IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-976

RENALDO DEVON MCGIRTH

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

In July 2006, Patricia Murawski was a neighbor of James and Diana Miller. They lived in a gated community, The Villages, in Marion County. (V34, R1556, 1557, 1610). On July 21, Murawski testified that James Miller came into her yard, waving one arm, holding the other close to his body due to a previous stroke.[1] He was only wearing his underwear. (V34, R1561). Miller said his wife had been shot and to call 911. (V34, R1560, 1561-62). Another neighbor called 911 while Murawski attended to Miller's bloody head. (V34, R1562, 1563). Miller said three black men came into his home, shot his wife, and robbed them. (V34, R1569).

James and Diana Miller were married for forty-two years. (V34, R1576-77). In June 2006, James Miller said their thirty-eight year old daughter Sheila came to live with them after sustaining injuries in a car accident. Sheila lived with them so she could rehabilitate and regain mobility. (V34, R1609). The Millers purchased a wheelchair for Sheila. (V34, R1579, 1581, 1608).

Miller said Sheila has had a problem with drugs and alcohol since she was a teenager. He and Diana supported Sheila her

[1] Sheila Miller testified her father was a diabetic and had suffered through several strokes and heart attacks. (V35, R1765).

entire life but often disagreed on doing so. (V34, R1578-79). They purchased homes for Sheila and often helped her remove "crowds of people" from her condominium. (V6, R987; V34, R1606-07, 1608, 1622). They always ensured Sheila had a place to live. (V34, R1579). Diana handled all their finances. (V34, R1604). There were times Sheila stole money from them. (V34, R1626). Nonetheless, Sheila always called her mother when she needed help. (V34, R1627).

On July 21, Miller said three young black men came to his home. (V34, R1582, 1612). Sheila had been on the phone constantly that day. (V34, R1582). Sheila, confined in her wheelchair, answered the door. She embraced one of the three men[2] and let them in. Miller had never seen them before.[3] (V34, R1582-83, 1611, 1623). Miller had a 1:00 p.m. haircut appointment so he went to take a shower. (V34, R1584, 1612). When he came out of the bathroom and walked through the master bedroom, "a black man" with a gun grabbed him and dragged him to Sheila's bedroom. (V34, R1584, 1585, 1613, 1625). Diana Miller was lying on Sheila's bed, "spewing blood all over the place. She was just completely blood covered." She had been shot in the chest. (V34,

[2] Miller said this man had long hair and a beard. (V34, R1611-12, 1625).

[3] Sheila Miller testified the men called her for directions to the house which she gave with her father's help. (V35, R1742).

R1586, 1603). Diana was the only person in the room. (V34, R1626). She told him, “Don’t worry about it, Jim. Everything’s all right. I can handle it.” The man holding the gun told Miller to get on the floor. (V34, R1586). He lay on the floor facing the wall away from the bed. Miller had a problem hearing with his right ear and was unable to determine what the men were saying. (V34, R1587, 1614). Diana was taken out of the room. One of the men stayed with Miller “standing on my head.” He kept one foot on Miller’s neck, removing it periodically. (V34, R1588, 1614, 1618). Miller was told to keep his dog quiet or the dog would be shot. (V34, R1589, 1615). Miller was asked for, and he gave, his PIN to his bank account. (V34, R1615).

Diana was returned to Sheila’s bedroom after a short time. (V34, R1589, 1617). Miller said Diana was “rolled up in a ball at my feet and that’s when I figured she was dead.” (V34, R1589). Up until this point, he had not heard any gunshots. Miller saw a flash and was subsequently shot in the head.[4] He did not lose consciousness. (V34, R1591, 1619). Then, Diana was shot in the head. (V34, R1591-92, 1619). Miller had no idea where Sheila was during this time. (V34, R1603, 1613, 1616-17, 1620).

After the shooter left the room, Miller crawled through the bedroom window and went to Murawski’s house. (V34, R1592-93,

[4] The bullet was not removed from Miller’s head. (V40, R2534).

1598, 1620). He told deputies what had transpired, and that his 2000 Ford Windstar van was missing. (V34, R1604, 1605-06).

When Miller returned home from the hospital, he realized that his wallet[5] was missing as well as five hundred dollars from his bank account. (V34, R1604, 1624). Miller said that had both he and Diana died that day, Sheila would have inherited their estate, which was approximately three quarters of a million dollars. (V34, R1621). Shelia testified she was not aware of that fact. (V35, R1851). After Miller was released from the hospital, he obtained an injunction against his daughter. (V34, R1622).

Deputies Glenn Robinson and Angel Vargas found Miller at Murawski's home. (V34, R1628-29, 1630-31, 1638-39). Miller explained the events that had occurred, and that he had escaped through a bedroom window. (V34, R1632). Robinson and Vargas looked through the Millers' open window and saw Diana's body on the floor. She appeared to be breathing "deeply and heavily." There was blood on her back and underneath her mouth. Robinson entered the room through the window. (V34, R1633, 1642). Diana was unresponsive. Other deputies entered the room and helped

[5] Miller identified items stolen from him and Diana on July 21, 2006: wallets, medical ID necklace, medical ID bracelet, bottle of Nitroquick, credit cards, Diana's jewelry, Diana's golf hat, and a checkbook box. (V40, R2538-43).

Vargas clear the house for medical personnel to enter. (V34, R1634, 1635, 1645, 1647-48).

Deputies secured the Miller's home. (V34, R1652-53, 1654). Deputy Gabriel turned off the television set which was playing rap music "quite loudly." He unlocked the front door which had a deadbolt and doorknob lock. (V34, R1656). As soon as Miller's body was removed, the residence was secured. (V34, R1657-58).

Paramedic Robert Henderson found Diana Miller lying in a prone, face down position, taking three to four breaths per minute. She was totally unresponsive. (V34, R1661-62, 1663). She had puncture wounds to the front and back of her torso. Henderson and his partner moved Miller into the living room and manually ventilated her. (V34, R1663-64). The transport team arrived as Miller was being carried into the living room. (V34, R1664, 1669). Jamie Cowan, paramedic, intubated Miller and then transported her to the hospital. (V34, R1664, 1665, 1668).

Captain Tommy Bibb instructed available units to respond to the Millers' home. A "BOLO" was issued for the Millers' missing van. (V34, R1675-77, 1679). All personnel entering the crime scene were instructed to wear protective gloves and booties. (V34, R1683). Detective Rhonda Stroup was instructed to search the Millers' home for banking information. (V34, R1680). Stroup also talked to Mr. Miller. (V34, 1681-82). Detective McClane went to the Millers' bank. (V34, R1682).

Diana Bowles, bank branch manager, told Deputy McClane that the Millers had an account at her branch. (V35, R1697-98). She verified through a service provider that the Millers' bank cards were being used on the afternoon July 21, 2006.[6] (V34, R1700, 1701). On July 22, copies of bank records were obtained which indicated credit card use for the prior day. Bowles faxed copies to law enforcement. (V35, R1702, 1703, 1704, 1705, State Exh. 8). Attempts to use the cards occurred at an ATM in Gainesville[7] and at the Oaks Mall in Briar Meadows. (V45, R1703). $500.00 cash had been withdrawn from the Millers' account. (V35, R1704).

Kyle Hager worked at the information desk in the Oaks Mall in July 2006. (V35, R1706). He recalled two black men and a while lady in a wheelchair asked where the ATM's were located in the mall. (V35, R1708). One of the men had medium-length "dreads." (V35, R1708). The woman, who was wearing a sun visor,[8] had "a vacant look on her face. Like, she was maybe medicated at the time or she didn't seem to be there." (V35, R1709, 1710, 1712). She did not speak or make any gesture or movement at all. (V35, R1710, 1711-12).

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[6] Only a service provider can verify recent or "same day" transactions. (V35, R1699-1700).

[7] According to MSN Maps, Gainesville is about 65 miles from The Villages.

[8] Sheila Miller was wearing a red hat with large brim. (V38, R2325).

Deva Puranum worked at the Gold Valley Jewelry store in the Oaks Mall. (V35, R1713). On July 21, law enforcement requested to see the store's video surveillance security system. (V35, R1714). The video recording showed two black men in the store while another black man and a "white lady in a wheelchair" talked at the entrance to the store. (V35, R1715, 1717). The two men in the store, one with "dread locks," looked at the merchandise while the lady and man outside went from the ATM back to the store. (V35, R1716, 1717).

Jeffrey Stokes, loss prevention manager for K-Mart in Belleview, Florida, maintained the surveillance system. (V35, R1719, 1720). On July 21, law enforcement reviewed the tapes for that day, looking for "a female in a wheelchair with some other males." Stokes found made a copy. (V35, R1721, 1722). The tapes showed "the female in the wheelchair being pushed by a black male." They went into the electronics department, various aisles, and then exited the store. (V35, R1722).

Sheila Miller is the Millers' only child. (V35, R1731-32). She has battled drugs and alcohol her whole adult life. (V35, R1820). Her parents paid for her to go through a rehabilitation program. (V35, R1732-33, 1820). Her mother supported her financially her whole life. (V35, R1734-35). Her parents bought her places to live. On occasion, her mother helped her get rid of people she did not want in her home. (V35, R1736, 1822).

Sheila was severely injured in an auto accident in June 2006. (V35, R1737). Her parents sold her home and she moved in with them. Her mother rented a wheelchair and hospital bed for her. (V35, R1739). Sheila's cell phone broke during her auto accident. She used her parents' house phone to change her outgoing message that she could be reached at their home between 9:00 a.m. and 9:00 p.m. (V35, R1740-41, 1855).[9]

On July 21, Sheila gave McGirth, Roberts, and Houston directions to the house. (V35, R1742, 1795-96, 1824). When they arrived, Sheila unlocked the door. Her mother had been cutting trees in the yard. Diana entered the home with the three men following her. (V35, R1742, 1825). Sheila knew two of the men, "Pooney" and "Bro."[10] (V35, R1742, 1811-12). She did not know their real names. (V35, R1742). Sheila and McGirth used to be good friends. She had not seen him for two years because they had a "falling out." (V35, R1746, 1857). They knew each other through buying and selling drugs to each other. (V35, R1818, 1820). McGirth gave her a hug. (V35, R1746, 1796, 1812, 1818).

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[9] Detective Michael Mongeluzzo verified Sheila Miller's outgoing cell phone message. (V40, R2529-31).

[10] "Pooney" is the Appellant, Renaldo McGirth. (V35, R1743; V6, R1037-38, State Exh. 11). "Bro" is co-defendant, Theodore Houston. (V35, R2744; V6, R1035-36, State Exh. 12). Miller did not know the third co-defendant, Jarrord Roberts. (V35, R1744-45; V6, R1039-40, State Exh. 13). McGirth introduced Roberts as his cousin. (V35, R1844).

McGirth was carrying a backpack. (V35, R1746). Sheila and the three men talked in the living room. (V35, R1747). Her mother reminded her father to shower for his 1:00 appointment. (V35, R1826). Sheila wheeled herself into her bedroom to smoke. McGirth and Houston followed her in and closed the door. (V35, R1748, 1796, 1827). She asked Houston to open the window and put a fan in it while she smoked. (V35, R1749, 1827). McGirth told Houston to get Sheila's "present" out of the backpack. (V35, R1749, 1831). McGirth told Sheila he had drugs for her fiancé. (V35, R1831-32). Houston pulled out a roll of duct tape. (V35, R1749, 1796). McGirth turned around with a gun and pointed it at Sheila. (V35, R1749-50). McGirth said, "If you do what I say, nobody will get hurt." Sheila thought he was joking. (V35, R1750). She told them, "Stop it. This is getting ridiculous." Houston wrapped duct tape around her head, face, chin, hands and wrists. McGirth taped her mouth.[11] Sheila kept asking them, "Why are you doing this?" (V35, R1751-52, 1832-33). Sheila could not recall which man called for Diana to come to the bedroom. (V35, R1752). She heard her mother talking to Roberts in the living room. (V35, R1753, 1829). When Diana entered the bedroom, McGirth pushed her on to the bed. (V35, R1834). Sheila told her

[11] Detective Mongeluzzo did not observe any facial hair or arm hair missing from Sheila Miller in the areas where she was duct taped. (V40, R2532).

mother “to give all her money and all her stuff to him.” Diana said she only had $70.00. (V35, R1753, 1834). McGirth insisted the Millers had money because they lived in The Villages. (V35, R1754; V38, R2323). Roberts entered the room. He gave both the Millers’ wallets and car keys to McGirth. (V35, R1754, 1834, 1858). Diana asked Sheila what she had told these men about their lifestyle. (V35, R1835; V38, R2324). Diana agreed to get money. Sheila said her mother “threw her hands up like that and went to push herself out the door. And Pooney was standing in front of the door and that’s when he shot her at point blank range.” (V35, R1755, 1797, 1849). McGirth shot Diana in the chest. She fell on the bed and whispered, “Please call 911, you just shot me in the heart.” (V35, R1755, 1836). McGirth instructed Houston to retrieve the shell casing and put it in his pocket. (V35, R1800, 1838). Sheila started crying. McGirth wheeled her into the bathroom. (V35, R1756, 1837). McGirth put a gun to Sheila’s head and told her that, “if [you] don’t shut up, [I’m] going to take care of [you].” Diana told her, “Don’t worry. I’m all right. I’m all right.” (V35, R1756).

