IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-287

LIONEL MILLER

Appellant,

v.

STATE OF FLORIDA

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA, (CRIMINAL DIVISION)

****

ANSWER BRIEF OF APPELLEE

WILLIAM McCOLLUM
Attorney General
Tallahassee, FL

Lisa-Marie Lerner
Assistant Attorney General
Florida Bar No.: 698271
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108
Counsel for Appellee

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PRELIMINARY STATEMENT

Appellant, Lionel Miller, was the defendant at trial and will be referred to as the "Defendant" or "Miller". Appellee, the State of Florida, the prosecution below, will be referred to as the "State." References to the record on appeal will be by the symbol "ROA", to the transcripts will be by the symbol "T", to any supplemental record or transcripts will be by the symbols "SR" preceding the type of record supplemented, and to Miller's initial brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Lionel Miller was indicted on May 16 and was arraigned on May 31, 2006 on charges of first degree murder, burglary, attempted murder, and attempted robbery with force. [ROA: 334-337, 334-345] He filed a motion to suppress his statements to the police on which the court held an evidentiary hearing on May 21, 2007. [ROA: 779-80;T: 131-189] The trial court issued a written order denying that motion. [ROA: 1010-11]

On November 20, 2007 the jury found Miller guilty of first degree murder, burglary with a battery, attempted first degree murder with a knife, and attempted robbery with a deadly weapon. [ROA: 1241-45; T: 1305-06] The penalty phase trial took place on November 26-27, 2007 and resulted in a jury recommendation

for death by a vote of eleven to one. [ROA: 1268;T: 1616-19] The hearing pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993) occurred on December 21, 2007. [T: 285-290] In a written order dated February 1, 2008 the trial court sentenced Miller to death. It found five aggravating factors, all of which it gave great weight: 1. prior felony conviction for which defendant was under a sentence of imprisonment; 2. prior violent felony; 3. felony murder during a burglary and robbery; 4. heinous, atrocious, and cruel ("HAC"); and 5. victim particularly vulnerable due to age or disability. The court found six non-statutory mitigators: 1. dysfunctional family (some weight); 2. prior military service (very little weight); 3. cooperation with law enforcement (little weight); 4. remorse (very little weight); 5. anti-social personality disorder (little weight); and 6. history of substance abuse (some weight). [ROA: 1406-27]

The facts developed at trial establish that Jerry Smith lived alone a block or so from her son Chris Smith and his family. She was elderly and had Alzheimer's disease with impaired memory which was evident to those who spoke with her. [T: 638-40,684, 718-19, 1102] She was beautiful, always impeccably dressed, and wore lots of jewelry. [T: 700, 720-21]

On April 14, 2006 David Dempsey ("Dempsey") and Miller were driving around the neighborhood hoping to intercept the mailman to get a check which was being sent to Miller. [T: 866-67] The two men met Jerry when they stopped to see

if the mailman had yet been by her house. Miller spoke with her for an half hour. She was wearing a lot of jewelry and was quite talkative. [T: 868-69] After the men left, Miller discussed Jerry's memory problems and how easy it would be to rob her. He asked Dempsey to help him rob her but Dempsey refused. [T: 870] He repeatedly pestered Dempsey about helping with the robbery over the next two days, forcing Dempsey to avoid Miller. On April 16, Dempsey returned to sleep after Miller once again asked for a ride to Jerry's house which was about five miles away. [T: 1153] Miller was gone when Dempsey awoke. [T: 873-77]

On April 16, 2006 Jerry had brunch with her son and his family, walking home afterwards with $100 her son had given her. [T: 722-23, 733] She wore jewelry, including a ring she designed herself. [T: 731] She walked her dog around 7 that evening stopping to chat with two women near her home until 7:30. She wore a white linen suit with flowers on the jacket and jewelry. [T: 852-60] Robert Sutherland ("Sutherland"), her neighbor, saw her sitting on her front porch with her dog when he returned from walking his guests to their cars around 7:45. He saw noone else near her. [T: 701]

Jerry was security conscious. She always kept her doors locked and her blinds drawn so people could not see inside her house. [T: 624, 720-21] Larry Hayden ("Hayden") noticed her blinds up when he walked his dog by her house around dusk on April 16. He saw a man he later identified as Miller struggling with

her in her living room and heard her screaming, “Leave me alone!” Hayden went up to the house to see if Jerry was alright although Miller kept saying nothing was going on. Jerry was in the middle of the room. Miller stabbed Hayden below his rib cage when he came into the room. [T: 624-28, 636, 765, 644-45] Hayden struggled with the man while Jerry ran out the back. Miller followed her while Hayden went for help. He had told police in a statement that he saw the two on the corner of her back porch struggling. He saw Jerry head for a neighbor’s house while Miller was her back porch. Id., [T: 651, 670] Hayden saw no other person in Smith’s house, nor any cars waiting outside. [T: 652, 671] Smith came to the neighbor’s house while he lay on the neighbor's front lawn. [T: 663]

At 7:45 P.M. Tom Shumilack (“Shumilack”) heard screaming and saw Hayden run to Sutherland’s door, Smith’s immediate neighbor. He then saw Smith come from the back yard screaming for help. She told Shumilack that a man had broken in her house. [T: 674-78] He saw no other cars on the street and no other man. [T: 678]

John Jackson lived next door to Smith with Sutherland. They had friends over for the holiday and the guests left around 7:45 in the evening. He heard loud voices and then banging while he was cleaning up in the kitchen. Hayden was at his front door. Jackson fetched Sutherland from the backyard at 7:55. [T: 703-05] Smith came up to and into the house while Hayden stayed outside. Both were

bleeding. [T: 687-88, 695, 708-09] Smith was covered in blood and was so weak that she fell from a chair onto the floor. [T: 689] Hayden required surgery but recovered. Smith died from multiple stab wounds and blood loss. [T: 1086-87, 1098] She also had bruises on her scalp and arms consistent with a struggle and being hit. [T: 1099]

Around 8 to 8:15 in the evening of April 16 Richard Ramee ("Ramee") saw an anxious and disheveled man crossing Delaney Park which was roughly a block from Jerry's house. [T: 730] The man was holding his right side with possibly a shirt as he rushed through the park. [T: 916-23] Miller showed up at Stephen Prange's house the evening of April 16 with an injured arm with a sleeve wrapped around it. He asked him to use the phone and for some bandaging material. [T: 826-829] Prange's house was eight tenths of a mile from Jerry's. [T: 1153] Miller called Dempsey at 8:30 for a ride from Prange's house. [T: 873-77] Dempsey noticed his wounded arm and asked about it. Miller commented that anything that could go wrong, did. He said some guy tried to be a hero and his hero days were over. [T: 879-80] When Dempsey showed him a sketch of Miller in the paper on the 19th, Miller told him to say nothing, a warning he repeated shortly before the police arrested him. [T: 881-82, 885] Prange called the police the day after he heard about the killing and gave a statement before he knew there was a reward. [T: 830, 1121] He was paid a $5000 reward for the crime tip. [T: 833-34]

During the processing of the crime scene immediately following the attack the police found a crack pipe on the floor of Jerry's house which turned out to have Miller's DNA on it. [T: 758, 937, 1062] The plastic cup left on Smith's table had Miller's prints on it. [T: 1039] Two of the blood stains in the Smith's house were Miller's according to DNA analysis. [T: 1057] They also recovered a knife sheath from a Delaney Park bench. [T: 925, 928] The police later found a twelve and a half inch knife in the backyard of the house to the southwest of Jerry's; the knife had Miller's DNA on it. [T: 946, 967, 1018, 1064] During a search of Prange's house, they recovered a white sleeve from Smith's torn white jacket in the garbage can. [T: 728, 1004-17]

