IN THE SUPREME COURT OF FLORIDA

TODD ZOMMER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC08-494
L.T. No. 2005-CF-1200
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR OSCEOLA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On May 17, 2005, a grand jury in and for Osceola County, Florida returned an indictment charging Appellant, Todd Zommer, with the first degree murder of Lois Corrine Robinson. (V1:19-20). Prior to trial, Appellant filed numerous motions attacking the constitutionality of various aspects of Florida's death penalty statute. (V1-3:74-152, 185-89, 190-222, 248-62, 265-83, 292-379). After hearing argument on the motions, the trial court entered orders denying each of the motions. (V3:426-31. 441-58).

Appellant's case proceeded to a jury trial before the Honorable John M. Morgan on December 3-10, 2007. (V19:31). After the jury was selected, Appellant entered a plea of guilty to charges pending in other cases consolidated for trial: Case Number 05CR-1078: grand theft of a motor vehicle, fleeing and attempting to elude a law enforcement officer, resisting an officer without violence, possession of drug paraphernalia; Case Number 05CR-1094: attempted felony murder, robbery, and aggravated battery with a deadly weapon; Case Number 05CR-2184: two counts of grand theft of a motor vehicle; Case Number 04CR-2982: uttering a forgery and grand theft; Case Number 05CR-2121: grand theft of a boat; and Case Number 05TC-1855: leaving the scene of an accident involving property damage.

(V26:875-906). Appellant maintained his not guilty plea on the first degree murder charge and proceeded to jury trial.

At trial, Appellant conceded that he killed the victim, but his defense theory was that the murder was not premeditated and he should only be convicted of second degree murder. (V27:923-26; V30:1279-1383). The evidence established that Appellant was living off and on with Laura Schmid from January to April, 2005. V27:947-48). At some time during late February or March, 2005, Appellant stole a boat that another man had left at Laura Schmid's home. Laura Schmid's neighbor, Corrine Robinson, told Ms. Schmid that she saw someone take the boat, but she could not identify him. (V27:950-53).

On Saturday, April 9, 2005, Ms. Schmid was working at a coffee shop from 10:00 a.m. until midnight. (V27:954). Ms. Schmid spoke with Appellant on the phone that afternoon and he informed her that he could not come to her work because he did not have enough gas in her truck.[1] Ms. Schmid told Appellant that he could borrow $20 from her neighbor, Corrine Robinson, and she would repay Ms. Robinson on Sunday. (V27:956-57). Ms.

[1] Ms. Schmid had three vehicles at the time: a 1999 Mazda truck she leased, a 2005 Saturn, and a 1990 Mercury Grand Marquis. Ms. Schmid allowed Appellant to use all of her vehicles. (V27:954-55). On April 9, 2005, Appellant had allegedly taken the Saturn for an oil change and he told Ms. Schmid that he needed the truck to move logs or tree stumps. (V27:955-56).

Schmid saw Appellant at the coffee shop around 11:30 p.m. that evening, but only spoke to him for a moment. (V27:957-60, 965).

When Ms Schmid arrived home after work at approximately 12:30 a.m. on Sunday, she discovered a crack pipe on her coffee table which made her irate.[2] After going to church on Sunday morning, Ms. Schmid went to Corrine Robinson's home to repay the $20 Appellant had borrowed. Ms. Schmid noticed that Ms. Robinson's car was gone which was unusual because Ms. Robinson, who was 77 years old, often had people come and pick her up for church or lunch. (V27:960-61; V29:1157). Later in the afternoon, Ms. Schmid called the police because Ms. Robinson's car was still gone and two of Ms. Schmid's vehicles were not at her house. (V27:961).

On Monday, April 11, 2005, Ms. Schmid again called the police because she had not been able to contact Ms. Robinson and both Ms. Robinson's car and Ms. Schmid's two cars were still missing. (V27:961-63). In the presence of Osceola County Sheriff Officer Brad Butler, Ms. Schmid called Appellant on a cell phone and gave the phone to the law enforcement officer. Officer Butler testified that Ms. Schmid reported her two vehicles stolen at that time and he spoke with Appellant on the

[2] Ms. Schmid did not allow Appellant to smoke or use alcohol and drugs in her house. (V27:949-50).

phone and informed him that if he did not return the cars within one hour, he would be a suspect. (V27:928-32). Officer Butler also went and looked into the victim's home, but could not see inside her windows at that time. (V27:928).

On Tuesday, April 12, 2005, Officer Butler began his shift at 6:00 a.m. by checking on Ms. Robinson's home, and after being given a ladder from a neighbor, the officer was able to see inside the home and observe what appeared to be broken glass and a dark-colored stain. (V27:933). After making forced entry into the home, law enforcement officers discovered the deceased victim. Officer Butler subsequently placed a BOLO on the victim's vehicle, a Mercury Tracer. (V27:933-39). Shortly thereafter, the officer went to two nearby gas stations and searched the dumpsters and discovered a bag containing a pair of bloody Nike sneakers, a towel, and socks.[3] (V27:941-42; 1008-10). Subsequent DNA testing on the blood stains from the shoes matched the victim's DNA at all 13 loci, and DNA from Appellant and the victim were found on the socks. (V29:1194-1201).

The medical examiner, Dr. Sara Irrgang, testified that the level of decomposition of the victim's body was consistent with

[3] Charlene Santiago, an employee at one of the gas stations, testified that she observed the victim's Mercury Tracer parked at the gas station, with the windows open, on Sunday and Monday, April 10-11, 2005. (V28:1073-74).

the murder occurring on Saturday, April 9, 2005. (V29:1157-58). The cause of death was from at least two large incised wounds to the victim's neck which led to massive hemorrhage. (V29:1157, 1160). The medical examiner detailed the numerous injuries suffered by the victim, including multiple contusions to the head and face and defensive wound injuries to her hand.[4] (V29:1161-73). A shoe print left on the back of the victim's shirt was consistent with the design characteristics from the bloody Nike sneakers found in the dumpster. (V30:1225-27).

On April 12, 2005, after discovering the victim's body, law enforcement officers spotted Appellant and the victim's stolen Mercury Tracer at an apartment complex. (V28:1075-80). Appellant eventually led police on a brief car chase before crashing the car. (V30:1080-1116). Appellant fled the car and was quickly apprehended. When arrested, officers discovered a crack pipe in Appellant's pocket. (V30:1097).

On the same day of Appellant's arrest, law enforcement officers also stopped Joanne and James Vella driving Laura Schmid's stolen Mazda truck. (V27:1012-14). The Vellas, mother

[4] As will be discussed infra, Appellant confessed to a number of people that he committed the murder and admitted to striking the victim in the face with a wooden instrument until it shattered, striking her with a glass hurricane lamp, attempting to strangle her with a computer mouse cord, kicking and stepping on her, and slicing her throat with a knife from her kitchen. (V28:1037-39; V30:1235-40; 1262).

and son, met Appellant at a hotel they were living at on Thursday, April 7, 2005, and hung out with Appellant for the next five or six days. (V28:1032-33; 1060). James Vella testified that he, his mom, and Appellant all smoked crack cocaine during this period of time. The Vellas did not spend all their time around Appellant, as he would often leave and come back at a later time. Appellant had a red Mazda truck, a Saturn car, and on Saturday or Sunday, he was driving a Mercury Tracer. (V28:1034). On Saturday, April 9, 2005, Appellant borrowed a pair of Nike sneakers from the Vellas.[5] (V28:1035; 1061). On Tuesday morning, April 12, 2005, Appellant told the Vellas about stealing a boat from Laura Schmid. (V28:1036-39) Appellant stated that Ms. Schmid's neighbor witnessed him steal the boat and told him that she was going to call the police, so he killed her. (V28:1037). Appellant told James Vella about the murder in great detail:

> Mr. Zommer said he went over there to borrow $20 and talk to the lady. And he had pointed out some little trinkets that she had, I guess in her house. And he – when she bent down, he hit her over the head about six times with a guitar or some sort of mandolin, something like that. And then he had hit her over the head with a ceramic lamp. And she still hadn't died yet. So he told me that he went and got a knife and tried to cut her throat with his left-hand but that

[5] As discussed earlier, the bloody Nike sneakers were found in the dumpster behind the gas station after the victim's murder.

didn’t work. So he cut her throat with her (sic) right hand and left her there.

(V28:1037). Appellant told the Vellas that the victim was screaming at him while he beat her with the guitar. (V28:1038-39).

In addition to telling the Vellas the details of the murder, Appellant also told another friend, Matthew Druckenmiller, about the murder. Druckenmiller testified that Appellant told him that he struck Corrine Robinson in the head with a guitar while she was bending over to show him something. (V30:1236). After she fell to the ground, Appellant kicked her in the face and they continued to struggle. Appellant utilized a computer mouse cord to strangle the victim, but he was unsuccessful because she had her fingers in the way and she was fighting him. (V30:1236-38). Appellant then went to the kitchen and retrieved a knife that he used to slice her throat. (V30:1237). After slicing her throat, Appellant went into the kitchen and ate a bowl of Cheerios. Appellant told Druckenmiller that it was like an out of body experience, and that it “was the best feeling he ever had in his life, that he was alive after he killed her.” (V30:1238).

After his arrest, Appellant also gave an extremely detailed tape-recorded interview with a news reporter from a local television station. The videotaped interview was played for the jury. (V30:1259-71). Appellant told the reporter he killed

Corrine Robinson on Saturday afternoon because she would not mind her business and had recognized him as the person who stole the boat from Laura Schmid's home. (V30:1260-61, 1270). Appellant repeatedly told the reporter that he was not high at the time of the murder. (V30:1265-69).

After the State rested its case in chief, Appellant moved for a judgment of acquittal which was denied. (V30:1272-74). Thereafter, Appellant testified and admitted killing Corrine Robinson, but claimed that he was under the influence of crack cocaine at the time of the murder. Appellant testified that at about 10:00 o'clock in the morning on Saturday, April 9, 2005, he went to the Vellas' hotel room and, instead of using the $40 they gave him for rent money, he went and bought crack cocaine. (V30:1288-89). After smoking the crack, Appellant spoke to Laura Schmid and she told him to go to her neighbor's house and borrow $20. Appellant arrived at Corrine Robinson's house and she met him outside and gave him the money. (V30:1293). Appellant testified that instead of using the $20 for gas, he bought cigarettes and more crack cocaine. (V30:1293). He returned to Laura Schmid's home and took a hit of crack and then went over to Corrine Robinson's house because he wanted to talk. (V30:1295). Appellant testified that he was high at the time, and claimed that his statements to detectives and news reporters

that he was sober were simply "bravado." (V30:1295-97; 1328-29).