Sheila saw the men take her mother into the computer room. (V35, R1758). Diana stumbled into the wall as she walked by. (V35, R1839). McGirth told Diana to order some phones on the Internet. Diana did not know how to do that. Houston was ransacking the house. McGirth told Houston to “wipe down

everything and make sure that there was no fingerprints anywhere." (V35, R1759, 1838). Sheila pulled the duct tape off her mouth. She chewed it off her hands and threw it into the tub. (V35, R1760, 1854). She did not say a word. (V35, R1798).

McGirth returned to the bathroom and took Sheila to the computer room. He wanted her to get on the computer "because my mom - - wasn't functioning." (V35, R1760, 1799). Diana was still conscious and talking. (V35, R1761). Sheila could not find the phones that McGirth wanted to buy. Diana sat in a chair behind Sheila while she searched the Internet. (V35, R1763). Sheila called 411 "with Pooney having the gun at my head" to get the telephone number to Nextel. (V35, R1764, 1799). McGirth said they would buy the phones at the store. (V35, R1764). Sheila was told to get a credit card in order to get money at the bank. Diana pleaded with them to take her instead, since Sheila was unable to walk. Mr. Miller was in the shower while these events were taking place. (V35, R1765, 1841).

Sheila saw Roberts bring her father into her bedroom. Roberts instructed Miller to get on the floor. (V35, R1839, 1841, 1843). Miller said he had to go to the bathroom. Sheila and her mother pleaded with the men to allow him to go due to health problems. (V35, R1766, 1843). They allowed Miller to go into his bedroom with his dog. Miller secured the dog because the men were afraid of it. (V35, R1766). Miller was then

returned to Sheila's room and placed on the floor. (V35, R1767). Houston moved Sheila out of the computer room while her mother remained behind. Diana asked for some water as she lay down on the floor. (V35, R1767, 1844). She told Sheila, "Don't worry. Just do what they say. Everything is okay. I'm okay. I'm okay." She was conscious the whole time. (V35, R1767).

McGirth told Houston to put Sheila in the van. Houston had problems getting her through the door. McGirth pushed Sheila through the door. Roberts picked her up and put her in the van. Her wheelchair was placed in the back. (V35, R1768, 1799). Sheila asked, "Why am I going?" She was told, "They were taking me as a hostage because if the ATM machine didn't work, they were going to blow me right there." (V35, R1850).

Sheila said McGirth and Houston returned to house while Roberts stayed in the van. McGirth told Roberts to move the van from across the street into the Miller's driveway. (V35, R1768-69). McGirth and Houston exited the house. Sheila did not see who locked the door behind them. (V35, R1853). McGirth drove the van while Houston followed in the car the three men had arrived in. (V35, R1769, 1800). They went to a local ATM in the neighborhood. Sheila was removed from the van, put in her wheelchair and instructed to get some money. She was told, "There was another person at my house and that if I didn't do what they said that they would take care of my parents." (V35,

R1769). Diana had given McGirth her PIN. (V35, R1770, 1860). Sheila used the PIN and withdrew $500.00. McGirth gave Roberts some of the cash. (V35, R1770-71, 1801).

The group went to a local K-Mart. (V35, R1771, 1802). McGirth handed the gun to Roberts. He told Roberts if anything happened, “to make the call and have my parents taken care of.” (V35, R1772, 1802). Sheila was told another person was back at her house waiting on the other side. (V35, R1777). Roberts lifted Sheila out of the van. McGirth and Sheila went into the K-Mart looking for phones. (V35, R1772, 1802). She did not scream or call any attention to herself. (V35, R1803). As they left K-Mart, they rode together in the Miller’s van and left the other vehicle behind. (V35, R1772, 1777, 1803). McGirth gave some money to Houston. (V35, R1771).

They went to Oaks Mall in Gainesville, taking turns pushing Sheila around. (V35, R1775, 1779, 1804). McGirth and Sheila entered a shoe store. She gave the clerk her father’s credit card because she knew the clerk would ask for identification. When they could not produce identification, McGirth told the clerk they’d be back the next day for the shoes. (V35, R1780, 1807). Sheila did not try to alert anyone. She was repeatedly told not to try “anything funny.” And, “Pooney had the gun on him.” (V35, R1780, 1804). Sheila went to two ATM’s in the mall. (V35, R1780-81, 1805). She knew they would not get any more

money as there was a limit for the day. In addition, they only had one PIN, and did not have the PINs for the other bank cards. (V35, R1781). Sheila told the men the cards were being tracked when the ATM alerted them the card being used was "unauthorized." She thought her parents were still alive. (V35, R1781, 1805, 1846). Roberts went to the van and returned with more credit cards. (V35, R1782-83). The cards did not work at the mall so they went to a bank down the street. (V35, R1783). Sheila tried unsuccessfully to use the card at the drive-thru ATM. (V35, R1785).

The group went to a local convenience store. (V35, R1786, 1805). McGirth went in the store while the others remained in the van. Sheila, Houston, and Roberts saw a deputy's car nearby. Roberts and Houston panicked. (V35, R1786, 1806). When McGirth got back in the van, he was alerted that a deputy was nearby. He took off driving with the deputy in pursuit. (V35, R1788).

McGirth eventually pulled over. One of the men said, "Just shoot the cop." McGirth said, "I got it handled." (V35, R1789, 1858). As the deputy walked up to the back of the van, McGirth took off driving again. Sheila said, "We were flying ... going head on head with cars." (V35, R1789, 1809). Sheila saw someone step out of the bushes and place stop sticks in the road. (V35, R1790, 1810). The tires blew out and the van rolled several times, landing on top of a car. (V35, R1790, 1810). McGirth gave

Houston the gun and told him to “off” Sheila because she could identify them. (V35, R1790). Houston was the last person holding the gun. (V35, R1791, 1811). After the crash, Houston ended up underneath the van. (V35, R1811).

Sheila hit her head, and was not aware of what was happening. (V35, R1791, 1807-08). When she came to, McGirth, Houston, and Roberts were gone. (V35, R1791).

In 1989, Sheila Miller was convicted of a felony in the State of Michigan for possession of cocaine. In October of 2006, she was convicted of uttering seven forged checks. She was currently paying restitution on them. (V35, R1792, 1807). At one point, she had stolen her mother’s identity to obtain a credit card. Her father got an injunction against her. (V35, R1807).

Sheila Miller said “everyone” including McGirth, knew her parents were retired. McGirth knew they provided a good life for her, and that her mother gave her money when she needed it. (V35, R1835).

Detective Jason Heinrich heard a “BOLO” for a red Ford Windstar van. (V36, R1871-72). Heinrich spotted the van at a grocery store. He parked his marked patrol car across the street, alerted police dispatch, and waited for other units to arrive. However, when the van left, Heinrich followed. (V36, R1873-74, 1875). Half mile down the road, the van pulled over. Heinrich, holding his shotgun, ordered McGirth to shut off the

engine. McGirth did not comply, and proceeded to accelerate[12] back on the road. (V36, R1876). Further up the road, stop sticks were tossed in the van's path which caused the tires to deflate. Another patrol car "pitted"[13] the van, causing it to spin out of control and roll over. (V36, R1879-80, 1898). McGirth and Roberts exited through the van's windows, each one running in opposite directions. (V36, R1880-81). Houston was thrown underneath the van. (V36, R1883, 1893). Heinrich placed Houston in custody.[14] (V36, R1894-95). Houston's pockets contained a cell phone, keys,[15] cash, and shell casings. (V36, R1883, 1896-97). The items were placed in a bag and given to Detective Ross. (V36, R1881, 1882-83). Heinrich found a handgun underneath the van as well as a "hysterical" white female still inside the van. (V36, R1887, 1888). Deputies secured McGirth and Roberts. (R1882).

Lieutenant Bill Sowder responded to the crash scene where the van overturned. (V36, R1900, 1995). Sowder directed personnel to collect evidence and document it on a property form

[12] Heinrich estimated the vehicles were traveling in excess of 100 miles per hour. (V36, R1879).

[13] Precision Immobilization Technique.

[14] Heinrich later transported Houston to the hospital for a knee injury. (V36, R1889).

[15] The keys belonged to a Ford Focus. (V36, R1904).

which established the chain of custody. (V37, R2100). Detective Ross assisted Sowder. (V36, R1901; V37, R2100, 2101). Ross gave Sowder the items Heinrich had collected from Houston. (V36, R1901).

Sowder photographed the crash scene, the interior and exterior of the van, and two credit cards located near the van. (V37, R2101-02, 2103-04). One of the credit cards belonged to James Miller. (V37, R2109). Sowder photographed the following items located inside the van: a man's wallet, credit cards, chip bag, a red ball cap, and a plastic bag containing bottles of water. Sowder photographed a firearm located at the rear of the van. (V37, R2105, 2106). He recovered a live .25 caliber round from the interior. (V37, R2118).

Deputy Damon Baxley responded to Monroe Regional Hospital where Houston was taken for a knee injury. Baxley took over custody of Houston. (V36, R1889, 1906). Houston's clothing was collected, placed in evidence, and given to evidence technician Lisa Berg. (V36, R1907, 1924, 1928). There were indications of blood on Houston's shirt. (V36, R1925). Berg conducted gunshot residue ("GSR") and trace metal tests on Houston. (V36, R1908, 1918-19, 1929, 1930). There was a trace metal reaction on Houston's hands. (V36, R1930).

Lisa Berg conducted "GSR" and trace metal tests on Sheila Miller. (V36, R1920, 1922-23). Results of the trace metal test

indicated trace metal on the tip of Miller's left thumb and inner digit of her right thumb. (V36, R1923).

Agent David Rasnick joined in the pursuit of the Millers' van. (V36, R1943, 1947). He was aware stop sticks were going to be used to slow the pursuit of the van. The vehicles were travelling at 105 miles per hour. (V36, R1948, 1949). Deputy Dodd deployed the stop sticks. (V36, R2055). After the van hit the stop sticks, Rasnick executed the "PIT" maneuver, which sent the van into a spin. (V36, R1951, 1954). The van spun and rolled to a stop. McGirth and Roberts exited, each one running in the opposite direction. (V36, R1951). Rasnick chased Roberts, secured and handcuffed him, and him placed in a patrol vehicle. (V36, R1954, 1957).

Ronald Cyr was mowing his yard on July 21 when a young, black male with "bushy hair" and a mustache appeared and offered him money if Cyr would drive him in to town. (V36, R1959-60, 1961, 1963, 1964). Cyr declined and said he was working. He observed helicopters flying over the area. McGirth asked for a drink as he headed into Cyr's workshop area. Cyr offered him water from the hose as McGirth continued to inch his way into Cyr's workshop. (V36, R1961-62). Cyr's wife directed deputies toward the workshop where they apprehended McGirth. (V36, R1963, 1966, 1978-79).

Detective Michael Sands collected the contents of McGirth's pockets which included money, a lighter, and pieces of paper containing phone numbers. (V36, R1976). The contents were placed in a bag and turned over to an evidence technician. (V36, R1978). McGirth told Sands his name was "Michael McGirth" and that he was seventeen-years-old. (V39, R2349).

Detective Brandon Spillman reported to Cyr's property after McGirth was apprehended. (V36, R1990, 1992-93). Spillman searched the barn and found a black tank top, which he turned over to Lieutenant Sowder. (V36, R1993-94).

Lieutenant Ruamen Delarua, K-9 unit, saw McGirth and Roberts flee in opposite directions after the van overturned. (V36, R2039, 2042). Delarua issued K-9 warnings[16] to Roberts. (V6, R939; V36, R2042, 2050, State Exh. 42).[17] Delarua deployed his K-9 German Shepard, "Titan," after Roberts refused to stop. (V36, R2042). Titan chased Roberts for approximately 100 feet. Delarua recalled Titan after he lost sight of the dog and Roberts. He placed Titan on a tracking harness. (V36, R2044-45). Titan alerted Delarua to a golf visor[18] which Delarua saw Roberts

[16] The warnings consist of the following: "Marion County Sheriff's K-9. You are under arrest. Surrender or I'll release the dog." These warnings are given at least twice. (V36, R2044).

[17] Deputy Michael Dodd was Lieutenant Delarua's backup. (V36, R2056).