The police arrested Miller on April 19, 2006 and took him to the station to be interviewed and booked. Miller had a bandage on his arm. [T: 979] He told the officer escorting him to the interview room that he wanted to talk to the police about what had happened. [T: 978] Detectives Michael Moreschi ("Moreschi") and Joel Wright ("Wright") conducted the interview and said that Miller understood the questions and wanted to speak to them. [T: 766-69] When the police were moving Miller from the station to the jail they passed a group of local media to whom Miller admitted to killing Smith. [T: 769, 816-818]

Miller told the police that he met Smith on the 14th when he was looking for the mailman. After talking to her he formed a plan to rob her. On Easter he walked

over to her neighborhood and started chatting with Smith. He asked for a glass of water which she gave him. He left the plastic cup on her table. Smith opened the blinds while he was in her house. He threw her on the couch and repeatedly tried to get her jewelry, especially her rings. She screamed and resisted. A neighbor came in the house and Miller became afraid of returning to prison and he freaked out and stabbed him. The men struggled while Smith ran out the back. He followed her and she screamed. She kept screaming so he stabbed her to quiet her. He also stabbed himself so he returned to her house and took her jacket. He ran and tossed the knife in the neighbor's bushes. Sometime during the attack, he lost his crack pipe. He cut through the park and tossed the knife's sheath. He went to Prange's house and called Dempsey for a ride. [T: 1133-39, 1143-44]

Upon this information, the jury convicted Miller of first degree murder, burglary, attempted murder, and attempted robbery. Following the conviction, the court held a penalty phase trial. The State presented Marie Hansen, the medical examiner, who testified that Smith had Alzheimer's. She said the stab wounds were painful and made with a great deal of force since one went completely through the arm. Smith was conscious both during and after the attack. [T: 1326-1338] Jim Gravely is a parole officer from Oregon who testified that Miller was on parole for robbery and manslaughter at the time of this crime. [T: 1338-48] Paul Fisher, Neal Hutchins, Bonnie Garthus, and Ed Holst testified to the manslaughter Miller

committed in Portland, Oregon. [T: 1352-1390] Myrna and Christopher Smith provided victim impact testimony. [T: 1395-1405] Glen Miyamoto, Robert Miller, and Willard MacGregor testified about Miller's Oregon robbery conviction. [T: 1411-1428] The defense presented Joan Johnson who was an investigator who conducted a family background investigation on Miller. [T: 1438-1442] Eric Mings is a psychologist who provided Miller's family background and testified about Miller's substance abuse history and resulting problems. He opined that Miller has an antisocial personality. [T: 1443-1470] Drew Edwards is an expert in chemical dependency who testified about the brain impairment which occurs with repeated cocaine and drug use. He said Miller would do well in a highly structured setting. [T: 1471-1505] The State then presented Jeffrey Danziger, a psychiatrist, who opined that Milled had an antisocial personality which is the same thing as a sociopath. He did not believe the crime was committed under extreme mental or emotional disturbance nor did Miller have a history of psychotic behavior. Miller knew the wrongness of his conduct while he committed this crime. [T: 1506-1536] The jury returned a recommendation for death by a vote of eleven to one. [T: 1616-19]

SUMMARY OF THE ARGUMENT

Point I: The trial court properly found venirman Eddington not death qualified and dismissed him for cause.

Point II: Florida's death penalty system is Constitutional and the aggravating and mitigating factors need not be alleged in the indictment nor need they be found by a unanimous jury vote.

Point III: The Miranda warnings given to Miller were sufficient and the trial court properly denied the motion to suppress his statement.

Point IV: The trial court did not abuse its discretion in allowing testimony that the crime occurred on Easter and that the victim's son was an attorney.

Point V: The trial court properly allowed testimony concerning the facts behind Miller's prior violent felony convictions.

Point VI: There was competent, substantial evidence to support the trial court instructing the jury on the avoid arrest aggravator.

Point VII: The sentence is proportional.

POINT I

THE TRIAL COURT PROPERLY FOUND VENIRMAN EDDINGTON NOT DEATH QUALIFIED AND DISMISSED HIM FOR CAUSE.

Miller begins his appeal by challenging the trial court's granting of a cause challenge for Juror 407, Eddington. He claims the court erred in finding the juror was not qualified to sit on a penalty phase jury. This issue is not preserved nor did the court err in granting the cause challenge since Eddington unambiguously said he would not impose the death penalty in a murder case thereby making him incompetent to sit as a juror. Eddington's answers, when considered in their entirety, show he could not assure the court he could set aside his views on the death penalty and follow the law. This evinces there was no abuse of discretion and the matter should be affirmed.

As a preliminary matter, this issue is unpreserved. In order to preserve the issue of the granting of a for cause challenge, the party opposing the challenge must re-raise its objection before the jury is sworn. Ault v. State, 866 So.2d 674, 683-84 (Fla. 2003) (finding issues preserved as counsel renewed his objection to the removal of the juror prior to jury being sworn); Joiner v. State, 618 So.2d 174, 175-76 (Fla. 1993) (requiring party opposing challenge to renew objection prior to swearing in of jury in order to preserve issue as acceptance of jury without objection gives rise to reasonable assumption counsel abandoned earlier objection

and now is satisfied with jury); Arnold v. State, 755 So.2d 696, 698 (Fla. 4th DCA 1999).

In Turner v. State, 645 So.2d 444, 446 (Fla. 1994) in response to a cause challenge the defense attorney said, "For the record, I don't believe [Roche] indicated that she had a fixed opinion as to whether she could give [the death penalty] or not." This Court held that statement was not a timely objection to the trial court's granting of a cause challenge. Without a specific objection, the issue was unpreserved and not reviewable. See also Maxwell v. State, 443 So.2d 967, 970 (Fla.1983) (argument that trial court erred in excusing a juror for cause not preserved without timely objection). Miller's counsel stated much the same thing when asked by the court. "The fact that it would be difficult for him is not gonna preclude him from being a fair and impartial juror." Furthermore, he did not renew this argument against the court excusing Eddington before the jury was sworn, thereby failing to preserve the issue for appeal. (T:10 80;13 585-592).

The validity of a cause challenge is a mixed question of law and fact, on which a trial court's ruling will be overturned only for manifest error. Fernandez v. State, 730 So.2d 277, 281 (Fla.1999). Manifest error is equivalent to an abuse of discretion. See Kimbrough v. State, 700 So.2d 634, 638-39 (Fla.1997)(stating that court's determination of juror's competency will not be overturned absent manifest error and concluding that trial court did not abuse its discretion in excusing a juror

for cause). The trial judge's determination of a prospective juror's qualifications when granting a cause challenge is given deference by the reviewing courts. Castro v. State, 644 So.2d 987, 989 (Fla.1994).

Additionally, the record clearly supports the court's granting of this cause challenge. A potential juror may be excused for cause if the juror has a state of mind regarding the case that will prevent the juror from acting with impartiality. §913.03(10), Fla. Stat . (2006). Ault governs review of cause challenges:

> The test for determining juror competency is whether a juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. ... A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. ... "In reviewing a claim of error such as this, we have recognized that the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record." ... Thus, a trial court has great discretion when deciding whether a challenge for cause based on juror incompetency is proper. ... A trial court's determination of juror competency will not be overturned absent manifest error....
>
> However, prospective jurors may not be excused for cause simply because they voice general objections to the death penalty. ... The relevant inquiry in deciding whether prospective jurors may be excluded for cause based on their views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with [the court's] instructions and [the juror's] oath.'"