Appellant denied having any intent to kill Corrine Robinson when he went to her house. During their conversation inside the house, Mrs. Robinson commented that she thought Appellant had stole the boat from Laura Schmid's home and also told him she did not appreciate the way he was using Mrs. Schmid. (V30:1298-1307). Appellant changed the subject and got Mrs. Robinson to show him some of her doll collection. While she was on the ground putting a doll back into its box, Appellant struck her with an ukelin, a wooden string instrument. (V30:1307-08). Appellant claimed he struck her twice with the ukelin,[6] and then hit her in the head with a glass lamp, knocking her unconscious. (V30:1308-10). Appellant attempted to strangle her with a computer mouse cord he took from another room, but it busted.[7] Appellant then went into the bathroom and urinated, and when he returned, Corrine Robinson was moaning, so he got up onto a chair and jumped onto her head and then kicked her in the face. (V30:1313). Appellant went into the kitchen and drank some tea

[6] Appellant admitted that he told detectives that he struck her six times with the ukelin, but denied telling James Vella this information. (V28:1037-38; V30:1330-33).

[7] Appellant claimed at trial that the victim never fought back with him and never attempted to prevent him from strangling her. (V30:1310-12).

from the refrigerator, and noticed a block of knives on the counter. He took one of the knives back into the living room and used it to slice the victim's throat.

After the murder, Appellant returned to Laura Schmid's home and showered and changed clothes. Appellant took a bag with his sneakers and threw it in a dumpster at a nearby gas station. (V30:1315-18). He then returned to the victim's home and ransacked the home to make it look like a burglary and took her car so that Laura Schmid would think that she was gone. (V30:1319). Appellant drove Corrine Robinson's car to a gas station and left it there unlocked with the windows open. (V30:1319). Appellant returned to Laura Schmid's home and took her truck and went to the hotel where the Vellas were staying. (V30:1319-20).

On cross-examination, Appellant admitted that he told Detective Colombrito that he got so excited during the murder that he got an erection. (V30:1334). Appellant denied planning the murder in advance and could not explain why he told Detective Colombrito that he walked around the house with the victim planning exactly where to strike her with the ukelin. (V30:1335-36). Despite testifying on direct examination that the victim never fought back, Appellant also could not explain why he told detectives that the victim moved around quite a bit

and grabbed his leg while he was kicking her. (V30:1332-33, 1337-39). Appellant told Detective Colombrito that after he stomped on and kicked the victim, he went into her kitchen and got a long knife and straddled over the victim "like a cowboy" and yanked her head up as he sliced her throat multiple times. (V30:1355-57). After Appellant testified,[8] the defense rested its case and renewed the motion for judgment of acquittal which was denied. After deliberating for thirty minutes, the jury returned a verdict of guilty on the charge of first degree murder. (V31:1439-45).

At the penalty phase proceedings, the State presented testimony from the medical examiner, Dr. Sara Irrgang. Dr. Irrgang testified that during the time Ms. Robinson was beaten and strangled, she would have experienced pain. (V32:1468, 1469-70). The smashing of the ukelin over her head would have caused pain. (V32:1469). The smashing of the hurricane lamp over her head would have caused pain. (V32:1469). Appellant's attempt to strangle her with the computer mouse cord would have also caused pain. (V32:1469-70).

[8] Appellant testified against the wishes of his attorneys. During re-direct, Appellant acknowledged that he was aware the trial court had granted his motion to suppress, and that by taking the witness stand, the prosecutor would be allowed to question him regarding his statements during the interview with Detective Colombrito. (V30:1374-83).

Based upon the injuries Ms. Robinson sustained, the State's witnesses' testimonies, and upon Appellant's own testimony, Dr. Irrgang opined it was evident that Ms. Robinson was conscious and struggling during her attack. (V32:1468-69). Defensive wounds were found on the back of each of her hands. (V32:1468-69, 1472). Dr. Irrgang believed the attack would have had to have taken place over a period of time, as time was needed to inflict the multiple injuries and because the victim's injuries indicated she was not in the same location throughout the incident. (V32:1468). Dr. Irrgang was unable to determine whether or not the victim was conscious at the precise time her throat was slit, but was sure that as long as she struggled she would have remained conscious. (V32:1470, 1472). Dr. Irrgang testified that Ms. Robinson would have become unconscious within four heartbeats of her throat being cut due to blood loss. (V32:1470-71).

In order to establish that Appellant was previously convicted of a prior violent felony, the testimony of Edgardo Fuentes was presented. On April 12, 2005, Mr. Fuentes was working for the Ramada Inn doing pest control. (V32:1473). He was leaving his truck on foot walking towards a parking area when he heard a car's racing engine behind him. (V32:1473). He was hit in the back by the car, his head hit the windshield and

he flipped over the car. (V32:1473). Fuentes lay on the ground unconscious. (V32:1473). When he regained consciousness, he saw two men walking to him whom he believed were coming to his aid. (V32:1474). Instead, Fuentes told how as he put his hand out, the men started kicking him in his face, chest, and "wherever they could." (V32:1474). Additionally, the men stole his wallet. (V32:1474, 1479).

Fuentes was taken to the hospital emergency room for his injuries which consisted of a swollen eye and a cut on his head. (V32:1474, 1477). Due to his injuries, Fuentes was unable to work for two days. (V32:1475). Fuentes identified Appellant as one of the men who attacked him. (V32:1474-75). Appellant's pleas to attempted felony murder, robbery and aggravated battery were entered into evidence.[9] (V32:1474-76).

The State presented the testimony of three in-court witnesses as victim impact testimony, and the State's victim's advocate read statements from the Washington State Robinsons and from Ms. Robinson's younger brother, Artie. (V32:1494-1510). At the conclusion of the victim impact testimony, the State rested its case. (V32:1510).

[9] Appellant's plea of guilty for grand theft of Roy Kelley's boat was also later entered into evidence. (V32:1481).

Appellant called various lay witnesses during the presentation of his penalty phase case and two mental health experts. Daniel Newell, a program supervisor at the children's center Appellant was institutionalized at as a teenager, testified that on April 8, 2005, Appellant left a message saying he needed to talk to him. Newell testified that Appellant sounded stressed. (V33:1636). Once in jail, Appellant left later messages for Newell wherein Appellant said he messed up and needed to talk. (V33:1636-38).

Appellant's siblings and aunt and uncle testified regarding Appellant's parents. Appellant's mother was an alcoholic who was not nice to Appellant. (V33:1669). She was described as cold, not loving, stern, strict and cruel. (V34:1684, 1704, 1717-18, 1727). Appellant's sister testified their mother was involved in Appellant's treatment at the children's center. (V34:1669). Appellant's sister and uncle both testified that Appellant acted aggressive towards his mother. (V34:1692, 1710). They also both testified that Appellant's mother was not physically abusive. (V34:1692, 1707).

Dr. Jethro W. Toomer, a forensic psychologist, testified that he met with Appellant on January 22, 2007, at the Osceola County Detention Center, and performed numerous psychological tests. (V33:1537-48). Dr. Toomer reviewed records relating to

Appellant's developmental years and the instant charge. (V33:1536-37). When asked about what occurred, Appellant did not talk to Dr. Toomer about the details of the crime. (V33:1595). Dr. Toomer explained that the psychological testing process is designed to rule in, as well as, rule out certain aspects of functioning. (V33:1538). Dr. Toomer testified the following tests were part of his evaluation: an IQ assessment, academic screening, and personality assessments. (V33:1539-40). Additionally, a substance abuse assessment was conducted and Appellant was screened to identify whether or not there was any underlying organic impairment or brain damage. (V33:1539-40). No organic impairment or brain damage was identified by Dr. Toomer.

Based on the totality of the data, Dr. Toomer's opinion was that Appellant suffered from borderline personality disorder. (V33:1543-44). Dr. Toomer explained that this was the overriding diagnostic category, but his secondary diagnosis was psychoactive substance abuse. (V33:1543-44, 1554-56). Dr. Toomer opined that Appellant was under the influence of extreme mental or emotional disturbance at the time he murdered Ms. Robinson based upon his suffering the effects of borderline personality disorder. (V33:1603-04). Dr. Toomer further opined that Appellant's capacity to conform his conduct to the

requirements of the law was impaired. (V33:1604). However, Dr. Toomer did not testify that Appellant's capacity to conform his conduct to the requirements of the law was substantially impaired. Dr. Toomer did not have any information that Appellant had any psychosis when he murdered Ms. Robinson. (V33:1607-08, 1609). There was no evidence Appellant had any delusions or hallucinations when he murdered Ms. Robinson. (V33:1608, 1609).

Dr. Toomer did not agree that Appellant had time to reflect when he left Ms. Robinson's house and returned to commit the murder. (V33:1596, 1606). Dr. Toomer's belief is that Appellant is mentally impaired and could not engage in rational thought, weighing of alternatives and projection of consequences. (V33:1607). Dr. Toomer agreed, though, that Appellant was able to discern right from wrong at the time he murdered Ms. Robinson. (V33:1572-73). He also agreed that Appellant's actions demonstrated planning behavior. (V33:1584-85).

Appellant's childhood was marked by behavioral problems and aggressiveness. (V33:1574-75, 1561-62, 1582). Appellant was institutionalized at age 12 when he was referred to a program at the Hamden Children's Center as a result of impaired, acting-out behavior. (V33:1561-63, 1575, 1581). Dr. Toomer read that

Appellant's mother dropped him off at the Center, did not tell him where he was going, and provided no suitcase. (V33:1562). During cross-examination, Dr. Toomer testified that the Center was not a place a parent could simply abandon a child (V33:1579). After his initial referral, Appellant would be placed into the Center a second time due to aggressive behavior towards his mother. (V33:1581). While at the Center, Appellant had difficulty following rules, was extremely hyper and displayed outbursts of anger. (V33:1579).