[18] Deputy Joshua Parker collected the hat. (V36, R2050-51, 2052).

wearing as he fled. (V36, R2045-46, 2047). Titan tracked Roberts to a bushy area approximately one mile from the crash location. (V36, R2048, 2056). Titan bit Roberts on the right thigh and held him with his teeth.[19]

Deputy Michael Dodd responded to the location and handcuffed Roberts. (V36, R2048, 2057). Dodd searched Roberts and collected various items which included: James Miller's wallet; Miller's medical ID bracelet; and a pill bottle containing Nitro Quick ("nitroglycerin"). Dodd submitted the items to Deputy Walter Ray.[20] (V36, R2057; V37, R2067-68, 2069). Ray submitted the items to evidence technician, Lisa Berg. (V37, R2069, 2072, 2080).

Deputy Ray took custody of Roberts. (V36, R2058; V37, R2067). He rode in the ambulance that transported Roberts to the hospital. (V37, R2069).

Lisa Berg collected Roberts' clothing at the hospital. (V37, R2074). His shirt contained suspected blood. She found $275.25 in his shorts' pockets. (V37, R2075, 2076). A trace metal test revealed a reaction on Roberts' right thumb. A gunshot residue test was also conducted. (V37, R2079).

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[19] Roberts was treated at Monroe Regional Medical Center for the bite wound. (V36, R2049).

[20] Deputy Ray submitted the items to evidence technician Lisa Berg. (V37, R2069).

After McGirth's arrest, Debra Wilcox, forensic DNA technician trainee, photographed McGirth, collected his clothing, and conducted gunshot residue ("GSR") and trace metal tests. (V36, R1998, 2000, 2001, 2012). Wilcox observed trace metal reactions on McGirth's hands. (V36, R2005). Specifically, "a trace metal reaction was observed on suspect Renaldo McGirth's left palm, left pointer finger, left top of hand down to the area between pointer finger and third finger. A trace metal reaction was also observed on the suspect's right top of the thumb, right top and bottom of pointer finger, the middle fingertip, the ring fingertip and around the entire ring finger." (V36, R2005).

Dedrea Joyner, Marion County Sheriff's Office, prepares all lab and evidence submissions sent to the Florida Department of Law Enforcement ("FDLE") for analysis. In July 2006, she was a property intake technician. (V37, R2082). She verified the items of evidence collected in this case and placed them into evidence. (V37, R2084-87).

Ashley Clark, evidence technician, packaged some of evidence collected, including a bottle of nitro quick pills and a medical bracelet. (V37, R2089-90).

James Burgess loaned his car to Renaldo McGirth in July 2006. A woman staying in the same motel as McGirth vouched for him and said she knew him. (V37, R2091-92, 2093, 2096). There

were at least three people in the same room with McGirth. (V37, R2097). Burgess was not at the motel when McGirth and the others drove off with his car. (V37, R2097).

On July 21, Lieutenant Richard Balius located the vehicle abandoned by McGirth at the Belleview K-Mart. He found a black backpack located on the back seat. (V37, R2123-24, 2140). Detectives Gary Bush and Christine Peters assisted Lt. Balius. (V37, R2124, 2127). Det. Bush followed the vehicle as it was towed to the Marion County Sheriff's impound yard. (V37, R2128). Sergeant Thomas Calhoun took custody of and secured the vehicle. (V37, R2131-32).

Lisa Berg returned to the Miller's home on July 22 and took photographs. (V37, R2134-35, 2139). She collected bloody clothes. (V37, R2135-36). A pair of shorts contained a projectile in the pocket. (V37, R2136-37). On July 25, Berg examined the Ford Focus vehicle at the impound yard. (V37, R2139; V39, R2354). She photographed the black backpack located in the back seat. (V37, R2140). She photographed a roll of duct tape lying on the front passenger side floorboard. (V37, R2141).

Berg searched the backpack and found several articles which included the following: a towel, cordless telephones, keys, jewelry, checkbook box containing the Millers' address, bills, and duct tape. (V37, R2143-2150). Berg was present when McGirth's fingerprints were taken. (V37, R2151).

Theodore Houston[21] agreed to testify if he was permitted to withdraw his plea. (V38, R2201-02, 2297-98, 2301, 2333). Houston consulting with his lawyer. The parties filed a stipulation to vacate the plea and set Houston's case for trial. (V38, R2229).

Houston[22] was a friend of McGirth and Roberts, who are cousins. (V38, R2237, 2238, 2240). On July 21, 2006, McGirth and Roberts came to his neighborhood in a car that McGirth had obtained the day before. (V38, R2240-41). Houston joined them, and the three men drove towards The Villages. McGirth told Houston he had stored phone numbers in Houston's phone and needed to retrieve them. McGirth said to "ride with him to the mall" that "he was going to get him[self] a cell phone." (V38, R2241-42, 2243). Houston saw a black book bag in the back seat of the car. (V38, R2245).

The three men went to Wal-Mart where Roberts bought a package of tank tops. (V38, R2244-45, 2308). They went to a Dollar Store, but Houston remained in the car. (V38, R2246, 2308). McGirth and Roberts exited the store with a bag. Houston could not recall who was holding the bag, but McGirth asked him for the book bag in the back seat. McGirth put the Dollar Store

[21] Houston's attorney Michael Graves was present during Houston's testimony. (V38, R2224).

[22] Houston denied having the nickname "Bro." He admitted he wore his hair in long dreads at the time of the murder. (V38, R2301).

items inside. (V38, R2246-47, 2325). McGirth asked for Houston's phone. He made a call and got directions "to a house." (V38, R2248). When they arrived at the Millers', Houston saw "an old lady" in the yard. (V38, R2249). McGirth exited the car and asked Diana Miller if Sheila was home. (V38, R2249, 2251). Miller said yes. McGirth told Roberts and Houston to get out of the car and come with him. Sheila Miller[23] answered the door in her wheelchair. She gave McGirth a hug. (V38, R2250, 2251). McGirth and Sheila talked about her injuries. (V38, R2251). McGirth asked Sheila if he could talk to her alone. They went to a back room while Roberts and Houston remained in the living room. (V38, R2252). Eventually Houston went to Sheila's bedroom, knocked on the partially opened door, and asked to use the bathroom. (V38, R2252, 2253, 2323). Sheila asked Houston to open the bedroom window and put a small fan in it. (V38, R2254). McGirth asked Houston to get some tape[24] out of the book bag that McGirth had carried into the room. (V38, R2255). After Houston got the tape out, he saw McGirth pointing a gun at him and Sheila, "because I was right next to her." (V38, R2256). McGirth directed Houston to tape Sheila's hands and mouth. (V38, R2257). Houston attempted to tape Sheila's mouth. He told McGirth, "I

[23] Houston said he did not know Sheila by name. (V38, R2250).

[24] The plastic cover on the duct tape had the Dollar General Store's logo. (V38, R2258).

can’t tape her, I can’t do it.” McGirth then taped around Sheila’s mouth “several times” and wrapped her wrists together. (V38, R2259-60, 2319). McGirth rolled Sheila to face the window. Houston and McGirth left the room. Mrs. Miller was walking towards Sheila’s bedroom. Roberts was standing in front of her. (V38, R2260-61). Miller walked by Houston and McGirth. She entered Sheila’s room and asked her if she was okay. When Diana turned around, McGirth had the gun “pointed towards her head.” (V38, R2261).

McGirth asked Diana Miller for money. She said she did not have much around the house. Miller “shifted her weight from one foot to another. She told him, fine just take it.” Then, “McGirth shot her in the chest.” (V38, R2262). Miller grabbed her chest while McGirth pushed her onto the bed. McGirth directed Houston to find the “bullet shell.” The gun jammed. McGirth took the clip out of the gun, removed a bullet, and told Houston to re-load it. (V38, R2263, 2304, 2320). McGirth rolled Sheila to the bathroom and shut the door. (V38, R2264, 2266, 2270). Houston laid the gun down by the door. When McGirth asked him where the gun was, Houston said he “didn’t want nothing to do with it.” McGirth loaded the gun, pointed it at Houston, and told him he “already has something to do with it.” He gave Houston a rag and instructed him to “wipe down everything you touched or I’ll shoot you, too.” (V38, R2264-65, 2273). Houston

wiped down the window sill and fan in Sheila's bedroom. He retrieved the cartridge case from the floor and put it in his pocket. (V38, R2265, 2320). Houston was not sure where Roberts was during this time. (V38, R2266, 2327).

Roberts came to Sheila's bedroom. McGirth told Roberts to bring Mr. Miller to Sheila's room after he got out of the shower. (V38, R2266-67, 2321, 2327). Houston did not see who actually brought Mr. Miller into the bedroom. (V38, 2267, 2322). James Miller asked "what was going on" when he saw his wife bleeding on the bed. McGirth held the gun to Miller's head and instructed him to lay face-down on the floor. (V38, R2267-68, 2323). One of the Millers' dogs ran under the bed while another lay beside him. McGirth told Mr. Miller he was going to shoot the dog. (V38, R2275). Miller was told to take this dog back to his bedroom on the other side of the house. (V38, R2276). McGirth told Houston to take a gold necklace off Miller which had a "hospital sign" on it. (V38, R2276, 2320). Houston gave it to McGirth. Miller did as he was told and returned to Sheila's bedroom. (V38, R2276).

McGirth told Roberts to search the house for a wallet. He returned with a wallet and car keys. McGirth put the keys in his pocket and looked through the wallet. (V38, R2268-69, 2270, 2328-29). McGirth asked which credit card could be used at an ATM. Houston did not remember which one of the Millers responded

to McGirth. (V38, R2270). McGirth took Diana Miller to the computer room. Sheila was brought there, as well. (V38, R2271, 2272). She no longer had duct tape on her mouth and wrists. (V38, R2272). McGirth instructed Houston to get the duct tape wrappings off the bathroom floor. Houston did not recall where he put them. (V38, R2273).

McGirth told Sheila to get on the computer and find where to purchase "Boost phones." (V38, R2274). Then, McGirth instructed Sheila to get off the computer. They would go to an ATM. Sheila said they could use the ATM in The Villages because it did not have a camera. (V38, R2277, 2324). Mrs. Miller gave them the PINs to their credit cards. (V38, R2277).

Sheila told McGirth her parents' van was parked across the street. McGirth told Roberts to get the van. McGirth told Houston to get the black book bag and a massage kit. (V38, R2278). McGirth told Mrs. Miller to go back to Sheila's room, "she was ... crawling." (V38, R2283). Houston saw McGirth "standing over somebody." He heard a gunshot as he was walking out of the Millers' house. McGirth called Houston back into the home and instructed him to retrieve a shell casing from the hallway floor. McGirth said they would "throw them away down the road." (V38, R2280, 2320). He saw that both the Millers were in the same room. He put the shell casing in his pocket, and retrieved the massage kit and the book bag. (V38, R2281, 2321).

Houston turned up the volume on the television. (V38, R2282). As he was walking out the front door, Houston heard another gunshot. (V38, R2281). Roberts was in the van at this time. (V38, R2311).

McGirth gave Houston the keys to the car they had arrived in and instructed him to follow behind them. Houston followed the van to the ATM in The Villages. (V38, R2283-84, 2303). McGirth, Roberts, and Sheila went to the ATM. McGirth pushed Sheila in her wheelchair. After they returned to the van, Roberts lifted Sheila and put her in the seat. McGirth got in the driver's seat. (V38, R2284).

Houston followed the van to K-Mart in Belleview. (V38, R2285). After they parked, McGirth got in the car with Houston. He instructed Houston that, if Sheila asked, Houston was to tell her that McGirth had called an ambulance for her mother. Houston asked to go home. McGirth said no, because "I might tell my daddy what happened." (V38, R2286). Houston got in the van. Roberts had already taken Sheila out. McGirth took Sheila into the K-Mart while Roberts and Houston waited in the van. Roberts gave Houston some money. (V38, R2287).

McGirth and Sheila returned to the van. The four of them drove towards the Gainesville Mall. (V38, R2288, 2289). Sheila asked if an ambulance had been called for her mother. Houston told her yes. (V38, R2289). The foursome went to several stores.

At some point, McGirth and Sheila were alone. Houston walked into a jewelry store with Roberts following him. (V38, R2290-91). The group re-joined and went back to the van. (V38, R2291).

Houston described Roberts holding a lighter to credit cards in an effort to melt them. (V38, R2292). The group stopped at another ATM. McGirth instructed Sheila to get some money. Sheila told McGirth the cards were being tracked when the ATM did not dispense any cash. (V38, R2292, 2324). They continued driving on SR441 heading towards Ocala. (V38, R2293). Sheila used Houston's phone to buy drugs. (V38, R2325). They stopped at a convenience store. McGirth went in the store while the other three waited in the van. (V38, R2293, 2308). Houston saw a police car drive up behind the van, then park down the block, watching the van. (V38, R2293). McGirth got back in the van and noticed the police car. He drove down SR441 with the police car following. When the police car's lights went on, McGirth initially pulled over. He threw the handgun in Houston's lap. (V38, R2294, 2320). Then, "we was on a high speed chase." (V38, R2294).

