

The Defendant was born on August 11, 1959 and was thirty-eight years old on the day he murdered Mr. Cardoso. Dr. Maher testified that based on the Defendant's records and his interviews with the Defendant, the Defendant functions emotionally at the level of a fourteen to sixteen year old.

Dr. Maher suggested that the Defendant lacked the full emotional capacity of an adult and was functioning at the emotional level of a fourteen to sixteen year old. Dr. Maher could offer no objective evidence to support this speculation, and could point to no environmental cause for the Defendant's arrested emotional development other than that the Defendant

had to overcome his limited intelligence at school and was a black man in the community. Dr. Maher also testified that even a child in elementary school has the ability to understand that robbery and murder are wrong.

The court finds that the Defendant was mature enough to extensively plan out sophisticated robberies, had a job for seven years, and maintain familial relationships. These observations demonstrate that the Defendant was capable of functioning as a mature adult. Overall, though, the court finds that the Defense has established that the Defendant is emotionally immature but gives this statutory factor little weight, as the immaturity did not impair him in planning the sophisticated robbery.

**C. Low IQ - Non-Statutory**

Dr. McClain is the forensic psychologist who conducted the Defendant's IQ testing. She testified that with respect to the Defendant's overall IQ functioning, his IQ was within the borderline range. As noted above, Dr. McClain did not testify that the Defendant's IQ prevented him from conforming his conduct to the requirements of law or appreciating the criminality of his actions.

Dr. Maher described the Defendant's IQ as being in the low normal range. However, Dr. Maher's testimony failed to establish that this factor has any significant relation to his ability to appreciate the criminality of his actions. The Defendant's ability to commit the crime as described above is inconsistent with a low to borderline IQ. Further, the ability to maintain consistent employment for seven years is also a contradiction.

The court finds that the Defendant does have a low to normal IQ. However, the court gives this finding little weight, as he was clearly able to plan out his robberies in an increasingly sophisticated manner. As mentioned above, the Defendant thoroughly prepared for each crime by learning the hours and days of each business' operation, scoping out available exits and security, and attending to the number of personnel. He

committed the crimes at times and on days that minimized the potential for being caught but maximized profit.

**D. Background, Environment, and Mental Status – Non-Statutory**

As explained above, the court has found that the Defendant's mental status does not amount to a statutory mitigating circumstance. However, the court now analyzes whether his background and the environment in which he was raised, combined with his mental status, constitutes a non-statutory mitigating circumstance.

Dr. Maher testified that the Defendant faced certain challenges in his life. He specifically referenced the Defendant's low to normal IQ and growing up as a black man in the community. The Defendant's mother testified that the Defendant was a loving son and a well behaved child. She did not indicate that his childhood was plagued by abuse or other problems.

For the reasons articulated above the court finds that the Defendant does not suffer from any type of mental or emotional disturbance other than some degree of immaturity and a low IQ. The court finds that the Defendant has some limited mental impairment but gives this finding little weight in light of the Defendant's ability to work around these impairments by committing sophisticated robberies. The court further finds that the Defendant's background and the environment in which he was raised does not mitigate this crime.

**E. Family Relationships – Non-Statutory**

During the penalty phase of the trial, the Defendant's mother and niece each testified regarding their relationship with the Defendant. Their testimony established that the Defendant was well behaved as a child and was a positive father figure to his niece. Although there is very little objective proof of this assertion, the court is reasonably convinced it has been established because the standard for the establishment of the existence of this factor

is relatively low. The court gives this mitigator some weight.

**F. Work History – Non-Statutory**

The Defendant's mother testified that the Defendant maintained consistent employment for seven years after his release on parole. Again, the relatively low standard for the establishment of such a factor reasonably convinces the court that this factor exists and the court gives it some weight.

**G. Exemplary Disciplinary Records in Jail/Prison – Non-Statutory**

During the penalty phase of the trial, the Defendant presented Linda Dyer as a witness. Ms. Dyer is the classifications supervisor and custodian of records for the Pinellas County Sheriff's Office. She keeps records of all the disciplinary reports, which are issued whenever an inmate breaks a rule of the jail. Ms. Dyer testified that the Pinellas County Sheriff had custody of the Defendant from January 19, 2001 through the date of the penalty phase. During that time, he had one disciplinary report. She testified that based on her twenty-one years of experience in classifications, one disciplinary report in over four years is a good record. The Defendant also entered into evidence a disciplinary report from the Hillsborough County Jail revealing that the Defendant had one disciplinary report issued against him during the time he was incarcerated there. Additionally, Dr. Maher testified that the Defendant is able to behave and function properly when he is placed in a highly controlled and supervised prison environment. The court finds that this mitigating circumstance was established but gives it little weight.

**H. Lack of Premeditation - Non-Statutory**

The Defense argues that the death penalty should not be imposed because the State did not prove that the Defendant acted with premeditation or that he had the intent to kill Mr. Cardoso. However, the court finds that ample evidence of premeditation was

presented at trial.

The Defendant shot Mr. Cardoso when they were alone inside a break room at Big Lots. Witnesses heard what sounded like a struggle or confrontation, and the autopsy revealed bruising on Mr. Cardoso's right shoulder, arm, and hand consistent with having occurred at or immediately before the shooting. The fatal gunshot wound entered the victim's upper left shoulder below the neckline and traveled downward in a back to front, left to right trajectory. Circumstantial evidence including the path of the bullet, the distance from which the gun was fired, and the fact that the gun was aimed at a vital area, striking the lung, liver, and major blood vessels, suggests that Mr. Cardoso was shot while in a submissive, kneeling position with his torso leaning toward the floor and the Defendant standing above him, while Mr. Cardoso was not struggling and posed no immediate threat to the Defendant.

Even after firing the fatal gunshot, the Defendant executed the robbery as planned without allowing other employees to call for medical help to save Mr. Cardoso's life. Throughout the robbery, the Defendant repeatedly threatened to kill victims who disobeyed his commands and held a loaded pistol to victims' heads. All this evidence indicates that the Defendant was prepared to use lethal force to overcome any resistance he encountered during the planned commission of the robbery.

Even if the court was to find that there was no evidence of premeditation, the lack of premeditation alone is not a legal bar to the imposition of the death sentence. Since the Defendant acted alone and personally shot Mr. Cardoso, it was unnecessary for the court to either instruct the jury or to make specific findings under *Enmund v. Florida*, 458 U.S. 782 (1982) or *Tison v. Arizona*, 481 U.S. 137 (1987).

The Court's holding in *Enmund* that an accomplice in a first degree felony murder could not be sentenced to death if he did not actually kill or intend to kill or intend that lethal force be used was later modified

in *Tison*. *Id*. at 146. There, the court held that an accomplice in a felony murder who did not himself inflict the fatal wound was nonetheless subject to the death penalty if he was a major participant in the underlying felony and showed reckless disregard for human life. *Id*. at 158. By authorizing the imposition of the death penalty on accomplices who did not possess the intent to kill, both the United States' Supreme Court and the Florida Supreme Court have clearly ruled that premeditation is not a prerequisite to capital punishment.

The court finds that the Defendant has not established this factor and therefore gives it no weight.

**D. Invalid Aggravating Factors – Non-Statutory**

The Defendant contends that the jury's recommendation was based on invalid aggravating factors. Specifically, he contends that his alleged lack of remorse and failure to testify are improper aggravating factors and cannot be considered. *Sochor v. Florida*, 504 U.S. 527, 532 (1992).

The Defense also presented this argument in his Motion Concerning Penalty Phase Proceedings in which he requested a new penalty phase. The court thoroughly reviewed and heard this issue and denied that motion on November 7, 2005. Here, the Defendant again contends that the jury improperly considered his lack of remorse and failure to testify in making its sentencing recommendation. While the court's ruling is unchanged, it is appropriate to briefly address the matter in this sentencing order as well.

During the trial, the court had well-acquainted herself with relevant law concerning proper argument with respect to aggravators and mitigators in cases where the death penalty is sought. Prior to the closing arguments in the penalty phase, the court specifically advised the attorneys of the lawful parameters of said closing, and that the court would be listening very closely to the remarks of the attorneys and would not hesitate to intercede in its responsibility to assure a fair trial. Among the list

of comments the court prohibited was any attempt on the part of the State to argue "lack of remorse" as an aggravator. The court was well aware that lack of remorse is an improper aggravator and cannot be considered. The court was alert to any potential improper argument in this regard. Earlier, during the cross-examination of defense witness Dr. Maher by Assistant State Attorney Crow, the Defense objected that Mr. Crow's questioning was moving into an area of "remorse, or lack of remorse." In fact, the court found that while Mr. Crow's questions were proper, that he should use caution in asking such questions. The court zealously ensured throughout the penalty phase that there be no argument of lack of remorse as an aggravator and the court is well-satisfied that such an impropriety did not take place.

At no time during the trial did the State attempt to prove any aggravating factors by introducing evidence of lack of remorse, nor did it argue lack of remorse as a non-statutory aggravator. Two primary themes existed throughout the Defense's penalty phase presentation. First, that the Defendant's actions were not premeditated and second, that the Defendant's actions were the result of some type of mental impairment or diminished capacity. Such arguments invited the State to, among other things, provide evidence and arguments that the Defendant's actions were premeditated and that he had the capacity to know that his actions were wrong. Addressing these areas by either side necessarily involves testimony and argument regarding the Defendant's state of mind at the time of the killing. "Remorse," though, is an entirely different concept having to do with regret for some past deed. The State has correctly argued that remorse is not related to the Defendant's intent during a crime but is instead defined as "a gnawing distress arising from a sense of guilt for past wrongs (as injuries to others)." *Beasley v. State*, 774 So 2d 649, 672 (Fla 2000).

The focus of the State was not on "remorse" in any way. Rather the focus of the State was on the state of mind of the Defendant during the murder. The State's cross-examination questions and argument in this

regard were invited by the Defense, but would have ostensibly been proper even had they not been invited.

The Defendant also alleges that the jury foreperson's out of court statements prove that the jury improperly considered his lack of remorse and also his failure to testify in rendering its decision. The comments at issue here were made to journalists and printed in articles in the St. Petersburg Times and the Tampa Tribune. However, Florida law prohibits the use of juror testimony to impeach a verdict. § 90.607(2)(b), Fla. Stat.; *Sims v. State*, 444 So. 2d 922 (Fla. l984) (Juror testimony concerning the jury's alleged consideration of the Defendant's failure to testify was inadmissible as this is a matter that inheres in the verdict). *Devoney v. State*, 717 So. 2d 501 (Fla. 1998)(Juror testimony that jury may have relied on inadmissible evidence, which the court had instructed them to ignore, was inadmissible as a basis for granting a new trial).

**Summary of Mitigating Factors**

The court finds that with regard to the various mitigating factors, the following were established: the Defendant had a good relationship with at least two family members, maintained consistent employment for seven years after his release on parole, had an exemplary disciplinary record while in jail, had the mental immaturity of a teenager and had a low to normal IQ. The court has given each of these factors some or little weight as set out above. It is notable that some of these factors, while establishing mitigation, also support a finding that the Defendant was able to appreciate the criminality of his actions.

**Proportionality Review**

The court recognizes that the Supreme Court of Florida will conduct a proportionality review of the sentence in this case. *See Dixon v. State*, 283 So. 2d 1 (Fla. 1973). The most logical interpretation of the evidence in this case established that the Defendant intentionally and with premeditation shot Mr. Cardoso during the commission of a robbery. The Defendant

shot Mr. Cardoso while Mr. Cardoso was unarmed and kneeling on the floor in a passive position. Further the Defendant was on parole at the time of the murder and had committed thirteen prior felony offenses. Nothing about the nature of the offense, the Defendant's age, mental ability, or background suggests that a death sentence for his conduct would be disproportionate. Furthermore, the court's review of other capital cases has led the court to conclude that the death penalty would be a proportionate sentence in this case.

## Conclusion

The court finds that the State has established three aggravating factors beyond a reasonable doubt, and the court further finds that five mitigating circumstances have been established. The court recognizes that in considering the aggravating and mitigating circumstances, there is no arithmetic formula. It is not enough to weigh the number of aggravators against the number of mitigators. The court carefully considered the nature and quality of each of the aggravators and mitigators.

The aggravating circumstances in this case are atrocious. The Defendant has a life long history of violent crimes as demonstrated by his thirteen prior violent felony convictions. At the time he committed the murder of John Cardoso, in the course of a robbery, he was on parole for committing other robberies. These factors greatly outweigh the comparatively insignificant mitigating factors. The court has considered and given great weight to the advisory verdict of the jury, who by a vote of eight to four recommended that the death penalty be imposed. The court also independently finds that the aggravating factors far outweigh the mitigating factors, and the murder of John Cardoso thus warrants the imposition of the death penalty.