Dr. Toomer's opinion was that Appellant did not suffer from antisocial personality disorder despite meeting the seven criteria and despite his continual diagnosis of conduct disorder, a factor in determining whether one has antisocial personality disorder. (V33:1582-87, 1599). The criteria for antisocial personality disorder that Dr. Toomer agreed were present in Appellant were (1) failure to conform to social norms with respect to lawful behavior as indicated by repeatedly performing acts that are grounds for arrest, (2) deceitfulness, (3) impulsivity or failure to plan ahead, (4) irritability and aggressiveness, as indicated by physical fights or assault, (5) reckless disregard for safety of self or others,[10] (6) consistent

[10] Appellant took his son to a crack house which Dr. Toomer agreed would show a disregard for his son's safety. (V33:1585).

irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations, and (7) lack of remorse. (V33:1582-86, 1599).

Dr. Toomer's reasons for not finding antisocial personality disorder was because in his opinion the diagnosis of conduct disorder was not appropriate and because Appellant had episodes of appropriate functioning.[11] (V33:1582-83, 1587-88, 1600-01). Conduct disorder is characterized by individuals, prior to age 18, who are involved in activity which violates the norms of society and rights of others. (V33:1574). Trained therapists at the Children's Center working with Appellant on a regular basis over the course of at least one year diagnosed Appellant with conduct disorder. (V33:1593-94) Dr. Toomer agreed that, prior to being placed in the Children's Center, and while there, Appellant's behavior was indicative of conduct disorder. (V33:1591). For instance, Appellant deliberately engaged in fire-setting with the intention of causing serious damage (V33:1590), instigated fights with peers while at the Center (V33:1589, 1590), and was physically cruel to people and animals, burying kittens and using a golf club to hit their heads. (V33:1590). Appellant violated rules at home and at the

[11] Appellant spent two and a half years married, working, with no reported drug use or criminal activity. (V33:1600).

Center, and was involved in deceitfulness and theft. (V33:1590-91). Finally, his last admission to the Center was because of aggressive behavior towards his mother. (V33:1589-90). Dr. Toomer disagreed with State expert Dr. Tressler's diagnosis of antisocial personality disorder. (V33:1598-99).

Appellant also presented the testimony of Dr. Jeffrey Danziger, a forensic psychiatrist, who met with Appellant on two occasions at the Osceola County jail after his arrest. (V34:1738, 1739, 1740). Prior to the initial interview Dr. Danziger reviewed a number of documents related to the evidence against Appellant. (V34:1739-40). During the initial interview, Appellant was irritable, had rapid speech and an elevated mood. (V34:1741). Dr. Danziger's opinion was that Appellant was presenting symptoms consistent with bipolar disorder. (V34:1741). Appellant reported depression and two suicide attempts. (V34:1742). The suicide attempts were self-reported, there were no records or testimony from Appellant's family corroborating this information. (V34:1763). Appellant would later deny these attempts during the State's expert's evaluation. (V34:1795). Appellant also related previous episodes of mania. (V34:1742). Included in Appellant's self-report were times he believed he had special powers, sonic boom powers, and i-beam powers. (V34:1743).

After Dr. Danziger's initial contact, he obtained records from Riverview Hospital and the Children's Center that indicated Appellant had problems with his behavior, including fire-setting and aggressiveness. (V34:1745-47). Additionally, Appellant had insomnia suggesting to Dr. Danziger the early stirring of a mood disorder. (V34:1746). Other information Dr. Danziger considered was the possibility of loss of oxygen at birth, a family history of substance abuse and neglect. (V34:1748—49).

During Appellant's trial, and over two years after Dr. Danziger's initial contact, Dr. Danziger re-evaluated Appellant. (V34:1750, 1751). Appellant showed signs of mania, and exhibited some depressive symptoms. (V34:1751-52). Dr. Danziger agreed that the fact Appellant was on trial facing the death penalty would contribute to Appellant's low mood. (V34:1766). Dr. Danziger conducted testing which showed "rather obvious signs and symptoms of mania." (V34:1752).

Based upon the records reviewed, the trial witnesses' testimonies and his evaluations, Dr. Danziger's opinion was that on the day of Ms. Robinson's murder, Appellant was suffering from bipolar disorder, a mental illness. (V34:1752-53).[12] Dr.

[12] After the murder, the jail psychiatrist did not diagnose Appellant with bipolar disorder, he noted Appellant was irritable and demanding, had insomnia, was restless and angry, and had no depression. (V34:1773).

Danziger testified that bipolar disorder comes in episodes, and persons experience times of somewhat normal behavior. (V34:1771-72). Based upon Appellant's self-report, a secondary diagnosis of substance abuse was made. (V34:1753). Dr. Danziger testified that the use of cocaine and crystal methamphetamine would likely incite the disorder to extreme highs and aggression, and irritability. (V34:1754-55). He identified the risk of violence as great. (V34:1754). In Dr. Danziger's opinion, the cocaine and crystal methamphetamine acting in concert with the bipolar disorder placed Appellant in a state where he was actively mentally ill, yet acting in a cruel, heartless fashion when he murdered Ms. Robinson. (V34:1757). Dr. Danziger did not find that Appellant's capacity to appreciate the criminality of his conduct to the requirements of the law was substantially impaired. (V34:1766). Dr. Danziger also did not find that Appellant was psychotic. (V34:1759). Based upon his evaluations, he was not aware of any delusions Appellant was suffering when he murdered Ms. Robinson. (V34:1759). Appellant did not report any hallucinations at the time he murdered Ms. Robinson. (V34:1759). Dr. Danziger agreed that Appellant knew right from wrong when he murdered Ms. Robinson. (V34:1758).

Dr. Danziger, unlike Dr. Toomer, found that Appellant suffers from antisocial personality disorder. (V34:1758-59, 1770). Seven months prior to the murder, a jail psychiatrist also diagnosed Appellant with antisocial personality disorder. (V34:1767, 1772). Dr. Danziger explained that antisocial personality disorder is not a major mental illness, but is among the personality and character disorders. (V34:1759). Dr. Danziger did not agree with Dr. Toomer's diagnosis of borderline personality disorder. (V34:1758, 1760).

The State's mental health expert, Dr. Daniel Patrick Tressler, a forensic psychologist, evaluated Appellant on December 13, 2007. (V35:1786-87). Prior to evaluating Appellant, he reviewed the deposition of defense expert, neuropharmacologist Dr. Lippman, Appellant's childhood clinical records, Appellant's Connecticut Department of Corrections' records and Appellant's Osceola County jail medical records. (V35:1786-88).

Dr. Tressler conducted a standard clinical interview, inquiring into Appellant's background, family, and drug use. (V35:1787). Dr. Tressler's questions were designed to fill in gaps from the records. (V35:1787-88). Regarding his wife, Appellant described a very good relationship he was pleased with but they went through a period of deterioration after they moved

to Florida. (V35:1789-90). The reason Appellant gave for the decline in their relationship was his wife's employment as a corrections officer. (V35:1790). Appellant considered her choice of employer to be tantamount to infidelity as she was working in a field which Appellant considered to be hostile to him. (V35:1790). Regarding his four-year-old child, Appellant indicated he enjoyed his child but was angry because a restraining order was issued that kept him from having contact with his child. (V35:1790). Appellant told Dr. Tressler about an incident involving his child which was a factor in his marital separation. (V35:1790). Appellant took his son to a crack house party and placed him in the care of a stranger while he was using crack with a friend. (V35:1790-91). Regarding his own childhood, Appellant indicated he was abandoned by his family, and was placed into various facilities which interrupted his family life. (V35:1791). Appellant claimed to have no insight as to why he had been placed into these facilities. (V35:1791). Appellant reported his mother was an alcoholic. (V35:1792).

Based on the records, Appellant had engaged in a variety of disruptive and aggressive behaviors. (V35:1791). Appellant had set fires, committed acts of animal cruelty and was disruptive to the point where his mother thought he needed to be placed

somewhere. (V35:1791-92). Dr. Tressler requested Appellant to take psychological tests, but Appellant refused to do so, saying he was not in the mood, and had previously taken the tests and did not want to repeat them. (V35:1788). Dr. Tressler asked Appellant about prior suicide attempts and Appellant cited none. (V35:1795).

Dr. Tressler asked Appellant about his sleep patterns because one of the non-obvious clues to bipolar disorder is a person's sleep patterns. (V35:1792, 1793-94). He indicated he never had a need for a large amount of sleep, and prefers not to sleep too long as he feels like he is missing something. (V35:1792-93). Appellant indicated he prefers sleeping six hours per night and Dr. Tressler found nothing unusual about this. (V35:1792-93, 1794). Appellant has had a consistent need for sleep throughout most of his life. (V35:1793). Appellant indicated that it was a major problem for him that he was unable to use narcotics while in jail. (V35:1793). Appellant had used drugs for many years to preserve what to him was a stable and normal state. (V35:1793). For instance, the inability to use marijuana as a sleep-aid was a particular problem for Appellant. (V35:1793).

Dr. Tressler described Appellant's mental state as mildly agitated, mildly angry, mildly irritated, but not out of

control. (V35:1794). Appellant did not express any particular unusual emotions. (V35:1794). There was no evidence of depression. (V35:1794). There was no evidence of anxiety or nervousness. (V35:1794). Appellant's anger was directed towards his wife, family, persons in jail, and the trial jury for convicting him of what he felt was not a premeditated act. (V35:1794). Appellant's irritation was directed towards Dr. Tressler as he had chosen an evaluation time that conflicted with Appellant's recreational schedule. (V35:1794-95). Dr. Tressler found Appellant's anxiety level to be appropriate as Appellant had been convicted of first degree murder and was facing a possible death sentence. (V35:1795).

Based upon his evaluation and review of records, Dr. Tressler diagnosed Appellant with antisocial personality disorder, a character disorder, not a major mental illness. (V35:1795-96, 1805). Furthermore, Dr. Tressler testified Appellant developed in his adult life a dependence upon multiple drugs. (V35:1796). Dr. Tressler described antisocial personality disorder as having its origins prior to age eighteen and representing a longstanding pattern of disregard for the rights, needs, and feelings of others. (V35:1796-97). Other features Dr. Tressler described were: lack of remorse, a rationalization for harming others, tendency to engage in

behavior that violates the law, and to engage in reckless behavior that may lead to negative consequences. (V35:1797). A person suffering from a personality disorder like Appellant has a pattern of behavior that is maladaptive. (V35:1805). However, that behavior is presumed to be under the person's control. (V35:1805).