Houston was still holding the gun when the van overturned. McGirth told him to "kill Sheila. And I told him no ... I'm not going to kill her. She was screaming and crying." (V38, R2295, 2320). The van landed on top of Houston. He was arrested and taken to the Sheriff's office. (V38, R2295-96).

Houston initially lied to police about his presence in the Miller's home as well as the events that took place. (V38, R2296, 2309-11, 2333). He wanted his father to be with him during questioning. (V38, R2296).

Dr. Julia Martin, medical examiner, initially examined Diana Miller's body at the hospital on July 21. (V39, R2359-60). There was a lot of blood, but she noted signs of resuscitative efforts. Miller had a gunshot wound to her chest and another to the back of her head. (V39, R2360).

Dr. Martin performed the autopsy the next day. (V39, R2361). There was an entrance gunshot wound to the back of Miller's head. (V39, R2363). It entered through her skull, into the brain, stopping in the right frontal lobe. The muzzle of the gun did not have contact with her scalp. (V39, R2366, 2367). Martin removed the projectile. (V39, R2367). Miller had a second gunshot wound to her chest. The bullet entered the left side of her chest, went through her left lung, and exited through her back. Martin did not recover this projectile. (V39, R2370). Dr. Martin said the gunshot wound to Miller's chest occurred first as there was accumulated blood in the chest cavity. The bullet did not injure the aorta or puncture the pulmonary artery. The gunshot wound to Miller's head rendered her "immediately unconscious" and she died shortly thereafter. (V39, R2374). Dr.

Martin concluded Miller died as a result of the gunshot wound to her head. (V39, R2375).

Detective Bill Sowder attended Miller's autopsy and took custody of the recovered projectile. (V39, R2380). He participated in the collecting of DNA samples from Sheila Miller and Theodore Houston. (V39, R2381, 2382, 2383). Evidence technician Shelby Roberts collected DNA samples from Jarrord Roberts and Renaldo McGirth. (V39, R2385, 2386).

FDLE analyst James Pollock examines evidence for the presence of blood, semen, or other body fluids. (V39, R2410, 2411). He received known DNA standards from Diana Miller, Sheila Miller, Renaldo McGirth, Jarrord Roberts, and Theodore Houston. (V39, R2423, 2424, 2425). Pollock examined the following items of evidence: Roberts' blue jean shorts, white t-shirt, white cap, and a pair of white Jordan shoes;[25] Houston's blue jean shorts, white t-shirt, belt, and a pair of white Nike shoes; McGirth's black tank top, black shorts, and a belt. (V39, R2419, 2426). All these items tested positive for the presence of blood. (V39, R2427). The DNA found on each of those sets of clothing matched the DNA profiles of the person identified as wearing that clothing. (V39, R2427).

[25] Roberts clothing and shoes did not contain either James Miller's or Diana Miller's DNA. (V39, R2441, 2454-55).

Pollock examined various items for “touch DNA.” (V39, R2430). These items included: a Ziploc baggie containing a black wallet; a .25 caliber semiautomatic handgun, the magazine, and a cartridge; and a piece of duct tape found in the black backpack recovered from the Ford focus. (V39, R2430-31). The Ziploc baggie contained a partial DNA mixture which included Sheila Miller as a contributor. Roberts’ DNA did not match but could not be excluded. McGirth and Houston were excluded as possible contributors. (V39, R2432-33, 2435, 2443, 2445). The handgun contained a DNA mixture. The major contributor matched Roberts. (V39, R2436-37, 2448). Pollock did not get any other results that were interpretable. (V39, R2436-37). The handgun and cartridge did not have any blood DNA on them. (V39, R2446). The piece of duct tape matched the DNA profile of Sheila Miller. (V39, R2439). The DNA results from testing the magazine were not interpretable. (V39, R2446).

Daniel Radcliffe, FDLE, is a gunshot residue analyst. (V39, R2459-60). He examined the gunshot residue kits used on Sheila Miller and Jarrord Roberts. He did not find any gunshot residue. (V39, R2464-65, 2466). Radcliff explained there are various reasons why a gunshot residue test may be negative: 1) the person did not handle the gun; 2) the person had an opportunity to wash their hands before they were sampled; 3) the ammunition did not contain the elements that were being tested; and 4)

passage of time between the time a gun was fired and a gunshot residue test was conducted. (V39, R2466, 2476). A trace amount of gunshot residue was found in the kit used on Houston. (V39, R2467-68). This could have resulted from Houston handling the gun, firing the gun, or being in close proximity when the gun was fired. (V39, R2468). The residue was found on the back of Houston's right hand. (V39, R2469). The residue kit used on McGirth indicated a trace amount of gunshot residue on McGirth's left palm. (V39, R2469-70, 2482). Radcliff said a small caliber bullet produces a small amount of gunshot residue. (V39, R2471, 2484). A .25 caliber bullet is small, with a .22 being the only caliber smaller. (V39, R2472).

FDLE firearms and toolmark analyst Mysaa Farhat examined the .25 caliber semiautomatic pistol. (V39, R2486, 2488-89). The gun had a safety device, which, when used, would have blocked the gun from firing. (V39, R2490). Farhat test fired the weapon four times. These four projectiles were compared with those collected as evidence by the Marion County Sheriff's office. There was a "strong similarity" between the test-fired bullets and spent casings, indicating a likelihood that they had been fired from the same firearm. (V39, R2491-92). Farhat concluded the bullet collected from Houston's shorts was fired from the .25 caliber semiautomatic pistol. (V37, R2137-38; V38, R2265, 2320; V39, R2494, 2495). The projectile removed from Miller's

head at her autopsy was fired from the .25 caliber semiautomatic pistol. (V6, R936; V38, R2495, 2498, State Exh. 95).

Charlotte Allen, FDLE latent print analyst, identified Houston's fingerprint on the role of duct tape found in the black backpack. (V6, R936; V37, R2149; V39, R2507-09, State Exh. 80).[26] Roberts fingerprints were identified on at least six paper items found in Mr. Miller's wallet. (V6, R935; V39, R2511, 2513, State Exh. 53). McGirth's fingerprints were identified on two papers items from Miller's wallet. (V6, R935; V39, R2515, 2519, State Exh. 53). Allen did not identify any fingerprints on the .25 caliber handgun. (V39, R2517-18).

McGirth called Jeanne Dembitsky as his first witness. At shortly after 1:00 p.m. on July 21, Dembitsky saw "three late-teenage gentlemen, African-American gentlemen, and one middle-age Caucasian woman" exit a red minivan parked at a convenience store located near The Villages. The woman walked "unassisted" into the store. (V40, R2568, 2569-70, 2572). Dembitsky did not notice if the woman walked normally, only that she was "unassisted." (V40, R2572). The woman stayed at the counter while the three men collected snacks and put them on the counter. The men were "quite excited, very upbeat" while the

[26] The court reporter typed State Exhibit "8" (V39, R2507) rather than the correct exhibit number for the duct tape, which is State Exhibit "80." (V6, R936; V37, R2149).

woman seemed “a little unhappy with their exuberance.” (V39, R2571).

Janice Johnson testified she has over thirty years experience in law enforcement in crime scene processing and examination of evidence. She trains law enforcement officers in the detection, collection, and preservation of physical evidence. (V40, R2589-90). She has conducted and collected “hundreds” of gunshot residue kits. (V40, R2591). Johnson reviewed the gunshot residue analysis, FDLE reports, and a videotape taken of McGirth as the gunshot residue kit was administered. (V40, R2592). In her opinion, the potential for contamination of the gunshot residue collection was “very great.” McGirth’s hands were not bagged, the test was not conducted until seven hours had transpired after the shooting, and McGirth’s hands were potentially contaminated in the back seat of a patrol car. (V40, R2592-93). In addition, he was handcuffed, and touched various surfaces. (V40, R2593). McGirth’s clothing was mishandled and was possibly contaminated on the interview room floor. (V40, R2595). The gloves used by the deputy that conducted the gunshot residue kit were not the sterile gloves contained within the kit. (V40, R2595-96, 2597).

Paramedic Lori Maxwell responded to the van crash scene. (V41, R2615-16, 2618). Sheila Miller did not appear to have any signs of trauma, and said she was “fine.” (V41, R2620, 2621).

Miller said she was “not able to walk well on her own.” (V41, R2622). Maxwell saw a wheelchair in the back of the van. (V41, R2626). Miller was calm, talkative, and “quite relaxed.” (V41, R2623, 2627). However, Miller told Maxwell she was in the van against her will, “under duress.” (V41, 2626).

Suzanne Taggert supervises all branch managers and day-to-day operations for Citizens’ Bank. (V41, R2635). Taggert described images from a July 21, 2006, videotape, taken of the drive-thru ATM on Newberry Road in Gainesville. (V41, R2636, 2638, Def. Exh. 2). The video shows a female lean in and out of the vehicle several times while using the ATM. (V41, R2639-40).

Major Patty Lumpkin talked to Sheila Miller before she was transported to the hospital after the van crashed. (V41, R2642, 2644, 2647). Miller was “pretty shaken up” and “visibly upset.” R2645). She asked about her parents “constantly.” (V41, R2645). Miller told Lumpkin she knew some of the people in the van, but only by their nicknames. (V41, R2649). She knew who shot her mother. (V41, R2646). She told Lumpkin about the vehicle that was left at the K-Mart. (V41, R2646).

On February, 8, 2008, McGirth was found guilty on Counts I, II, III, and V. McGirth was found not guilty on Count IV - kidnapping with a firearm.

The penalty phase was held February 12-13, 2008. (V46, R3177-3340, V47, R3341-3532).

Ann Tauriainen, Diana Miller's aunt, lived a few house away from the Millers. Family members got together on a regular basis. (V46, R3195-96, 3198, 3199). Miller was a very caring person who checked on Tauriainen's welfare every morning. (V46, R3200, 3202).

Miller's friends, Maria Franks, Lori Travis, and Lee Hancock, testified that Miller was a very active person. She took good care of her husband and went out of her way for others. (V46, R3206, 3210, 3213, 3215, 3217, 3220, 3224).

Dr. Julia Martin, medical examiner, said Miller's health was very good. (V46, R3233). Dr. Martin estimated approximately fifteen to thirty minutes had elapsed from the time Miller was shot in the chest to the time of the fatal head wound. (V46, R3234-35). She was conscious during that time. (V46, R3235, 3239). The chest wound would have been painful and Miller would have had difficulty breathing.[27] (V46, R3235, 3236). Miller was alive when the gunshot to her head was inflicted. (V46, R3237).

Theodore Houston could not recall how many times Miller asked McGirth to call 911 after she was shot. (V46, R3243-44). McGirth told Houston not to help Miller. (V46, R3245).

Appellant called his mother, Michelle McGirth, as his first witness. (V47, R3349). Michelle's mother, Mazie Oliver, was "the

[27] It would have become more difficult to breathe as Ms. Miller's left lung (which had been penetrated by the first shot) filled with blood. (V46, R3236).

backbone" for the family. (V47, R3352). McGirth was very close to his grandmother. Oliver picked him up from school and took him to church, and to sports games. McGirth took it very hard when she passed away in 1999, and subsequently received grief counseling sessions. (V47, R3353, 3373, 3386). Michelle said McGirth "is a good kid. He's always taking a liking unto everybody that he come in contact with." (V47, R3354, 3379). He was a handy man around the house. "He was just so far advanced." (V47, R3355). McGirth was very involved in his church. (V47, R3354, 3355, 3365).

McGirth did not grow up with his father. (V47, R3360-61). He was close with Michelle's twin brother, Michael (deceased).[28] (V47, R3353, 3359, 3361). McGirth enjoyed singing and writing poetry. He coached the football team at his church. (V47, R3362). Michelle always made sure McGirth came home at night. (V47, R3373). However, there was no stability for McGirth regarding academics. He attended many different schools and programs. (V47, R3381, 3382-83, 3387).

McGirth was a good student but got into fights in school. (V47, R3375-76). He threatened teachers. (V47, 3377). He received his high school diploma through a program in the county

[28] Michael McGirth had a violent criminal history. Nonetheless, Michelle McGirth said "he was a great role model to Renaldo." (V47, R3386).

jail.[29] (V47, R3378). He has an anger problem. He continued to have problems after attending programs to rehabilitate him. (V47, R3379).

McGirth's criminal history began in 1998, at age ten. (V47, R3388). In July 2006, two weeks before the murder of Diana Miller and attempted murder of James Miller, Michelle bonded McGirth out of jail. (V47, R3389).

Pastor Wayne Woodyard said his church had various youth activities.[30] (V47, R3393-94). Woodyard encouraged McGirth to play and coach football. McGirth sang and participated in church events. (V47, R3397, 3398). McGirth was "respectful" and "well-mannered." When McGirth was eight-years old, Woodyard became McGirth's friend and counseled him for his anger problem. V47, R3399-3400, 3401). Although McGirth got angry, it was "no more than ... any other young person." (V47, R3399). Woodyard had "mercy" for McGirth after he committed a lewd act on the ten-year-old girl. (V47, R3401).

