IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2016

ERIC KURT PATRICK

Appellant,

v.

STATE OF FLORIDA

Appellee.

****

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

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

On November 9, 2005 Patrick was indicted with one count each of first degree, kidnapping, and robbery. (R. 1:3-5) The defense filed motions to suppress both his statement and physical evidence on which the court conducted an evidentiary hearing. (R. 4:576-88, 615-40, T. 21:2367-2492) The trial court denied the motions. (R. 4:612-14)

The jury trial began on February 2, 2009 and ended on February 20, 2009 with the jury finding guilty on all three counts. (T. 18:2124-26) There was a recess of approximately four months between the guilt and penalty phase trials. After the penalty phase trial the jury recommended a death sentence by a vote of 7-5. (R. 5:904-6, t. 27:3282-85) On August 20, 2009 the trial court held a hearing pursuant

to Spencer v. State, 615 So. 2d 688 (Fla. 1993) where the defense called two experts and Patrick and his mother made statements. (R. 6:1025-1116) The court sentenced Patrick to death on October 9, 2009. In so doing, the court found six aggravating factors: Patrick was under a sentence of imprisonment (great weight); Patrick had a prior violent felony (great weight); the murder occurred in the course of a felony (great weight); pecuniary gain (merged with felony murder); the murder was heinous, atrocious, and cruel ("HAC") (great weight); and the murder was cold, calculated, and premeditated ("CCP) (great weight). The court also found sixteen non-statutory mitigators: Patrick's father was physically and mentally abusive (little weight); Patrick had a tragic youth (little weight); his childhood was unstable (little weight); there was family abuse (some weight); substance abuse from an early age (little weight); Patrick suffered from severe drug abuse at the time of the crime (some weight); Patrick sought absolution and forgiveness (little weight); Patrick had remorse (some weight); he loves his family (little weight); Patrick is close to his mother (some weight); his brother attended the trial (little weight); Patrick confessed (little weight); he had good conduct throughout the trial (little weight); he suffered from emotional stress combined with a history of family dysfunction (little weight); he had experienced childhood sexual abuse and exploitation (some weight); and he had some mental health

history as discussed in number 14 (little weight). (R. 6:959-77)

Robert Lyon ("Lyon") and Jenny Scott ("Scott") were friends with Steven Schumacher ("Schumacher") who saw him daily. Schumacher was an elderly man in his seventies who had mobility problems due to a previously broken neck; he also had an injured elbow around the time of the murder. Lyon and Scott would run errands for him, took him to doctor's appointments, and handled Schumacher's financial matters. (T 12:1277-82, 1287) Scott visited him daily. (Id. 1320) They last saw Schumacher on September 25, 2005 when he went over to offer him dinner. Patrick was there as well. Lyon had first met Patrick two weeks earlier and saw him a couple of times since that given that Patrick was staying with Schumacher. (Id. 1282-84, 1324) Schumacher always called Lyon every morning but failed to do so on either that Monday or Tuesday morning and his truck was missing as well. (Id. 1289-90) Scott also did not see or hear from Schumacher on those days. There was no answer at the apartment when she went over on Tuesday, the blinds were drawn (which was unusual), and the truck was missing. She called the sheriffs and waited until they arrived before opening the apartment. When she went in, the bedroom was dark and disarrayed with blood stains all over the place. (Id. 1326-34)

Deputy James Snell responded to Scott's call and went in the apartment with

her around 9:30 in the morning on Tuesday. (Id. 1343-46) He too saw the blood stains on the bed and found Schumacher's body in the bathtub. (Id. 1347-51) The body was very bloody and had the hands and ankles bound in the back; there was tape all around the head and face with the face resting on the drain. The pants were pulled down although still on the body. The body was cold and stiff and the blood had pooled. (Id. 1352-54, 13:1484-86) The ankles were bound with torn sheets and a cord from a lamp with six or seven knots in them. The wrists were bound by a telephone cord and tape. There was bruising on an elbow, the chin, and the top of the head. The tape on the head went both horizontally and vertically and there was a pillow case folded over the mouth under the tape. (T. 13:1399-1402) The tape seemed to be one continuous piece. (Id. 1428)