Ault, 866 So.2d at 683-84 (emphasis supplied, citations omitted). See Adams v.

Texas, 448 U.S. 38, 45 (1980); Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984).

The U.S. Supreme Court noted in Wainwright v. Witt, 469 U.S. 412 (1985) that there is no requirement for absolute clarity or that the juror would "automatically" vote against guilt or the death penalty:

> ... because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 424-26 (footnotes omitted).

This Court has held that trial courts have “a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record." Smith v. State, 699 So.2d 629, 635-36 (Fla. 1997). See Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998)(sitting as fact finder, judge has superior vantage point to see/hear witnesses and assess credibility); Chandler v. State, 442 So.2d 171, 174 (Fla. 1983) (stating "court was better able to observe [juror's] depth of conviction regarding the death penalty, [and] we defer to his estimation of her

ability to serve impartially"); Davis v. State, 859 So.2d 465, 473 (Fla. 2003); Conde v. State, 860 So.2d 930, 939 (Fla. 2003).

In Hannon v. State, 638 So.2d 39 (Fla. 1994), this Court stated "[t]he inability to be impartial about the death penalty is a valid reason to remove a prospective juror for cause". However, jurors who have expressed strong feelings about the death penalty may serve if they indicate an ability to abide by the trial court's instructions. Johnson v. State, 660 So.2d 637 (Fla. 1995). If there is any reasonable doubt that a prospective juror cannot render a verdict based solely on the evidence submitted and the trial court's instruction of law, he should be excused. Bryant v. State, 656 So.2d 426, 428 (Fla. 1995); King v. State, 622 So.2d 134 (Fla. 3d DCA 1993). The relevant inquiry is whether a juror can perform his or her duties in accordance with the court's instructions and the juror's oath. Farina v. State, 680 So.2d 392, 396 (Fla. 1996).

Here, Eddington's first response to a question on his opinions on the death penalty was "I don't believe in it." He consistently said that it would be "very difficult" for him to follow the law in considering the death penalty, saying "I don't think I could." He told the court that he could envision no circumstances where he would impose the death penalty. He maintained this stance even after the defense attorney spent some time trying to educate and to rehabilitate him. The *only* time he ever wavered in his dismissal of death as a potential penalty was when the

attorney threw out Hitler's and Osama Bin Laden's names. The State Attorney then asked if he could consider the death penalty in a murder case which was not a mass murder or genocide and the juror said no. (T:10 70-80) Based upon those set of responses, viewed in their entirety, the trial court properly excused him for cause. (T:10 81)

Jurors who "cannot and will not conscientiously obey the law with respect to one of the issues in a capital case" may be excused for cause. San Martin v. State, 717 So.2d 462, 467 (Fla. 1998) quoting Lockhart v. McCree, 476 U.S. 162, 176 (1986)); Castro v. State, 644 So.2d at 989(finding for cause removal of juror proper where juror stated he was unsure he could follow the court's instructions). Both the trial and the reviewing courts should consider the juror's responses in their totality. See Franqui v. State, 804 So.2d 1185, 1192 (Fla.2001) (relying on vacillation throughout voir dire in reviewing grant of cause challenge); Johnson v. State, 969 So.2d 938 (Fla. 2007) (Upholding a cause excusal when the juror had a state of mind concerning the death penalty that would have substantially impaired her ability to perform her duties as a juror); see also Meade v. State, 867 So.2d 1215, 1216 (Fla. 3d DCA 2004) (reviewing grant of cause challenge based on the totality of the juror's responses). In this case, Eddington's responses were consistent in refusing to consider the death penalty as punishment for a murder case. He only conceded that death might be appropriate in cases involving

terrorism or genocide and even then he did not say he would impose it, only that he could "envision" it. Eddington obviously was opposed to the death penalty and refused to consider it in any circumstance other than a world class mass murder; even then, he could not guarantee that he would consider it. The trial court did not abuse its discretion in excusing this juror for cause. This Court should deny this claim.

POINT II

MILLER'S DEATH SENTENCE DOES NOT VIOLATE THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE APPRENDI V. NEW JERSEY, 530 U.S. 466(2000), AND RING V. ARIZONA, 120 S. CT. 2348 (2002), DO NOT APPLY TO FLORIDA'S CAPITAL SENTENCING SCHEME. (RESTATED).

Miller argues that Florida's capital sentencing scheme is unconstitutional thereby mandating a reversal of his death sentence and an imposition of a life sentence. Specifically, Miller challenges the failure to allege the aggravating factors in the indictment, the lack of specific findings by the jury regarding aggravating factors, the lack of unanimity of the jury's penalty phase recommendation, and argues that Florida's sentencing scheme requires more than one aggravating factor to support a death sentence. All of these claims are without merit and should be denied.

Initially, this Court has rejected both the Sixth and Eighth Amendment challenges to the death penalty statute. While questions of law are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994), Miller has offered nothing new to call into question the well settled principles that death is the statutory maximum sentence, death eligibility occurs at time of conviction, and that the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence.

Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001); Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death is maximum penalty and repeated rejection of arguments aggravators had to be charged in indictment, submitted to jury and individually found by unanimous jury). See Perez v. State, 919 So.2d 347, 377 (Fla. 2005) (rejecting challenges to capital sentencing under Ring and Furman); King v. Moore, 831 So.2d 143 (Fla. 2002). Florida's capital sentencing is constitutional. See Proffitt v. Florida, 428 U.S. 242, 245-46, 251 (1976) (finding Florida's capital sentencing constitutional under Furman); Hildwin v. Florida, 490 U.S. 638 (1989) (noting Sixth Amendment does not require case "jury to specify the aggravating factors that permit the imposition of capital punishment in Florida"); Spaziano v. Florida, 468 U.S. 447 (1984); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003). Miller's reliance on Blakely v. Washington, 542 U.S. 296 (2004) does not further his argument since it just reaffirmed the Court's previous rulings in Apprendi and Ring.

A. Indictment

Miller argues that Apprendi and its logic require that the aggravating factors be listed in the indictment since it was charged as a capital crime. Initially, the Federal Constitution does not require an indictment at all so the analysis must be done under existing Florida law. Hurtado v. California, 110 U.S. 516 (1884). Apprendi v. New Jersey, 530 U.S. 466(2000) does not apply; the death penalty is

not an increase in the statutory maximum for first-degree murder, but is within the stated statutory maximum. Because death is a statutory sentence, the judge may determine the facts relating to a death sentence just as a judge does with other sentences within the statutory maximum. Apprendi concerns what the State must prove to obtain a conviction, not the penalty imposed for that conviction. Also, Apprendi does not affect prior precedent with respect to capital sentencing schemes such as Florida's. Apprendi, 120 S.Ct. at 2366. This Court has repeatedly rejected the application of Apprendi to the Florida capital punishment system and has rejected the need to list the aggravating factors in an indictment. Mills, 786 So. 2d 532; Mann v. Moore, 794 So.2d 595, 599 (Fla. 2001); Porter v. Crosby, 840 So.2d 981. Those cases also held that the statutory maximum under § 775.082 is death.

The question whether aggravating and/or mitigating factors must be specified in an indictment is thus governed by Florida law. Florida law clearly does not require the aggravating factors to be listed in the indictment. In rejecting this claim years ago, this Court stated:

> The aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in section 921.141(5), Florida Statutes (1987). Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove. Hitchcock v. State, 413 So. 2d 741, 746 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982). Vining's claim that Florida's death penalty statute is unconstitutional is also without

> merit and has been consistently rejected by this Court. See Thompson v. State, 619 So. 2d 261, 267 (Fla. 1983), cert. denied, --- U.S. ----, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993), and cases cited therein.