Pastor Woodyard's wife, Gina Woodyard, said her younger brother mentored McGirth. (V47, R3419). McGirth is very smart. He never appeared to be mentally ill. (V47, R3426-27). McGirth

[29] In 2002, McGirth committed a lewd act on a ten-year-old girl. (V47, R3379, 3389, 3428).

[30] A portion of a videotape depicting McGirth's participation in a 1997 Christmas pageant was published for the jury. (V47, R3396).

assisted other parishioners, especially the elderly. “He was always there to help.”(V47, R3419, 3420). The church gave McGirth an educational foundation of the difference between right and wrong. (V47, R3426).

Mischelay Copeland, McGirth’s younger sister, said McGirth is a considerate brother. (V47, R3403, 3404). He helped her with her homework “all the time -- he’s very smart.” (V47, R3408). McGirth was respectful and very overprotective. (V47, R3409).

Teresa Johnson, a family friend, said McGirth was very involved in church. He was respectful, considerate, and intelligent. Johnson never saw him angry. (V47, R3430, 3432, 3434). If he was shown love, “you got it back ten-fold.” (V47, R3434).

Quinton McGirth,[31] Appellant’s older brother, said Appellant was very involved in sports, church, and music. (V47, R33450-51). Their grandmother frequently took care of them while their mother worked. Appellant was respectful to others. (V47, R3453).

Tara Lofton, McGirth’s aunt, helped her mother, Mazie Oliver, take care of McGirth. (V47, R3456, 3457-58). Oliver was a very loving person, especially with her grandchildren. (V47, R3458). McGirth was a good student, whom she described as being

[31] Quinton McGirth is incarcerated for second-degree murder. (V47, R3440). He has not been involved in Appellant’s life since 2000. (V47, R3454-55).

"pretty smart." (V47, R3459). He was well-mannered, respectful, and considerate. (V47, R3461).

Rondy Grimes, McGirth's father, only dated McGirth's mother for a short time. He never knew she was pregnant with his child. In 2007, he was contacted and subsequently provided a sample for a DNA test, which confirmed he was McGirth's father. (V47, R3262-63, 3464, 3465). Grimes spent as much time as possible visiting McGirth in jail. (V47, R3466).

On February 13, 2008, the jury recommended a death sentence by a vote of 11 to 1. (V47, R3526).

The *Spencer*[32] hearing was held on March 26, 2008. (V48, R1-96).

On May 5, 2008, the trial court sentenced McGirth to death for the murder of Diana Miller. (V49, R1-61).

This appeal follows.

SUMMARY OF THE ARGUMENT

The closing argument claim, which relates solely to the guilt stage, is not a basis for reversal. There was no abuse of discretion by the trial court, and there is no legal support for a contrary conclusion. In any event, assuming that the issue is preserved in the first place, any error was harmless.

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

The trial court did not abuse its discretion in instructing the jury, in response to a question from them, that "conscious intent" for purposes of the law of principals is not the same thing as premeditation for purposes of the law of homicide. The jury was correctly instructed, and there is no error.

The "victim impact" evidence claim is not preserved for review, and, even if it had been, no improper evidence was introduced. Moreover, any error was harmless.

The "*Williams* Rule" claim has no legal basis. The complained-of evidence was not introduced by the State, and does not fall within the scope of the *Williams* Rule. Moreover, the evidence at issue was not improper because it was an integral part of the sequence of events making up this crime. Alternatively, any error was harmless beyond a reasonable doubt.

The avoiding arrest aggravator was properly found, and is supported by competent substantial evidence. The sentencing court properly applied this aggravating factor in accord with well-settled Florida law. Alternatively, even without this aggravator, death remains the proper penalty.

Likewise, the cold, calculated and premeditated aggravating circumstance was properly found in this case -- that aggravator is supported by competent substantial evidence. Under settled Florida law, that aggravator was properly found.

The heinous, atrocious or cruel aggravator was also properly found in this case -- that aggravator is also supported by competent substantial evidence. Settled Florida law supports this aggravator, and also forecloses the notion that there is an "intent" element to the heinousness aggravator.

The *Ring v. Arizona* claim is foreclosed by binding precedent because McGirth was convicted of the underlying offense of robbery, as well as being convicted of a contemporaneous violent felony. Florida law precludes a *Ring* claim under such circumstances.

The evidence is more than sufficient to support McGirth's conviction -- his guilt was established beyond a reasonable doubt.

Likewise, McGirth's death sentence is proportional to the offense. Five aggravating factors were established, and the mitigation was minimal, at best. This Court has upheld death sentences that were less aggravated and more mitigated than this one.

ARGUMENT

I. THE CLOSING ARGUMENT CLAIM

On pages 38-41 of his brief, McGirth argues that he is entitled to relief based upon the State's comment, in closing argument, that:

> That would be like giving the pilots of the two planes that crashed into the World Trade Center a pass --

(V47, R3478). **While McGirth says this argument was made during the guilt stage of his capital trial, that is incorrect.** Assuming that the issue is preserved, since the defense asked that the "Court direct the State not to discuss 9/11 in their closing," and the Court did exactly that, there is no basis for reversal for the reasons set out below. Florida law is settled that

> Wide latitude is permitted in arguing to a jury. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). It is within the judge's discretion to control the comments made to a jury, and we will not interfere unless an abuse of discretion is shown. *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990); *Breedlove*, 413 So. 2d at 8.

Moore v. State, 701 So. 2d 545, 551 (Fla. 1997). Likewise, a trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999); *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); *Hamilton v. State*, 703 So. 2d 1038, 1041 (Fla. 1997) (noting that a ruling on a motion for mistrial is within the trial court's discretion); *United States v. Puentes*, 50 F.3d 1567, 1577 (11th Cir. 1995) (stating that district court's ruling on a motion for

mistrial is reviewed for abuse of discretion); *United States v. Honer*, 225 F.3d 549, 555 (5th Cir. 2000) (reviewing the denial of a motion for mistrial for abuse of discretion). There was no abuse of discretion, and there is no basis for relief.

In his brief, McGirth relies on *Ruiz v. State*, 743 So. 2d 1 (Fla. 1999), to support his claim for relief. In fact, this Court said the following about the argument at issue in that case:

> This blatant appeal to jurors' emotions was improper for a number of reasons: it personalized the prosecutor in the eyes of the jury and gained sympathy for the prosecutor and her family; it contrasted the defendant (who at that point had been convicted of murder) unfavorably with Ms. Cox's heroic and dutiful father; it put before the jury new evidence highly favorable to the prosecutor; it exempted this new evidence from admissibility requirements and from the crucible of cross-examination; and most important, it equated Ms. Cox's father's noble sacrifice for his country with the jury's moral duty to sentence Ruiz to death

Ruiz v. State, 743 So.2d 1, 7 (Fla. 1999). None of the reasons articulated by this Court in *Ruiz* are present in this case, and that decision does not help McGirth. Under the facts of this case, the state’s argument was merely an analogy, as the trial court found. There was no abuse of discretion, and there is no basis for relief.

To the extent that McGirth says that “other courts” have criticized references to defendants as terrorists, he overreads those decisions. For example, in *Lung*, the court said:

> The remarks regarding September 11 included a reference in opening statement to the date of the offense, September 16, 2001, as "about five days after the terrorist attack in New York City" and noting that things had been quiet between the terrorist attack and the end of the week following the attack; that there had not been a lot of crimes committed. Then, in inquiring of a police officer, the prosecutor asked if between "9-11" and the date of the offense, there had been much going on in the county.
>
> In closing argument, the prosecutor suggested that things that might typically be considered harmless could be dangerous instruments. He alluded to circumstances of the September 11 incident for that purpose. He asked, "[B]efore September 11, 2001[,] who would have thought a set of knitting needles was a dangerous instrument[.]" He talked of people regularly getting on airplanes with such items. He did this with regard to jury instructions that used the term "dangerous instrument."
>
> The trial court's conclusion that the remarks were not objectionable is not clearly erroneous.

Lung v. State, 179 S.W.3d 337, 342-343 (Mo. App. S.D., 2005).

Likewise in *Hernandez v. State,* the appellate court did not find error:

> Webster's Dictionary defines terrorism as "the act of terrorizing; use of force or threats to demoralize, intimidate, and subjugate." *Webster's New World Dictionary* 1469 (2nd College ed. 1986). In this case, Appellant used force and threat of force to intimidate his victims. We hold that the prosecutor was merely summarizing the evidence against Appellant, and did not violate Appellant's rights.

Hernandez v. State, 114 S.W.3d 58, 64 (Tex. App. 2003). *People v. Kipp* 26 Cal. 4th 1100 (2001), and *Corwin v. State*, 870 S.W. 2d 23 (Tex. Cr. App. 1993), contain no discussion of defendants being referred to as terrorists. In any event, the State's

argument in this case was not comparing McGirth to a terrorist, but rather was drawing an analogy to Sheila Miller's culpability *vis a vis* McGirth's. There was no improper argument, and there is no basis for relief.

Alternatively, without waiving the foregoing arguments, any error was harmless beyond a reasonable doubt, and did not adversely affect McGirth's substantial rights. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Given the weight of the evidence against McGirth, which was, to say the least, overwhelming, there is no possibility that the argument at issue had any effect on the result. There is no basis for relief.

II. THE JURY QUESTION CLAIM

On pages 41-45 of his brief, McGirth says that the trial court incorrectly answered a jury question about the "conscious intent" component of the principal jury instruction. The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997) (noting that a trial court has wide discretion in instructing the jury). There was no abuse of discretion, and, indeed, no legal error has even been identified. Because that is so, there is no basis for relief.

The question asked by the jury was whether "conscious intent" (for the law of principals) is the same thing as "premeditation" (for homicide). (V45, R3168). The trial court

answered the jury's question by correctly stating that conscious intent is not the same thing as premeditation, and that the law does not fix a specific amount of time that is necessary for the formation of "conscious intent." McGirth points to no decision indicating that the trial court's answer to the jury's question was wrong. In fact, *Carranza v. State* demonstrates that the trial court's response was correct:

> Carranza expressed his intent to participate in murder and by choking Bataille did an act to assist Sandoval in committing the crime. This evidence was sufficient to show a conscious intent to participate in the murder, and the state presented sufficient evidence of premeditation to withstand a judgment of acquittal.

Carranza v. State, 985 So. 2d 1199, 1202 (Fla. 4th DCA 2008). The legal concepts are different, and the response of the trial court was proper in all respects.

To the extent that further discussion is necessary, the evidence demonstrates that McGirth was the individual who shot Diana Miller, and that he is the person who ultimately executed Ms. Miller with a gunshot to the head. (V9, R1523-24, V45, R3170-71). Because that is so, McGirth's argument that he might have been convicted of offenses that he did not "intend or assist with" fails for want of a factual basis, assuming that argument is preserved to begin with. *See,* V45, R3155 *et. seq*. This claim is not a basis for relief.

Alternatively, without waiving the foregoing arguments, any error was harmless beyond a reasonable doubt, and did not adversely affect McGirth's substantial rights. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). There is no basis for relief.

III. THE VICTIM IMPACT EVIDENCE CLAIM

On pages 46-50 of his brief, McGirth argues that "excessive and inflammatory victim-impact evidence" was introduced at the penalty phase of his capital trial. The testimony at issue came from four witnesses, and amounts to approximately 40 pages of transcript. McGirth did not object to any of the testimony, did not cross-examine any of those witnesses, and had no objection to the minimal items of evidence introduced during their testimony. Because McGirth did not object at all, he has preserved nothing for review.

Florida law is settled that a specific objection is required to preserve a victim impact issue for appellate review. This Court has clearly held that a proper objection is required:

> The failure to contemporaneously object to a comment on the basis that it constitutes improper victim testimony renders the claim procedurally barred absent fundamental error. *See, e.g., Norton v. State*, 709 So. 2d 87, 94 (Fla. 1997); *see also Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997). In *Burns v. State*, 699 So. 2d 646, 653-54 (Fla. 1997), this Court ruled that a defendant's challenge to victim impact testimony on the basis that it was unduly prejudicial was procedurally barred because the defendant did not raise this specific objection at trial. Moreover, in

> Norton, this Court determined that a defendant's motion for a mistrial at the conclusion of a witness's testimony was insufficient to preserve the witness's impermissible comment for appellate review. 709 So .2d at 94.
>
> Sexton's claim that the State witnesses provided improper victim impact testimony was not preserved for appellate review because defense counsel failed to contemporaneously object during the testimony of either Boron or Barrick. Furthermore, even if the motion for a mistrial at the conclusion of Boron's testimony was sufficient for preservation purposes, defense counsel did not request the mistrial on the grounds now raised on appeal. *See Burns*, 699 So. 2d at 653-54. Rather, defense counsel moved for a mistrial arguing that Boron wept during her testimony and made an improper reference to Sexton's first trial. Accordingly, because Sexton did not properly preserve the issue for appellate review, Sexton's claims pertaining to the victim impact testimony are procedurally barred unless the victim impact testimony constitutes fundamental error.