The sheriffs found no evidence of forced entry into the apartment and the air conditioning was set at sixty degrees so all the windows had condensation on them. (T. 14:1384-85) The deputies found tape matching that on Schumacher's face in the kitchen garbage; his wallet was in the living room. There were bloody footprints on the tile, a large blood stain on the bedroom carpet, and blood spatter on the dresser and wall. (Id. 1391-94) The bedroom lamp was cracked and missing its cord. A cord was in the bed under the sheets. There was blood spatter on the sheets and headboard. Teeth were found in the bedclothes. A broken box with

blood on it was under the dresser. (Id. 1395-97)

According to the criminalist, the blood spatter on the headboard and wall indicated that the blows were struck below the level of the headboard with the person being on the bed next to it. (T. 14:1583) The size of the blood drops were consistent with someone being beaten with a striking force. (Id. 1584-85) The size of the blood stain on the carpet indicated that a body had lain there for some time and the stains on the dresser showed that blows had been struck on that prone body separate and apart from the blows stricken near the headboard. (Id. 1586-89) The criminalist also testified that Patrick's boots had made the bloody footprints found in the apartment. (Id. 1602-04)

Deputy Kurt Bukata ("Bukata") ran into Patrick at a gas station and arrested him on an out-standing warrant. Patrick had injuries on his knuckles and was carrying a duffle bag. Bukata inventoried the duffel bag and found inside blood-stained boots, jeans, briefs, and socks. (T. 13:1405-07, 14:1555-58) Patrick had some abrasions on his upper body (T. 14:1560-61) He told Bukata that he had had a fight with some guys over his shoes. (T. 14:1559) DNA tests found Schumacher's blood on Patrick's jeans, (T. 15:1719-23)

The medical examiner testified that Schumacher could have breathed since his nose was not covered but it would have been extremely difficult since he was

on his belly with his arms and legs tied behind and on top of him. (T. 14:1488-89) Schumacher had multiple injuries to the head and neck from something hitting him. His forehead was red and swollen. There were abrasions on the right side of the face and on top of the eye and on the eyes. There was also a cut on the cheek with bruising on the nose. There were multiple cuts on the scalp and left cheek caused by a blunt object which split the skin and bruised the surrounding area, making a "V" shaped pattern, which might have been caused by the wooden box found by the sheriffs. The whole face had injuries and a number of teeth were broken or missing. The injuries to the mouth were also caused by a blunt object. (Id. 1494-99, 1529-38) There were more bruising and injuries on the ear, chest, and neck. A good amount of force was required to split the skin with such a blunt object. (T. 1501-06) There were also crush injuries and hemorrhages under the scalp. There was blood on the top of the brain and under the brain membrane; the brain itself was swollen. (Id. 1507-10) There was hemorrhaging all over the neck area including fractures of the cartilage of the voice box and windpipe which took a significant crushing or pressing force to accomplish. A person standing on the neck or pressing the neck forcefully against a hard surface might cause such injuries. (Id. 1511-18) The cause of death was blunt force trauma to the head and strangulation from the neck injuries. (Id. 1518-19) There was no reason to tape the

mouth if the person was already dead. (Id. 1522-23) Schumacher's blood alcohol level was .02 percent. There were no defensive wounds; there was bruising to the knees and elbows. (Id. 1528)

Martin Diez was an inmate in the Broward jail in September through October 2005 and Patrick was in his room for about a week during that time. (T. 15:1651-53) He told of the multiple conversations they had about the murder and that Patrick was not at all remorseful during them. Diez was helping him with his legal paperwork. Diez was disturbed both by the crime and by the pleasure Patrick took in it so he began taking notes of what was said. (Id. 1654-55) He told his attorneys what was happening and wrote out an affidavit which they took to the state attorney's office. He had talked to others before about their crimes but turned Patrick's statements in because of Patrick had so enjoyed killing Schumacher. (Id. 1565-58)

According to Patrick, he met Schumacher at Holiday Park during a rain shower when both men took shelter under a pavilion. Patrick said that Schumacher was a homosexual and that he pretended to be one as well. Schumacher bought him lunch at Burger King and then offered him a place to stay while he got on his feet. Patrick planned from the beginning to take Schumacher for his money and to kill him. Patrick beat the pin number for the ATM card out of Schumacher when he

resisted telling him. Schumacher screamed and begged for his life which made Patrick liked since it made him feel powerful. He beat him badly in the bedroom, breaking his nose and cutting his face. Patrick's facial expressions indicated to Diez that the death was completely meaningless to him. Patrick taped Schumacher's face and bound his arms and legs, hog tying him, to make it look like a home invasion robbery which had occurred while Patrick was at work, which had been his plan from the beginning. (T. 15:1659-62)