The fact that Appellant had a relationship with his wife, and with Laura Schmid did not negate Dr. Tressler's diagnosis of antisocial personality disorder. (V35:1797). Dr. Tressler explained that it is not uncommon for a person with antisocial personality disorder to have one or more marriages. (V35:1797). The key, Dr. Tressler explained, is not that a person can have a marriage, but rather, the key is their behavior during the marriage. (V35:1797). Dr. Tressler explained what was seen during Appellant's marriage was a disregard for his wife's thoughts and feelings, and behavior inconsistent with a loving and caring relationship, but consistent with a relationship that was based upon Appellant getting what he wanted. (V35:1797-98). Similarly, Appellant's relationship with Laura Schmid was one where he took full advantage of her and was irritated she had her own needs. (V35:1798). Dr. Tressler described Appellant as exploitive, abusive. (V35:1798). According to Dr. Tressler, the fact that Appellant felt abandoned as a child did not negate

his diagnosis of antisocial personality disorder but explained his lack of capacity to form loving relationships. (V35:1798-99).

In making his diagnosis, Dr. Tressler considered borderline personality disorder among several hundred others. (V35:1799). Dr. Tressler's opinion was that Appellant was not suffering from borderline personality disorder because he did not meet the diagnostic criteria. (V35:1799). Dr. Tressler explained that borderline personality disorder is most common in females, and when the personality fears abandonment and rejection, the person will likely harm themselves, whereas the antisocial personality will likely become angry and harm others. (V35:1799-1800).

Dr. Tressler also considered, but rejected, bipolar disorder as a diagnosis. (V35:1800-01). Dr. Tressler explained one of the most important things to consider when considering a bipolar disorder diagnosis is the ability to rule out drugs as an influence on one's behavior. (V35:1801). When he examined Appellant's interview with law enforcement he recognized the grandiosity and hyper verbal speech associated with bipolar disorder. (V35:1801). At this time, Appellant was still under the influence of stimulant drugs. (V35:1801). Later when the drugs were removed from his system (over the next two years) there was no evidence of mania or hypomania. (V35:1801). There

was no evidence of moods fluctuating autonomously. (V35:1801-02). As a result, Dr. Tressler believed that there was not a basis to find bipolar disorder. (V35:1802). He was able to rule out bipolar disorder ultimately because he was unable to substantiate its basis. (V35:1805).

Based upon reviewing the Osceola County Sheriff's records and Appellant's interview, Dr. Tressler did not find any evidence Appellant misperceived reality when he murdered Ms. Robinson. (V35:1806). In fact, his ability to focus at the time of the murder was quite acute and he was later able to describe the murder in great detail. (V35:1806). Appellant was able to focus on every element of the environment, discussed the details of the interior of Ms. Robinson's home, and discussed the noises Ms. Robinson made as he was killing her. (V35:1806). Appellant described his behavior at the time of the murder as being very much in control. (V35:1806). Appellant's description of the murder was very important to Dr. Tressler in rendering his opinions, as he felt it spoke volumes about Appellant's state of mind at the time of the offense. (V35:1806-07).

Dr. Tressler agreed with Drs. Toomer and Danziger that Appellant knew right from wrong at the time he murdered Ms. Robinson. (V35:1807). Dr. Tressler further opined that

Appellant understood the consequences of his actions. (V35:1807). Dr. Tressler's opinion was that Appellant was not suffering from an extreme emotional or mental disturbance when he murdered Ms. Robinson. (V35:1807). He opined that Appellant's behavior can be accounted for by Appellant's personality disorder and his addiction and use of stimulant drugs. (V35:1807-08). Dr. Tressler did not find that Appellant was suffering from a cocaine psychosis when he murdered Ms. Robinson. (V35:1827).

Dr. Tressler's testimony concluded the penalty phase of the trial. (V35:1830-31). The following day the State and defense counsel presented closing arguments. (V36:1864-1924). The jury returned its advisory sentence by a vote of 10 to 2 recommending that the trial court impose the death penalty upon Appellant. (V12:1795; V36:1939, 1943, 1944).

A Spencer[13] hearing took place on January 4, 2008. (V17). At the hearing, neither the State nor Appellant wished to present any additional evidence or argument. (V17:2191, 2192-93). Appellant declined the opportunity to make a statement. (V17:2192). Appellant and the State filed sentencing memorandums with the trial court. (V13:1800-12, 1829-34, 1835-58). The trial court's sentencing hearing took place on

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

February 22, 2008. The trial court found four aggravating circumstances: prior violent felony convictions, the murder was committed to avoid arrest, the murder was cold, calculated and premeditated (CCP), and the murder was especially heinous, atrocious, or cruel (HAC). (V13:1863-68). Both statutory mental mitigators were rejected. (V13:1868-70). Numerous nonstatutory mitigators were found and given little to moderate weight. (V13:1871-76). The trial court found that the four aggravating circumstances far outweighed the mitigating evidence and sentenced Appellant to death.[14] (V13:1876

[14] The trial court noted that the HAC aggravator, standing alone, was sufficient to far outweigh the mitigating circumstances in this case. (V13:1876).

SUMMARY OF THE ARGUMENT

The trial court properly found that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. After realizing that the victim had identified Appellant as the person who had stolen a boat, Appellant formed an intent to murder her to eliminate her as a witness. Appellant proceeded to savagely beat the victim with multiple items, attempted to strangle her with a computer mouse cord, and ultimately sliced her throat with a knife. During the course of the beating, Appellant left the room where the attack took place on two separate occasions and obtained a different weapon in which to continue his assault. The trial court applied the correct rule of law in finding this aggravating circumstance and competent substantial evidence supports the finding of CCP.

As the trial court properly found, the murder of Ms. Robinson was especially heinous, atrocious or cruel. The evidence, including Appellant's own trial testimony, established that he savagely beat Ms. Robinson for quite a period of time. Appellant beat Ms. Robinson with a wooden musical instrument, shattering it in the process, and then struck her with a glass lamp. Appellant left the room where the attack took place and returned with a computer mouse cord and tried to strangle the

victim, but she prevented him. The victim was still conscious and moving, so Appellant jumped off a chair and stepped on her head, and then kicked her in the face. He then left the room and ultimately returned with a knife. Appellant straddled her body and lifted her head by her hair, and sliced her throat several times. The evidence established that the victim was conscious during most of the attack. Based on this evidence, the trial court properly found that the HAC aggravator was applicable to the instant murder.

The trial court properly rejected the two statutory mental mitigating factors. Appellant presented evidence from two mental health experts, Drs. Toomer and Danziger, and the State also presented testimony from a mental health expert, Dr. Tressler. Each of the experts presented differing opinions, and based on this conflict in the evidence, as well as the other evidence presented in the case, the trial court properly rejected the proposed statutory mental mitigators. Appellant has failed to demonstrate that the trial court abused its discretion in this regard.

Appellant's argument that his death sentence is disproportionate is without merit. The trial court properly found four aggravating circumstances, including two of the most serious, HAC and CCP. The trial court did not find that any

statutory mitigators were applicable, but did find the existence of numerous nonstatutory mitigators, primarily those related to Appellant's deprived childhood, dysfunctional family, drug use, and mental health factors. As the trial court found, however, the "truly heinous, atrocious and cruel manner in which this murder was committed standing alone, even in the absence of the other aggravating circumstances, is sufficient to far outweigh the mitigating circumstances in this case."

Appellant's argument that Florida's death penalty statute is unconstitutional pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), is also without merit. This Court has repeatedly rejected Appellant's argument on the merits. Additionally, Appellant's claim is without merit because, prior to trial, Appellant pled guilty to prior violent felonies which served as the basis for one of the aggravating circumstances present in this case.

ARGUMENT

ISSUE I

COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Appellant challenges the applicability of the cold, calculated and premeditated aggravating factor found below. In considering such a claim, this Court's function is to review the record to determine whether the trial court applied the right rule of law in finding this aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy v. State, 696 So. 2d 693, 695-96 (Fla. 1997). In the instant case, the trial court's findings are supported by competent substantial evidence and the correct rule of law was applied. Accordingly, this Court must affirm the lower court's application of the CCP aggravating factor. Id.; see also Orme v. State, 677 So. 2d 258, 262 (Fla. 1996) (duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent, substantial evidence); Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990) (noting that this Court will not substitute its judgment for that of trial court when there is a legal basis to support finding an aggravating factor).

The trial court found the following facts to support this aggravator:

The defendant went to Ms. Robinson's house on the day of the murder to borrow money. Ms. Robinson gave the defendant the money he requested and the defendant left. The evidence established that, during the course of his contact with Ms. Robinson, the defendant felt that Ms. Robinson recognized him as the person she had witnessed steal a boat.

After getting the gas money from Ms. Robinson, there was no reason for the defendant to return to her house. The defendant, having left, however, formed an intent to kill Ms. Robinson and returned to her house, savagely beat her and murdered her with deliberate ruthlessness.

While the murder was not particularly well planned, it was not the product of emotional frenzy, panic or a fit of rage. The defendant left the victim's residence, had time to calmly reflect upon his course of action, decided what he was going to do and returned to carry out his purpose. During the course of committing the murder, the defendant twice left the room in which the attack took place, went to other areas of the house and obtained another weapon with which to continue his brutal assault upon Ms. Robinson.

The murder of Ms. Robinson was calculated in that after the defendant decided that Ms. Robinson recognized him as the thief who had stolen a boat, he decided to kill her in order to avoid being arrested and prosecuted for the theft, and to make the killing look like a robbery.

There was no evidence of any legal or moral justification for the killing of Ms. Robinson. To the contrary, the sole motive for the killing was to eliminate Ms. Robinson as a possible witness in a criminal prosecution against the defendant.

The court finds that the state has proved this aggravating circumstance beyond a reasonable doubt. While some aspects of the proof of this, aggravating circumstance overlap with the proof that the murder

> was committed in order to eliminate a witness, the court finds that they are distinct aggravating circumstances and both, individually, merit great weight.

(V13:1866) (emphasis added).

In order to establish the CCP aggravator, the State must prove four elements: the murder was the product of cool, calm reflection rather than prompted by frenzy or a fit of rage; the murder must be the product of a careful plan or prearranged design; heightened premeditation; and there must be no pretense of moral or legal justification. Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). All of these factors are reflected in the court's findings outlined above, and therefore the correct law was applied below.