Vining v. State, 637 So. 2d 921, 927 (Fla. 1994); see also, Mann, 794 So. 2d 595; Medina v. State, 466 So. 2d 1046, 1048 n. 2 (Fla. 1985) (State need not provide notice concerning aggravators).

In reaching its conclusion, the Court in Mills analyzed the statute which listed life as the first punishment. The version of § 775.082(1), Fla. Stat.(2006) in effect at the time of Miller's trial refers to a sentence of death first and then to a sentence of life without parole. If the 1979 statute at issue in Mills made death an available sentence, as this Court held that it did, then the 2006 statute applicable to Miller leaves no doubt that death is not an "enhanced sentence" under Apprendi. Because that is so, a death sentence is not an "enhancement" of the sentence -- it is a sentence that a defendant convicted of a capital felony is eligible to receive.

Moreover, even if Apprendi is somehow applicable to Florida's capital sentencing scheme, that result would not help Miller. Miller has contemporaneous felony convictions (first degree attempted murder, armed robbery, and burglary). The prior violent felony aggravator falls outside the scope of Apprendi and, under the facts of this case, are sufficient to support a sentence of death even if the other aggravators are not considered. Apprendi expressly excluded prior convictions from the matters that must be found by a jury before "sentence enhancement" is

allowable. The State does not concede that a sentence of death, in Florida, is an "enhanced sentence" as that term is used in Apprendi. This Court has rejected challenges under Ring v. Arizona, 120 S.Ct. 2348 (2002) where the defendant has a contemporaneous felony conviction. Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting that "felony murder" and the "prior violent felony" aggravators justified denying Ring claim); Salazar v. State, 991 So.2d 364 (Fla. 2008) ("Ring is satisfied in this case because the trial court applied the prior violent felony conviction aggravator based on Salazar's conviction for the contemporaneous attempted murder of Ronze Cummings."); Duest v. State, 855 So.2d 33, 49 (Fla. 2003) ("We have previously rejected claims under Apprendi and Ring in cases involving the aggravating factor of a previous conviction of a felony involving violence."); Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions").

Even if Apprendi is somehow applicable to capital sentencing, there is no basis for relief because of the manner in which Florida's death penalty statute operates. Miller's argument that aggravators are "elements of the crime" has been expressly rejected by this Court. Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995); Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988). Relief must be denied.

B. An unanimous recommendation by a 12 person jury.

Miller also argues that the jury must unanimously make the specific findings required under § 921.141(3), Fla. Stat. (IB 55). His claims that the death penalty is unconstitutional for failing to require juror unanimity, findings of fact in the jury's recommendation, or specific findings of aggravating factors are without merit. These issues are not addressed in Ring, and in the absence of any Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 822 So.2d 1269 (Fla. 2002); Cox v. State, 819 So.2d 705, 724 n.17 (Fla. 2002) (noting prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)). Moreover, this Court has already rejected these arguments post-Ring. Porter, 840 So.2d at 986 (rejecting argument that aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Doorbal, 837 So.2d 940 (Fla. 2003)(same). Additionally, as detailed above, Apprendi does not apply to Florida's capital sentencing procedures.

Courts are not required to have juries specify in their penalty recommendations which aggravating or mitigating factors exist. This Court stated, "[this] presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of

capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984).

This Court has previously rejected the argument that a unanimous jury sentence recommendation is required. Evans v. State, 800 So.2d 182 (Fla. 2001); Sexton v. State, 775 So. 2d 923 (Fla. 2000); Alvord v. State, 322 So. 2d 533 (Fla. 1975). This Court has also held that "a capital jury may recommend a death sentence by a bare majority vote." Card v. State, 803 So.2d 613, 628 n. 13 (Fla. 2001) citing Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994).

Miller is incorrect when he argues that the issues raised and addressed in Doorbal are different from his. When this Court uses "aggravating factors" it clearly includes the specific aggravating factors "sought" by the State, the specific aggravating and mitigating factors found by the jury, and the jury's weighing of them. Doorbal wanted those specifics included in the indictment and specific jury findings by a unanimous jury detailed. Those are exactly what Miller is arguing here. This Court has already denied these arguments. Both the Apprendi and Ring decisions are inapplicable and there is no basis for relief.

C. A Single Aggravating Factor Is Sufficient to Support a Death Sentence.

It is Miller's position that § 921.141, Fla. Stat. does not contemplate the imposition of a death sentence based upon a single aggravator. This Court has rejected such claims and Miller has not offered a basis for rejecting such precedent.

Miller claims § 921.141 Fla. Stat. does not provide for single aggravator cases and focuses on the plural word circumstances in the phrase "sufficient aggravating circumstances" found in § 921.141(2)(a) and (3)(a). He argues that the language is not the equivalent to “one or more” and clearly intends for the jury to find more than one in order to recommend death. He alleges that the statute clearly did not envision single aggravator cases or it would have explicit language to that effect. § 921.141 is not ambiguous and this Court has found previously that single aggravator cases are constitutional.

In 1973, this Court was called upon to determine if Florida's death penalty statute was constitutional. State v. Dixon, 283 So.2d 1, 2-3 (Fla. 1973), superseded by statute as stated in State v. Dene, 533 So.2d 265 (Fla. 1988). Before this Court in Dixon was the exact language at issue here. Interpreting the statute, in light of a challenge that the aggravators were vague and did not "provide meaningful restraints and guidelines for the discretion of judge and jury," this Court stated: "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the

mitigating circumstances provided...." Dixon, 283 So.2d 1, 8-9. Based upon this interpretation, a single HAC aggravator sentence was affirmed in LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978). Since then, this Court has affirmed several single aggravator cases. See Rodgers v. State, 948 So.2d 655 (Fla.2006); Butler v. State, 842 So.2d 817, 832-34 (Fla. 2003); Blackwood v. State, 777 So.2d 399 (Fla. 2000); Cardona v. State, 641 So.2d 361 (Fla. 1994), denial of postconviction relief reversed, 826 So.2d 968 (Fla. 2002). In Burdick v. State, 594 So. 2d 267, 271 (Fla. 1992), the Court held that "It is a well-established rule of statutory construction that when a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment." Here, this Court has long interpreted the statute as it was written post Furman that a single aggravator is all that is needed. The Legislature readopted the statutes after those decisions, thus adopting the Florida Supreme Court's case law. Consequently, they have now adopted the one aggravator standard as if it was written into the statute. This Court must affirm.

POINT III

THE MIRANDA WARNINGS GIVEN TO MILLER WERE SUFFICIENT AND THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS HIS STATEMENT.

Miller next claims the Miranda[1] warnings were deficient because the detective did not specifically advise him that he had a right to a free lawyer after questioning began. He argues, without providing support, that he believed his right to a free attorney evaporated once questioning began. This alleged deficiency in the advisement of Miller's rights made his subsequent statement not freely and voluntarily given. The State contends that the warning were consistent with the dictates of Miranda and its progeny, including Florida law. The trial court properly denied the defense motion to suppress his statements.