Patrick planned on being at work when Schumacher was found and had packed a lunch. He left the house with the ATM card, which he used, and the truck. He returned to the apartment and then placed the body in the tub so the blood would drain there and be out of sight. He left the lunch in the truck at a Tri-Rail station. and had used the ATM at a convenience store when he got caught on his warrant so he did not have the chance to clean up the scene at all. (T. 15:1659-63) Bank records and video showed that Schumacher's ATM card was used three times after his death and showed Patrick, with his duffle bag, using the card. (Id. 1739-47)

Patrick told Diez that he tried to act surprised when the police informed him of Schumacher's death. (Id. 1664) Patrick gave Diez all sorts of family information including social security numbers since he was helping him fill out legal forms.

(Id. 1665) Diez never read any paperwork on Patrick's case or saw any news reports on it. (Id. 1667) The state attorney did not promise Diez anything for the information or testimony. (Id. 1666, 1679-80) Diez has informed on other defendants as well in exchange for deals with the prosecution but did not do so here where the state promised him nothing. (Id. 1672-75, 1761)

The state introduced tapes of telephone conversations between Patrick and his mother. In those calls, Patrick admits hitting Schumacher and says he does not want to remember what happened. (T. 15:1756-58) Patrick also gave a statement to the police where he recounted meeting Schumacher at Holiday Park and he took him to his home to wash his clothes. Patrick knew he was gay and said that he was not pushy until the last night. Schumacher gave him his ATM card that Sunday night before bed because Patrick might need it during work. (T. 16:1811-14)

Patrick said he did repulsive things to stay with Schumacher. Schumacher was very nice to him, giving him a place to stay and taking him around to look for work. That Sunday night, they were sleeping in the same bed and Schumacher came on to Patrick to aggressively and Patrick "freaked out." He beat him and tied him up to prevent him from calling the police. He could not stop hitting him. Schumacher was very vocal during the attack so Patrick taped his mouth to silence him. Patrick said that he was drinking and eating pills that night before the attack.

Patrick admitted that he might have choked him and that Schumacher asked him to stop several times. Schumacher told him he was doing alright although he gurgled a bit. Patrick that Lyon and Scott would come by and help Schumacher. (T. 16:1789-95, 1807, 1830-32) Patrick said he put Schumacher on his side in the tub and that he was still alive when he did so. Although he initially denied using anything other than his hands to hit him, he ultimately admitted to beating him with a wooden box because his hands hurt so much; Schumacher's teeth had left marks on his hands. (Id. 1808-10, 1837-38)

Patrick took the truck and left it at the Tri-Rail station in Boca Raton. He took Schumacher's ATM card with him. He said that Schumacher had let him use the card before so he already knew the pin number. He used the card three times until he hit the daily limit. The account had $4000 in it. He admitted that he went back to the apartment later, cleaned up a bit, and checked on Schumacher. (T. 16:1796-1807) Patrick admitted to taking cash and a watch in addition to the truck and ATM card (Id. 1819-20) Patrick said that Schumacher did not deserve to die like that but he had never intended to kill him. (Id. 1804-05, 1825-28) He was scared and on drugs that night so he was paranoid and not thinking straight. (Id. 1833) Patrick also admitted to frequenting gay bars to meet gay men because he could get more food, help, and money from them. (Id. 1834-37)

At the penalty phase trial the State introduced a certified copy of Patrick's 1998 conviction for armed carjacking and a certified copy of the Department of Corrections form indicating that Patrick was on controlled release until February 2007. (T. 23:2766-67, R. 1:224-30, SR. 221-23) Scott Tison ("Tison") testified for the State and recalled how he met Patrick in a bar in 1997. They left for Tison's home and later Tison agreed to drive Patrick home. During that drive, Patrick ordered Tison to stop, pulled a knife on him, and demanded his wallet, money, and ATM card. Tison escaped only when they encountered two police cars. (T. 23:2778-86)