(V13/2338-2350) (e.s.)

## SUMMARY OF THE ARGUMENT

**Issue I – The Williams Rule Claim**

The trial court did not abuse its discretion in admitting collateral crimes evidence. Peterson's collateral crimes were uniquely similar and admissible to prove his common modus operandi (M.O.) and, therefore, identity. Also, Peterson's collateral crimes were admissible to prove his intent/motive, opportunity, preparation, plan, knowledge, absence of mistake/accident, and to rebut any innocent explanation for Peterson's behavior and possession of certain items. Finally, as the trial court explicitly found, the collateral crimes evidence did not become a feature of the trial.

**Issue II – The Lethal Injection Claim**

The defendant's lethal injection claim is procedurally barred and without merit. Peterson did not raise any challenge to lethal injection in the trial court. Furthermore, as this Court repeatedly has held, execution by lethal injection does not constitute cruel and unusual punishment.

**Issue III – The Proportionality Claim**

The sentence of death is proportional. As the trial court cogently summarized, the "Defendant intentionally and with premeditation shot Mr. Cardoso during the commission of a

robbery. The Defendant shot Mr. Cardoso while Mr. Cardoso was unarmed and kneeling on the floor in a passive position. Further, the Defendant was on parole at the time of the murder and had committed thirteen prior felony offenses. Nothing about the nature of the offense, the Defendant's age, mental ability, or background suggests that a death sentence for his conduct would be disproportionate." (V13/2349)

**Issue IV – The "Lack of Remorse" Claim**

The trial court specifically found that "[a]t no time during the trial did the State attempt to prove any aggravating factors introducing evidence of lack of remorse, nor did it argue lack of remorse as a non-statutory aggravator . . . [t]he focus of the State was on the state of mind of the Defendant during the murder. The State's cross-examination questions and argument in this regard were invited by the defense, but would have ostensibly been proper even had they not been invited." (V13/2348) The trial court's dispositive ruling is supported by competent, substantial evidence.

**Issues V and VI – The Ring Claims (Consolidated)**

Florida's death penalty statute is not unconstitutional under Ring. Additionally, as this Court repeatedly has held, when a defendant has a prior violent felony conviction, Ring is not implicated.

**Issue VII – The "Burden Shifting" Jury Instruction Claim**

The Defendant's penalty phase jury instruction claim is procedurally barred and without merit. Although the defense raised a preliminary "burden shifting" objection, the defendant did not object to the penalty phase instructions at the time they were given. Furthermore, this Court repeatedly has held that the standard jury instructions do not impermissibly shift the burden of proof.

**Issue VIII – Sufficiency of the Evidence Claim (Supplemental)**

There was sufficient evidence to support the defendant's conviction for first degree murder, both as premeditated and felony murder. Felony murder was undisputed. Peterson entered the Big Lots store armed with a loaded gun and he shot Mr. Cardoso when they were alone in a break room. Evidence of premeditation included, *inter alia*, Peterson's repeated threats, the path of the bullet, the distance from which the gun was fired, and the fact that the gun was aimed at a vital area (striking the lung, liver, and major blood vessels). Mr. Cardoso was shot while in a submissive, kneeling position with his torso leaning toward the floor and Peterson standing above him. In other words, Mr. Cardoso was not struggling and posed no immediate threat to Peterson when he was shot and killed.

## ARGUMENT

## ISSUE I

## The Williams Rule Claim

On Christmas Eve, 1997, the defendant, Charles Peterson, entered the Big Lots store in St. Petersburg shortly before closing. Peterson, who was armed with a loaded gun, secretly remained in the back of the store when it closed that day. A stock clerk, John Cardoso, was the first employee that Peterson confronted after closing hours. Peterson shot and killed Mr. Cardoso. Mr. Cardoso was shot in the shoulder/lower-neck and the bullet traveled downward to his liver, consistent with Mr. Cardoso kneeling when he was shot.

Peterson, who wore gloves and disguised his face with a dark nylon stocking mask, profanely threatened the employees at gunpoint. Peterson repeatedly used derogatory language, forced the remaining employees into a back room, past the body of their murdered co-worker. Peterson demanded that they get down on their hands and knees in a line, ordered them not to look at his face, and told them to do what he said or he would kill them. Peterson tied one of the employee's hands behind her back with plastic ties from the store and forced another employee to return to the cash room where Peterson stole approximately $10,000. Peterson hid the money in a backpack taken from the

store shelves. Peterson then fled the store, carrying the bag of money and his handgun.

At trial, the State presented collateral crimes evidence of three of Peterson's other armed robbery offenses: (1) Family Dollar Store (February, 1997), (2) PharMor (May, 1998), and (3) McCrory's (August, 1998).

Peterson now argues that the trial court erred in admitting collateral crimes evidence of three similar robberies to prove a material fact in issue, including the defendant's M.O./identity, plan, intent/motive, and absence of mistake or accident. For the following reasons, the collateral crimes evidence presented at trial was relevant to prove the material facts contemplated above, and the trial court did not abuse its discretion.

**The Williams Rule & Standard of Review**

In Williams v. State, 110 So. 2d 654, 662 (Fla. 1959), this Court held that similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant *solely* to prove bad character or propensity. The Williams rule is codified in § 90.404(2)(a), Fla. Stat. (2003).

The trial court's order admitting similar fact evidence is

reviewed under an abuse of discretion standard. See Chandler v. State, 702 So. 2d 186 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998).

Any evidence relevant to prove a material fact at issue is admissible unless precluded by a specific rule of exclusion. §90.402, Fla. Stat. (2003). Thus, as recognized in Williams, relevant evidence will not be excluded merely because it relates to facts that point to the commission of a separate crime.

Furthermore, the admissibility of other crimes evidence is not limited *only* to crimes with similar facts. See Zack v. State, 753 So. 2d 9, 16 (Fla. 2000), citing Bryan v. State, 533 So. 2d 744 (Fla. 1988) (stating that "similar fact evidence may be admissible pursuant to section 90.404, and other crimes or bad acts that are not similar may be admissible under section 90.402"). In Zack, this Court noted that the distinction between "similar fact" and "dissimilar fact" evidence was reiterated in Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997):

> Thus, section 90.404 is a special limitation governing the admissibility of similar fact evidence. But if evidence of a defendant's collateral bad acts bears no logical resemblance to the crime for which the defendant is being tried, then section 90.404(2)(a) does not apply and the general rule in section 90.402 controls. A trial court has broad discretion in determining the relevance of evidence and such a determination will not be disturbed absent

> an abuse of discretion. Heath v. State, 648 So. 2d 660, 664 (Fla. 1994).
>
> Thus, whether the evidence of other bad acts complained of by Zack is termed "similar fact" evidence or "dissimilar fact" evidence, its admissibility is determined by its relevancy. The trial court must utilize a balancing test to determine if the probative value of this relevant evidence is outweighed by its prejudicial effect. See § 90.403, Fla. Stat. (1995); Gore v. State, 719 So. 2d 1197 (Fla. 1998).
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> Zack, 753 So. 2d at 16.

**Procedural Background**

Prior to trial, the State filed a Williams rule notice (V1/53-60) and argued, *inter alia*, that Peterson's collateral crimes were admissible to prove notice, opportunity, a common modus operandi (M.O.) and, therefore, identity, as well as intent/motive, plan, absence of mistake/accident, to rebut an innocent explanation for Peterson's behavior and possession of certain identified items (V1/53-59; V10/1724-1729; 1731), to corroborate the anticipated trial testimony of Peterson's accomplice, Darryl Sermons (V10/1729-1730), and to discredit an anticipated alibi defense from Peterson's sister.[1] (V10/1733)

[1] On April 2, 2004, the defense filed an addendum to notice of alibi, notifying the State that the defendant's sister, Victoria Peterson, claimed to have borrowed the defendant's Ford Bronco to go shopping on Christmas Eve, at the time of the Big Lots murder. (V10/1850) (The defendant's accomplice, Sermons, contended that this vehicle was used at the Big Lots crime.) Williams rule evidence is admissible to corroborate an

At the pre-trial hearing on April 5, 2004 (V14/2376-2440), the trial judge ruled that the collateral crimes evidence from the 1997-1998 offenses was admissible to prove the defendant's M.O./identity. (V14/2430-31) Additionally, the collateral crimes evidence was relevant to prove intent/motive in that Peterson used a consistent threat of violence over that necessary to commit a robbery, and to corroborate the anticipated trial testimony of Sermons, the defendant's accomplice and driver of the getaway vehicle.[2] (V14/2439-2340)

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accomplice's testimony and dispute an alibi defense. See Moore v. State, 324 So. 2d 690 (Fla. lst DCA 1976). (Williams rule testimony admissible to show common scheme where accomplices acted together in a similar way and to corroborate accomplices' testimony and meet alibi defense.)

In light of the addendum to the defendant's notice of alibi, the Family Dollar store robbery on February 14, 1997, became especially relevant. As the State pointed out below (V10/1733), the defendant's sister testified to a false alibi for the defendant during the Family Dollar trial. At the behest of the defendant, she was called to testify that Peterson was attending a Valentine's Day barbeque at the time of the crime, despite other witnesses who stated that the barbeque did not occur on that date and conclusive DNA evidence exclusively linking (one in 621 billion) Peterson to the Family Dollar crimes. Thus, the Family Dollar case not only established bias on the part of the anticipated defense witness, but it also constituted additional similar fact evidence against Peterson in that he had attempted to use the same relative to create a false alibi in both cases. (V10/1733).

[2] Contrary to the defendant's suggestion on appeal, the mere fact that Peterson's accomplice ultimately did not testify at trial and Peterson did not call his sister as an alibi witness, does not render the collateral crime issue moot. The same issue obviously could resurface in the event, albeit unlikely, of any

The trial court noted the unique similarities in the armed robberies of all of the targeted stores: the masked assailant hid in the back of the stores until closing, used a similarly-described [dark or chrome] handgun, confronted the employees at gunpoint, placed the gun to an employee's head, assembled the employees together in a common location, threatened the employees not to look at him, made the employees lie down, tied the employees with material obtained from the stores, and placed the money in bags/containers obtained from the store. (V14/2433-2434) The trial court found no material dissimilarities in the following: descriptions of the mask [the court noted that "[t]hey were all fairly similar types"] (V14/2434)]; the defendant's hiding place, use of assorted curse words, variations in estimates of the defendant's height/weight, or use of an employee to help accumulate the money [a practical decision]. (V14/2434) The trial court excluded any evidence of the sexual battery offenses in the Family Dollar case. (V14/2437-38) During a hearing on July 15, 2005, the parties entered into a stipulation regarding the DNA evidence in the Family Dollar case. (V15/2551)

Prior to closing arguments, the defense renewed their

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retrial. The State does not waive or abandon any of its arguments emphasizing the relevance of the collateral crime

Williams rule objection, and the trial court specifically noted that the other crimes evidence did not become a feature of the trial. (V27/1617-1618) As the trial court explained,

> . . . I have paid careful attention throughout the trial to the evidence, as well as having read all the relevant case law to the issue, and I do not believe that it has become a feature of the trial in the legal sense that that word is intended.
>
> Specifically, the [Kormondy] case that I cited to you folks earlier that I read indicates that the meaning of the term "feature" is particularly directed toward those instances when the State is attempting to introduce evidence of this nature for the purposes of impugning the character of the defendant. And in those circumstances when the State is legitimately using the information to prove either motive, opportunity, intent, preparation, plan, knowledge, identity or the absence of mistake or accident on the part of the defendant, that, first of all, the sheer volume of the testimony is not particularly relevant to that determination. As long as the State is using it for one of those purposes, it can be used without being -- becoming a feature. Clearly, in this case, that is the purpose for which the State is attempting to introduce this evidence. And it appears, if nothing else from the cross-examination questions of the Defense, that they have called identity into issue. And certainly, by the motion that was made that I currently have under advisement at the close of the State's case, likewise, motive with respect to premeditation, absence of mistake or accident was also called into play by the Defense. And so as I previously ruled and now continue to rule, that objection is overruled.
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> (V27/1617-1618) (e.s.)

Additionally, in denying the defendant's motion for new trial, the trial court again addressed the defendant's renewed

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evidence to Peterson's accomplice and any alibi claim.