Sexton v. State, 775 So. 2d 923, 932 (Fla. 2000). McGirth did not object to the admission of the testimony at issue (beyond a general, legally invalid, pre-trial objection), and has not preserved this claim for review.[33] Further, he has not argued that there was fundamental error in the admission of this testimony - – there is no basis for relief.

To the extent that further discussion is necessary, McGirth's claim is virtually indistinguishable from the victim-

[33] McGirth's pre-trial objections were general in nature, and the trial court expressly stated in its order that the issue could be raised after discovery was concluded. (Vol. 2, R. 366-67). McGirth never raised the issue again.

impact claim that this Court rejected in *Wheeler*. In that decision, this Court said:

> During the entire presentation of victim impact evidence, Wheeler made no specific objections to any portion of the testimony or any particular aspect of the photographic evidence, although Wheeler renewed his general objection to presentation of any victim impact evidence.[34] We conclude that the claim Wheeler now makes that the victim impact evidence was impermissibly made a feature of the penalty phase was not preserved by Wheeler's general pretrial objections addressed to all victim impact evidence, where he made no specific objections to any of the evidence presented and failed to object below on the grounds argued here. It is well-established that for a claim "to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) (*quoting Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)). Moreover, in this appeal, Wheeler still fails to identify any specific error in admission of the victim impact testimony or photographs. *See Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008) ("Initially, we reject this claim [of error in admission of victim impact evidence] because Deparvine ... fails to sufficiently identify the error.")

Wheeler v. State, 4 So. 3d 599, 606 (Fla. 2009). *See also, Farina v. State*, 937 So. 2d 612, 628-629 (Fla. 2006).

Alternatively, without waiving the procedural bar, there is no basis for relief because there is no error. None of the evidence was improper, and none of it was contrary to the restrictions placed on victim impact testimony. Even if this claim had been preserved by timely objection, there is no legal

[34] Unlike Wheeler, McGirth did not renew any previously-raised objection to the victim impact evidence.

error, and, consequently, no legal basis for reversal. *Payne v. Tennessee,* 501 U.S. 808 (1991); *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995).

Alternatively, without waiving the foregoing arguments, any error was harmless beyond a reasonable doubt, and did not adversely affect McGirth's substantial rights. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Given the weight of the evidence against McGirth, which was, to say the least, overwhelming, it makes no sense to suggest that the descriptions of the victim (which did not include any improper content) caused or contributed to the jury's sentencing recommendation. McGirth's own conduct earned him a sentence of death, and that would have been the sentence even if there had been no victim impact evidence at all. There is no basis for relief of any sort.

IV. THE "*WILLIAMS* RULE" CLAIM

On pages 51-56 of his brief, McGirth argues that the State was improperly allowed to introduce "*Williams* Rule" evidence concerning the "drug based" relationship that existed between Sheila Miller and the defendant. The admissibility of evidence is within the discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000).

Likewise, whether the probative value of the evidence is substantially outweighed by its prejudicial impact is reviewed for abuse of discretion. *Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000). There is no basis for relief for the reasons set out below.

The first reason that McGirth's claim is not a basis for relief is that it is based on an incorrect legal premise. Despite the claim to the contrary, the record shows that the evidence at issue was **not introduced by the State,** but rather came out during cross-examination of Sheila Miller by counsel for McGirth's co-defendant.[35] While it is true that the State filed a notice of intent to introduce *Williams* Rule evidence, (SR1, R1) **it is also true that the State did not introduce such evidence.** Because that is so, this is not a "*Williams* Rule" issue at all, but is, at most, a claim that evidence elicited on cross-examination by co-defendant's counsel was improperly admitted. That is simply not a *Williams* Rule claim.

Rather, the testimony at issue is, at most, an integral part of the sequence of events making up this crime. As this Court has said, that is not *Williams* Rule evidence when introduced by the State, and it makes no sense at all to suggest

[35] Lest there be any confusion, McGirth's brief says, on page 52, that "the judge allowed **the prosecutor"** to introduce the complained-of evidence, citing to certain pages of Sheila Miller's testimony. All of those record citations refer to cross examination by co-defendant's counsel.

that the result changes under these facts. In *Smith,* this Court said:

> the admission by Smith was inextricably intertwined with the crime. *See Griffin v. State*, 639 So. 2d 966, 968 (Fla. 1994) (noting evidence of uncharged crimes which are inseparable from crime charged and evidence which is inextricably intertwined with the crime charged are not *Williams* rule evidence but, rather, are admissible under section 90.402). In *Tumulty v. State*, 489 So. 2d 150 (Fla. 4th DCA 1986), approved by *Padilla v. State*, 618 So. 2d 165 (Fla. 1993), the court adopted the following from Professor Charles W. Erhardt:
>
> > Professor Ehrhardt discusses "inseparable crime" evidence and the characteristics distinguishing it from "Williams Rule" evidence in his work on Florida Evidence (2d ed.1984):
> >
> > [T]he Florida opinions have not contained a close analysis of the reasons that inseparable crime evidence is admissible. Professor Wigmore suggests that this evidence is not admitted either because it shows the commission of other crimes or because it bears on character, **but rather because it is a relevant and inseparable part of the act which is in issue. This evidence is admitted for the same reason as other evidence which is a part of the so-called "res gestae"; it is necessary to admit the evidence to adequately describe the deed.** In addition to Wigmore's logical argument, it seems that both the language of Section 90.404(2)(a) and of *Williams* indicates that the rule applies to evidence of discrete acts other than the actions of the defendant committing the instant crime charged. Under this view, inseparable crime evidence is admissible under Section 90.402 because it is relevant rather than being admitted under 90.402(2)(a). Therefore, there is no need to comply with the ten-day notice provision. The Wigmore view has been

> adopted by the United States Court of Appeals for the Fifth and Eleventh Circuits.
>
> *Tumulty*, 489 So. 2d at 153 (footnote omitted). We conclude that these principles apply here as well.

Smith v. State, 866 So. 2d 51, 62-63 (Fla. 2004) (emphasis added). That analysis is applicable here, and establishes that there is no basis for relief.

Alternatively, any error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The evidence against McGirth was strong, and there is no possibility, much less a reasonable probability, that the evidence at issue (which was rather minimal testimony about drug involvement in a case which was permeated by drug use testimony) had any effect at all on the jury's verdict. The complained of testimony made no difference.[36] McGirth is not entitled to relief.

V. THE "AVOIDING ARREST" AGGRAVATOR

On pages 56-65 of his brief, McGirth argues that the trial court should not have found the "avoiding arrest" aggravating circumstance. Whether an aggravating circumstance exists is a factual finding which is reviewed under the competent substantial evidence standard. When reviewing aggravating factors on appeal, this Court in *Alston v. State,* 723 So. 2d

[36] The State abandoned any request for the *Williams* Rule jury instruction (V43, R2878-79), and no such instruction was given. (V44, R3029-96).

148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," *Quoting Willacy v. State,* 696 So. 2d 693, 695 (Fla.), *cert. denied*, 522 U.S. 970 (1997).

The sentencing court was well aware of the parameters of this aggravator when the victim is not a law enforcement officer. (V9, R1511). In finding the "avoiding arrest" factor applicable to this case, the court said:

> Because there has been no statement by the defendant, McGirth, as to h is thought processes, the State of Florida has had to rely upon circumstantial evidence to prove this aggravator beyond a reasonable doubt. The evidence established that neither Diana Miller or James Miller knew McGirth. However, other circumstantial evidence exists to support the existence of this aggravator. McGirth did not wear a mask or use gloves. McGirth made no effort to conceal his identity. The Miller's adult daughter, Sheila Miller, clearly knew McGirth, having given him a hug when he came into the Millers' residence. As such, McGirth would clearly have been aware that Diana and James Miller, through Sheila Miller, could ultimately identify him if they survived the robbery. There was absolutely no evidence of a struggle prior to the shooting of Diana Miller and James Miller nor any indication that the victim attempted to physically resist the robber. Both Diana Miller and James Miller

> were shot execution style, however, James Miller survived the gunshot wound to his head. Neither of the victims were confined by being bound, gagged, duct-taped, etc. This certainly suggests that the defendant, McGirth, was concerned that the Millers were in a position to pose a threat to the defendant after the robbery (*i.e.,* by identifying them) hence the respective gunshots to the head.
>
> Other facts support the existence of this aggravating factor. After Diana Miller was first shot in the chest, McGirth made sure that the shell casing was found and collected by his co-defendant, Theodore Houston. He also ordered the house to be wiped down to remove any fingerprints that may have been left. After removing Sheila Miller from the home, McGirth then placed the severely injured Diana Miller in a bedroom with her husband and shot them both. The shell casings were collected and removed from the home. McGirth locked the home and ensured that the car that had been used to drive them to the Millers' house was removed from the scene. When confronted by the deputy sheriff attempting to stop them, McGirth, who was the driver, fled in the van causing a high speed dangerous chase. Also, while in flight, McGirth ordered Houston to shoot Sheila Miller. This did not occur because shortly thereafter, the van that McGirth was driving was incapacitated by stop sticks that were placed in the road by deputies with the Marion County Sheriff's Office.

(V9, R1511-12).

The findings by the sentencing court are consistent with other cases in which the application of this aggravator has been upheld, such as *Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983), where the victim knew her killer, and *Jennings v. State*, 718 So. 2d 144 (Fla. 1998), where there was no other reason to kill the victim. This case is also factually indistinguishable from *Henry v. State*, 613 So. 2d 429 (Fla. 1992), and *Farina v.*

State, 801 So. 2d 44 (Fla. 2001), both of which were murders during the course of a robbery where victims who knew the defendants were killed to eliminate them as witnesses. *See also, Jones v. State,* 748 So. 2d 1012 (Fla. 1999); *Cave v. State*, 727 So. 2d 938 (Fla. 1998); *Thompson v. State*, 648 So. 2d 692 (Fla. 1994); *Preston v. State*, 607 So. 2d 404 (Fla. 1992); *Espinosa v. State*, 589 So. 2d 887 (Fla. 1991), *vacated on other grounds, Espinosa v. Florida*, 505 U.S. 1079 (1991). The trial court followed Florida law in finding the avoiding arrest aggravator, and that finding should not be disturbed.

Alternatively and secondarily, even without the avoiding arrest aggravating factor, death is still the proper penalty. Even without this aggravator, four strong aggravating factors remain, including the coldness and heinousness aggravators. Under these facts, any error is harmless. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986).

VI. THE COLDNESS AGGRAVATOR

On pages 65-67 of his brief, McGirth argues that the cold, calculated and premeditated (CCP) aggravating factor was improperly applied in sentencing. Whether an aggravating circumstance exists is a factual finding which is reviewed under the competent substantial evidence standard. When reviewing aggravating factors on appeal, this Court in *Alston v. State,* 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of

review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," *Quoting Willacy v. State,* 696 So. 2d 693, 695 (Fla.), *cert. denied*, 522 U.S. 970 (1997).

In the sentencing order, after reviewing the standard for applying the coldness aggravator, the trial court said:

> The competent evidence at trial established, and the Court finds, that the defendant, McGirth, made arrangements to borrow a motor vehicle and made arrangements with his friend, Sheila Miller, the victim's adult daughter, to travel to the Miller's residence in The Villages. This was a gated neighborhood to which access could be obtained only through communication with the resident at the home who would have to provide permission to enter the subdivision. McGirth had obtained, in advance, the weapon that he ultimately used to kill Diana Miller and brought it with him in his backpack. The Court also finds that Diana Miller provided absolutely no resistance to McGirth regarding his felonious activities at her house prior to being killed. At the time McGirth first shot Diana Miller in the chest, she had her hands in the air clearly indicating to McGirth that she was not providing any resistance to him. After shooting her in the chest, he pushed Diana Miller on a bed and demanded money. Diana Miller, having been previously shot, agreed to get money for McGirth. She was moved to the "computer room" by McGirth to respond to his demands that he obtain or purchase phones off the internet. There was absolutely no evidence that Diana Miller's murder occurred

> suddenly as a result of a struggle or was committed in a rash or spontaneous way. Specifically, though being shot in the chest and having cooperated with McGirth's demands, McGirth caused Diana's husband, James, to be brought into their daughter's (Sheila) bedroom, where Diana was first shot, and had Mr. Miller lie face down on the floor. Diana Miller was required to crawl back into this bedroom. McGirth had already directed one of his colleagues to pick up the earlier shell casing and that the house be wiped clean of fingerprints. The co-defendant, Roberts, had obtained the Millers' wallets and car keys at McGirth's direction. McGirth had wanted to know what debit cards went to the ATM machine and had directed that jewelry be taken. The evidence established that Roberts, Houston and Sheila Miller had left or were leaving the house but that McGirth, rather than simply leaving this crime scene and not commit the murder, chose, as a matter of course before leaving the residence, to first shoot James Miller in the head, while Diana Miller was lying near her husband's feet, and then executed Diana Miller by shooting her in the back of her head.
>
> The Court specifically finds that the State of Florida has established this aggravating factor beyond a reasonable doubt and the Court gives this aggravating circumstance great weight.