Dawn Allford ("Allford") was Schumacher's daughter. She explained that he had two fused disks, an injured elbow, and was recovering from a broken neck. She also gave victim impact testimony. (T. 23:2791-98)

Dorothy Dolighan was friends with Patrick's mother and knew him while he was growing up. She loved him very much. (T. 24:2822-30) Patrick's brother Carsten also testified. Their father was very strict and spanked them with a belt for misbehavior or bad grades. They never knew when their father would get mad. He was also verbally abusive. He had a severe alcohol problem and would go on binges. He physically abused his wife who had to be hospitalized more than once for her injuries. (T. 24:2857-59) Philip Arth is an investigator who testified about

collecting records on Patrick and his family. (T. 24: 178-98)

Patrick's mother Ingrid Franke also testified that his father was physically and verbally abusive to both her and the two boys. In 1973 she had him arrested for abusing Patrick. She said that Patrick was a good child. After she divorced the father Patrick moved in with him since she could not support him. He ran away once and ended up in a psychiatric facility. She loves him and he is very supportive of her. (T. 25:2945-51)

Father Jerry Singleton who visited prisons as part of his ministry. He met and grew to know Patrick. He believes him to be an intelligent and sincere person who had a serious drug and alcohol addiction which led him into problems. Since he has been in jail, he began a 12 step program and can assist other recovering inmates. Patrick has taken full responsibility for his actions and is deeply remorseful. (T. 25:2954-65)

Patrick himself took the stand. He recalled his childhood in Alaska and the beatings with a belt by his father when he misbehaved. He also saw his mother beaten. His father was also verbally abusive to him and the rest of the family. He detailed his history of substance abuse. That abuse led to his ten convictions. He was embarrassed and humiliated by what he had done to Schumacher. (T. 25:3028-30)

Christopher Fichera ("Fichera") is a clinical and forensic psychologist who was also called by the defense. He created a power point presentation which highlighted the mitigation in this case given the information gathered from the other witnesses and records. He gave the jury a brief history of Patrick's family. He explained the concepts behind mitigation and how they would apply to Patrick. He concluded that Patrick had a psychologically damaging childhood which made him predisposed to a number of problems as well as to violent behavior. (T. 26:3049-3141)

SUMMARY OF THE ARGUMENT

ISSUE I - The trial court properly excused the mentioned jurors for valid hardship reasons and Patrick has not demonstrated how the court's actions prejudiced him at trial.

ISSUE II- The trial court was well within its discretion when it refused to allow in testimony that Schumacher had a history of picking up gay men, ruling it more prejudicial than probative.

ISSUE III - The trial court did not abuse its discretion when it limited Diez's testimony to the facts of what he was offered for his testimony rather than having explain his hopes and dreams of state assistance.

ISSUE IV - The trial court was within its discretion when it gave the voluntary

intoxication instruction since there was evidence in the record that Patrick used drugs and alcohol on the night of the crime. Furthermore, this issue was insufficiently briefed and should be deemed waived.

ISSUE V - The trial court's denial of the motions to suppress were supported by the evidence from the suppression hearing.

ISSUE VI - The trial court did not abuse its discretion in admitting a limited number of autopsy photographs where there was testimony that the medical examiner needed them to explain her testimony.

ISSUE VII - Patrick failed to object to the prosecutor's closing argument so the issue was not preserved for appeal. Since the arguments were proper, he can show no fundamental error.

ISSUE VIII - The trial court used the correct standard when it denied the motion for judgement of acquittal; this issue is unpreserved for appeal since there was no objection made at trial.

ISSUE IX - There was no cumulative error in the guilt phase trial.

ISSUE X - The trial court properly gave the standard jury instructions at the penalty phase trial. Patrick again failed to sufficiently brief this issue and it should be deemed waived.

ISSUE XI - Patrick failed to object to the prosecutor's penalty phase argument so

the issue is not preserved for appeal. Furthermore, the argument was not objectionable.

ISSUE XII - The trial court properly sustained objections to the defense's closing argument when counsel attempted to argue facts not before the jury.

ISSUE XIII - The trial court did not abuse its discretion in limiting the testimony and visual demonstration of one of the defense penalty phase witnesses since the material was not relevant and part of it was inflammatory.