The evidence demonstrated that Appellant, fueled by his desire to eliminate Ms. Robinson as a witness to his theft of a boat, planned the instant murder, and took multiple steps to ruthlessly murder Ms. Robinson. There is an absence of any indication of resistance, provocation, or emotional frenzy or rage. No pretense of justification has been asserted, and there is absolutely no evidence of any possible justification in this record.

Appellant went to Ms. Robinson's home to borrow twenty dollars. Appellant left Ms. Robinson's with the borrowed money in hand, and returned later to murder her because she would "not mind her business" and had recognized him as the person who

stole the boat from Laura Schmid's home. (V30:1260-61, 1270, 1293, 1295). Upon returning to Ms. Robinson's home, Appellant first tried to beat her to death, using a wooden instrument until it shattered, and then utilized a glass hurricane lamp. (V28:1037-38; V30:1236, 1308-10, 1330-33). When this failed, Appellant left Ms. Robinson on the floor, retrieved a computer mouse cord and attempted to strangle her to death. (V30:1236-38). When this method failed, Appellant went to the bathroom and urinated. He returned to find Ms. Robinson moaning on the floor and he proceeded to jump on her head and kick her in the face. (V30:1313). Appellant then left Ms. Robinson again, went to her kitchen and drank tea from her refrigerator, found an appropriate knife for her murder, and returned to straddle her "like a cowboy," lifting her head and slicing her throat to the bone and killing her. (V28:1037-38; V30:1237, 1313-16, 1355-57). Appellant caused multiple contusions to Ms. Robinson's head and face, and her hands were left with defensive wounds. (V29:1161-73; V32:1468-69, 1472).

After the murder, Appellant returned to Laura Schmid's home and showered and changed clothes. He placed his bloody socks and sneakers in a bag and threw them into a dumpster at a nearby gas station where they were later recovered by law enforcement. (V27:941-42; 1008-10; V30:1315-18). Appellant then returned to Ms. Robinson's home, ransacking it to make it appear as if a

burglary had taken place and then he drove Ms. Robinson's vehicle away from her home and parked it at a gas station so it would appear she was not at home. (V28:1073-74; V30:1319).

There was ample time for reflection over the course of the murder and there was ample time and opportunity for Appellant to leave Ms. Robinson and cause no further harm. This Court has upheld the application of the CCP aggravating factor repeatedly under similar circumstances. See Barnhill v. State, 834 So. 2d 836, 850-51 (Fla. 2002) (finding that defendant had ample time and opportunity to reflect upon his actions while in the victim's house before strangling the victim with multiple items); Ibar v. State, 938 So. 2d 451, 474 (Fla. 2006) (noting defendant had ample time to reflect on actions, victim was killed execution-style, and defendant had opportunity to leave the scene without committing the murder); Hertz v. State, 803 So. 2d 629, 650-51 (Fla. 2001) (noting victims were bound and gagged, unable to resist, and defendant had ample time to reflect and leave scene). To the extent Appellant may assert his drug use negates a finding of CCP, this Court has recognized that this factor may be applied to a chronic drug user, where no evidence is presented that the drug use destroyed the defendant's ability to plan. Guardado v. State, 965 So. 2d 108, 117 (Fla. 2007). Further, this Court has held CCP may be found

despite the existence of mental mitigation. Barnhill, 834 So. 2d at 851.

Appellant attempts to argue against the finding of CCP because he claims there is no evidence of when he formed the intent to kill Ms. Robinson, because there was a lack of a careful or prearranged design, and because he did not return to her home with any weapons. Initial Brief of Appellant at 40-41. To the contrary, the facts demonstrate that he formed his intent to kill Ms. Robinson when he realized she recognized him as the boat thief. Even if Appellant's plan was not formed until after he came back to Ms. Robinson's home, CCP was properly found because Appellant's actions outlined above demonstrate sufficient reflection at the scene to support this factor. See Knight v. State, 746 So. 2d 423, 436 (Fla. 1998) ("Even if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill"). Appellant's attempt to negate the calculated method by which Appellant murdered Ms. Robinson by arguing lack of design is likewise refuted by the record. Appellant shopped Ms. Robinson's home for his choice of weapons, using each in a ruthless fashion to effectuate her death and changing his mode until he found the most deadly weapon. Moreover, this Court has held CCP may be

found where a defendant did not bring his own weapon but procured one at the scene. Buzia v. State, 926 So. 2d 1203, 1215-16 (Fla. 2006).

In sum, the trial judge's factual findings are supported by the evidence, and the correct standard of law was applied, compelling affirmance of the use of this aggravator. The court below did not err in finding and weighing the CCP aggravating factor. Furthermore, any possible error would be harmless in this case, given the other strong aggravating factors present and the lack of any significant mitigation. See Geralds v. State, 674 So. 2d 96, 104-05 (Fla. 1996) (concluding there was no reasonable likelihood of a lesser sentence after this Court struck CCP, leaving aggravating factors of heinous, atrocious and cruel and committed during course of burglary; mitigation of 22 years old, love for family, unloving mother, and bipolar manic personality); Holton v. State, 573 So. 2d 284, 293 (Fla. 1990) (erroneous finding of CCP was harmless in light of three other valid aggravating factors, mitigation of drug addiction and father of two children). For these reasons, Appellant is not entitled to any relief on this issue.

ISSUE II

THE TRIAL COURT PROPLERLY FOUND THAT THE MURDER WAS COMMITTED IN A MANNER THAT WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Appellant next challenges the applicability of the heinous, atrocious, or cruel aggravating factor. Again, this Court must review the record to determine whether the trial court applied the right rule of law for the aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy, 696 So. 2d at 695-96. Such a review in this case confirms the propriety of the trial court's finding of the HAC aggravating factor.

The trial court stated the following to support this aggravator:

> In order for a killing to be one that is especially heinous, atrocious or cruel, it must be one that evinces extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. *Cheshire v. State*, 568 So.2d 908 (Fla. 1990). The killing must be both conscienceless or pitiless and unnecessarily tortuous to the victim. *Richardson v. State*, 604 So.2d 1107 (Fla. 1992). In determining whether a killing is committed in a heinous, atrocious or cruel manner, the focus is on the victim's perceptions of the circumstances rather than the defendant's. *Lynch v. State*, 841 So.2d 362 (Fla. 2003); *Guzman v. State*, 721 So.2d 1155 (Fla. 1998).
>
> The testimony in this case establishes beyond a reasonable doubt that there was a prolonged, pitiless attack upon Ms. Robinson, and that she was conscious during at least most of the attack up until the time

defendant slit her throat. The medical examiner, Dr. Irrgang, testified that Ms. Robinson would have been conscious when the defendant was hitting her in the head, as she had wounds on both sides of her head that indicated movement of her head during the attack. She testified that it was likely that Ms. Robinson struggled with her attacker.

The defendant testified at trial that it took a "period of time" for him to kill Ms. Robinson and that "the time frame isn't as short as people are...are making it seem. It - it was a distance in between...". He testified that he hit her with the wooden instrument until it broke into pieces and that he then hit her with the hurricane lamp, after which she seemed knocked out. He left the room, obtained the computer mouse cord, returned and attempted to strangle Ms. Robinson with the mouse cord, but was unsuccessful.

While the defendant testified at trial that he was unsuccessful in strangling Ms. Robinson with the cord because his hands slipped off the cord, he told Matthew Druckenmiller that the victim was able to get her fingers under the cord around her neck and that he couldn't strangle her because he was prevented by her resistance.

After failing to kill Ms. Robinson by strangulation, the defendant again left the room and went to the bathroom where he urinated. Upon returning to the living room, the defendant testified that Ms. Robinson was moving around and moaning. The defendant then got on top a chair and stepped on her head and kicked her in the face. Then he testified she was "flopping around" and "every time I kicked her, she'd moved to one spot and I'd kick her and I'd get in the other - I think I kicked her twice."

It was then that the defendant went to the kitchen, and got himself something to drink out of Ms. Robinson's refrigerator. While in the kitchen, the defendant saw a block of knives in the [sic] and decided to get a knife and return to continue his attack on Ms. Robinson. Upon returning once more to

the living room, the defendant straddled Ms. Robinson's prostrate body, lifted her head by her hair and sliced her throat several times, causing her almost immediate death.

While slitting the throat of a conscious victim has been held to be heinous, atrocious or cruel, it is unclear from the evidence in this case that Ms. Robinson was, in fact, conscious at the time her throat was slit. Dr. Irrgang, the medical examiner who performed the autopsy on Ms. Robinson, was unable to testify with certainty that was the case, although she testified it was certainly possible.

Nonetheless, the evidence clearly establishes that the victim was conscious during most of the prolonged attack. The court finds from the evidence that the killing of Ms. Robinson was indeed conscienceless, pitiless and unnecessarily tortuous. It is certain that Ms. Robinson was conscious and feeling pain during the brutal beating by the defendant who was verbally taunting her during the attack. The prolonged, brutal beating of Ms. Robinson, standing alone is sufficient to make this murder heinous, atrocious and cruel.

In addition, however, Ms. Robinson would have felt a foreknowledge of impending death as she was being strangled by the mouse cord. If the attempted strangulation caused her to lose consciousness, her last thoughts would have been the anxiety and fear of struggling to breath and being unable to overcome the defendant's attempt to strangle her. If the strangulation attempt did not cause Ms. Robinson to lose consciousness, her last perceptions would have been of having her head pulled up by her hair and the knife being brought up to her throat by the defendant before he effected her death. *Either* possible circumstance would be one that would cause extreme anxiety and fear with foreknowledge of death.

The state has proved this aggravating circumstance beyond any reasonable doubt and the court gives it great weight.

(V13:1866-68) (emphasis added).

In order to establish the HAC aggravating factor, the State must prove that the murder was conscienceless or pitiless and unnecessarily tortuous to the victim. Francis v. State, 808 So. 2d 110, 134 (Fla. 2001). These factors are expressly applied and reflected in the court's findings outlined above, and therefore the correct law was applied below.

Appellant alleges that this factor was erroneously applied because 1) he did not intend to inflict pain or otherwise torture; 2) he speculates that Ms. Robinson may have been unconscious for much of the attack; and 3) he speculates that Ms. Robinson's death did not take a prolonged period of time. Initial Brief of Appellant at 47-51. However, Appellant's arguments are legally incorrect and refuted by the court's findings and record.