Williams rule claim and reiterated that the collateral crime evidence did not become a feature of the trial:

> As to number three, with respect to the Court hearing and admitting Williams Rule evidence as to other crimes, alleging that they had become a feature of the trial, at the time we had the hearing on the Williams Rule, I carefully reviewed law and issued my decision based upon the law that Williams Rule does not become a feature of a trial by virtue of the number of witnesses, the length of the testimony. That's not what the law means by Williams Rule evidence becoming a feature the trial.
>
> Clearly, in this case the Williams Rule evidence was relevant and logical on several basis, I previously outlined in my ruling, and, therefore -- well, actually, let me also note that did, upon reviewing the case law, take what I would call the recommendation, as opposed to the mandate of the courts of appeal, indicating that the reading of a curative -- not a curative – the reading of a cautionary instruction prior to any Williams Rule testimony is a good idea. I did, in fact, do that prior to the jury hearing any Williams Rule evidence.
>
> (V17/2902) (e.s.)

**The Collateral Crimes**

In this case, the State presented collateral crimes evidence of three other armed robberies of discount stores/pharmacies committed by a lone black gunman wearing a stocking mask and gloves and using a common "M.O." In each offense, the masked gunman would hide in the store until closing, force the employees to a common location, profanely threaten the employees at gunpoint, and tie one or more of the employees with material found in the store before stealing the proceeds from the tills

and safe. The gunman usually held the handgun (described either as a small black semi-automatic or a chrome/silver automatic gun) to the head of one or more of the employees, and he threatened his victims not to look at him and directed them to look away.

As the State summarized below, Peterson was linked to these three collateral armed robberies either by eyewitness identifications (some positive, others more tentative), by mytochondrial and nuclear DNA evidence, by stolen property and evidence recovered from Peterson's residence/storage unit, and/or by the store's video camera surveillance as follows:

Family Dollar
4477 Gandy Blvd., Tampa
8:10 p.m., Friday, 2/14/97
ID: Nuclear DNA matching the defendant, with the statistical probability of that profile occurring only once per 621 BILLION persons and once per 385 BILLION persons; car seen by witnesses matched Peterson's vehicle; similarity of offenses including M.O.

Pharmor
4460 66th St. N, St. Petersburg
10:10 p.m., Tuesday, 5/12/98
ID: MtDNA (99.88% of persons eliminated with 95% certainty); Store security video captured Peterson trying to cover his face when entering store; suspect on video identified as Peterson by then-girlfriend, Janet Hillman; suspect wearing a black Tommy Hilfiger T-shirt, visible in store's video surveillance, black Tommy Hilfiger T-shirt recovered from Peterson's storage unit.

McCory's
9th St, St. Petersburg.
5:35 p.m., Saturday, 8/29/98

ID: Victim identified Peterson from photopak with 90% certainty (pre-trial); Check and other papers from McCrory's with date of the robbery found behind the refrigerator in Peterson's garage; Peterson's fingerprint on the check; similarity of M.O.

On appeal, Peterson does not dispute the trial court's ruling that the defendant's responsibility for these collateral armed robbery offenses was established by clear and convincing evidence. (V14/2430) See Bryant v. State, 787 So. 2d 904 (Fla. 2d DCA 2001).

**Identity**

The State recognizes that the requirement of similarity is most strictly applied when the collateral crime evidence is offered to prove the identity of the perpetrator through showing the use of a similar modus operandi (M.O.). See Drake v. State, 400 So. 2d 1217 (Fla. 1981). In such cases, the collateral crimes must be strikingly similar and share some unique characteristic or combination of characteristics which sets them apart from other offenses. Randall v. State, 760 So. 2d 892 (Fla. 2000); Buenoano v. State, 527 So. 2d 194 (Fla. 1988). However, it is not necessary that each individual similarity be unique or unusual; it is sufficient that the aggregate pattern of activity is so. See Gore v. State, 599 So. 2d 978 (Fla. 1992); Black v. State, 630 So. 2d 609, 617 (Fla. 1st DCA 1993)(noting that the "collateral crime evidence is not required to be so unique that no other perpetrator could have committed

both offenses . . . [r]ather, the two crimes share some unique features suggesting the same perpetrator.")

The more demanding strict similarity requirement for proving identity through modus operandi is not applicable when other crime evidence is used to prove other issues, such as intent or knowledge. See Torres v. State, 834 So. 2d 342 (Fla. 3d DCA 2003). Indeed, even evidence of dissimilar crimes is admissible if relevant to any issue in the case other than bad character. See Finney v. State, 660 So. 2d 674, 681 (Fla. 1995)(overall similarity is not required when other crime evidence is admissible to prove motive); Zack v. State, 753 So. 2d 9, 16 (Fla. 2000)(other crime evidence relevant and admissible as part of prolonged criminal episode demonstrating Zack's motive, common scheme, M.O., intent, and the entire context surrounding the charged murder).

Peterson repeatedly attempts to dissect each criminal episode and isolate each discrete act. However, it is not required that each collateral crime be examined in isolation. Evidence connecting the defendant with multiple similar crimes can be collectively considered in evaluating the proof of the defendant's involvement. See Mutcherson v. State, 696 So. 2d 420 (Fla. 2d DCA 1997); Johnston v. State, 863 So. 2d 271, 281 (Fla. 2003), citing Crump v. State, 622 So. 2d 963, 968 (Fla.

1993)(noting that this Court has upheld the use of collateral crime evidence when the common features considered in conjunction with each other establish a sufficiently unusual pattern of criminal activity, and although common features between each of the crimes may not be unusual when considered individually, taken together these features establish a sufficiently unusual pattern of criminal activity).

In any event, the collateral crime evidence in the instant case met the striking similarity requirement and was properly admitted to establish a common modus operandi (M.O.) and, therefore, identity. All of the targeted stores were small discount stores or pharmacies. In each case, the assailant entered the business shortly before closing and hid in the store until he thought the business was closed. The assailant, a lone black male wearing a dark mask and gloves and carrying a handgun, confronted one or more of the employees at gunpoint and placed the gun against an employee's head. The victims in the 1998 robberies (McCrory's and Phar-Mor) reported that the gun was placed directly against or pointed directly at their heads, and the murder victim at Big Lots was shot at close range in the lower neck/shoulder area with the bullet traveling downward through his body. The defendant assured that all employees were accounted for; and, when possible, the defendant directed all of

the store employees to a common location. He profanely threatened the employees, made derogatory comments, and directed them by words and actions not to look at him. He forced the employees to lie face down (except, on occasion, the employee that he enlisted to help him retrieve the cash). He tied one or more of the employees using material found in the store. When he stole the day's proceeds from the office safe and cash drawers, he placed the money inside a book bag or a similar container obtained from the store. Due to Peterson's use of a mask and gloves, his facial features were obscured and no fingerprints were linked to a potential suspect. Therefore, proof of the defendant's modus operandi through these other crimes was critical to establish identity. Any dissimilarities between the crimes are insubstantial. See Gore v. State, 599 So. 2d 978, 983-84 (Fla. 1992); Johnston v. State, 863 So. 2d 271, 281-282 (Fla. 2003)(finding that dissimilarity in crimes was insubstantial and likely the result of a difference in the opportunity with which the defendant was presented, rather than a difference in m.o.)

Florida courts have authorized use of collateral crime evidence with far less compelling similarities. In Bryant v. State, 235 So. 2d 721 (Fla. 1970), the defendant was accused of robbing a laundromat, forcing the attendant to lie down on the

floor during the robbery, then shooting the attendant in the head and killing him. This Court held admissible Williams rule testimony that the defendant had robbed a bar five days earlier, forced the victims to lie on the floor, then in leaving and without provocation struck the female victim in the head with his gun; this evidence tended to establish his modus operandi and, thus, his identity. In both cases, the defendant used similar filthy and profane language and threats, had the victims lie down, showed a similar interest in harming people on their heads and "capped his violent performance with useless and sadistic acts." Bryant, 235 So. 2d at 722.

In Randolph v. State, 463 So. 2d 186 (Fla. 1984), the defendant was charged with first-degree murder/robbery. Randolph's girlfriend, Glinton, was a prostitute who gave Randolph her earnings. At Randolph's instruction, she engaged in sex with the victim. Afterwards, Randolph pushed Glinton out of the way and he accosted the victim. Glinton ran away but heard Randolph tell the victim not to try anything and he wouldn't shoot; she then heard two gunshots. The victim had been killed with a .25-caliber pistol. In Randolph, the State introduced Williams rule evidence that a few days earlier in the same area of town two men picked up Glinton and another prostitute for sex. After they were done, the women disappeared

and Randolph robbed them using a .25-caliber gun. Randolph was overheard saying that he could have killed one of them because he didn't have any money. This Court held that this evidence demonstrated Randolph's motive, intent, and state of mind in approaching and eventually killing the victim. Further, this Court held the evidence admissible because proof of the defendant's modus operandi was important in corroborating the state's key witness, Glinton.

In this case, Peterson's M.O.--–targeting smaller discount stores/pharmacies (those with only a few employees, most of whom were female), hiding in the back of the store until closing (or when he thought the store was closing), wearing a dark mask, brandishing a dark or chrome handgun, profanely directing employees to a central location where they were commanded to lie down, assuring that all of the employees were accounted for, tying up some of the employees with material found in the store, referring to the victims in derogatory terms, and loading the cash into a bag/container obtained from the store, are strikingly similar with each other and with the Big Lots crime and, therefore, were relevant to proving identity.

In State v. Ackers, 599 So. 2d 222 (Fla. 5th DCA 1992), Ackers and a codefendant were charged with the armed robbery of a Popeye's Fried Chicken restaurant in Orlando. Armed with a

handgun and a broomstick, the two accosted the employees as they emptied the garbage at 12:30 a.m., forced them back into the store, then gathered the remaining employees together and forced them to lie down on the floor. They forced the manager to turn over cash from the open safe. Other black males waited outside in a dark colored Mercury Cougar getaway car. No fingerprints were found, but a bullet fired at a security camera was shown to have come from a co-defendant's gun. The State sought to introduce evidence that the defendant and two other black males carrying guns and a broomstick had robbed a KFC two weeks earlier at approximately 12:30 a.m. The robbers confronted the night manager and another employee as they were turning out the lights and leaving the store. The robbers forced the employees back into the restaurant, and forced the manager to open the safe and hand over the money. Two bullets were fired during the robbery, one almost striking the manager; the second employee was struck with the broomstick. A dark-colored Mercury Cougar was seen at this robbery scene. Although noting that there were some differences between the two crimes, the appellate court reversed the trial court's exclusion of the evidence, concluding that the similarities were striking and that the earlier robbery was admissible to prove Ackers' identity and participation in the Popeye's robbery.

Similarly, in Black v. State, 630 So. 2d 609 (Fla. 1st DCA 1993), the defendant was charged with separate robberies of a Service Merchandise, a Sports Authority, and a Scotty's. The robberies happened at or shortly before closing and money and merchandise were stolen in each robbery. The State was allowed to introduce evidence of the Scotty's robbery in the trial of the other two robberies in order to prove the identity of the perpetrator. In Black, the Court noted: "[a]ll robberies occurred at the end of a weekend business; at gunpoint, the robber ordered all store employees into a confined area and they were told not to come out for ten minutes; the robber disabled the store phone in each instance; the robber carried a large, dark semiautomatic handgun in each instance, the perpetrator was a tall, bulky black man wearing a plaid flannel shirt a dark ski mask and gloves." Despite some differences in the crimes (including the way the phones were disabled and the fact that the defendant forced his way in at closing on one occasion and hid in the store until after closing on another), the Court concluded that the well-established and substantial similarities were not overshadowed by the less consequential dissimilarities and that the evidence was therefore admissible.

**Intent/Motive**

The collateral crime evidence was also relevant and

admissible to prove the defendant's intent and motive for additional violence. In addition to showing the defendant's obvious intention to take large sums of money from each of the stores in a manner which minimized his chances of being seen and identified, the collateral crimes established the defendant's violent intentions toward his victims above and beyond the simple intent to rob. In the collateral crimes, Peterson held the firearm directly against the head of one or more of the victims; he repeatedly ordered them at gunpoint, with death being the possible consequence of disobedience, to turn away, lie face down and not to look at him.

Contrary to Peterson's current argument on appeal, the question of the defendant's motive/intent was not limited just to his intent to obtain money. Peterson was charged with premeditated murder and, therefore, the Williams rule evidence was relevant to proving intent and premeditation. See Bradley v. State, 787 So. 2d 732, 741-42 (Fla. 2001). As the trial court emphasized in denying Peterson's renewed Williams rule claim during his motion for judgment of acquittal:

> And certainly, by the motion that was made that I currently have under advisement at the close of the State's case, likewise, motive with respect to premeditation, absence of mistake or accident was also called into play by the Defense. And so as I previously ruled and now continue to rule, that objection is overruled.

(V27/1617-1618) (e.s.)