ISSUE XIV - The death sentence is proportional.

ISSUE XV - There were no fundamental errors in the sentencing order.

ISSUE XVI - Florida's capital sentencing scheme is constitutional.

ISSUE XVII - There was no cumulative error in the penalty phase.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RELEASING JURORS FOR CAUSE DUE TO HARDSHIP. (Restated)

Initially Patrick claims that the trial court erred in releasing certain jurors for cause without first allowing the defense to question them, thereby violating his due process right to a fair trial. He argues that the court promised to allow both sides to question the jurors but then refused to allow the questioning by the defense. He

specifically points to the excusals of nine potential jurors: Hughes; Fernandez; Souci; Safaroff; Gregorio; Gravel; Guerror; Johnson; and Mason. He particularly notes that Souci was an opponent of the death penalty and the defense wished to question her and attempt to rehabilitate her which the court did not allow it to do. The State contends that the trial court's actions were well within its discretion and were proper given the information available to it and the parties. This issue is without merit and Patrick's convictions should be affirmed.

Each of the jurors listed above were excused for hardship reasons after they repeatedly told the court, either from its questioning or the state's, that they could not serve. Florida statute § 40.013 (5) and (6) states:

> (5) A presiding judge may, in his or her discretion, excuse ... a person who is physically infirm from jury service ....
> (6) A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity.

"During the general qualification process under section 40.013(6), Florida Statutes (1997), removal of a potential juror for hardship is within the trial court's discretion. *See Jones v. State*, 749 So.2d 561, 562 (Fla. 2d DCA 2000). " Wright v. State, 857 So.2d 861, 877 (Fla. 2003); Hertz v. State, 803 So.2d 629, 638 (Fla. 2001); Davis v. State, 859 So.2d 465, 473 (Fla. 2003). The trial court specifically mentioned this section when it excused several of the mentioned people. "Discretion is abused only when the judicial action is arbitrary, fanciful, or

unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." White v. State, 817 So. 2d 799, 806 (Fla. 2002); Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla. 2000); Huff v. State, 569 So.2d 1247 (Fla. 1990).There was no abuse of discretion here.

The first six of these individuals were questioned on the first day of the jury selection. Hughes told the court that she was a teacher and the FCATs were in the coming the following week and her students and their work would preoccupy her. (T. 2:90) She later told the prosecutor that she would be very distracted by her work and would have difficulty paying strict attention to the trial. The prosecutor only inquired about hardship.[1] (T. 3:206-7) Fernandez told the court that her mother was quite ill and she was concerned about her. (T. 2:98) She later told the prosecutor that she would be too worried and distracted about her mother to serve since she is an only child and cares for her mother daily. (T. 3:217-18) Gregorio told the court that she could not serve because she has a toddler with autism for whom she was searching for services, her fiancé was scheduled for back surgery any day, plus she was the sole income for all three. (T. 2:105-6) She reiterated this to the state saying that her family needed her. (T. 3:230) Neither the court nor the

state asked Hughes, Fernandez, or Gregorio about the death penalty or anything else of substance. Gravel was not released at all but returned and was questioned by the defense. (T. 3:282, 7:701)

Two of the people released for hardship were questioned by the court about the death penalty in addition to their hardships. The court initially just asked Souci for her personal information when she volunteered:

> Your Honor, it would be a hardship. The nature of my business, of my job is that if I don't work I don't get paid and just the thought of no income for my family for ten days is, is very stressful on me, thank you.

(T. 2:102) Later when the court inquired generally of the panel of strong feelings on the death penalty the following transpired:

> ... okay, that would be Ms. Souci, I got ya. You feel that under no circumstances should the death penalty ever ...
> MS. SOUCI: Yes.
> THE COURT: You can't think of any circumstances?
> MS. SOUCI: No, I can't, Your Honor.

(T. 3:149-50) The state only asked about her hardship to which she said, "MS. SOUCI: Yes, that would be a tremendous hardship." (T. 3:226) Safaroff told the court that she was in medical treatment and could not serve; later she said she was religiously opposed to the death penalty. (T: 2:104-5, 3:150) Later, she asked to

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[1]The transcript incorrectly lists Poux as responding but it is clear that it was Hughes who answered. (T. 3:207)

speak with the court and told all that she was in pain, her medication made her sleepy, and that she could end up in the hospital at any time. (T. 3:186-87)

The court said that it wanted to release jurors for hardship at the end of the day so as to not needlessly make them return the next only to be released then. The defense told the court that it would agree to release jurors for hardship even if it had yet to question them about the death penalty.