The review standard is that "a presumption of correctness" applies to a trial court's determination of historical facts but a *de novo* standard applies to legal issues and mixed questions of law and fact which ultimately determine constitutional issues. Cuervo v. State, 967 So.2d 155, 160 (Fla. 2007); Fitzpatrick v. State, 900 So. 2d 495, 510, 533-34 (Fla. 2005); Smithers v. State, 826 So.2d 916 (Fla. 2002); Connor v. State, 803 So.2d 598 (Fla. 2001); Parker v. State, 873 So.2d 270, 279 (Fla. 2004). The trial court's ruling on the voluntariness of a

[1]Miranda v. Arizona, 384 U.S. 436

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

"When, as here, a defendant challenges the voluntariness of his or her confession, the burden is on the State to establish by a preponderance of the evidence that the confession was freely and voluntarily given." DeConingh v. State, 433 So.2d 501 (Fla. 1983). "In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there was coercive police conduct." State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), citing Colorado v. Connelly, 479 U.S. 157 (1986). "The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained." Sawyer, 561 So.2d at 281.

The court held a hearing on the motion to suppress on May 21, 2007. Miller refused to attend. (T: 105) The court ordered him to appear by phone. Speaking

with the court on the phone, Miller refused to come. The court told Miller is was unusual for him not to be present. The judge went on to say:

> Do you understand, also, Mr. Miller, that since it was only you and the police officers there, that you have an absolute right to be here to consult with your lawyers about the testimony of the officers to make sure they're testifying correctly and you also have a right to testify yourself as to what happened? Do you understand that?

The court then took a waiver of his presence as well as his right to testify given that his was the only other testimony about the events of his interview. (T: 149-53)

The Orlando police arrested Miller on April 19, 2006 and took him directly to the interview room in the police station. Officer Andre Boren ("Boren") escorted him and stayed with him until the lead detectives arrived. Boren never asked Miller any questions; he only provided the drink and cigarette Miller requested. Miller informed him that he wanted to talk to the police for the first time in his life. He asked if he could have a single cell and his cell phone. (T: 132-33) Boren only replied that he would tell his superiors; he made Miller no promises. (T: 134) Miller was put in the room at 5:40 PM. (T: 140)

Wright and Moreschi entered the room at 6:50 that same day. Wright read him his rights from a standard card used by the Orlando Police Department. Those rights were:

> You have the right to remain silent. Do you understand?
> Anything you say may be used against you in court. Do you understand?

> You have the right to talk to a lawyer before and during questioning. Do you understand?
> If you cannot afford a lawyer and want one, one will be provided for you before questioning without charge. Do you understand?
> Has anyone threatened you or promised you anything to get you to talk to me?

(T: 146-47) Miller waived all of these rights after he said he understood them. He said he wanted to talk and at no time during the interview did he ask to speak to an attorney. (T: 146-48, 154, 175) The officers and Miller had a discussion on his request for a single cell where the officers explained they had no power over housing decisions in the jail or prison. This conversation took 14 minutes after which Wright recorded Miller's statement. (T: 154-55) Wright and Miller passed some reporters on the way to the transportation to the jail. Miller responded to questions and admitted his guilt. (T: 167-69) The defense presented no evidence. The trial court found Miller's statements to Boren and Wright free and voluntary. (T: 187-189)

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." To ensure compliance with the privilege against self-incrimination, the United States Supreme Court outlined in Miranda v. Arizona four procedural safeguards that must be employed to protect the privilege when an individual has been deprived of freedom during a custodial interrogation:

> He must be warned prior to any questioning that [1] he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479. These protections were designed to help prevent an individual's will from being overborne in an custodial interrogation. Id. at 469-70.

The U.S. Supreme Court held that Miranda's reference to "a fully effective equivalent" meant that "Miranda itself indicated that no talismanic incantation was required to satisfy its strictures." California v. Prysock, 453 U.S. 355, 359(1981). The Court rejected any suggestion of a "desirable rigidity in the form of the required warnings" regarding whether the advice about the availability of appointed counsel was inadequate because the defendant "was not explicitly informed of his right to have an attorney appointed before further questioning." Id. That same Court later stated: "Reviewing courts . . . need not examine Miranda warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" Duckworth v. Eagan, 492 U.S. 195, 203(1989)(quoting Prysock, 453 U.S. at 361).

This Court has adopted similar standards to ensure the voluntariness of confession to comply with both the U.S. and article I, section 9 of the Florida Constitution. Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992) outlined the

following rights Florida suspects must be told of prior to custodial interrogation:

> [1] they have a right to remain silent, [2] that anything they say will be used against them in court, [3] that they have a right to a lawyer's help, 2 and [4] that if they cannot pay for a lawyer one will be appointed to help them.

In keeping with Prysock and Duckworth this Court in Anderson v. State, 863 So. 2d 169, 182 (Fla. 2003) stated: "Although Miranda warnings must be given to suspects before custodial interrogation can begin, there is no talismanic fashion in which they must be read or a prescribed formula that they must follow, as long as the warnings are not misleading."

On the basis of State v. Powell, 998 So.2d 531 (Fla. 2008) Miller argues that the advisements given here provide "a narrower and less functional warning than required by Miranda." Id. 1064. In Powell the warnings did not specifically advise that a defendant had the right to have an attorney present during questioning. Miller concedes that Wright advised him of that particular right. He argues that the advisement should also have included that an attorney would be provided both before and during questioning free of charge. He is asking this Court to create a talismanic invocation. He argues that Miller may have decided to request a lawyer and then was confused over whether he could get one mid stream. Given Miller's statements to both Boren and then the media, the record clearly shows in this case that his desire to talk is what prompted him to make the statement and he knew

what he was doing. His statement was freely and voluntarily given as the trial court properly found.

Furthermore, the Orlando Police Department's Miranda advisements do not suffer the defects discussed in Powell. They reasonably conveyed Miller's Miranda rights and in no way misled him. Miller was told of his right to have an attorney appointed, a right he mentioned that he had exercised a number of times in his criminal past. On the basis of these warnings, he, and any other defendant, knew that he could have an attorney at all stages of the interview and that one would be provided for free. This Court has also stated: "We must keep in mind that the reason for informing individuals of their rights before questioning is to ensure that statements made during custodial interrogation are given voluntarily, not to prevent individuals from ever making these statements without first consulting counsel." Sapp v. State, 690 So.2d 581 (Fla. 1997).

Even if this Court finds the warnings deficient, any error was harmless. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.; Hamilton v. State, 547 So.2d 630 (Fla. 1989). There was overwhelming evidence of Miller's guilt. Dempsey testified about how and where Miller met Smith. He told about Smith's jewelry and memory problems and how Miller wished to rob her. Miller

left on his own Sunday morning after he tried to get Dempsey to help him. Miller called him later that night to pick him up. When Dempsey arrived, he saw Miller's cuts. Miller later told him that everything went wrong and that he had to stop a hero. Miller also repeatedly warned him not to say anything to the police. (T: 863-914)

Haydon saw Miller in Smith house struggling with her. Miller attacked and stabbed him before following Smith out the back. Smith showed up moments later at her neighbor's house, stabbed and covered in blood. (T: 621-673) Miller left his crack pipe, fingerprints, and blood in Smith's house. (T: 937, 961, 1039, 1057, 1062) Ramee saw a man rushing oddly through the park just after the time of the crime. (T: 916-923) Miller left Smith's jacket in Prange's house after leaving shortly after the crime. (T: 845-49, 1004-21) The police found his knife sheath in the park. (T: 925) Smith's body had defensive cuts and bruising on it as well as bruising from where her jewelry had been pulled at. (T: 1082-1114) Given the amount of evidence against Miller, any error in admitting his statement was harmless. Additionally, as shown above, the details of the planning and the execution of these crimes were provided in substantial part by other witnesses. In his statement Miller was self-serving, trying to minimize his culpability when

describing how he tried to take her jewelry and then how he stabbed both Haydon and Smith. Any error was harmless beyond a reasonable doubt. This Court should affirm.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING TESTIMONY THAT THE CRIME OCCURRED ON EASTER AND THAT THE VICTIM'S SON WAS AN ATTORNEY.