In the McCrory's robbery, Peterson specifically threatened to kill victim Anne Weber if she looked at him. In the Family Dollar store robbery, Peterson repeatedly threatened the female victims, and he left DNA evidence that positively identified him. In the Big Lots case, there were no eyewitnesses to the shooting itself. Therefore, evidence of the defendant's actions in the other robberies was relevant not only to show his intent in committing the robbery, but to show his intentionally shooting the subdued, kneeling victim.

Since it is unlikely that any two crimes were committed in an *exactly identical* way, similarity is the standard for admissibility, and the existence of some differences will not render Williams rule evidence inadmissible. See Chandler v. State, 702 So. 2d 186 (Fla. 1997). In determining whether the dissimilarities are "substantial," the Court should consider the strength and uniqueness of the similarities as well as the dissimilarities and whether the dissimilarities are explained or explainable in a way that limits their importance. See Johnston v. State, 863 So. 2d 271 (Fla. 2003).

In every case, Peterson expressed violent intentions to the victims, by implicitly and explicitly threatening to kill them if they did not immediately comply with his demands. The fact

that "only" one victim was killed is not a sufficient dissimilarity to affect the admissibility of otherwise relevant evidence. In Randolph v. State, 463 So. 2d 186 (Fla. 1984), this Court held that evidence of a previous gunpoint robbery was sufficiently similar to show a common M.O. was used in a later robbery murder, even though the first victim was unharmed. In the landmark Williams case, the fact that a collateral crime victim fortuitously discovered the defendant before he could carry out his intended crime did not affect the admissibility of the similar fact evidence. In Duckett v. State, 568 So. 2d 891 (Fla. 1990), the defendant's first two victims were neither raped nor murdered, but the last victim was both sexually assaulted and murdered. See also Randall v. State, 760 So. 2d 892 (Fla. 2000)(evidence of prior choking of girlfriend and ex-wife during sexual activity, admissible in strangulation murders of two prostitutes); Chandler v. State, 702 So. 2d 186 (Fla. 1997)(evidence of similar abduction and sexual assault in which victim was released was admissible in abduction and murder of woman and her teenage daughters).

**The Probative Value was not Substantially Outweighed by the Danger of Unfair Prejudice and the Williams Rule Evidence did not become a Feature of the Trial**

Section 90.403 provides that relevant evidence may be excluded only if the probative value of the evidence is

substantially outweighed by the danger for unfair prejudice. Unfair prejudice may occur when the collateral evidence is allowed to become a feature of the trial and thus, transcends the bounds of relevance. Snowden v. State, 537 So. 2d 1383 (Fla. 1st DCA 1989).

Peterson directs this Court's attention to Devers-Lopez v. State, 710 So. 2d 720 (Fla. 4th DCA 1998) and Taylor v. State, 855 So. 2d 1 (Fla. 2003). Neither case benefits the defendant. In Devers-Lopez, the defendant was charged with driving under the influence of alcohol and/or Halcion. Since the evidence raised the issue as to whether she had unknowingly ingested a drug which caused her to become impaired once she was already driving, the Fourth District concluded that Devers-Lopez was entitled to a jury instruction on this defense. Additionally, the Court agreed that the trial court erred in denying her motion in limine to exclude all evidence of illegal drugs found in her urine. The Court in Devers-Lopez explained, "[t]he state's expert testified at the hearing on her motion that these chemical traces would have had no effect on her ability to drive. Since the state never charged her with driving under the influence of these chemicals, we find that the urinalysis results, based on the evidence presented, were irrelevant and unduly prejudicial." Id. at 721. And, in Taylor, hearsay

statements of the victim were improperly admitted, as was a credit application with false statements, but they were deemed harmless.

When similar fact evidence is used to prove identity through a common modus operandi, reviewing courts have focused on whether the highly relevant pattern of evidence was so disproportionately emphasized that it became a feature of the trial, rather than merely incidental to the trial on the charged crime. Neither the volume of testimony alone nor the number of crimes proved is determinative. See Conde v. State, 860 So. 2d 930 (Fla. 2003); Snowden v. State, 537 So. 2d 1383 (Fla. 1st DCA 1989)("More is required for reversal than a showing that the evidence is voluminous"); Townsend v. State, 420 So. 2d 615 (Fla. 4th DCA 1982)(number of pages and exhibits related to collateral crimes is not the sole test when such quantity is the result of there being numerous similar crimes.)

This Court has upheld even the extensive use of Williams rule testimony and tangible evidence, particularly where the evidence is highly probative. For example, in Wilson v. State, 330 So. 2d 457 (Fla. 1976), this Court upheld the use of collateral crimes testimony relating to an unnamed number of similar abductions and shootings which consumed over 600 pages of transcript and which the Court itself referred to as

"extremely extensive." In Zack v. State, 753 So. 2d 9 (Fla. 2000) this Court approved the admission of what was later termed to be "extensive evidence of thefts, sexual assault and murder" in the two week period leading up to the charged murder. In Zack, this Court concluded that the evidence was not excessive under the circumstances and was relevant to Zack's intoxication defenses and helped to paint a clear picture of the defendant. In Snowden v. State, 537 So. 2d 1383 (Fla. 3d DCA 1989), the introduction of collateral crime testimony of sexual assaults on two other children which accounted for one-half of the witnesses and one-third of the testimony did not require reversal. As the court noted in Snowden, quoting Bourjaily v. United States, 483 U.S. 171 (1987), "[i]ndividual pieces of evidence, insufficient in themselves to prove a point, may in culmination prove it. The sum of an evidentiary pattern may well be greater than its constituent parts."

The Williams rule evidence in this case consisted of three other armed robberies. This Court has upheld the introduction of even greater numbers of similar crimes without finding the feature/incident rule violated. See e.g. Conde v. State, 860 So. 2d 930 (Fla. 2003)(evidence of five prior homicides was relevant to prove identity, intent and premeditiation and did not violate feature/incident rule); Stano v. State, 473 So. 2d

1282 (Fla. 1985)(evidence of eight other murder convictions in penalty phase to establish aggravating factor did not violate feature incident rule); Wournos v. State, 644 So. 2d 1000 (Fla. 1994)(evidence of five other homicides committed by Wournos were relevant to proving intent and premeditation and disproving claim of self-defense and did not violate feature/incident rule); Townsend v. State, 420 So. 2d 615 (Fla. 4th DCA 1982)(where the defendant was charged with three murders of prostitutes—two strangled and one stabbed, evidence of six prior strangulation murders of prostitutes was relevant to identity, M.O., and motive); Ashley v. State, 265 So. 2d 685 (Fla. 1972)(in trial for murder of hitchhiker, proof of four subsequent homicides several hours later using the same gun, established motive, intent, and identity and modus operandi and did not violate the feature incident rule.); Hawkins v. State, 206 So. 2d 5 (Fla. 1968)(proof of four similar gas station robberies committed over an eight day period-both before and after murder with which defendant was charged-were admissible to prove pattern, motive and intent in the crimes.)

The collateral crimes evidence did not violate §90.403, Fla. Stat. or the feature/incident rule. Peterson complains that an additional 22 witnesses were called at trial; however, this number included several witnesses who necessarily offered

comparatively routine testimony, such as matters relating to the store's videotape surveillance and law enforcement's authentication of evidence seized from the defendant. And, although there were several victims in each crime, the testimony was limited to only one or two victims in each case. Furthermore, as in Conde v. State, 860 So. 2d 930, 947 (Fla. 2003), the trial court repeatedly instructed the jury as to the proper purpose of this Williams rule evidence each time it was introduced.

The collateral crime evidence showed a common modus operandi, established the motive and intent in the defendant's contact with the victims, and countered arguments attempting to explain these factors away. Because there are pervasive similarities and insubstantial dissimilarities between the armed robbery offenses, the trial court did not abuse its discretion by finding that the collateral crimes were admissible as Williams rule evidence. Furthermore, in light of the two eyewitness identifications, error, if any arguably exists, was clearly harmless in this case. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

## ISSUE II

## The Lethal Injection Claim

**Procedural Bar**

Peterson's Eighth Amendment challenge to the constitutionality of lethal injection was not presented to the trial court and, therefore, is procedurally barred on appeal. The only claim made by Peterson relating to the imposition of the death penalty was Peterson's motion to bar imposition of the death penalty based on Ring v. Arizona, 536 U.S. 584 (2002). [V9/1635-1650). If the specific claim raised on appeal is not raised to the trial court, the claim is not preserved for appeal. Spann v. State, 857 So. 2d 845, 852 (Fla. 2003); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Therefore, Peterson's current, unpreserved challenges to lethal injection are procedurally barred.

**Merits**

Even if Peterson's current lethal injection claim was not procedurally barred, which the State emphatically disputes, Peterson's argument still must fail. This Court repeatedly has held that death by lethal injection is not cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution and under the Florida Constitution. See Diaz v. State, 945 So. 2d 1136 (Fla.), cert. denied, 127 S.

Ct. 850 (2006); Sims v. State, 754 So. 2d 657, 668 (Fla. 2000)(holding that execution by lethal injection is not cruel and unusual punishment); Provenzano v. State, 761 So. 2d 1097, 1099 (Fla. 2000); Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005); Robinson v. State, 913 So. 2d 514 (Fla. 2005). This Court has consistently rejected defense arguments challenging the constitutionality of this method of execution. See Suggs v. State, 923 So. 2d 419, 441 (Fla. 2005); Sochor v. State, 883 So. 2d 766, 789 (Fla. 2004)(rejecting claims that both electrocution and lethal injection are cruel and unusual punishment).

Furthermore, this Court repeatedly has upheld the three-drug protocol and procedures for administering lethal injection in Florida. See Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007); Schwab v. State, 969 So. 2d 318 (Fla. 2007), *stay granted* by Schwab v. Florida, 169 L. Ed. 2d 416 (2007).

The defendant's unpreserved challenge to the use of the three-drug cocktail as violating the Eighth Amendment was rejected in Schwab:

> . . .Schwab relies upon no new evidence as to the chemicals employed since this Court's previous rulings rejecting this very challenge. In ***Sims v. State,*** 754 So. 2d 657, 668 (Fla. 2000), after reviewing the evidentiary hearing, including testimony from defense experts which questioned the chemicals to be administered during executions, this Court held that "the procedures for administering the lethal injection . . . do not violate the Eighth Amendment's

> prohibition against cruel and unusual punishment." 754 So. 2d at 668. The Court reiterated its *Sims* holding in *Hill v. State,* 921 So. 2d 579 (Fla. 2006), where the petitioner challenged the use of specific chemicals in lethal injection, asserting that a research study published in the medical journal *The Lancet* presented new evidence that Florida's lethal injection procedures may subject the inmate to unnecessary pain. *See id.* at 582 (discussing Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution,* 365 Lancet 1412 (2005)). This Court held that the study did not justify holding an evidentiary hearing in the case and relied on its prior decision in *Sims. Id.* at 583; *see also Rutherford v. State,* 926 So. 2d 1100, 1113-14 (Fla.) (rejecting the argument that the study published in *The Lancet* presented new scientific evidence that Florida's lethal injection procedure created a foreseeable risk of the gratuitous infliction of unnecessary pain on the person being executed), *cert. denied,* 546 U.S. 1160, 126 S. Ct. 1191, 163 L. Ed. 2d 1145 (2006); *Rolling v. State,* 944 So. 2d 176, 179 (Fla. 2006) (same).
>
> Schwab v. State, 969 So. 2d 318 (Fla. 2007).

The defendant's unpreserved challenge to the three-drug protocol involves the same three drugs that were approved in Sims and subsequent cases. Consequently, Peterson's lethal injection challenge remains procedurally barred.

Finally, the defendant is not entitled to any relief based on the Supreme Court's grant of certiorari in Baze v. Rees, 128 S. Ct. 34 (2007), amended, 128 S. Ct. 372 (2007). In Baze, the Supreme Court granted certiorari to decide whether the proper standard for judging this type of Eighth Amendment claim was a substantial risk of wanton infliction of pain, as the Kentucky

Supreme Court held, or an unnecessary risk of pain, as Baze urged. After reviewing the evidence presented in Lightbourne, this Court held that regardless of which standard the Supreme Court chooses in the Baze case, the result will be the same insofar as the Florida procedures, protocols, and drugs are concerned. Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007).