> MR. RERES: Even if Ms. Ferraro is not through we'll still agree.
> THE COURT: I'm not limiting her to thirty minutes.
> MR. RERES: We still agree the ones that are clear to not to have the, come back I don't want to inconvenience anybody just for the sake of inconveniencing them.
> THE COURT: All right. But if either one of you has an objection to the people who will make the Court's short list based upon me hearing what they are saying, that's fine, they'll be told to come back.

(T. 3:187-89) The state finished its voir dire at approximately 4:50 P.M. and the defense did not want to start its at that late hour. (T. 3:266-68) The court reiterated that it did not want to inconvenience jurors who would be released anyway and the defense agreed. The court swore Patrick in and asked him if he agreed to release the jurors for cause (hardship) rather than bringing them back. He agreed. (T. 3:269-71)

The court then went through a long list of jurors it thought excusable. The defense agreed to excuse a number of them, including any pro-death jurors. The court agreed to bring a someone back when the defense asked to question her and

she had no hardship claim. (T. 3:274) The defense objected "for the record" without requesting to bring her back for questioning or stating the grounds when the court suggested excusing Hughes because she said she was too distracted to serve properly. (T. 3:276) When the court came to Fernandez's name the state agreed to a cause challenge to which the court indicated that it was going to release her under Fla. Stat. § 40.013 whether the parties agree or not. The defense again objected "for the record" without stating why or asking to question her. (T. 3:278) The court released Safaroff due to her health problems which was clearly allowed under § 40.013 (5), noting that the defense had agreed to release another juror in a similar situation. (T. 3:279-80)

The defense did specifically ask to question Souci the following day. The court pointed out that she was adamantly opposed to the death penalty as well as her financial hardship. (T. 3:279) For Gregorio the following exchange took place:

> MS. TATE: Gregorio is cause.
> MR. RERES: We object to a cause challenge at this time.
> THE COURT: On what basis?
> MR. RERES: Okay.
> THE COURT: She talked about loss of time and money, if she's not there she's not getting paid. We're letting everybody else off, you know, I can't discriminate against these people. I know you all may like some of 'em but everybody else that you all moved for cause for I granted, so.
> MS. TATE: Also, Judge, for the record her fiancé is having emergency back surgery this Friday.
> THE COURT: He's on the list any day now. What am I, going to

> recess the trial so she can be with him? Objection noted and she's a cause challenge. I'm going to bring Klempner back to be-talked to. Moss is coming back. Nay is coming back. McDonald is coming back. Let's talk about Ms. Falco.
> MR. RERES: We agree to a cause challenge, Judge, she's auto death.

It is not at all clear from this record that the defense maintained its objection to the release of Gregorio, so the State contends that Patrick waived his right to appeal on this particular excusal. Peterka v. State, 640 So.2d 59, 65-66 (Fla.1994) (lack of contemporaneous objection to court's dismissal, for cause, of prospective juror waived issue); Cannady v. State, 620 So.2d 165, 168-69 (Fla.1993) (defendant failed to preserve issue of court's excusal, for cause, of three potential jurors who did not feel they could vote for the death penalty, where defense counsel made a general objection but failed to object to the excusal of each venire member individually).

The next day the last three mentioned jurors were questioned and again the state's voir dire did not end until around 5 P.M. None of these three were questioned about anything other than their personal information and hardship. Guerrero told the court that he was a self-employed exterminator working by himself and that it would be a financial hardship for him to serve. (T. 4:339, 5:438) Johnson explained that he was the caretaker for his eighty-six year old mother and would have to hire someone to care for her if he served which he could not afford

to do. (T. 4:356-57, 5:469) Mason said that he had small children, one of whom was four, and he was the only one able to pick them up in the afternoon from school. (T. 4:362-63, 5:478-79) The court engaged in the same practice it had the day before and the defense agreed. (T. 5:518) The defense allowed at least two jurors to be released even though it had not questioned them. (T. 5:400, 430) The court goes through the jurors individually, bringing a number back for each side. Although the defense asked to question each of these three, it did not articulate its objection to releasing them given their hardship claims and the court released them for the reasons each had stated and noted that it had to remain consistent in the way it treated the various jurors. (T. 5:521, 523, 524-25)