As to Appellant's claim that there was no "intent" to torture, the facts of this case demonstrate otherwise. In addition, this Court has repeatedly recognized that intent is not a necessary element of this aggravating factor. Ocha v. State, 826 So. 2d 956, 963-64 (Fla. 2002); Francis, 808 So. 2d at 135; Guzman v. State, 721 So. 2d 1155, 1160 (Fla. 1998). Prior cases routinely acknowledge that HAC is consistently applied where the victim suffers prolonged torture, as here, without any specific discussion as to the defendant's mental

condition. This is because where facts demonstrate that a victim suffered a great deal, the reasonable inference is that the defendant either intended or was indifferent to such suffering. See Bogle v. State, 655 So. 2d 1103 (Fla. 1995) (rejecting claim that HAC could not be upheld because nothing in the case established that defendant intended to cause the victim unnecessary suffering). Accordingly, a defendant's state of mind is not a dispositive fact that must be determined and weighed every time that HAC is considered. Rather, the relevant facts are typically those showing the manner in which the homicide occurred. Nevertheless, the facts in the instant case clearly show an utter indifference to the suffering of the victim. The evidence presented below, and outlined in the court's findings on this factor, clearly demonstrate that "the defendant acted with complete indifference to the victim's suffering." Bogle, 655 So. 2d at 1109.

Appellant hit Ms. Robinson in the head first with the ukelin, and when she questioned "Oh, my god what was that?", Appellant told her it was her ceiling and hit her again as she was looking up. (V30:1308). Appellant hit her multiple times with the ukelin until it shattered. (V28:1037-38; V30:1330-33). Appellant told Matthew Druckenmiller Ms. Robinson fought with him after she was hit with the ukelin. (V30:1236). Appellant then hit Ms. Robinson with a glass lamp. (V30:1308-10). After

leaving the room, Appellant went and found a computer mouse cord, and attempted to strangle her to death with the cord, but was unsuccessful. (V30:1310-11). Appellant told Druckenmiller that he was unsuccessful because she had her fingers in the way and was fighting him. (V30:1236-38). While Appellant subsequently denied a struggle and testified that his fingers slipped off the cord, the medical examiner testified that there were defensive wounds on the back of each of Ms. Robinson's hands, thereby refuting Appellant's testimony. (V32:1468-69, 1472). After the unsuccessful strangulation, Appellant went into the victim's bathroom and urinated. (V30:1312-13). Upon returning, Appellant acknowledged Ms. Robinson was moaning and moving. (V30:1313). At this time, Appellant testified he jumped on Ms. Robinson's head and kicked her in the face. Appellant described her as "flopping around" and said when he kicked her she would move to one spot and "I'd kick her in the other". (V30:1313). Appellant then went and drank tea from Ms Robinson's refrigerator, found an appropriate knife for her murder and returned to straddle her "like a cowboy," lifting her head and slicing her throat several times to the bone killing her. (V28:1037-38; V30:1237, 1313-16, 1355-57). There is no question of Ms. Robinson's suffering, no question of her fear as she was hit, jumped on, kicked and strangled, and certainly no

question Appellant acted with complete indifference to her suffering.

As far as Appellant's speculation about the victim's alleged lack of consciousness, the evidence showed only that unconsciousness could not have come quickly enough for Ms. Robinson. As outlined by the court below and highlighted above, the evidence clearly established that Ms. Robinson was conscious and suffering through much of her ordeal. The medical examiner, Dr. Sara Irrgang, testified that as long as Ms. Robinson struggled, she would have remained conscious. (V32:1470, 1472). Further, Dr. Irrgang testified that during the time Ms. Robinson was beaten and strangled, she would have been experiencing pain. (V32:1468, 1469-70). Based upon the injuries Ms. Robinson sustained, the State's witnesses' testimonies, and upon Appellant's own testimony, Dr. Irrgang opined it was evident that Ms. Robinson was conscious and struggling during her attack. (V32:1468-69). Defensive wounds were found on the back of each of her hands. (V32:1468-69, 1472). Dr. Irrgang believed the attack would have had to have taken place over a period of time, as time was needed to inflict the multiple injuries and because the victim's injuries indicated she was not in the same location throughout the incident. (V32:1468).

In Guzman, this Court affirmed the heinous, atrocious or cruel aggravating factor where the defensive wounds and blood

trail indicated that the victim was aware of what was happening to him and would have felt pain as a result of the large number of injuries he sustained. Although Appellant asserts that Ms. Robinson may not have been conscious for much of the attack, nothing in Guzman suggests that a victim must be conscious for a "significant portion of the attack." To the contrary, this Court in Guzman only found that the victim was conscious during "at least part of the attack." Guzman, 721 So. 2d at 1160. Given the description of the murder in this case and the medical examiner's testimony regarding the victim's consciousness and pain, it is apparent that the victim in this case suffered horribly and that the HAC aggravator should be affirmed.

As far as Appellant's speculation that this attack was not prolonged, HAC does not rest upon the length of time of the attack but whether the murder was conscienceless or pitiless and unnecessarily tortuous. Francis, 808 So. 2d at 134. As outlined above, this murder was of this character. Further, even Appellant recognized that the murder took time and the time frame was not as short as people were making it seem. (V13:1867). Dr. Irrgang also testified the attack would have had to have taken place over a period of time, as time was needed to inflict Ms. Robinson's multiple injuries. (V32:1468).

The finding of HAC in this case is consistent with a number of other decisions from this Court on the applicability of that

factor. See Farina v. State, 801 So. 2d 44, 53 (Fla. 2001) (noting HAC aggravator pertains more to victim's perception of the circumstances than to the perpetrator's); Hannon v. State, 638 So. 2d 39 (Fla. 1994) (beating and stabbing of a screaming victim); Atwater v. State, 626 So. 2d 1325, 1329 (Fla. 1993), (victim beaten prior to or during the stabbing); Randolph v. State, 562 So. 2d 331, 338 (Fla. 1990) (victim repeatedly hit, kicked, strangled, and knifed); Lamb v. State, 532 So. 2d 1051, 1053 (Fla. 1988) (defensive wounds, head struck six times, victim moaning and kicked in face). Accordingly, the trial court's finding of the HAC aggravator should be affirmed.

Even if this Court were to find that competent substantial evidence does not support the trial court's finding of HAC, any error would be harmless. The trial court found three other aggravators: CCP, prior violent felony conviction, and murder committed to avoid arrest. No statutory mitigation was found. Any error in finding HAC cannot be said to have affected Appellant's death sentence. As such, any error would be harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE III

THE TRIAL COURT PROPERLY APPLIED THE LAW WHEN ADDRESSING AND REJECTING APPELLANT'S MITIGATING EVIDENCE.

Appellant asserts in his third issue that the trial judge misinterpreted the testimony from the mental health experts during the penalty phase and consequently misapplied the applicable law in rejecting the two statutory mental mitigating factors. Contrary to Appellant's assertion, the record contains competent substantial evidence to support the trial court's rejection of these two statutory mitigators.

The test on appeal for a trial court's rejection of a mitigator is whether the "the record contains 'competent substantial evidence to support the trial court's rejection of [] mitigating circumstances.'" Reynolds v. State, 934 So.2d 1128, 1159 (Fla. 2006) (quoted citations omitted). A trial court's findings on mitigating factors are reviewed for an abuse of discretion. Foster v. State, 679 So.2d 747, 755 (Fla. 1996). As such, the question presented in the instant issue is whether the trial court abused its discretion in rejecting the two statutory mental mitigators. The record here supports the trial court's findings.

As to whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, the trial court found:

> In considering whether this mitigating circumstance has been established, the court has considered the totality of the evidence and testimony in the case, including the testimony of the mental health experts who testified at the penalty phase hearing and the evidence relating to the following separately listed suggested mitigators: under the influence of extreme mental disturbance (1), under the influence of extreme emotional disturbance (2), ability to conform conduct to requirements of law substantially impaired (3), oxygen deprivation at birth (6), early onset of mental disturbances (10), antisocial personality disorder (11), biological influence on mental disorders (13), lack of maturity as a young person (18), lack of impulse control (19), prescribed Ritalin as a child (28), relationship issues (33), sucked fingers, rocker (35), low self-esteem (36), hyperactive (39), problems sleeping (41), overly emotional as a child (42), excessive anxiety as a child (43), adjustment disorder (46), distraught phone call made to Danny Newell before incident (63), suffered from depression (64) and suffered from borderline personality disorder (66).
>
> Three experts who evaluated the defendant testified in the penalty proceeding: Dr. Jethro Toomer, a board certified psychologist, Dr. Jeffrey A. Danziger, a board certified psychiatrist, and Dr. Daniel Tressler, a psychologist who specializes in forensic psychology.
>
> Dr. Toomer testified that in his opinion the defendant suffers from a borderline personality disorder and psychoactive substance abuse with a possible adjustment disorder with anxiety. Dr. Danziger diagnosed the defendant with bipolar disorder, exacerbated by polysubstance abuse, and antisocial personality disorder. Dr. Tressler testified that the defendant has an antisocial

personality disorder, a polysubstance dependence and attention deficit disorder.

Both Dr. Tressler and Dr. Danziger testified that they disagreed with Dr. Toomer's diagnosis of borderline personality disorder. Dr. Tressler testified that those suffering from borderline personalities are more commonly women and tend to harm themselves, not others, when they feel abandoned.

Neither Dr. Toomer nor Dr. Tressler agreed with Dr. Danziger that the defendant has bipolar disorder. Dr. Tressler testified that his opinion that the defendant was not bipolar was supported by his evaluation of the defendant and the jail records of the defendant's conduct in the two years following his arrest - there was no evidence during that period of the mania or hypomania associated with bipolar disorder. Dr. Danziger admitted that the defendant did not exhibit some of the classic symptoms associated with someone suffering from bipolar disorder in a manic episode and that in examining the records from the defendant's incarceration he was unable to find any record suggestive of active mental illness. Dr. Danziger further stated that the jail psychiatrists at the Osceola County Jail and the Florida Department of Corrections during previous incarcerations had diagnosed the defendant with antisocial personality disorder and had not found him to be suffering from any major mental illness.

Dr. Tressler and Dr. Danziger both testified that the defendant has an antisocial personality disorder. As noted, the jail psychiatrists, whose records the experts relied upon, in part, also had diagnosed the defendant with antisocial personality disorder. While Dr. Toomer agreed that the defendant meets all seven criteria specified for such a diagnosis and, additionally, had been diagnosed as a youth with conduct disorder, another factor in support of a diagnosis of antisocial personality disorder, based on a "clinical perspective" rather than a "cookbook perspective" the defendant does not have an antisocial personality disorder.