Miller next argues that the trial court erred in allowing the fact that the crime took place on Easter to come before the jury through various witnesses. He also contends that it was error to allow Chris Smith to say he was an attorney. He asserts that both are irrelevant and overly prejudicial. He argues the jury might believe in Miller's guilt simply because of the career of the victim's son. Beyond merely asserting it Miller fails to demonstrate how the fact that Miller chose to commit these crimes on a holiday prejudiced him. As such he has failed to adequately plead it and the claim should be denied. Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived). The State submits that this evidence was not unduly prejudicial and the trial court properly admitted it. The claim should be denied.

As provided in Williams v. State, 967 So.2d 735, 753 (Fla. 2007): "The Evidence Code provides that "[a]ll relevant evidence is admissible, except as provided by law." §90.402, Fla. Stat. (2006). The Code places the following

limitation on the admission of evidence: 'Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.' § 90.403, Fla. Stat. (2006). The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. See Alston, 723 So.2d at 156." "A trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed." San Martin v. State, 717 So. 2d 462, 470-471 (Fla. 1998); Ray v. State, 755 So.2d 604 (Fla. 2000); Zack v. State, 753 So.2d 9 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." White v. State, 817 So. 2d 799, 806 (Fla. 2002); Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla. 2000); Huff v. State, 569 So.2d 1247 (Fla. 1990). The Appellee submits that the Appellant has not demonstrated an abuse of discretion in the instant case.

Miller did timely and repeatedly object to any of the witness's mentioning that these crimes occurred on Easter. In orienting the jury to the time and date of the offenses, the State mentioned once during opening and closing arguments that the day was Easter. The defense objected on the grounds that it was unduly

prejudicial and a non-statutory aggravator and moved for a mistrial which the court denied. (T: 599-600) The prosecutor stated that the day was relevant in order to explain the number and movement of the people in the neighborhood. Jackson mentioned it as how he remembered the day and explained how he had guests, when they left, and how he was in the kitchen so long cleaning up. (T:685-87) Sutherland mentioned it once, again grounding the day and explaining why he had guest, walked them to their cars, knew the time, and so forth. Chris Smith also mentioned it once, explaining why his mother had been over for a brunch at his house. (T: 722) MacKenzie explained she was in the neighborhood to have Easter dinner with her mother. (T: 852) The final person to mention the day was Miller himself. During his statement, he told the detectives that he made the decision to rob Smith and walked over to her house on Easter. (T: 1136) Clearly, Miller, like the other witnesses, remembered and placed the day by the fact that it was named date; thus, it was relevant to explain both the events and the individuals' memories. No emotional outbursts or arguments were made over the fact that it was Easter. Miller was not prejudiced by these isolated mentions of the holiday. He has failed to show prejudice.

Chris Smith mentioned once that he was attorney. (T: 717) As the court noted, a party may elicit the occupation along with other basic facts about a witness. The fact that he was a lawyer was not argued nor mentioned as evidence

of Miller's guilt. Also, contrary to Miller's assertions that a sizeable portion of the population holds lawyers in high esteem, the number and variety of hostile and negative lawyer jokes presents another opinion. Again, Miller has failed to show prejudice.

A ruling on a motion for mistrial is subject to an abuse of discretion standard. Smith v. State, 866 So.2d 51, 58-59 (Fla. 2004); Anderson v. State, 841 So.2d 390 (Fla. 2002); Smithers v. State, 826 So. 2d 916, 930 (Fla. 2002); Gore v. State, 784 So.2d 418, 427 (Fla. 2001). A motion for mistrial should be granted only when necessary to ensure the defendant receives a fair trial. See Goodwin v. State, 751 So.2d 537, 546 (Fla. 1999). "A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial." England v. State, 940 So.2d 389, 401-2 (Fla.2006); see Hamilton v. State, 703 So.2d 1038, 1041 (Fla.1997) ("A mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial."). Under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable.... [D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." Trease v. State, 768 So.2d 1050, 1053 n. 2 (Fla.2000) (second alteration in original) (quoting Huff v. State, 569 So.2d 1247, 1249 (Fla.1990)). Thus, Miller is entitled to a new trial only if these isolated mentions of Easter and the one mention that Chris Smith was an attorney deprived

him of a fair and impartial trial, materially contributed to the conviction, were so harmful or fundamentally tainted as to require a new trial, or were so inflammatory that it might have influenced the jury to reach a more severe verdict than that it would have otherwise. Spencer v. State, 645 So.2d 377, 383 (Fla.1994).

A "criminal takes his victim as he finds him." Brate v. State, 469 So.2d 790, 795 (Fla. 2d DCA 1985); Maynard v. State, 660 So.2d 293, 296 (Fla. 2d DCA 1995). Unless the fact is used to evoke sympathy, its existence does not render it inadmissible. This Court in Muehleman v. State, 503 So. 2d 310, 317 (Fla. 1987), deemed a reference to the victim as a "feeble, sickly, 97-year-old man" could tend to excite the jury's passion but such were “the horrible facts of what occurred.” Similarly, gruesome photographs do not inherently create undue prejudice by inflaming the emotions of a jury. Defendants "should expect to be confronted by photographs of their accomplishments." Henderson v. State, 463 So.2d 196, 200 (Fla. 1985). Miller is stuck with the fact that the crimes occurred on Easter. Neither the State nor any of the witnesses used that fact to appeal to the sympathy or emotions of the jury. It was merely the day of the events. Likewise, the one mention that a witness was an attorney in no way implied Miller’s guilt. The quality and quantity of evidence refutes any claim the few references complained of caused the conviction or death recommendation. The trial court properly admitted the evidence and denied the motions for mistrial.

Even if this Court finds that the trial court should not have allowed the testimony detailed above, any error was harmless. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the verdict." Id.; Hamilton, 547 So.2d 630. There was overwhelming evidence of Miller's guilt. Dempsey testified about how and where Miller met Smith. He told about Smith's jewelry and memory problems and how Miller wished to rob her. Miller left on his own Sunday morning after he tried to get Dempsey to help him. Miller called him later that night to pick him up. When Dempsey arrived, he saw Miller's cuts. Miller later told him that everything went wrong and that he had to stop a hero. Miller also repeatedly warned him not to say anything to the police. (T: 863-914)

Haydon saw Miller in Smith house struggling with her. Miller attacked and stabbed him before following Smith out the back. Smith showed up moments later at her neighbor's house, stabbed and covered in blood. (T: 621-673) Miller left his crack pipe, fingerprints, and blood in Smith's house. (T: 937, 961, 1039, 1057, 1062) Ramee saw a man rushing oddly through the park just after the time of the crime. (T: 916-923) Miller left Smith's jacket in Prange's house after leaving shortly after the crime. (T: 845-49, 1004-21) The police found his knife sheath in the park. (T: 925) Smith's body had defensive cuts and bruising on it as well as

bruising from where her jewelry had been pulled at. (T: 1082-1114) Given the amount of evidence against Miller, any error in admitting his statement was harmless. Additionally, as shown above, the details of the planning and the execution of these crimes were provided in substantial part by other witnesses. In his statement, Miller was self-serving, trying to minimize his culpability when describing how he tried to take her jewelry and then how he stabbed both Haydon and Smith were. Any error was harmless beyond a reasonable doubt. This Court should affirm.