Additionally, the Supreme Court also granted certiorari in Baze to address whether a means for carrying out an execution violates the Eighth Amendment if there are readily available alternatives that pose less risk of pain and suffering. Baze, 128 S. Ct. at 372. Resolution of this issue likewise does not entitle this defendant to any relief. As this Court explained in Schwab,

> [w]e find that the toxicology and anesthesiology experts who testified in Lightbourne agreed that if the sodium pentothal is successfully administered as specified in the protocol, the inmate will not be aware of any of the effects of the pancuronium bromide and thus will not suffer any pain. Moreover, the protocol has been amended since Diaz's execution so that the warden will ensure that the inmate is unconscious before the pancuronium bromide and the potassium chloride are injected. Schwab does not allege that he has additional experts who would give different views as to the three-drug protocol. Given the record in Lightbourne and our extensive analysis in our opinion in Lightbourne v. McCollum, we reject the conclusion that lethal injection as applied in Florida is unconstitutional.
>
> Schwab v. State, 969 So. 2d 318 (Fla. 2007).

The Defendant’s unpreserved arguments must be rejected and the trial court’s imposition of a death sentence affirmed.

## ISSUE III

## The Proportionality Claim

Peterson next asserts that his sentence is not proportionate. As the following will establish, a review of the facts of this case as compared to similar cases, establishes that the death sentence was properly imposed and is proportionate.

### Legal Standards

Proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." Schoenwetter v. State, 931 So. 2d 857, 875 (Fla. 2006). Rather, to determine whether death is a proportionate penalty, this Court must consider the totality of the circumstances of the case and compare the case with other similar capital cases where a death sentence was imposed. See Boyd v. State, 910 So. 2d 167, 193 (Fla. 2005); Troy v. State, 948 So. 2d 635, 654 (Fla. 2006).

### Facts

Peterson was convicted on July 27, 2005 for the first degree murder of John Cardoso. In the sentencing order, the trial court found the following facts were established at trial:

> Evidence during the guilt phase of the trial established that the Defendant entered the Big Lots shortly before closing and hid until the store closed.

> Then, disguised by a dark nylon mask and gloves and carrying a pistol, he accosted the employees who remained after closing. He held the pistol to various employees' heads as he threatened them and shouted orders. He forced the employees to lie face down in a break room at the rear of the store, ordering them not to look at his face and to follow his orders. He threatened to kill them if they did not follow his orders. He forced the employees to twice walk past Mr. Cardoso as he lie bleeding to death on the floor. He tied one employee's hands behind her back and forced another employee to return to the cash room where he stole approximately $10,000.00. Finally, the Defendant fled the store carrying a bag of money and the pistol.
>
> (V13/2340).

Upon imposing the death sentence in the instant case, the trial judge found the existence of three aggravating factors: 1) under a sentence of imprisonment; 2) thirteen prior violent felony convictions; and, 3) during the commission of a robbery. In support of these three aggravating factors, the trial court explained that at the time of the murder, Peterson was under active supervision on life parole for three 1981 robberies of a similar nature to Peterson's entire criminal history. The court also noted that Peterson had thirteen prior violent felony convictions including multiple armed robberies and sexual batteries which resulted in a total of nine life sentences. The court further observed that Peterson's violent criminal history extended over the course of nineteen years, and that even after Mr. Cardoso's murder, Peterson continued his pattern of violence

by committing additional robberies. (V13/2337-38)

Balanced against these three weighty aggravating factors, the court summarized the mitigation it found as follows:

> The court finds that with regard to the various mitigating factors, the following were established: the Defendant had a good relationship with at least two family members, maintained consistent employment for seven years after his release on parole, had an exemplary disciplinary record while in jail, had the mental immaturity of a teenager and had a low to normal IQ. The court has given each of these factors some or little weight as set out above.
>
> (V13/2349).

The trial court rejected both statutory mental health mitigators. (V13/2342)

**Analysis**

In conducting proportionality review, this Court has stated that in the absence of demonstrated legal error, this Court will accept the trial court's findings on the aggravating and mitigating circumstances and consider the totality of the circumstances of the case in comparing it to other capital cases. Rodgers v. State, 948 So. 2d 655, 670 (Fla. 2006), citing Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000). Each of the aggravators found in the instant case was supported by substantial competent evidence. The trial court gave great weight to the first two aggravators, noting that Peterson had previous convictions for violent felony offenses, thirteen in

all, and that he was under a sentence of imprisonment at the time of the murder for three robbery offenses of a similar nature. (V13/2338, 2340) The court gave the third aggravator, during the course of a robbery, significant weight, and explained,

> The court is mindful that the matter of the Defendant having committed the murder during the commission of the robbery has been, to some extent, considered by the jury in the guilt phase of the trial. Because it has already been considered to some degree, the court now gives significant but not great weight to this statutory aggravating factor.
>
> (V13/2340).

Peterson argues that this case is not proportionate because there is no evidence of the heinous, atrocious, or cruel (HAC) or cold, calculated, and premeditated (CCP) aggravators. This Court has never held that either factor was a prerequisite for imposing a death sentence. In fact, this Court has repeatedly rejected this argument. Most recently, this Court in Blake v. State, 2007 Fla. LEXIS 2387 (Fla. 2007), stated:

> Blake also suggests that death is not proportional because the trial court did not find the heinous, atrocious, or cruel (HAC) or cold, calculated, and premeditated (CCP) aggravators. The absence of these aggravators is relevant, but is not controlling. See Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). We have upheld many death sentences where neither HAC nor CCP was present. See, e.g., Bryant v. State, 785 So. 2d 422, 436-37 (Fla. 2001); Mendoza, 700 So. 2d at 673; Melton v. State, 638 So. 2d 927, 928 (Fla. 1994); Freeman v. State, 563 So. 2d 73, 75 (Fla. 1990); Carter v. State, 576 So. 2d 1291, 1293 (Fla. 1989).

> We conclude that Blake's sentence is proportional to other death sentences this Court has upheld. See, e.g., Bryant, 785 So. 2d at 436-37 (citing Mendoza, 700 So. 2d at 673, in rejecting a "robbery gone awry" argument where the trial court found three aggravators: (1) prior violent felony--sexual battery, grand theft, robbery with a weapon, and aggravated assault with a mask; (2) commission during a robbery; and (3) avoid arrest); Mendoza, 700 So. 2d at 679 (rejecting a "robbery gone awry" argument where the trial court found two aggravators: a prior violent felony--armed robbery in connection with a separate case--and commission during a robbery); Melton, 638 So. 2d at 930 (upholding a death sentence in connection with a robbery-murder, where the sentence was supported by two aggravators, including prior first-degree murder and robbery convictions); Carter, 576 So. 2d at 1293 (rejecting a "robbery gone bad" argument where the trial court found three aggravators: (1) under sentence of imprisonment; (2) prior violent felonies--armed robbery and murder; and (3) commission during a robbery); Freeman, 563 So. 2d at 75 (upholding a death sentence supported by two aggravators--prior convictions for first-degree murder, armed robbery, and burglary of a dwelling with assault, all committed three weeks prior--and commission during a burglary and commission for pecuniary gain (merged)).
>
> Blake at 26-28.

Peterson, like Blake and Bryant before him, had an extensive criminal history and committed the crime during the course of a robbery. Peterson, like Blake, was under a sentence of imprisonment at the time he committed the crime. Neither Peterson, Blake, nor Bryant had any significant evidence in mitigation.

Further, this Court should also reject the argument that the

case is not among the most aggravated because there allegedly is no evidence that Peterson intended to commit murder when he entered the store, i.e., that this was akin to a "robbery gone bad." This same argument was presented in both Blake and Bryant and squarely rejected as follows:

> We conclude that Blake's sentence is proportional to other death sentences this Court has upheld. See, e.g., Bryant, 785 So. 2d at 436-37 (citing Mendoza, 700 So. 2d at 673, in rejecting a "robbery gone awry" argument where the trial court found three aggravators: (1) prior violent felony--sexual battery, grand theft, robbery with a weapon, and aggravated assault with a mask; (2) commission during a robbery; and (3) avoid arrest); Mendoza, 700 So. 2d at 679 (rejecting a "robbery gone awry" argument where the trial court found two aggravators: a prior violent felony--armed robbery in connection with a separate case--and commission during a robbery); Melton, 638 So. 2d at 930 (upholding a death sentence in connection with a robbery-murder, where the sentence was supported by two aggravators, including prior first-degree murder and robbery convictions); Carter, 576 So. 2d at 1293 (rejecting a "robbery gone bad" argument where the trial court found three aggravators: (1) under sentence of imprisonment; (2) prior violent felonies--armed robbery and murder; and (3) commission during a robbery); Freeman, 563 So. 2d at 75 (upholding a death sentence supported by two aggravators--prior convictions for first-degree murder, armed robbery, and burglary of a dwelling with assault, all committed three weeks prior--and commission during a burglary and commission for pecuniary gain (merged)).
>
> Id. at 2007 Fla. LEXIS 2387, 27-28 (Fla. 2007).

The trial court in the instant case carefully considered, and rejected, Peterson's claim that this was a "robbery gone bad," and specifically found:

H. Lack of Premeditation - Non-Statutory

> The Defense argues that the death penalty should not be imposed because the State did not prove that the Defendant acted with premeditation or that he had the intent to kill Mr. Cardoso. However, the court finds that ample evidence of premeditation was presented at trial.
>
> The Defendant shot Mr. Cardoso when they were alone inside a break room at Big Lots. Witnesses heard what sounded like a struggle or confrontation, and the autopsy revealed bruising on Mr. Cardoso's right shoulder, arm, and hand consistent with having occurred at or immediately before the shooting. The fatal gunshot wound entered the victim's upper left shoulder below the neckline and traveled downward in a back to front, left to right trajectory. Circumstantial evidence including the path of the bullet, the distance from which the gun was fired, and the fact that the gun was aimed at a vital area, striking the lung, liver, and major blood vessels, suggests that Mr. Cardoso was shot while in a submissive, kneeling position with his torso leaning toward the floor and the Defendant standing above him, while Mr. Cardoso was not struggling and posed no immediate threat to the Defendant.
>
> Even after firing the fatal gunshot, the Defendant executed the robbery as planned without allowing other employees to call for medical help to save Mr. Cardoso's life. Throughout the robbery, the Defendant repeatedly threatened to kill victims who disobeyed his commands and held a loaded pistol to victims' heads. All this evidence indicates that the Defendant was prepared to use lethal force to overcome any resistance he encountered during the planned commission of the robbery.
>
> (V13/2346)(e.s.)

Similarly, Peterson's argument that his case is like both Urbin v. State, 714 So. 2d 411 (Fla. 1998) and Terry v. State, 668 So. 2d 954 (Fla. 1996) should be rejected. This identical

argument was presented in Blake and rejected. In Blake, this Court noted that Urbin was seventeen at the time of the crime whereas Blake was twenty-three. In this case, Peterson was thirty-eight years old when he shot John Cardoso in the back and killed him. (V13/2343)

Likewise, this Court in Blake also distinguished Terry, 668 So. 2d 954, noting that Terry was only twenty-one and had only two aggravators: prior violent felony and capital felony committed during the course of an armed robbery/pecuniary gain. Id. at 965. Conversely, Blake, like Peterson, had the additional aggravator of under a sentence of imprisonment. Blake was on felony probation at the time of the murder and Peterson was on life parole for three 1981 robberies when he committed the instant murder.

In Blake, this Court further distinguished Terry because the prior violent felony in Terry was a contemporaneous conviction for acting as a principal to the aggravated assault committed by the codefendant. See Terry, 668 So. 2d at 965-66. Whereas, in Blake, the prior violent felony conviction was for first-degree murder in connection with a separate attempted robbery with a firearm. In this case, Peterson's prior violent felony aggravator was supported by evidence that Peterson had thirteen (13) prior violent felony convictions resulting in a total of

nine life sentences and including multiple armed robberies and sexual batteries. Thus, Peterson's prior convictions for entirely separate violent crimes differs from the aggravation found in Terry and makes it proportionate to the death sentence imposed in Blake v. State, 2007 Fla. LEXIS 2387, 25-26 (Fla. 2007).

Peterson also claims his case is not the least mitigated. In support of this, however, he merely recites the trial court's findings. As previously noted, the trial court did not find that any of the mitigation deserved great weight. The court summarized the mitigation it found as follows:

> The court finds that with regard to the various mitigating factors, the following were established: the Defendant had a good relationship with at least two family members, maintained consistent employment for seven years after his release on parole, had an exemplary disciplinary record while in jail, had the mental immaturity of a teenager and had a low to normal IQ. The court has given each of these factors some or little weight as set out above.
>
> (V13/2349)

Based on the foregoing, this Court should affirm the sentence imposed in the instant case as proportionate to other cases where this Court has upheld the sentence of death. See Blake v. State, 2007 Fla. LEXIS 2387, 25-26 (Fla. 2007); Bryant v. State, 785 So. 2d 422, 436-37 (Fla. 2001); Mendoza v. State, 700 So. 2d 670, 679 (Fla. 1997)(concluding that death sentence was

proportionate for twenty-five-year-old defendant who killed a robbery victim with a single gunshot; court found two aggravating factors of prior violent felony conviction and pecuniary gain and gave little weight to defendant's alleged history of drug use and mental health problems); Carter v. State, 576 So. 2d 1291, 1292-93 (Fla. 1989)(affirming sentence for robbery/murder with three aggravators; (1) under sentence of imprisonment (parole); (2) prior violent felonies; (3) during commission of a robbery balanced against nonstatutory mitigation).