> Dr. Toomer testified that it is his opinion that the defendant was under the influence of extreme mental or emotional disturbance at the time of the killing. According to Dr. Danziger, the Defendant was suffering from a mental illness, bipolar disorder, when he committed the murder. Opinions of experts are different from factual evidence in that, even if uncontroverted, expert opinion is not necessarily binding on the fact finder. *Walls v. State*, 641 So.2d 381 (Fla. 1994). Here, there was no unanimity of opinion among the experts.
>
> The court, considering all of the expert testimony, and the other evidence in the case is not reasonably convinced that the defendant was under the influence of extreme mental or emotional disturbance at the time of the murder or that he was suffering from borderline personality disorder or bipolar disorder. The evidence convinces the court that the defendant has an antisocial personality disorder and a dependence on multiple substances, but the drug dependence did not cause or substantially contribute to his killing of Ms. Robinson.
>
> As Dr. Tressler testified, antisocial personality disorder is not a major mental illness, but a characterological disorder under which it is presumed that a person's behavior at any given point in time is under the person's control and is not being driven by a mental illness that causes them to misperceive reality. See *Elledge v. State*, 706 So.2d 1340 (Fla. 1997).
>
> The court rejects the existence of this mitigator.

(V13:1868-70) (emphasis supplied).

As to whether the capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, the trial court found:

Dr. Tressler and Dr. Danziger both were of the opinion that the defendant's capacity to conform his conduct to the requirements of the law was not substantially impaired when he killed Ms. Robinson. Dr. Toomer disagreed, based upon his diagnosis of borderline personality disorder in combination with drug use. As noted above, the court does not find that the defendant has a borderline personality disorder.

The evidence regarding drug use at the time of the crime is inconsistent. The defendant gave statements after the murder, both to law enforcement and the news media, that he was not high on drugs when he murdered Ms. Robinson. He later told the mental health experts, and testified at trial, that he was. The defendant has a history of being untruthful when he feels it will be to his benefit. In his trial testimony, the defendant admitted that he has told lies to a lot of people to get what he wanted, that he lied to the detective in this case, that he lied to the news reporter, that he lied in order to get a psychological evaluation, that he made things up after the arrest to "seem like a psycho" and that he has habitually lied to get money or drugs. In the psychological evaluations, the defendant described two suicide attempts in detail to Dr. Danziger; when evaluated by Dr. Tressler, he denied that he had ever attempted suicide.

The only evidence of drug use by the defendant on the day of the murder consists of the self-serving statements of the defendant himself, which are contradicted by other statements he made that he had not used drugs that morning.

The circumstances of the crime show a person who is demonstrably capable of appreciating the criminality of his conduct and taking steps to cover up his crime to avoid detection. While the court has little doubt that the defendant, as he claims, is a long-term drug abuser, the court does not find that he was impaired by the use of drugs at the time the murder was committed.

> All three experts agreed that the defendant is of normal intelligence, was not insane at the time of the murder and knew the difference between right and wrong. There is no evidence that the defendant was unable to fully appreciate the criminality of his conduct. The facts of the case clearly establish that the defendant knew what he was doing was wrong and took steps to try to cover up his crime. The court finds that this mitigator has not been established.

(V13:1870-71) (emphasis supplied).

In sentencing Appellant to death for the murder of Ms. Robinson, the trial judge complied with the applicable law, including the dictates of this Court's decision in Campbell v. State, 571 So. 2d 415 (Fla. 1990). The trial court expressly evaluated the aggravating factors and mitigating circumstances, and insured adequate appellate review of its findings by discussing the factual basis for each of the aggravating and mitigating factors. Campbell clearly recognizes that the factual question as to whether a mitigating factor was reasonably established by the evidence is a question for the trial judge, and the trial judge has the responsibility to assess the appropriate weight of any mitigation found. No abuse of discretion has been demonstrated with regard to the trial judge's factual findings or legal conclusions on any factors in the instant case.

This Court has repeatedly recognized that a trial judge may reject expert testimony, particularly when it is refuted by other evidence presented. Knight v. State, 746 So. 2d 423, 436

(Fla. 1998) (noting even uncontroverted expert testimony can be rejected, especially when it is difficult to reconcile with other evidence); Walls v. State, 641 So. 2d 381, 388 (Fla. 1994). Further, credibility determinations are within the purview of the trial court. Walker v. State, 707 So. 2d 300, 318 (Fla. 1997).

Regarding the mental or emotional disturbance mitigator, the trial court summarized all the expert evidence presented and was not convinced Appellant suffered from a mental illness. Dr. Toomer testified that Appellant was under the influence of an extreme mental or emotional disturbance at the time of the murder, but his diagnosis of borderline personality disorder was refuted by Drs. Danziger and Tressler. (V34:1759; V35:1799). Furthermore, Dr. Danziger's diagnosis of a mental illness, bipolar disorder, was refuted by Dr. Tressler. (V35:1800). Dr. Tressler could not substantiate a basis for bipolar disorder, especially where, as here, once drugs were removed, there was no evidence of mood fluctuation. (V35:1801-02). Dr. Tressler ultimately opined that Appellant was not suffering from an extreme emotional or mental disturbance when he murdered Ms. Robinson. (V35:1807).

The trial court was not bound by the findings of the defense experts, Drs. Toomer or Danziger, especially given the contrary evidence presented by the State's expert, Dr. Tressler,

and the facts of the case. See generally Rose v. State, 787 So. 2d 786, 802-03 (2001) (expert Toomer's finding of borderline personality disorder rebutted by State's theory Rose was sociopath). Here, both Drs. Danziger and Tressler found Appellant suffered from antisocial personality disorder. (V34:1758-59, 1770; V35:1795-96, 1805). Further, Dr. Toomer even admitted that Appellant met all of the required criteria for antisocial personality disorder. (V33:1582-87, 1599). Moreover, department of corrections records supported this conclusion as seven months prior to the murder, Appellant was diagnosed by the jail psychiatrist with antisocial personality disorder. (V34:1767, 1772).

Antisocial personality disorder is not a major mental illness, but a character disorder wherein the individual is presumed to be in control of his actions. (V34:1759; V35:1805). The murder in this case demonstrates a person who was in control of his actions, took multiple steps to accomplish the murder, and took a great deal of care to conceal his misdeed. In this case, the court simply found Dr. Tressler's diagnosis to be correct, and competent substantial evidence supports this finding. Thus, Appellant has failed to demonstrate an abuse of discretion.

Regarding the statutory mental mitigator that Appellant's capacity to appreciate the criminality of his conduct was

substantially impaired, both Drs. Danziger and Tressler did not find this mitigator applicable. (V34:1766; V35:1806-07). And while Dr. Toomer testified that Appellant's capacity was "impaired," he did not testify that it was *substantially* impaired as required by Florida Statutes, section 921.142(7)(e). (V33:1604). More importantly, Appellant could discern right from wrong and appreciated the criminality of his conduct when he murdered Ms. Robinson as evidenced by his efforts to conceal his crime by dumping his bloody socks and shoes, staging a burglary scene, and driving the victim's car to another location so it would appear she was not at home. (V33:1572-73; V34:1759; V35:1806-07).

This Court has affirmed the rejection of this mitigator under similar circumstances. In Pittman v. State, 646 So. 2d 167, 170 (Fla. 1994), the facts surrounding the murders undermined this mitigator where Pittman took steps to destroy evidence and effectuate a getaway. In Provenzano v. State, 497 So. 2d 1177, 1184 (Fla. 1986), this Court upheld the rejection of the conforming to the law mitigator based upon the facts of the case, in addition to the defendant's knowledge of right and wrong where Provenzano took steps to secret his crime. See also Nelson v. State, 850 So. 2d 514, 531 (Fla. 2003) (affirming trial court's evaluation and rejection of the statutory mitigators where the defendant's "purposeful actions are

indicative of someone who knew those acts were wrong and who could conform his conduct to the law if he so desired.”). This mitigator was not established by the evidence presented and Appellant’s actions belie its finding. There was no abuse of discretion. The trial court was reasonable in rejecting the offered statutory mitigation and its findings must be affirmed.[15]

[15] Although the trial court rejected the two statutory mental mitigators, the court did consider and give weight to Appellant’s mental health issues and drug use as nonstatutory mitigation.

ISSUE IV

APPELLANT'S DEATH SENTENCE IS PROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES.

In the instant case, the trial court followed the jury's recommendation and sentenced Appellant to death for the murder of Lois Corrine Robinson. The trial court found that four aggravating circumstances had been established: (1) Appellant was previously convicted of another capital felony or of a felony involving the use of or threat of violence to a person; (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (3) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (CCP); and the capital felony was especially heinous, atrocious or cruel (HAC). Appellant proposed the existence of seventy (70) separate mitigating circumstances, both statutory and nonstatutory. Based on the evidence, the trial court rejected the existence of the two mental statutory mitigating circumstances proposed by Appellant, but found numerous nonstatutory mitigating circumstances.[16]

[16] The trial court grouped a number of the seventy proposed mitigating factors into broader categories.

Appellant asserts that his death sentence is not proportionate when compared to other cases. This Court's proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the aggravating and mitigating evidence established in the instant case demonstrates the proportionality of the death sentence imposed. On appeal, Appellant challenges the applicability of the HAC and CCP aggravating circumstances. As discussed in Issue I and II, supra, the evidence overwhelmingly supports these two aggravating circumstances. Although Appellant concedes that the State proved the existence of the other two aggravating circumstances, prior violent felony and witness elimination, he asserts that these aggravators should not be given much weight because of the circumstances. Appellant's argument regarding these two aggravators is misplaced.