(V9, R1505-6).

The premise of McGirth's argument is that Mrs. Miller was killed in a "spontaneous shooting of the type that occurs in a 'robbery gone wrong.'" *Initial Brief* at 66-67. That argument has no validity in the face of the facts set out above, which are undisputed, and which establish a planned and methodical execution of the victim (along with the attempted execution of the second victim). Neither victim attempted to resist, unlike the case in *Chamberlain v. State,* 881 So. 2d 1087 (Fla. 2004), where this Court found the coldness aggravator inapplicable. In

contrast, both of McGirth's victims were wholly compliant and cooperative, as was the case in *McCoy v. State*, 853 So. 2d 396 (Fla. 2003), and *Farina v. State*, *supra.*

In *Farina*, this Court upheld the coldness aggravator, saying:

> In order to establish the CCP aggravator, the evidence must show
>
> > that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.
>
> *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994) (citations omitted); *accord Walls v. State*, 641 So. 2d 381 (Fla. 1994). While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." *Walls,* 641 So. 2d at 388. The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." *Geralds v. State*, 601 So. 2d 1157, 1163 (Fla. 1992). **However, CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.** *See Bell v. State*, 699 So. 2d 674, 677 (Fla. 1997).
>
> In the instant case the following facts support the CCP aggravating circumstance: this specific Taco Bell restaurant was chosen as the target for the robbery because Anthony was familiar with its employees and procedures; Anthony visited the restaurant earlier in the evening to see who was working and the brothers

> discussed the fact that Anthony knew three of the employees present that night; the brothers purchased bullets for their gun before the robbery; the employees were rounded up and confined to small area where they would be easier to control; the brothers' discussion just before the shooting began and Anthony's comment that it was "[Jeffery's] call" shows intent to carry out plans to kill; and none of the victims offered resistance. Therefore, we find competent, substantial evidence in the record supporting the finding that the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. Accordingly, we hold that the trial court did not err in its finding of the CCP aggravating circumstance.

Farina v. State, 801 So. 2d 44, 53-54 (Fla. 2001). (emphasis added). The only item of evidence missing from this case to distinguish it from *Farina* is the discussion between the perpetrators, and, in light of the other evidence against McGirth (which is contained in the sentencing order), that makes no difference in the outcome.

Likewise, in *McCoy*, this Court upheld the application of the coldness factor based on facts that are no different from those present in this case:

> McCoy next contends that the trial court's application of the cold, calculated, and premeditated aggravating factor was improper in the instant case. This Court recently reiterated the operative standard of review in examining the application of aggravating circumstances: "[A] trial court's ruling on an aggravating circumstance will be sustained on review so long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record." *Dennis v. State*, 817 So. 2d 741, 765-66 (Fla. 2002) (*quoting Gore v. State*, 784 So. 2d 418, 432 (Fla.2001)), *cert. denied*, 537 U.S. 1051, 123 S.Ct. 604, 154 L.Ed.2d 527 (2002).

Additionally, "[c]ompetent substantial evidence is tantamount to legally sufficient evidence, and [this Court] assess[es] the record evidence for its sufficiency only, not its weight." *Almeida v. State,* 748 So. 2d 922, 932 (Fla. 1999).

Legally sufficient evidence exists in the record on appeal to support the trial court's application of the CCP aggravator. As noted by the trial court, the video surveillance tape, when considered in conjunction with the medical examiner's testimony, demonstrates advance procurement of the murder weapon, absolutely no resistance or provocation on the part of the victim, and a killing carried out as a matter of course. *See Farina v. State*, 801 So. 2d 44, 54 (Fla.2001), *cert. denied*, 536 U.S. 910, 122 S.Ct. 2369, 153 L.Ed.2d 189 (2002); *Bell v. State*, 699 So. 2d 674, 677 (Fla.1997). McCoy methodically guided the victim throughout the ABC Liquors store, attempting to turn off the alarm and surveillance taping devices, and obtaining all of the cash within the establishment. He then forced Elliott into a storage room - a place which held no money or valuables for him to obtain. There, he shot the victim once in the abdomen to disable her, once in the upper neck or lower head to paralyze her, and once in the face, killing her. The final two shots were fired from between six and twelve inches away.

The appellant's actions were properly deemed cold, calculated, and premeditated by the trial court. Indeed, **the instant case is an example of the "deliberate ruthlessness" for which application of this aggravating factor is reserved.** *See Zack v. State*, 753 So. 2d 9, 21 (Fla. 2000); *Jennings v. State*, 718 So. 2d 144, 152 (Fla. 1998). **There were no signs of physical struggle at the crime scene, and the appellant had ample opportunity to leave ABC Liquors after completing the robbery. However, he considered his options, and unnecessarily executed a compliant hostage.** Application of the CCP aggravating circumstance is proper. *See Looney v. State*, 803 So. 2d 656, 678 (Fla. 2001) (applying CCP where "the defendants had ample opportunity to reflect upon their actions, following which they mutually decided to shoot the victims execution-style"), *cert. denied*, 536 U.S. 966, 122 S.Ct. 2678, 153 L.Ed.2d 850 (2002); *Alston v. State,* 723 So.2d 148, 162 (Fla. 1998)

> (sustaining the CCP aggravator where the **"appellant had ample opportunity to release [the victim] after the robbery," but chose to kill him**); *Eutzy v. State*, 458 So. 2d 755, 757 (Fla. 1984) (**sustaining CCP where there was no sign of struggle, yet the victim was shot execution-style**).

McCoy v. State, 853 So. 2d 396, 407-408 (Fla. 2003). (emphasis added). The unchallenged facts of Mrs. Miller's murder are the same (but for the fact that she was killed in her own home) as the facts of *Farina* and *McCoy* -- those cases were appropriate for application of the coldness aggravator, and this one is, as well.[37]

Alternatively and secondarily, even without the avoiding arrest aggravating factor, death is still the proper penalty. Even without this aggravator, four strong aggravating factors remain, including the heinousness aggravator. Under these facts, any error is harmless. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986).

VII. THE HEINOUSNESS AGGRAVATOR

On pages 67-69 of his brief, McGirth argues that the trial court improperly applied the heinous, atrocious or cruel aggravator in sentencing him to death. Whether an aggravating

[37] The State does not suggest that there is error in finding the CCP aggravator applicable to this murder. However, even in the absence of that aggravator, death is still the proper sentence in this case, which, even without the CCP factor, would remain supported by four weighty aggravators juxtaposed against mitigation that borders on non-existent. Death is the proper sentence in this case.

circumstance exists is a factual finding which is reviewed under the competent substantial evidence standard. When reviewing aggravating factors on appeal, this Court in *Alston v. State,*723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," *quoting Willacy v. State,* 696 So. 2d 693, 695 (Fla.), *cert. denied*, 522 U.S. 970 (1997).

In finding that the heinousness aggravator was applicable to the murder of Mrs. Miller, the trial court said:

> As previously stated in this sentencing order, the evidence clearly established that the defendant, McGirth, shot Diana Miller in the chest. The medical examiner, Dr. Martin, testified that the bullet passed through the sternum bone through Diana Miller's lung and out her lower back. Dr. Martin testified that approximately 30 minutes would have elapsed from the time that Diana Miller was first shot in the chest until the time of her fatal gunshot wound to her head and that the bullet going through her sternum would have been quite painful. The Court also finds that Diana Miller was conscious from the time she was shot in the chest until her fatal head wound and was clearly cognizant of the activities going on around her at the time including McGirth's demand for money, jewelry, taking her to the computer room to try to buy items off the internet, having to crawl back to her

daughter's room, being kept on the floor next to her husband of more than 40 years as he was being kept face down and clearly being in a position to hear her husband shot just immediately before she herself was executed. During this interval, because the bullet went through her lung, the victim's lung was collapsing and, due to blood collecting in her left chest, she was having increasing difficulty breathing. Dr. Martin testified, and the Court so finds, that as time elapsed and Diana would begin to lose full function, her anxiety would be increasing.

The evidence at this trial also established that Diana Miller begged for someone to call 911 but that her requests were refused. She was becoming increasingly incapacitated but not unconscious at the time she was shot in the head. She asked for water and indicated that she was cold. Theodore Houston attempted to assist her but was ordered to stop by the defendant, McGirth, with a derogatory comment directed to Houston by McGirth suggesting weakness. Obviously, Diana Miller was and remained in significant physical pain from the time she was first shot in the chest by McGirth and would have been conscious and aware of the deteriorating circumstances both in her physical health as well as the events unfolding around her at her house just prior to her death. Diana Miller had to crawl back down the hallway into the bedroom (Sheila's room) where she was originally shot and where her husband, James Miller, was now being held.

Diana Miller was lying near the feet of her husband when her husband was senselessly and with no moral or legal justification shot in the head by McGirth. She clearly would have heard her husband being shot. She was aware that her daughter had been duct-taped by these men. This Court has little doubt that Diana Miller, despite her weakening and painful condition due to the first shot to the chest, was aware that she was McGirth's next victim as she lay on the floor of the house that she and her husband of so many years had bought to spend their last years. A HAC finding is proper even if the victim is killed by a single gunshot wound if the entire sequence of events demonstrated that the victim suffered substantial mental anguish, *Henyard v. State*, 689 So. 2d 239, 254 (Fla. 1996), and the victim's fear and emotional

> strain may be considered as contributing to the heinous nature of the murder even when the victim's death was almost instantaneous. *Preston v. State*, 607 So. 2d 404, 410 (Fla. 1992), quoted in *Hutchinson v. State*, 882 So. 2d 943, 958-59 (Fla. 2004). Lastly, the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances. *Swafford v. State* 5433 So. 2d 270, 277 (Fla. 1988); *Hutchinson* at 959. The Court finds that these actions of the defendant were cruel, heinous, atrocious and utterly callous. Diana Miller did not deserve to die like this.

(V9, R1509-11). The sentencing order follows Florida law in all respects, and should not be disturbed.

To the extent that further discussion is necessary, the heinousness aggravator is also supported by this Court's decisions in *Farina v. State*, 801 So. 2d 44 (Fla. 2001), *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994), and *Hannon v. State*, 638 So. 2d 39 (Fla. 1994). Those cases, like this one, were gunshot murders which were preceded by a period of time in which the victim was terrorized before being murdered. It takes no imagination to recognize the terror that Diana Miller endured during the last 30 minutes of her life -- those circumstances establish the heinousness aggravator beyond any doubt at all.

Finally, to the extent that McGirth relies on *Bonifay v. State,* 626 So. 2d 1310 (Fla. 1993) and *Clark v. State*, 609 So. 2d 513 (Fla. 1992) for the proposition that there is an "intent element" attached to the heinousness aggravator, that is not the

law. The "intent" component of *Bonifay* was dispensed with in *Ocha*,[38] when this Court said:

> Indeed, in *Guzman v. State*, 721 So. 2d 1155 (Fla. 1998), the Court held:
>
> > The intention of the killer to inflict pain on the victim is not a necessary element of the [HAC] aggravator. As previously noted, the HAC aggravator may be applied to torturous murders where the killer was utterly indifferent to the suffering of another.
>
> *Id*. at 1160; *see also Bowles v. State*, 804 So. 2d 1173, 1177 (Fla. 2001) (stating that "there is no necessary intent element to HAC aggravating circumstance"); *Hitchcock v. State*, 755 So. 2d 638, 644 (Fla. 2000) (same).

Ocha v. State, 826 So. 2d 956, 963-964 (Fla. 2002). To the extent that discussion of *Clark* is necessary, that case did not speak to an "intent component" of the heinousness aggravator, but rather addressed a murder in which the victim was shot twice in rapid succession. *Clark v. State*, 609 So. 2d at 514. That is not the situation in this case, and *Clark* is simply inapplicable to these facts. The trial court properly found the heinousness aggravator, and that determination should not be disturbed.

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[38] *Ocha* spoke directly to *Bonifay*, stating:

> Ocha attempts to rebut the presumption of heinousness by showing his lack of intent to prolong Skjerva's suffering. For this he relies on this Court's statement in *Bonifay v. State . . . .*

Ocha v. State, 826 So. 2d at 963.

Alternatively and secondarily, even without the avoiding arrest aggravating factor, death is still the proper penalty. Even without this aggravator, four strong aggravating factors remain, including the coldness aggravator. Under these facts, any error is harmless. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986).