## ISSUE IV

## The Penalty Phase "Lack of Remorse" Claim

Next, Peterson claims that, during the penalty phase, the prosecutor improperly cross-examined the defense psychiatrist, Dr. Maher, on alleged "lack of remorse" and relied on "lack of remorse" during closing argument. The trial court specifically found that, *"[a]t no time during the trial did the State attempt to prove any aggravating factors by introducing evidence of lack of remorse, nor did it argue lack of remorse as a non-statutory aggravator."* (V13/2348) For the following reasons, Peterson's penalty phase "lack of remorse" claims are both procedurally barred and also without merit.

**Procedural Bars**

In the title of his fourth issue, Peterson alleges that the trial court erred in denying a motion for *mistrial* and for a new penalty phase. (Initial Brief of Appellant at 65). The defense did not request a mistrial at any time during the penalty phase. (See V16/2675-2829) Therefore, Peterson's perfunctory "mistrial" complaint is procedurally barred. See Rose v. State, 787 So. 2d 786, 797 (Fla. 2001).

Furthermore, the defense did not object to *any* of the prosecutor's penalty phase closing arguments. The failure to

raise a contemporaneous objection to allegedly improper closing argument comments waives any claim concerning such comments for appellate review. See, e.g., Brooks v. State, 762 So. 2d 879, 898 (Fla. 2000).

Peterson has not established the existence of any error, at all, much less fundamental error that is "so prejudicial as to vitiate the entire trial." Chandler v. State, 702 So. 2d 186, 191 n.5 (Fla. 1997). Fundamental error has been defined as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error." Card v. State, 803 So. 2d 613, 622 (Fla. 2001).

Furthermore, Peterson's belated motion seeking a new penalty phase was untimely filed. On July 27, 2005, Peterson was found guilty of first-degree murder. (V12/2127) On July 29, 2005, the jurors, by a vote of 8 to 4, recommended the death penalty. (V12/2129) On August 3, 2005, Peterson filed a motion for new trial. (V12/2139-2140) Although Peterson's motion for a new trial was timely under Rule 3.590, Fla. R. Crim. Proc., this motion was based solely on the guilt phase. (See V12/2139-2140) Two months later, on October 3, 2005, Peterson filed a "Motion Regarding Penalty Phase Proceedings." (V12/2177-2180) The State

respectfully submits that Peterson's motion seeking a new penalty phase, which was filed more than two months *after* his trial, was untimely and, therefore, procedurally barred.

**Standards of Review**

This Court reviews trial court decisions as to the scope of cross-examination on an abuse of discretion standard. Boyd v. State, 910 So. 2d 167, 185 (Fla. 2005), citing McCoy v. State, 853 So. 2d 396, 406 (Fla. 2003).

Likewise, the control of prosecutorial comments and conduct in closing argument is within the trial court's discretion and will not be disturbed absent a clear showing of abuse of discretion. Smith v. State, 866 So. 2d 51, 64 (Fla. 2004). In reviewing such claims, this Court has confirmed its respect for the vantage point of the trial court, being present in the courtroom, over just a reading of a cold record. Id. at 64.

**Lack of Remorse–The Legal Standards**

The State certainly does not dispute this Court's precedent which prohibits lack of remorse as an aggravating factor, but allows the State to present such evidence to rebut proposed mitigation. Indeed, this precedent was summarized in Tanzi v. State, 964 So. 2d 106, 114-115 (Fla. 2007):

> . . . This Court's precedent clearly prohibits lack of remorse as evidence of an aggravating factor. In Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983),

this Court held that “lack of remorse is not an aggravating factor” and that "lack of remorse should have no place in the consideration of aggravating factors." Additionally, in Atwater v. State, 626 So. 2d 1325, 1328 (Fla. 1993), this Court found that a trial court “erred in permitting the State on cross-examination to ask [the defense's expert] whether persons with antisocial personality showed remorse.” However, this Court has permitted evidence of lack of remorse to rebut proposed mitigation, such as remorse and rehabilitation. See Singleton v. State, 783 So. 2d 970, 978 (Fla. 2001) (holding “that lack of remorse is admissible to rebut evidence of remorse or other mitigation such as rehabilitation"); cf. Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991) (finding that although lack of remorse is permitted to rebut evidence of remorse or rehabilitation, the trial court erred in permitting the State to present evidence of lack of remorse before the defense presented any testimony).

In this case, the trial court did not abuse its discretion in allowing the State's questions regarding lack of remorse. Tanzi’s mitigation witness opened the door to this line of questioning. See Ellison v. State, 349 So. 2d 731, 732 (Fla. 3d DCA 1977) (“Having opened the door to this line of questioning by his own direct testimony, [defendant] cannot now be heard to complain that t he State marched through the door so opened."). Further, from a review of the record, it is clear that the State used lack of remorse to rebut the proposed mitigator of bipolar disorder, not to establish an aggravator. The State did not present any testimony regarding Tanzi's remorse or lack thereof for Acosta's murder. Moreover, the trial judge instructed the jury that it was not to consider lack of remorse as an aggravator. Because lack of remorse was mentioned by the defense on direct and because the State used it to rebut a proposed mitigator, we find that the trial court did not abuse its discretion.

Tanzi, 964 So. 2d at 114-115(e.s.)

For the following reasons, Peterson is not entitled to any relief from this Court predicated on alleged “lack of remorse.”

**Analysis**

The State did not attempt to prove any aggravating factors by introducing evidence of lack of remorse and did not argue lack of remorse as a non-statutory aggravator. In fact, the trial court's sentencing order specifically addressed, and squarely rejected, the defendant's alleged "lack of remorse" claim:

> **D. Invalid Aggravating Factors – Non-Statutory**
>
> The Defendant contends that the jury's recommendation was based on invalid aggravating factors. Specifically, he contends that his alleged lack of remorse and failure to testify are improper aggravating factors and cannot be considered. *Sochor v. Florida*, 504 U.S. 527, 532 (1992).
>
> The Defense also presented this argument in his Motion Concerning Penalty Phase Proceedings in which he requested a new penalty phase. The court thoroughly reviewed and heard this issue and denied that motion on November 7, 2005. Here, the Defendant again contends that the jury improperly considered his lack of remorse and failure to testify in making its sentencing recommendation. While the court's ruling is unchanged, it is appropriate to briefly address the matter in this sentencing order as well.
>
> During the trial, the court had well-acquainted herself with relevant law concerning proper argument with respect to aggravators and mitigators in cases where the death penalty is sought. Prior to the closing arguments in the penalty phase, the court specifically advised the attorneys of the lawful parameters of said closing, and that the court would be listening very closely to the remarks of the attorneys and would not hesitate to intercede in its responsibility to assure a fair trial. Among the list of comments the court prohibited was any attempt on

the part of the State to argue "lack of remorse" as an aggravator. The court was well aware that lack of remorse is an improper aggravator and cannot be considered. The court was alert to any potential improper argument in this regard. Earlier, during the cross-examination of defense witness Dr. Maher by Assistant State Attorney Crow, the Defense objected that Mr. Crow's questioning was moving into an area of "remorse, or lack of remorse." In fact, the court found that while Mr. Crow's questions were proper, that he should use caution in asking such questions. The court zealously ensured throughout the penalty phase that there be no argument of lack of remorse as an aggravator and the court is well-satisfied that such an impropriety did not take place.

At no time during the trial did the State attempt to prove any aggravating factors by introducing evidence of lack of remorse, nor did it argue lack of remorse as a non-statutory aggravator. Two primary themes existed throughout the Defense's penalty phase presentation. First, that the Defendant's actions were not premeditated and second, that the Defendant's actions were the result of some type of mental impairment or diminished capacity. Such arguments invited the State to, among other things, provide evidence and arguments that the Defendant's actions were premeditated and that he had the capacity to know that his actions were wrong. Addressing these areas by either side necessarily involves testimony and argument regarding the Defendant's state of mind at the time of the killing. "Remorse," though, is an entirely different concept having to do with regret for some past deed. The State has correctly argued that remorse is not related to the Defendant's intent during a crime but is instead defined as "a gnawing distress arising from a sense of guilt for past wrongs (as injuries to others)." ***Beasley v. State***, 774 So 2d 649, 672 (Fla. 2000).

The focus of the State was not on "remorse" in any way. Rather the focus of the State was on the state of mind of the Defendant during the murder. The State's cross-examination questions and argument in this regard were invited by the Defense, but would

have ostensibly been proper even had they not been invited.

(V13/2347-48)(e.s).

The trial court's order is supported by the following competent, substantial evidence and should be affirmed for the following reasons.

At the commencement of the penalty phase, defense counsel announced his intention to call Dr. Maher to "talk about the [defendant's] capacity to conform [his] conduct to the requirements of the [law]." (V16/2664) According to defense counsel, both of the defendant's mental health experts would testify about the defendant's emotional and mental age, dealing with the lack of capacity. (V16/2664) Additionally, defense counsel stated that "Dr. Maher would also talk about the, for lack of a better term, lack of future dangerousness." (V16/2664)

The State did not present any evidence of lack of remorse in its case in chief, the State never argued alleged "lack of remorse," and the defense raised only a single objection based on alleged "lack of remorse" during the cross-examination of Dr. Maher, to wit:

MR. WATTS [Defense Counsel]: Judge, *the area that we're going into now would be remorse or absence of remorse, and I object to getting into that area.*

MR. CROW [Prosecutor]: Judge, he's put on that this person doesn't have the capacity to appreciate the

wrongfulness of his act. That's what this witness testified. I'm allowed to explore that on cross-examination.

THE COURT: I agree you're allowed to explore it, but I also agree you're getting into a tricky area with respect to -- and I'm going to instruct them. I'm sure you're not going to argue the lack of remorse is an aggravator. You're trying to show it not to be a mitigator.

MR. CROW: I'm trying to show the basis for his opinion is flawed, and I think I'm allowed to do that. The case law on remorse really deals with using remorse to enhance –

THE COURT: That's fine.

MR. CROW: -- which is not an issue in this case, which I'm not attempting to do.

THE COURT: I slightly disagree. The other case law on remorse has to do with using lack of remorse as an aggravator, which it cannot be done. I know. I assume you're not in any way trying to do that. You're trying to refute a mitigator as opposed to establish –

MR. CROW: I'm also trying to impeach the credibility of this witness and the validity of his findings in terms of why he is the way he is, whether it's immaturity or antisocial personality disorder. I think they're alternative explanations. He's chosen to explain that to the jury, and I have to explore that.

THE COURT: I understand that. I'll let you do that. At the same time, I caution you that the focus on lack of remorse is something which I see as an area that is problematic here.

MR. CROW: I don't intend to focus on it. This is the second question.

THE COURT: All right. The objection is overruled in part but with some direction to the State to be cautious. Thank you.

(V16/2714-2715)(e.s.)

At this point in the record, Dr. Maher had already established, without objection, that his diagnosis of Peterson's antisocial personality disorder made any information that Peterson provided suspect, that antisocial personalities are characterized by a pervasive pattern of disregard for the rights of others, and that some are callous or even contemptuous of other people's feelings and rights. Dr. Maher had also offered his opinion, without objection, as to the degree to which these characteristics applied to Peterson. As to the one question to which the defense objected-whether Dr. Maher had information that these characteristics did not apply to the defendant-Dr. Maher answered yes—indicating he was aware of evidence indicating that the defendant was not contemptuous of the victims. The defense made no "lack of remorse" objection to any other questions or comments by the State.

The evidence and unobjected-to comments were permissible responses both to Dr. Maher's attempt to predict Peterson's future conduct in prison and to respond to Dr. Maher's expert testimony that Peterson's inability to empathize with victims substantially impaired his capacity to appreciate the criminality of his actions or to conform his conduct to the requirements of the law.

The trial court did not abuse its discretion in overruling the defense objection during the cross-examination of Dr. Maher. An expert witness certainly may be cross-examined concerning the basis for his opinion and the facts he knew or considered in reaching that opinion. See Hildwin v. State, 531 So. 2d 124 (Fla. 1988), *affirmed*, 490 U.S. 638, 104 L.Ed.2d 728 (1989)(state could rebut evidence presented by defendant as to his nonviolent nature).