Appellant claims that the prior violent felony aggravator should be given less weight because the crime occurred after the murder and the victim was fortunate enough not to suffer serious injury. Prior to trial, Appellant pled guilty to, among other offenses, attempted felony murder, robbery, and aggravated battery with a deadly weapon. These crimes occurred shortly after Appellant murdered Corrine Robinson and stole her car. While driving the victim's car, Appellant revved the engine and struck Edgardo Fuentes from behind as he was walking across a parking lot. (V32:1473-75). Mr. Fuentes crashed his head into the windshield, shattering it, and was briefly knocked unconscious. When he woke up, Appellant and James Vella were approaching him and they then began kicking him in the face and chest and stole his wallet. (V32:1474). Fortunately, Mr. Fuentes only suffered minor injuries as a result. Although the attempted murder and other violent felonies occurred after the instant murder, the law is well established that Appellant's conviction for these crimes may be considered an aggravating circumstance by the trial court. See Knight v. State, 770 So. 2d 663 (Fla. 2000) (stating that "because the conviction for the other violent felony occurred prior to this penalty phase, the trial court properly considered it as an aggravating factor). Furthermore, even though the victim was fortunate to not suffer

serious injury, the attempted murder and aggravated battery qualify as "life-threatening" crimes which support the prior violent felony aggravator. See Mahn v. State, 714 So. 2d 391, 399 (Fla. 1998) (finding of a prior violent felony conviction aggravator only attaches "to life-threatening crimes in which the perpetrator comes in direct contact with a human victim").

Likewise, Appellant's argument that the witness elimination aggravator should not be given much weight is also misplaced. Appellant states in his brief:

> The recognition of appellant as the perpetrator of the [boat] theft is questionable given that Laura Schmid testified that Robinson believed it was the owner and his brother who took the boat and in any case could not identify the people. Thus, while appellant may have believed that the victim witnessed this offense this belief was unfortunately misplaced.

Initial Brief of Appellant at 66. Appellant fails to mention critical facts negating his argument; namely, that he pled guilty to the theft of the boat and told numerous people, and testified at trial, that the victim recognized him as the person that took the boat and he killed her because she recognized him.

In finding this aggravator, the trial court properly set forth the applicable law:

> The law is clear that, when the victim is not a law enforcement officer, in order for this aggravator to apply the state must prove that the sole or dominant motive for the murder was the elimination of the witness. *Urbin v. State*, 714 So. 2d 411 (Fla. 1998). Proof of the

> defendant's motive may be by circumstantial evidence, statements by the defendant, or a combination thereof. *Willacy v. State*, 696 So. 2d 693 (Fla. 1997); *Sireci v. Moore*, 885 So. 2d 882 (Fla. 2002).

(V13:1864). Here, Appellant's confession that he killed the victim because she recognized him as the boat thief is direct evidence of this aggravator. This direct evidence, as well as the other evidence, clearly establishes that the trial court properly found the existence of this aggravator and gave it great weight.

The four valid aggravating circumstances found by the trial court far outweigh the nonstatutory mitigation.[17] The nonstatutory mitigation established that Appellant had a deprived childhood and dysfunctional family, a history of drug abuse, and some mental health factors that did not rise to the level of statutory mental mitigation. When compared to the four weighty aggravating factors,[18] it is clear that Appellant's case is one of the most aggravated and least mitigated cases.

Appellant relies on a number of cases to argue that his death sentence is disproportionate, but these cases are clearly

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[17] Notably, the trial court found that the HAC aggravator, standing alone, was sufficient to outweigh the mitigating evidence. (V13:1876).

[18] This Court has previously held that the CCP and HAC aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999).

distinguishable. See Blakely v. State, 561 So. 2d 560 (Fla. 1990) (applying the no-longer applicable "domestic dispute" exception to find sentence disproportionate), disavowed by Evans v. State, 838 So. 2d 1090, 1098 n.6 (Fla. 2002); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (reversing adolescent's death sentence where two aggravators of prior felony and during the course of robbery were outweighed by mitigation evidence of severe physical abuse, neglect, youth and immaturity, marginal intellectual functioning and drug use); Farinas v. State, 569 So. 2d 425 (Fla. 1990) (reversing death sentence on proportionality grounds where the two aggravating factors were outweighed by mitigating evidence establishing existence of statutory mental mitigator and the murder occurred during a "heated, domestic confrontation"); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (finding that the mitigating circumstances of extreme emotional or mental disturbance, substantially impaired capacity to conform conduct, brain damage, and the emotional age of a child outweighed aggravation where HAC and CCP were "conspicuously absent"); Wilson v. State, 493 So. 2d 1019 (Fla. 1986) (reversing death sentence for murder because it occurred during heated, domestic dispute);[19] Kramer v. State, 619 So. 2d

[19] In Evans, supra, this Court "disavowed" the domestic dispute exception found in Wilson and Blakely, supra. See Evans, 838

274 (Fla. 1993) (court found death sentence for murder occurring as a result of a spontaneous fight between a disturbed alcoholic man and a man who was legally drunk was disproportionate where two aggravating circumstances, HAC and prior violent felony, were outweighed by mitigation of alcoholism, mental stress, and severe loss of emotional control).

The instant case is clearly distinguishable from the cases relied on by Appellant. Here, there are four strong aggravating circumstances: avoid arrest, HAC, CCP, and a prior violent felony for, among other offenses, attempted murder. The facts of the murder show a particularly heinous murder carried out with a great level of premeditation and utilizing numerous weapons against a helpless, elderly victim. Although Appellant presented evidence that he used drugs during the days surrounding the murder, the evidence, including Appellant's own statements, clearly indicate that he was not under the influence of drugs at the time of the murder and he demonstrated great recall of the details surrounding the murder. The trial court found that neither of the proffered statutory mitigators were applicable, and the nonstatutory mitigation consists primarily

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So. 2d at 1098 n.6; see also Floyd v. State, 34 Fla. L. Weekly S359, 363 (Fla. June 4, 2009) (noting that, in later years, this Court clarified its position and no longer recognizes "a domestic dispute exception in connection with death penalty analysis").

of a dysfunctional family upbringing, drug usage, and some conflicting mental health opinions.[20]

The State submits that Appellant's case is proportionate to other capital cases. See Davis v. State, 2 So. 3d 952 (Fla. 2008) (four aggravating circumstances, including HAC and CCP, outweighed three statutory mitigators and numerous nonstatutory mitigators); Merck v. State, 975 So. 2d 1054 (Fla. 2007) (finding death sentence proportionate where two aggravating factors of HAC and prior violent felony outweighed one statutory mitigator, the defendant's age, and numerous nonstatutory mitigators including defendant's difficult family background, his alcoholism and alcohol use on the night of the murder, and his capacity to form and maintain positive relationships); Rose v. State, 787 So. 2d 786 (Fla. 2001) (death sentence proportionate where four aggravators, including HAC and prior violent felony, outweighed substantial mental mitigation and depraved childhood); Spencer v. State, 691 So. 2d 1062 (Fla. 1996) (death sentence proportionate where two aggravating circumstances, prior conviction for a violent felony and HAC, outweighed two mental heath mitigators, and a number of nonstatutory mitigators including drug and alcohol abuse,

[20] As noted in Issue III, supra, Appellant was evaluated by three mental health professionals, each of which came to a different diagnosis.

paranoid personality disorder, sexual abuse by father, honorable military record, good employment record, and the ability to function in a structured environment); Lawrence v. State, 698 So. 2d 1219 (Fla. 1997) (death sentence proportionate where three strong aggravators, HAC, CCP, and under sentence of imprisonment, outweighed five nonstatutory mitigators including a learning disability, a low IQ, a deprived childhood, the influence of alcohol, and a lack of a violent history). As the trial court noted in the instant case, "the truly heinous, atrocious and cruel manner in which this murder was committed standing alone, even in the absence of the other aggravating circumstances, is sufficient to far outweigh the mitigating circumstances in this case." (V13:1876). Given the strong aggravation and relatively weak mitigation present in this case, this Court should find that Appellant's death sentence is proportionate.

ISSUE V

APPELLANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IS WITHOUT MERIT.

In his last issue on direct appeal, Appellant challenges the trial court's denial of his motion to declare Florida's death penalty statute facially unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). As this is a purely legal issue, appellate review is *de novo*. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

Prior to trial, Appellant filed motions with the trial court to preclude the death penalty and to declare Florida's death penalty statute unconstitutional because the statute: (1) does not require aggravating circumstances to be charged in the indictment (V1:74-77); (2) does not require a unanimous verdict to return a recommendation of death (V2:215-18); (3) does not provide adequate guidance to the jury in the finding of sentencing circumstances (V2:252-60); and (4) requires the judge to make the findings of fact necessary to impose a death sentence in violation of Ring. (V2:311-38).[21] The trial court denied Appellant's motions. (V3:426, 430, 444, 453).

[21] Appellant filed numerous other pretrial motions challenging various aspects of Florida's death penalty statute, but

Appellant asserts that the trial court erred in denying his motion to preclude the death penalty based on his argument that the indictment failed to allege a crime punishable by death and failed to require that the jury find sufficient aggravating circumstances and insufficient mitigating circumstances. Appellant's argument is misplaced and has been consistently rejected by this Court. See State v. Steele, 921 So. 2d 538 (Fla. 2005) (noting that the lack of notice of specific aggravating circumstances in an indictment does not render a death sentence invalid); Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005) (noting that this Court has rejected Ring in over fifty cases); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

Additionally, Appellant's Ring claim is without merit in the instant case given his prior felony convictions. Prior to the trial for the murder of Corrine Robinson, Appellant pled guilty to numerous crimes, including the attempted murder,

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Appellant only cites to these four motions in his Initial Brief at 75.

robbery, and aggravated battery of Edgardo Fuentes. Because the defect alleged to invalidate the statute - lack of jury findings as to an aggravating circumstance - is not even implicated in this case due to the existence of the prior felony convictions, Appellant has no standing to challenge any potential error in the application of the statute. See Deparvine v. State, 995 So. 2d 351, 379 (Fla. 2008) (rejecting argument that Florida's death penalty statute is unconstitutional because it allows a judge, rather than a jury, to find the aggravating factors for a death sentence, and because it does not require jury unanimity in making its recommendation; "claim is without merit since it is undisputed that [defendant] has prior felony convictions and this Court has held that the existence of such convictions as aggravating factors moots any claim under Ring"); Marshall, supra (citing the numerous cases wherein this Court rejected Ring arguments when the defendant had a prior felony conviction); Winkles v. State, 894 So. 2d 842 (Fla. 2005) (rejecting Ring claim when defendant has prior felony conviction and rejecting argument that aggravating factors must be charged in the indictment). Accordingly, based on this Court's prior precedent, the instant claim should be denied.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm Appellant's judgment and conviction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Michael S. Becker, Assistant Public Defender, Public Defender's Office, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida, 32118, on this 9th day of July, 2009.

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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