POINT V

THE TRIAL COURT PROPERLY ALLOWED TESTIMONY CONCERNING THE FACTS BEHIND MILLER'S PRIOR VIOLENT FELONY CONVICTIONS.

Miller next argues that the trial court erred by allowing the State to present evidence during the penalty phase regarding the factual underpinnings of his prior convictions for manslaughter and robbery from Oregon. He asserts that the evidence was irrelevant and unduly prejudicial. He argues that the court should have limited that evidence to the fact of the conviction and the stipulated factual basis taken during the plea; by admitting the testimony, the court allowed the jury heard the facts of an offense for which Miller was not actually convicted. The State maintains that the trial court properly admitted the evidence which was not impermissibly prejudicial. This Court should affirm.

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

discretion is abused only where no reasonable person would take the view adopted by the trial court." White v. State, 817 So. 2d 799, 806 (Fla. 2002); Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla. 2000); Huff v. State, 569 So.2d 1247 (Fla. 1990). The State submits that Miller has not demonstrated an abuse of discretion in the instant case.

During the penalty phase trial the State presented evidence proving Miller's manslaughter conviction from Portland, Oregon. The State presented the Oregon judgement and conviction of Miller for the crime of manslaughter in the first degree. [Exh. 142, p. 292-93] A copy of the Oregon statute of manslaughter was also entered into evidence. At that time Oregon's manslaughter in the first degree included intentional killings. [Exh 143, p. 297-99][2] Hutchins testified that Miller was a tenant in his building in Portland. Several days before the killing he heard Miller threaten to kill victim Huff-Smith during an argument over Huff-Smith having disposed of Miller's paint thinner which he used to get high. [T:1358-68] Portland police officers testified to finding the victim's body in a closet covered with pillows and bloody drag marks leading to it from the outside hallway. [T:1352-57, 1372-79] They found the gun used to kill the victim in the car Miller

[2]The Oregon murder and manslaughter statutes do not address premeditation; they only address intentional killings which could be either murder or manslaughter depending on the facts or the crime and the defendant's emotional or mental state.

stole from the victim. [T:1411-16, 1372-79] A parole officer testified to Miller's confession to that killing. Miller said he and the victim argued at the time of the killing and he took the gun from the victim when he went for it. [T:1379-90]

The State also presented evidence regarding Miller's prior conviction for armed robbery. Again, it submitted the judgement and the Oregon statute as evidence. The robbery victim testified that Miller robbed him with a gun and threatened him. [1416-23]

The documentary and testimonial evidence presented by the State was proper. The evidence on the manslaughter showed that the killing occurred in the midst of an argument, perhaps an ongoing one. Miller did not bring the weapon to the argument but rather used the gun the victim drew on him. No witness or piece of evidence ever mentioned premeditation. The statute itself outlined that first degree manslaughter was for intentional killings which the Oregon prosecutor deemed appropriate for this crime. Miller's argument that the jury "got the distinct impression" of a premeditated murder is without merit. Furthermore, the trial court was well within its discretion to allow direct testimonial evidence of both of these violent prior convictions.

Section 921.141(1), Fla. Stat., sets forth the rules for the penalty phase of a capital trial. It states:

> (1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment ... In the proceeding, **evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant** and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). **Any such evidence which the court deems to have probative value may be received**, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(Emphasis added.) This Court interpreted this language regarding this very issue in Elledge v. State, 346 So. 2d 998(Fla. 1977). There, the trial court allowed the State to present evidence on the defendant's prior violent felony conviction by having the victim's widow testify to the factual details surrounding that prior crime. The trial court refused to restrict the evidence to the "bare admission of the conviction." This Court held that practice proper saying:

> [W]e believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is matter that can contribute to decisions as to sentence which will lead to uniform treatment and help eliminate "total arbitrariness and capriciousness in [the] imposition" of the death penalty. Proffitt v. Florida, supra, at 2969.

Id. 1001-2. See also Delap v. State, 440 So. 2d 1242, 1255-56 (Fla. 1983).

The trial court only allowed the actual facts behind the prior robbery and manslaughter convictions to come before the jury. Miller is inaccurate to say that those facts were for crimes for which he was not convicted. Miller must abide with the description of his actions in the prior killing rather than having a sanitized version give the jury a false impression of that crime and his actions. The jury and the court need to know what he did and under what circumstances he committed those crimes in order to analyze his character and come to a decision of the appropriate punishment for this murder. The trial court did not abuse its discretion in allowing this evidence before the jury. This court should affirm.

POINT VI

THERE WAS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT INSTRUCTING THE JURY ON THE AVOID ARREST AGGRAVATOR.

In Miller's final claim he asserts that the trial court erred in giving the jury the instruction on the avoid arrest aggravating factor where it did not find it when sentencing him. He argues that this additional instruction improperly tilted the scales toward a death recommendation by the jury. The State maintains that the trial court properly gave the instruction and properly did not find the aggravator. This claim is without merit. This Court should affirm.

Where there is evidence of a mitigating or aggravating factor present at a trial, the trial court is required to give an instruction on that factor. Stewart v. State, 558 So.2d 416, 420 (Fla. 1990); Bowden v. State, 588 So.2d 225, 231 (Fla. 1991), cert. denied, 503 U.S. 975 (1992)(where evidence of robbery presented, court must instruct on the relevant aggravator even if the court later finds it unproved); Welch v. State, 992 So.2d 206, 215-216 (Fla. 2008). However, the state must prove applicable aggravating circumstances beyond a reasonable doubt before a court can apply it. Williams v. State, 386 So.2d 538 (Fla.1980).

A Court may give a jury instruction on aggravators if there is credible and competent evidence to support it. Hunter v. State, 660 So.2d 244, 252 (Fla.1995); Welch, 992 So.2d at 2215-216. It is not error for a court to give a proper

instruction on the aggravator even if it could not have existed as a matter of law. Johnson v. Singletary, 612 So.2d 575 (Fla.1993)(trial court instructed on HAC but later found it unproved.) Simply because the State does not prove an aggravating factor does not mean that there was insufficient evidence of the factor to allow a jury to consider it.

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know. The judge should not in any manner inject his preliminary views of the proper sentence into the jurors' deliberations, for after the jury has rendered its advisory sentence the judge has the affirmative duty to decide the sentence in the context of his exposure to the law and his practical experience. As we acknowledged in Dixon, "to a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality" can serve as a buffer where the jury allows emotion to override the duty of a deliberate determination.

Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925; Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); Bowden, 588 So.2d at 231.

In Henry v. State, 649 So.2d 1366 (Fla.1994) the trial court did not find that the murder was committed during the course of a felony although it had instructed the jury on that. At trial, evidence was presented that the robbery victim had

jewelry in her purse or a container which was missing after her murder. There was also evidence that the defendant had no money before the murder but after had sold some jewelry in order to buy cocaine. This Court held that evidence sufficient to warrant presenting to the jury the issue of whether the murder was committed during the commission of a felony.

The trial court in Welch instructed on CCP but later did not find it. This Court held that the instruction was proper since the State had presented relevant evidence supporting CCP. The Medical Examiner testified that it took Welch seven to thirty minutes to kill the victims. Welch had also written a threatening note earlier to the victim. He cleaned up after the murders and stole items. The Court held that this was credible evidence supporting CCP. Welch, 992 So.2d at 2215-216.