The prosecutor's questions and comments were also invited by defense counsel's closing arguments during the guilt phase. Defense counsel's closing argued that Peterson's actions after the murder indicated he had not wanted Mr. Cardoso to die (because Peterson allegedly used a BB gun in the later McCrory's robbery to insure that subsequent victims would not be harmed). Thus, even if eliciting Dr. Maher's testimony was deemed error, it was invited and harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129, 1134-35 (Fla. 1986); Randolph v. State, 562 So.2d 331, 338 (Fla. 1990)(improper question by prosecutor regarding remorse constituted harmless error); Whitfield v. State, 706 So. 2d 1, 4 (Fla. 1997), citing Atwater v. State, 626 So. 2d 1325 (Fla. 1993).

The State's evidence established three powerful aggravating factors by overwhelming, uncontested proof: (1) the defendant

had previously been convicted for a violent felony offense, (2) the defendant was under a sentence of imprisonment at the time of the murder, and (3) the murder occurred during the commission of a robbery.

In December of 1981, Peterson was convicted and sentenced to prison for a series of violent crimes, including a Burglary Assault and an Aggravated Assault with a firearm. Peterson also received three life sentences for separate armed robberies committed with a firearm.

By the time of his sentencing proceeding, Peterson had been convicted of 13 prior violent felonies. Peterson's violent crimes escalated from armed robberies, to armed robberies and rapes, and culminated in murder. Peterson's record of prior violent felonies was striking in number and severity.

As confirmed in the undisputed documents and stipulations introduced during the penalty phase, Peterson was paroled in 1992 on his 1981 convictions. At the time of the Big Lots murder, Peterson was under active supervision on life parole for his three 1981 robberies.

The fact that Peterson murdered John Cardoso during the commission of and in furtherance of an armed robbery, during an offense similar to his other robberies, constituted the third weighty aggravating circumstance.

At trial, the defense characterized the Big Lots murder as "merely" a felony murder, committed without the intent to cause the death of the victim. In discussing the weight to be given the robbery as an aggravating factor, the State pointed out that the defendant's conduct in bringing the gun, shooting the victim in a vital area at a time when he was no longer an apparent threat, completing the robbery after shooting the victim (thus insuring that help could not be called until after the defendant fled) and using the victim's body to intimidate the remaining victims into compliance, evidenced that shooting the victim and letting him die were intentional acts whose purpose bore a significant relationship to the underlying robberies.

In this case, the prosecutor's closing focused on the defendant's actions and intent, prior to and contemporaneous with the victim's death. Remorse does not relate to a criminal's intent *during the commission of the crime*, but is instead defined as "a gnawing distress arising from a sense of guilt for wrongs (as injuries done to others)." See Beasley v. State, 774 So. 2d 649, 672 (Fla. 2000).

Any comments concerning the defendant's state of mind at the time of the crimes were relevant not only to the weight to be given aggravating factors, but to counter defense mitigation claims that Mr. Cardoso's death was an unintended accident.

Indeed, much of the defense closing was devoted to the suggestion that the victim's death was unintended and, as a result, the defendant did not use an actual firearm in a subsequent robbery.

The purpose of closing argument is "to review the evidence and explicate those inferences which may be reasonably drawn from it." In this case, the prosecutor's unobjected-to comments, which were fairly based on conclusions drawn from the evidence and relevant to aggravating or mitigating circumstances, were permissibly fair comments. Mann v. State, 603 So. 2d 1141 (Fla. 1992).

The State's cross-examination concerning the defendant's antisocial personality disorder was relevant to assessing the accuracy of Dr. Maher's prediction and opinion. The defense introduced records from the Hillsborough County Jail indicating that the defendant had no significant discipline problems for the period of time that he was incarcerated awaiting trial on the Family Dollar case. The defense also presented testimony through Dr. Maher concerning the existence of the statutory mitigating factor that Peterson's capacity to conform his conduct to the law or appreciate the criminality of his conduct was substantially impaired by his low intelligence and immaturity.

During the penalty phase, the defense and their expert witness suggested that the defendant's violent criminal behavior was caused by his low intellect and immaturity, that it occurred during episodes of alcohol or drug use, that it would diminish with age, and that it would not occur in a structured setting. In contrast to Dr. Maher's description of the causes of the defendant's criminal and violent behavior and the conditions under which it occurred, antisocial personality disorder is characterized by a pervasive pattern of disregard for and violation of the rights of others continuing from childhood through adulthood.[3]

The defendant's allegedly impaired capacity to empathize with victims, due to his low intelligence and immaturity, was a central premise of Dr. Maher's mitigation testimony, presented

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[3] The prosecutor's questions concerning Dr. Maher's diagnosis of the defendant as having antisocial personality disorder were based upon language taken directly from the description of Antisocial Personality Disorder contained in the Diagnostic and Statistical Manual of Mental Disorders, DSM IV-TR (2000), at 702-703. The issue of whether the defendant's criminal and violent behavior was the result of low intellect and immaturity or antisocial personality was relevant to the jury's consideration of Dr. Maher's testimony. Although the DSM—IV also lists as one of the diagnostic criteria for antisocial personality disorder A(7): "lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated or stolen from another," the State never asked about this characteristic. This characteristic focuses on the defendant's after-the-fact reaction to his conduct while questioning of the

to demonstrate that Peterson's ability to conform his conduct to law or appreciate the criminality of his acts was substantially impaired. By presenting only Dr. Maher's bare conclusion as to the existence of their mental health mitigation, the defense left any explanation of Dr. Maher's reasoning to cross-examination.

On cross-examination, when Dr. Maher was asked to explain the basis for his conclusion, Dr. Maher stated that while the defendant knew his conduct was criminal, he could not fully appreciate the wrongfulness of his conduct because he lacked the capacity to understand the extreme degree of suffering he inflicted. Dr. Maher testified that the defendant's lack of capacity to understand the tremendous suffering he was inflicting on his victims was not deliberate, but occurring only on an unconscious level. Dr. Maher explained that the defendant's lack of empathy resulted from the defendant having the emotional maturity of a 14 or 15 year old, having a low IQ and being "just plain dumb", and from his having had to overcome the fact that he was a poor, black man in "this community".

Therefore, the State was permitted, and obligated, to discredit this theory. During cross-examination, the State

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State in this care related to the motivations and causes for the defendant's behavior.

sought to undermine the expert's opinion by recounting the uncontested facts indicating that the defendant clearly understood the criminality of his actions in that he disguised his appearance, threatened to kill anyone who looked at him, wore gloves to prevent leaving fingerprints and preplanned the robberies by casing each store and having a ready means of getaway. The State permissibly established that Dr. Maher had diagnosed Peterson with antisocial personality disorder, a personality or character disorder that could account for the same lack of empathy and conformance to the law that Dr. Maher attributed to low intelligence and environmental obstacles. The State's cross-examination also permissibly challenged Dr. Maher's conclusion that the defendant lacked the capacity of empathy, based upon evidence of Peterson's ability to have essentially normal, loving and wholesome relationships with his own family members.

The State's questions and comments were in direct response to the defense expert's testimony that the defendant's ability to empathize with victims was a lack of capacity resulting from low intelligence and immaturity and which allegedly occurred only on an unconscious level. This was an issue Dr. Maher testified about, it was the basis of a requested jury instruction, and when viewed in context, the State's comments

were clearly appropriate for closing argument, as evidence by the lack of any contemporaneous objection.

Additionally, the State's arguments were invited response to the defense argument that the defendant's actions were not premeditated, as indicated by the defendant's subsequent conduct. During the guilt phase, the State introduced Williams rule evidence of three other robberies. During the last of these crimes, the robbery of McCrory's supervisor, Anne Weber, the defendant wielded a dark weapon that appeared to be an automatic pistol. At trial, the defense emphasized that the gun recovered with cash register receipts, checks and a bank bag from the McCrory's robbery was not a firearm, but, instead, was a dark colored pellet gun designed to mimic the appearance of an automatic pistol. During closing argument, defense counsel argued that evidence of premeditation was not clear and the defendant's lack of intent to harm anyone was established by Peterson's conduct during the subsequent McCrory's robbery. Defense counsel stressed that during the McCrory's robbery, the defendant carried a BB gun "so that nobody would get killed." By focusing on the defendant's subsequent conduct after Mr. Cardoso's death, the defense closing arguably suggested, albeit implicitly, that Peterson may have felt regret and remorse, i.e., as a result of Peterson's purportedly unintended harm to

Mr. Cardoso, Peterson changed his MO, thus insuring that it would not happen again. Admittedly, there could be a number of speculative explanations,[4] but only one circumstance involving Peterson's subsequent use of the BB gun would reflect the absence of intent to kill John Cardoso—that Peterson was distressed by or regretful about the occurrence.

The instant case involves more than merely a case of the defense failing to object. The defense called an expert witness knowing that his testimony was predicated on the defendant allegedly lacking the capacity for empathy, which they now claim is the equivalent of the lack of remorse. The State's attempt to undermine and impeach this testimony was proper. Prior to closing arguments, the State informed the court and the defense counsel of its intended argument. The court indicated that the State's argument was permissible and the defense did not disagree:

> MR. CROW [Prosecutor]: I don't — I certainly don't intend to argue any nonstatutory aggravators Judge. In terms of—in terms of the, as I understand, Dr. Maher's testimony, his basis for saying the defendant's capacity for being substantially impaired

[4] For example, given the victims' disparate descriptions of the firearm, it is possible that Peterson had more than one weapon. It is also conceivable that the defendant could have hidden or discarded the murder weapon out of self-interest, rather than out of concern for future victims because the pistol was damning evidence that could link him directly to the bullet that killed John Cardoso.

is that he's unable to empathize and understand the suffering he's inflicted on victims, and I do intend to discuss that and whether that, in fact meets the statutory standard—the mitigating standard.

THE COURT: I think that falls within the confines of what I just said—

MR. CROW: Okay.

THE COURT: -- that it's being offered in response to a mitigation.

MR. CROW: I normally divide my argument up where I talk about aggravators and I talk about the weight that should be assigned to aggravators, which means I do get into the substance of those things as opposed to just saying, "It's proven." I talk about why it should be given weight, and then I usually talk about mitigating circumstances. And the things that you are talking about, if they come up, would come up in rebutting the either mitigators or potential mitigators. And to some degree, since I go first, I don't know exactly what he's going to say, and I kind of have to anticipate.

THE COURT: I understand and appreciate that. I hope you'll appreciate the concern I have about overemphasizing something which could be construed as an aggravator when it isn't, and that's what my concern is. The case law I've read — within the confines of what you've told me, I think your argument is permissible.

(V16/2778-2780).

The defense expert testified that the defendant's future behavior in prison would be non-violent because, like a mischievous teenager who misbehaves after school, the defendant's violent criminality was the result of the availability of drugs and alcohol and lack of structure as opposed to the defendant's antisocial personality disorder. The

basis for his conclusion as to the existence of an alleged mitigating factor was defendant's diminished capacity to understand the suffering he imposed on his victims, even though he was able to empathize and have normal relationships with the people who held importance to him. The defense closing repeatedly emphasized that the defendant's conduct in taking preventative action in his subsequent crimes proved the lack of intent to shoot and kill Mr. Cardoso. These defense arguments clearly invited the State's fair responsive questioning and comments.

Error, if any, was invited, waived by the failure to object, is not fundamental, or, alternatively, is harmless in light of the defense theory and arguments and the strong proof of multiple aggravating factors.

Finally, Peterson cites to a newspaper article with Ms. Tunsil's comments, but no claim of error is raised concerning the trial court's disposition of this matter. As the trial court ruled:

> . . . The comments at issue here were made to journalists and printed in articles in the St. Petersburg Times and the Tampa Tribune. However, Florida law prohibits the use of juror testimony to impeach a verdict. §90.607(2)(b), Fla. Stat.; ***Sims v. State***, 444 So. 2d 922 (Fla. 1984)(Juror testimony concerning the jury's alleged consideration of the Defendant's failure to testify was inadmissible as this is a matter that inheres in the verdict).

> Devoney v. State, 717 So. 2d 501 (Fla. 1998)(Juror testimony that jury may have relied on inadmissible evidence, which the court had instructed them to ignore, was inadmissible as a basis for granting a new trial).
>
> (V13/2348).

Moreover, a new penalty phase would not prevent recurrence of the same issues--the defense could still introduce this same evidence of the defendant's lack of empathy, present the same expert predictions of the defendant's future behavior and argue in closing that the defendant's conduct subsequent to the crime indicated some regret and corrective action. The State should not be prohibited from fairly responding to these claims.