IX. THE *RING V. ARIZONA* CLAIM[39]

On pages 71-77 of his brief, McGirth argues that his death sentence violates *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This claim is not a basis for relief because he was also convicted of the underlying offense of robbery, which supports the aggravating circumstance of murder committed during the commission of a robbery. (V9, R1508). Further, McGirth was also convicted by the jury of the contemporaneous violent felony of attempted murder as to James Miller. (V9, R1507). Under settled Florida law, McGirth has no cognizable *Ring/Apprendi* claim.

This Court has repeatedly rejected *Ring/Apprendi* claims when the jury has convicted the defendant for the contemporaneous felony. Most recently, this Court held that:

> . . . a "defendant is not entitled to relief under *Ring* where the aggravating circumstance that the murder was committed during the course of a felony was

[39] Claim Eight was withdrawn by McGirth. The State has retained the original numbering from the *Initial Brief* in the interest of clarity.

> found and the jury unanimously found the defendant guilty of that contemporaneous felony." *Zack v. State*, 911 So.2d 1190, 1202 (Fla. 2005). Here, the trial court's finding of the contemporaneous felony aggravator is based on the jury's finding appellant guilty of the contemporaneous crimes of burglary and sexual battery.

Reese v. State, 34 Fla. L. Weekly S296, 298 (Fla. Mar. 26, 2009); *accord, Wright v. State*, 34 Fla. L. Weekly S497, 502 (Fla. Sept. 3, 2009); *Hayward v*. State, 34 Fla. L. Weekly S486, 494 (Fla. Aug. 27, 2009); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 601 n.8 (Fla. 2009); *Hojan v. State*, 3 So. 3d 1204, 1209 n.2 (Fla. 2009); *Frances v. State*, 970 So. 2d 806, 822-23 (Fla. 2007); *Rodgers v. State*, 948 So. 2d 655, 673 (Fla. 2006); *Smith v. State*, 866 So. 2d 51, 68 (Fla. 2004); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003). Under settled Florida law, there is no basis for relief under *Ring.*

SUFFICIENCY OF THE EVIDENCE

McGirth does not directly challenge the sufficiency of the evidence to support his conviction. This Court has described its review of the sufficiency of the evidence in death sentence cases in the following way:

> this Court has a mandatory obligation to review it in every case in which a sentence of death has been imposed regardless of whether the appellant has challenged the evidence. *See Jones v. State*, 963 So. 2d 180, 184 (Fla. 2007); *Fla. R. App. P*. 9.142(a)(6). "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of

> the crime beyond a reasonable doubt." *Simmons v. State,* 934 So. 2d 1100, 1111 (Fla. 2006) (*quoting Bradley v. State,* 787 So. 2d 732, 738 (Fla.2001)).

Hayward v. State, 34 Fla. L. Weekly S486, 495 (Fla. Aug. 27, 2009). The summary of the evidence provided by the Fifth District Court of Appeal in its decision affirming the conviction of McGirth's co-defendant (who was tried jointly with McGirth) demonstrates that the evidence is more than sufficient to sustain McGirth's conviction:

> Sheila Miller was residing with her parents, James and Diana Miller, when she invited Renaldo McGirth FN1 to visit her while she convalesced from an automobile accident that left her confined to a wheelchair. Sheila had not seen McGirth for almost two years, and the purpose of the visit was vague. McGirth was purportedly bringing her a gift, the nature of which appeared to be illicit. McGirth arrived with Roberts, his cousin, and Theodore Houston. FN2 Mrs. Miller greeted McGirth and all three went inside.FN3
>
> > FN1. Sheila and McGirth were former friends who had a falling-out. Apparently this invitation was to rekindle their friendship.
> >
> > FN2. Houston's trial was severed from Roberts' and McGirth's, who were tried jointly.
> >
> > FN3. An undercurrent throughout the case was the extent, if any, of Sheila Miller's involvement in the events. She had a history of drug and alcohol abuse and was supported financially, willingly by her mother and begrudgingly by her father. They had put her through substance abuse treatment, purchased at least two residences for her use, and paid all her living expenses. Despite this support, Sheila had stolen her mother's credit cards in the past.

McGirth, Houston, and Sheila went into Sheila's bedroom, while Roberts remained in the living room with Mrs. Miller. Once in the bedroom, McGirth produced a small handgun and instructed Houston to tape Sheila's mouth and bind her hands with duct tape which the trio had purchased on the way to the Miller residence. Mrs. Miller was called into the room and pushed onto the bed, where either McGirth or Houston demanded money. When Mrs. Miller stated she only had $70 and rose to get the money, McGirth shot her in the chest. The wound was not fatal. Just prior to or just after Mrs. Miller was shot, Roberts gathered up the Millers' wallets and car keys and handed them to McGirth. Mrs. Miller was then taken to the computer room in an unsuccessful attempt to order cell phones over the internet. Roberts brought Mr. Miller, who had been in the master bedroom, to Sheila's bedroom. Mr. Miller was forced to lie on the floor, pinned by a foot on his head.

Once the couple's credit cards and a personal identification number were obtained, Mrs. Miller was placed on the floor of Sheila's bedroom at Mr. Miller's feet. Roberts removed Sheila from the home and put her in the Millers' van. Inside the home, McGirth shot both Mr. and Mrs. Miller in the head as they lay on the bedroom floor. Mr. Miller survived; however, Mrs. Miller was not as fortunate. Bleeding from his head wound, Mr. Miller was able to exit the bedroom window and struggled to a neighbor's home, from where the sheriff's office was summoned.

McGirth, Roberts, and Sheila, ostensibly the victim of a kidnapping, left in the van. Houston followed in a silver Ford, the vehicle in which the trio had arrived. Proceeding to an automated teller machine (“ATM”), they withdrew $500, which McGirth divided into thirds. They then drove to a K-Mart in Belleview, Florida, where they once again unsuccessfully tried to locate a particular type of cell phone. Leaving the silver Ford in the K-Mart parking lot, they travelled to a mall in Gainesville, Florida. Attempts to withdraw money at the mall ATMs and purchase items from stores were unsuccessful.

At the Miller home, law enforcement secured the scene and began tracing the use of the Millers' credit

> cards. A BOLO was issued for the van. Still driving the van, Roberts, McGirth, Houston, and Sheila returned to Marion County, stopping at a convenience store to purchase snacks. Spotted by law enforcement, McGirth led the deputies on a high speed chase. The chase ended after the van was slowed by the use of stop sticks and disabled by the use of a PIT maneuver,FN4 which caused the van to roll. Houston was thrown from the van and pinned beneath it as it rolled; McGirth and Roberts exited the van and fled in opposite directions. Both were apprehended following a relatively short chase and with the assistance of canines. A search incident to Roberts' arrest produced jewelry and medication from the Miller home, as well as Mr. Miller's wallet. Roberts' fingerprints were found on the Millers' credit cards. A jury convicted Roberts of robbery with a firearm, and the lesser included charges of manslaughter and attempted manslaughter. He was acquitted of the kidnapping with a firearm charge relating to Sheila.
>
> FN4. Precision Immobilization Technique.

Roberts v. State 4 So. 3d 1261, 1262-1263 (Fla. 5th DCA 2009). There is no question but that McGirth's guilt was proven beyond a reasonable doubt, and there is no basis for relief.

PROPORTIONALITY

McGirth does not challenge the proportionality of his sentence of death. However, as this Court has held:

> Although Hayward does not assert that the sentence is disproportionate, we review every death sentence for proportionality "regardless of whether the issue is raised on appeal." *England v. State*, 940 So. 2d 389, 407 (Fla. 2006); *see also Fla. R. App. P*. 9.142(a)(6). In reviewing proportionality, the Court follows precedent that requires that the death penalty be "reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996). Therefore, in deciding whether death is a proportionate penalty, the Court makes "a

> comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003) (citations omitted). Accordingly, the Court considers the totality of the circumstances and compares the case with other similar capital cases. *See Duest v. State*, 855 So. 2d 33 (Fla. 2003). This analysis "is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). Rather, this entails "a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Urbin v. State,* 714 So. 2d 411, 416 (Fla. 1998).
>
> Further, in a proportionality analysis, this Court will accept the weight assigned by the trial court to the aggravating and mitigating factors. *See Bates v. State,* 750 So. 2d 6, 12 (Fla. 1999). We "will not disturb the sentencing judge's determination as to 'the relative weight to give to each established mitigator' where that ruling is 'supported by competent substantial evidence in the record.'" *Blackwood v. State*, 777 So. 2d 399, 412-13 (Fla. 2000) (*quoting Spencer v. State*, 691 So. 2d 1062, 1064 (Fla. 1996)).

Hayward v. State, 34 Fla. L. Weekly S486, 495 (Fla. Aug. 27, 2009). *Accord, Wright, supra.*

In this case, the sentencing court found five aggravating factors: (1) that the murder was cold, calculated and premeditated, (2) that McGirth had previously been convicted of a violent felony, (3) that the murder took place during the commission of a robbery, (4) that the murder was especially heinous, atrocious or cruel, and (5) that the murder was committed for the purpose of avoiding arrest. (V9, R1505-13). In

mitigation, the sentencing court assigned "significant" weight to McGirth's age, which was 18 at the time of the offense. (V9, R1514-15).[40] No other statutory mitigation was argued by the defense, and none was found by the court. (V9, R1515-17). McGirth proposed 18 separate non-statutory mitigators -- none of those mitigators were assigned more than some weight. (V9, R1518-1527).

In discussing the weighing of aggravation and mitigation, the sentencing court said:

> In this order, the Court has set forth the weight that it has given to the aggravating factors and the various mitigating factors, both statutory and non-statutory. In weighing the aggravating factors against the mitigating factors, the analysis does not turn on the number of factors which exist but rather the quality or the weight of given each factor. The process is more qualitative than quantitative. To that end, the Court finds that the aggravating circumstances in this case clearly outweigh the mitigating circumstances. The Court would further state that, even if the aggravating circumstance of the capital felony committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody had not been established and, further, if the Court had given great weight to the statutory mitigator of age of the defendant at the time of the crime, this would not change the Court's view and finding that the aggravating factors have significantly outweighed the mitigating circumstances. As to those non-statutory mitigating factors to which this Court has found either were not established or which were assigned no weight, if a reviewing court determines that these factors should have been assigned some weight by the Court, in light of the

[40] The court explained that significant weight "is slightly less than great or full weight in this Court's use of adjectives." (V9, R1515).

> Court's analysis of the facts regarding those non-statutory mitigating factors, they would have been assigned slight weight and would not have caused the aggravating factors, even without the avoid arrest/witness elimination aggravator, to have been outweighed by the mitigating factors. Lastly, if the Court was asked to find that the defendant's artistic ability, athletic prowess and helping other children with school work were also non-statutory mitigators, based upon the record, they would have been assigned slight to little weight and the aggravating circumstances would still have clearly outweighed all mitigating factors.

(V9, R1529-30).

To the extent that the sentence received by McGirth's co-defendant is a consideration, Roberts was tried jointly with McGirth, and there is no argument that the jury did not know what became of Roberts. The jury that convicted McGirth of first-degree murder convicted Roberts of manslaughter, and, since Roberts was convicted of a lesser offense, his culpability is, by definition, less than McGirth's. *Shere v. Moore*, 830 So. 2d 56, 61 (Fla. 2002) ("It is the crime for which the defendant is convicted that determines his or her culpability, and in this case that decision has been made by the trier of fact."); *Henyard v. State*, 689 So. 2d 239, 254-55 (Fla. 1996).

The jury recommended a death sentence by a vote of 11-1. (V9, R1503). The sentencing court found five aggravating factors, including the heinousness and coldness factors, which are among the weightiest in Florida's sentencing scheme. *See, e.g., Wright v. State*, 34 Fla. L. Weekly S497, 505 (Fla. Sept.

3, 2009); *Deparvine v. State,* 995 So. 2d 351, 381 (Fla. 2008); *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002). Only one statutory mitigator was found (or even argued), and the non-statutory mitigation is minimal. If anything, this case is both more aggravated and less mitigated than *Hayward, supra*, which only had two aggravating circumstances. Likewise, this Court affirmed sentences of death in *Pope v. State*, 679 So. 2d 710, 716 (Fla. 1996), *Whitton v. State,* 649 So. 2d 861 (Fla. 1994) and *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), each of which was arguably less aggravated and more mitigated than this case. In *Gamble v. State,* this Court affirmed the death sentence in a case having only two aggravators, and more mitigation than is present here. *Gamble v. State*, 659 So. 2d 242, 245 (Fla. 1995) (". . . two aggravating factors (cold, calculated, and premeditated and pecuniary gain), one statutory mitigating factor (age), and several non-statutory mitigating factors, most of which were given little weight."). In this case, there is no colorable argument that McGirth's sentence of death is in any way disproportionate.

CONCLUSION

WHEREFORE, based upon the foregoing, the State respectfully submits that McGirth's convictions and death sentence should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Christopher J. Anderson**, Esquire, 645 Mayport Rd., Suite 4-G, Atlantic Beach, Florida 32233 on this _____ day of September, 2009.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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