The aggravator of killing with the intent to avoid lawful arrest applies to witness elimination. See Consalvo v. State, 697 So.2d 805, 819 (Fla.1996). In Miller's trial the State presented evidence to support the avoid arrest aggravator. Miller stabbed Hayden directly in the chest when his attack on Smith was interrupted. He deliberately followed Smith out the back door and struggled with her rather than fleeing. In his statement, Miller said that he did not want to go back to prison and that is why he fought Hayden. He stabbed Smith to silence her because he thought her screams would lead to his apprehension since the neighbors

were aroused. This is competent, substantial evidence to support the trial court giving the instruction on the avoid arrest aggravating factor. The court then did its independent analysis of the evidence in determining that the State had failed to prove beyond a reasonable doubt the validity of this factor given the heightened requirement of showing the sole or dominant motive of the killing was to eliminate witnesses. (ROA: 1411-12)

Even if this Court determines that it was error for the court to give this instruction, any error is harmless. "[S]ince Florida juries do not issue findings as to aggravating and mitigating factors, the courts are required to presume that unsupported factors did not weigh with the jury, provided the jury was properly instructed." Johnson, 612 So.2d at 576. Where the jury is properly instructed and the trial court does not find the circumstance to exist, any error is harmless. Id.; Johnson v. State, 438 So. 2d 774, 779 (Fla. 1983) (Trial court instructed on HAC and great risk to many people, neither of which it found.); Sochor v. Florida, 504 U.S. 527 (1992); Henry, 649 So.2d 1366.

POINT VII

THE SENTENCE IS PROPORTIONAL. (added claim)

Although Miller did not address proportionality, this Court has the independent duty to do so. See England v. State, 940 So.2d 389 (Fla. 2006); Gore v. State, 784 So.2d 418 (Fla. 2001); Jennings v. State, 718 So.2d 144 (Fla. 1998). This Court reviews and considers all the circumstances in a case relative to other capital cases when deciding whether death is a proportionate penalty and to ensure uniformity. See Davis v. State, 859 So.2d 465, 480 (Fla.2003); Johnson v. State, 720 So.2d 232, 238 (Fla.1998); Urbin v. State, 714 So.2d 411, 416-17 (Fla.1998). The instant capital sentence is proportional and should be affirmed.

Proportionality review is a consideration of the totality of the circumstances in a case compared with other capital cases. Urbin, 714 So.2d 411. It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). The function is not to reweigh the factors, but to accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14 (Fla. 1999).

> However, in cases where more than one defendant is involved in the commission of the crime, this Court performs an additional analysis of relative culpability. Underlying our relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment. *See Ray v. State*, 755 So.2d 604, 611 (Fla.2000). *See also Jennings v. State*, 718 So.2d 144, 153 (Fla. 1998) ("While the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, disparate treatment of codefendants is permissible in situations where a particular defendant is more culpable.") (citation omitted).

Shere v. Moore, 830 So.2d 56, 61-62 (Fla. 2002). See also Mordenti v. State, 630 So.2d 1080 (Fla. 1994) (noting codefendant received immunity for testimony and finding no disparate treatment); Downs v. State, 572 So.2d 895 (Fla. 1990) (finding no disparate treatment where codefendant testified against the defendant under a grant of immunity). Yet, in Garcia v. State, 492 So.2d 360 (Fla. 1986), this Court upheld a prosecutor's discretion in plea bargaining with a less culpable codefendant and indicated such action does not violate proportionality principles. See also Diaz v. State, 513 So.2d 1045 (Fla. 1987); Brown v. State, 473 So.2d 1260 (Fla. 1985). Shere v. Moore, 830 So.2d 56, 63, n.9 (Fla. 2002).

Miller was convicted of first degree murder, residential burglary with battery, attempted first degree murder with a knife, and robbery with a deadly weapon. The court found five aggravating factors, all of which it gave great weight: defendant was on parole for a prior felony conviction at the time of this

crime; conviction of two separate prior violent felonies (manslaughter and robbery); felony murder during a burglary and robbery; HAC; and the victim was particularly vulnerable due to age or disability. In mitigation the court found six non-statutory mitigators: dysfunctional family (some weight); prior military service (very little weight); cooperation with law enforcement (little weight); remorse (very little weight); anti-social personality disorder (little weight); and history of substance abuse (some weight). [ROA: 1406-27] In addition, the heinous, atrocious, or cruel aggravator is one of the "most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So.2d 90, 95 (Fla.1999). As Miller notes, the prior violent felony is one of the "most weighty in Florida's sentencing calculus." Sireci v. Moore, 825 So.2d 882 (Fla. 2002).

This Court has affirmed capital sentences under similar circumstances. In Jimenez v. State, 703 So.2d 437 (Fla. 1997) the defendant broke into a 63 year old woman's house whom he beat and stabbed to death. The trial court found four aggravating circumstances including prior violent felony, felony murder, felony committed while the defendant was on parole, and HAC. It found two non-statutory mitigating factors. This Court affirmed the death sentence. In Johnson, 660 So.2d 637 the defendant broke into the home of a 73 year old woman, assaulted and stabbed her, and then stole her wallet. The trial court found three aggravating factors: prior violent felony, HAC, and felony murder. It also found

fifteen non-statutory mitigating factors. This Court found the sentence proportional and upheld the death penalty. In Morrison v. State, 818 So.2d 432 (Fla.2002), this Court affirmed a death sentence for a murder by stabbing during a robbery where the trial court found four aggravators including prior violent felony conviction, felony murder during an armed robbery or burglary with an assault, HAC , and that the victim was particularly vulnerable due to age. The court gave great weight to Morrison's low intellectual ability and "some weight" to seven other mitigators.

In Nelson v. State, 850 So.2d 514 (Fla. 2003) the defendant burgled the home of an elderly but healthy woman, attacked and kidnapped her, and then killed her. The trial court found six statutory aggravators including: the defendant was on felony probation for a previous felony conviction; felony murder; HAC; CCP; and the victim was particularly vulnerable. The trial court found 15 non-statutory mitigators, assigning some moderate weight with most receiving little weight.

This Court has also found the death penalty proportional in cases with similar aggravating and mitigating factors. In Bowles v. State, 804 So.2d 1173 (Fla.2001), the defendant killed the man who let him stay in his house. Bowles dropped a brick on him and then strangled him. This Court found the death sentence proportional when the aggravators were: (1) prior conviction of two violent felonies; (2) defendant was on felony probation when the murder was committed; (3) the murder was committed during a robbery and for pecuniary gain

(merged); (4) HAC; and (5) CCP. There were seven non-statutory mitigators giving significant weight to one of them. See also Francis v. State, 808 So.2d 110(Fla. 2001) (upholding death penalty for both stabbing murders of elderly sisters when trial court found four aggravators for each murder (HAC; victims vulnerable due to age; prior violent felony for contemporaneous murder; murders committed during the course of a robbery) and two statutory mitigators along with six nonstatutory mitigators); Aguirre-Jarquin v. State, 34 Fla. L. Weekly S299 (Fla. 2009)(affirming sentence for stabbing deaths of two women, one elderly and disabled, based on five aggravators including prior capital felony, felony murder during burglary, HAC, and the victim was particularly vulnerable with seven non-statutory mitigators). The sentence is proportional.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Defendant's convictions and sentence of death.

Respectfully submitted,
WILLIAM McCOLLUM
ATTORNEY GENERAL

S/Lisa-Marie Lerner_____
LISA-MARIE LERNER
Assistant Attorney General
Florida Bar No.: 698271

1515 N. Flagler Dr 9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Christopher S. Quarles, Esq. Office of the Public Defender, Ninth Judicial Circuit of Florida,444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118 on May 29, 2009.

S/Lisa-Marie Lerner
LISA-MARIE LERNER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately on May 27, 2009.

S/Lisa-Marie Lerner
LISA-MARIE LERNER