## ISSUES V AND VI (Consolidated)

### The Ring Claims

In Issue 5, Peterson argues that Florida's capital sentencing statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002), because the trial judge rather than the jury makes the findings of fact necessary to impose the death sentence and the jury recommendation need not be unanimous. Peterson raised these same grounds in his pre-trial motion challenging the legality of Florida's death penalty statute under Ring. (V9/1635-1650; V15/2584-85)

In Issue 6, Peterson argues that the existence of the prior felony aggravator should not bar the application of Ring. This ground was not raised by Peterson in the trial court and, therefore, it is procedurally barred on appeal. Furthermore, the defendant's prior violent felony convictions[5] exclude him from Apprendi's application. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (stating, "[*O]ther 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

[5] Five of Peterson's prior violent felony convictions were from a series of armed robberies in 1981. [Robbery with a Firearm (3), Burglary Assault with a Firearm (1) and Assault with a Firearm (1)]. Peterson also had another five violent felony convictions

jury, and proved beyond a reasonable doubt."); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003)(noting rejection of ***Ring*** claims in a number of cases involving a prior-conviction aggravator).

**Analysis:**

Peterson's intertwined Ring claims are also without merit have been repeatedly rejected by this Court since Ring was decided. As this Court recently reiterated in Frances v. State, 2007 Fla. LEXIS 1897 (Fla. 2007):

> . . . **in over fifty cases since *Ring*'s release, this Court has rejected similar *Ring* claims**. See Marshall v. Crosby, 911 So. 2d 1129, 1134 n.5 (Fla. 2005), cert. denied, 126 S. Ct. 2059 (2006). As the Court's plurality opinion in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), noted, "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." Id. at 695 & n.4 (listing as examples Hildwin v. Florida, 490 U.S. 638 (1989), Spaziano v. Florida, 468 U.S. 447 (1984), Barclay v. Florida, 463 U.S. 939 (1983), and Proffitt v. Florida, 428 U.S. 242 (1976)); see also King v. Moore, 831 So. 2d 143 (Fla. 2002) (denying relief under *Ring*).
>
> ***Ring* did not alter the express exemption in Apprendi v. New Jersey, 530 U.S. 466 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the cases. This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying *Ring* claims.** See, e.g., Smith v. State, 866 So. 2d 51, 68 (Fla. 2004) (denying relief on *Ring* claim and "specifically not[ing] that one of the aggravating factors present in this matter is a prior violent felony conviction"); Davis v. State, 875 So. 2d 359,

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resulting from his 1998 offenses. [Robbery with a Firearm (2), and Sexual Battery with a Deadly Weapon (3)].

> 374 (Fla. 2003) ("We have denied relief in direct appeals where there has been a prior violent felony aggravator."); Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003) (stating that the existence of a "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt"); Henry v. State, 862 So. 2d 679, 687 (Fla. 2003) (stating in postconviction case that this Court has previously rejected *Ring* claims "in cases involving the aggravating factor of a previous violent felony conviction").
>
> **Additionally, this Court has rejected claims that *Ring* requires the aggravating circumstances to be individually found by a unanimous jury verdict**. See Hodges v. State, 885 So. 2d 338, 359 nn.9-10 (Fla. 2004); Blackwelder v. State, 851 So. 2d 650, 654 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003).
>
> Frances, 2007 Fla. LEXIS 1897 (Fla. 2007)(e.s.)

This Court repeatedly has held that Ring is not implicated when a defendant has a prior violent felony conviction, and Florida's death penalty statute is not unconstitutional under Ring. Accordingly, the trial court's ruling should be affirmed.

## ISSUE VII

## The Penalty Phase Jury Instruction Claim

Peterson argues that the standard jury instruction during the penalty phase allegedly shifted the burden of proof. During the preliminary jury instruction conference, the defense objected to the alleged "burden shifting" instruction, and the trial court "noted" the defense objection and that the same language was contained in the model instruction, as recently amended. (V16/2771-72)

When the jury returned to the courtroom, the trial court instructed the jury, without further objection:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.
>
> (V16/2676).

**Procedural Bar**

Jury instructions are subject to the contemporaneous objection rule, and to preserve a jury instruction claim objections must be made at the time the instruction is given. See Walls v. State, 926 So. 2d 1156, 1180 (Fla. 2006); Nelson v.

State, 850 So. 2d 514, 525 (Fla. 2003). In this case, although defense counsel raised a preliminary objection during the charge conference, the defense did not raise a contemporaneous objection when the instruction was read to the jury. Therefore, this issue has not been preserved for appeal.

**Analysis**

Assuming, *arguendo*, that Peterson's alleged burden-shifting penalty phase jury instruction claim is properly before this Court, the defendant's claim is without merit. This Court has repeatedly rejected the argument that the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence. See Elledge v. State, 911 So. 2d 57, 79 (Fla. 2005); Rodriguez v. State, 919 So. 2d 1252, 1280-1281 (Fla. 2005); Sweet v. Moore, 822 So. 2d 1269, 1274 (Fla. 2002); Carroll v. State, 815 So. 2d 601, 622-23 (Fla. 2002); San Martin v. State, 705 So. 2d 1337, 1350 (Fla. 1997)(concluding that weighing provisions in Florida's death penalty statute requiring the jury to determine "whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist" and the standard jury instruction thereon did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence). The trial court's ruling should be affirmed.

## ISSUE VIII (Supplemental)
## The Sufficiency of the Evidence Claim

Peterson does not contest the sufficiency of the evidence to sustain his conviction for first degree murder. Nevertheless, this Court has an independent obligation to review the record for sufficiency of the evidence. See Blake v. State, 2007 Fla. LEXIS 2387 (Fla. 2007), citing Fla. R. App. P. 9.142(a)(6); Rodgers v. State, 948 So. 2d 655, 673-74 (Fla. 2006). In this case, as in Blake, the jury found the defendant guilty of first-degree murder on a general verdict form. (V12/2127) "A general guilty verdict rendered by a jury instructed on both first-degree murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation." Id., quoting Crain v. State, 894 So. 2d 59, 73 (Fla. 2004).

At trial, the defense suggested the possibility of an accidental discharge and the defense moved for judgment of acquittal solely on the theory of premeditated murder. (V27/1604) Thus, any belated defense challenge to the State's alternative theory of felony murder is procedurally barred.

In denying the motion for JOA on the theory of premeditation, the trial court explained:

> THE COURT: All right. Thank you very much. As, hopefully, the attorneys can tell, I have carefully

> considered this issue of whether or not I should grant the Defense motion for judgment of acquittal as to the premeditated portion of the State's case, including but not limited to conducting my own research. And the case which I have presented to the attorneys to review, Kormondy v. State, 703 So.2d 454, was the case which was closest that I was able to find to the factual scenario as presented before me today. However, it is distinguished upon my careful review of the case from the circumstances in front of me today in the following manner. First and most importantly are the continued threats of violence and death which were -- which came into evidence in this case not only in the instance specifically of the course of conduct under which the defendant is charged but also with respect to the prior Williams Rule testimony which was allowed by me for reasons previously stated by me. Likewise, in the Kormondy case, as it was pointed out by Mr. Crow, in that case a weapon was not brought to the scene by the defendant but, rather, located on the scene. There is a reference in the case to the lack of threats which I've already identified with respect to this case. And as Mr. Crow has just given his analysis of the means in which the gunshot, which occurred in this case to the back, occurred, I do find that at this time, based upon my review of the case law and the evidence before me, that there is not a reasonable hypothesis under which I could grant the motion, and, therefore, at this time it is denied.
>
> (V27/1639)(e.s.)

Moreover, the trial court's sentencing order (V13/2346-2347) painstakingly addressed and rejected any alleged "lack of premeditation" as a purported non-statutory mitigating factor, and the trial court emphasized that "ample evidence of premeditation was presented at trial." (V13/2346-2347) And, even if the defendant's death sentence was based exclusively on felony murder, [s]ince the Defendant acted alone and personally shot Mr. Cardoso, it was unnecessary for the court to either

instruct the jury or to make specific findings under Enmund v. Florida, 458 U.S. 782 (1982) or Tison v. Arizona, 481 U.S. 137 (1987). (V13/2346-2347) As the trial court cogently stated:

> H. Lack of Premeditation - Non-Statutory
>
> The Defense argues that the death penalty should not be imposed because the State did not prove that the Defendant acted with premeditation or that he had the intent to kill Mr. Cardoso. However, **the court finds that ample evidence of premeditation was presented at trial**.
>
> **The Defendant shot Mr. Cardoso when they were alone inside a break room at Big Lots. Witnesses heard what sounded like a struggle or confrontation, and the autopsy revealed bruising on Mr. Cardoso's right shoulder, arm, and hand consistent with having occurred at or immediately before the shooting. The fatal gunshot wound entered the victim's upper left shoulder below the neckline and traveled downward in a back to front, left to right trajectory. Circumstantial evidence including the path of the bullet, the distance from which the gun was fired, and the fact that the gun was aimed at a vital area, striking the lung, liver, and major blood vessels, suggests that Mr. Cardoso was shot while in a submissive, kneeling position with his torso leaning toward the floor and the Defendant standing above him, while Mr. Cardoso was not struggling and posed no immediate threat to the Defendant**.
>
> **Even after firing the fatal gunshot, the Defendant executed the robbery as planned without allowing other employees to call for medical help to save Mr. Cardoso's life. Throughout the robbery, the Defendant repeatedly threatened to kill victims who disobeyed his commands and held a loaded pistol to victims' heads. All this evidence indicates that the Defendant was prepared to use lethal force to overcome any resistance he encountered during the planned commission of the robbery**.

> Even if the court was to find that there was no evidence of premeditation, the lack of premeditation alone is not a legal bar to the imposition of the death sentence. **Since the Defendant acted alone and personally shot Mr. Cardoso**, it was unnecessary for the court to either instruct the jury or to make specific findings under Enmund v. Florida, 458 U.S. 782 (1982) or Tison v. Arizona, 481 U.S. 137 (1987).
>
> (V13/2346-2347)(e.s.)

The defense has never disputed, nor could they credibly dispute, that the murder of Mr. Cardoso was committed during the Big Lots armed robbery. Therefore, the defendant's unchallenged murder conviction certainly may be sustained as felony murder.

Additionally, competent, substantial evidence supports Peterson's first-degree premeditated murder conviction. In the Williams rule cases and this case, the victims were threatened with death if they looked at Peterson, if they disobeyed or lied to him. Peterson made his intent clear not only by his words, but by his actions in holding the firearm against the victim's head. Peterson insured that the employees complied with his demands at gunpoint and he threatened death if they failed to do so. Peterson's malevolence throughout all of these attacks went beyond the intent necessary to commit robbery, and became an essential part of his scheme in controlling the employees.

The Big Lots case was the first instance of some sort of resistance. Some of the employees heard a noisy commotion

coming from the back room, and Mr. Cardoso had some bruising on his right side, bruising around his right shoulder, right flank, right elbow, and right thumb. However, at the time the fatal shot was inflicted, the path of the bullet wound (from the back, down and forward, left to right) was consistent with Mr. Cardoso kneeling in a subdued position.

The circumstances were inconsistent with any type of accidental shooting during a struggle. The victim's hands were undamaged and the gunshot wound was consistent with the victim being on his knees and bent forward in a position where he was subdued and could no longer resist. The gunshot wound was not a contact wound, but a close wound inflicted into a vital area of his body. Although repeated threats of murder were made to other employees, the victims who were compliant were not killed.

In order for the defendant to carry out his robbery and control the remaining employees (who heard the commotion in the back room), Peterson assured that Mr. Cardoso would not run or resist by shooting him. Peterson even made a point of the shooting, intentionally parading the other employees past Mr. Cardoso's body, to intimidate them and prevent any resistance. Peterson made repeated statements of his intent and he reinforced the threats by use of the firearm.

In short, Peterson armed himself with the loaded gun

beforehand, he knew how to use it, and he had no hesitation in wielding it in any of the robberies. Peterson was an armed criminal who went into the store with the intent to kill anyone who resisted, and he acted on that stated intent when he shot Mr. Cardoso in the back. The evidence presented at trial, as also summarized by the trial court, is sufficient to establish premeditation and/or felony murder. After viewing the evidence in a light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt; and, therefore, sufficient evidence exists to sustain the defendant's conviction for first degree murder. See Reynolds v. State, 934 So. 2d 1128, 1145 (Fla. 2006).

## CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Andrea M. Norgard, Esquire, Post Office Box 811, Bartow, Florida 33831 this 29th day of January, 2008.

## CERTIFICATE OF FONT COMPLIANCE

**I HEREBY CERTIFY** that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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