Each of these prospective jurors had cited valid reasons to be released for hardship or medical reasons. The trial court was fully within its discretion to release them. Furthermore, the defense specifically agreed to the procedure the court used to release jurors before they were questioned by the defense. Additionally, the state did not question any of these jurors about anything other than their hardship claims and the defense could not have added any additional information with further questioning. Hardship is not a subject from which a juror is "rehabilitated." Patrick does not allege what possible prejudice he suffered by his counsel not questioning these prospective jurors on their hardship claims nor

does he argue that they would not have ultimately been excused. Florida courts have held that counsel from either side does not generally participate in the jury qualification questioning although the court may allow them to do so. See Wright, 857 So.2d at 877; Remeta v. State, 522 So.2d 825, 828 (Fla.1988); O'Quendo v. State, 823 So.2d 834, 836 (Fla. 5th DCA 2002). Given that law and the record in this case, the trial court did not abuse its discretion by excusing these prospective jurors for hardship.

As to Souci and her views on the death penalty, the trial court again had discretion to excuse her, especially since she had made her hardship claim so pointedly each time she could.

> The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision. *See Gore v. State*, 706 So.2d 1328, 1332 (Fla.1997). "It is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error." *Fernandez v. State*, 730 So.2d 277, 281 (Fla.1999) (citing Mendoza v. State, 700 So.2d 670, 675 (Fla.1997)). "A trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in our review of the cold record." *Mendoza,* 700 So.2d at 675.

Hertz, 803 So.2d at 638. "A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." Ault v. State, 866 So.2d 674, 683-684 (Fla. 2003). Clearly there was support in the record

to excuse Souci from her responses that she could not follow the law and impose the death penalty; initially she even interrupted the court to say just that. (T. 3:149-50) See Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985) ("[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' "); Ault, 866 So.2d at 683-684 ("The test for determining juror competency is whether a juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court."). The court did not abuse its discretion in excusing her given her opinions on the death penalty in conjunction with her hardship.

The cases cited by Patrick do not assist his argument. In O'Connell v. State, 480 So.2d 1284 (Fla. 1985) two "death-scrupled" jurors were excluded by the court after the prosecution had questioned them on the death penalty but refused to allow the defense an opportunity to also question them. This Court reversed, noting the court allowed the prosecution to re-examine jurors after defense questioning and cause challenges but refused the defense to do the same. "This double standard on the part of the trial judge amounted to a violation of due process." Id. 1286-87.

In Patrick's trial, neither party questioned the jurors on substantive matters and, as noted before, the prosecutor limited her one question to each to hardship issues.

In Hernandez v. State, 621 So.2d 1353 (Fla. 1993) this Court vacated a death sentence when the trial court excluded a "death-scrupled" juror who was equivocal in his stance on the death penalty, initially saying that he could impose it and later said he was completely opposed to which the court noted that he had figured out a way to get off the jury. The court excused him without letting the defense question him. Souci was never equivocal in her opinion. In Willacy v. State, 640 So.2d 1079 (Fla. 1994) a prospective juror said she could not impose a death sentence when the state questioned her. This Court held that while the trial court *properly excused her for cause*, it should have allowed the defense a chance to question her so remanded for a new penalty trial. Something similar happened in Sanders v. State, 707 So.2d 664 (Fla. 1998) where a prospective juror responded to the court's general inquiry on the death penalty that she could never impose death. The court invited the prosecution to question her but the state promptly challenged her for cause for that opinion and the court would not allow the defense to question her. Again, in this case, neither side questioned these venire people about the death penalty nor were they challenged or excused due to their opposition to the death penalty but for hardship. As noted in the record, this trial court allowed the defense

to bring back any juror it requested who did not have a hardship. The state routinely agreed to excuse jurors for hardship, mostly without even knowing their stance on the death penalty. The trial court did not abuse its discretion in excusing Souci for hardship rather than bringing her back for further questioning only to then excuse her. This Court should affirm.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PROHIBITING TESTIMONY ON VICTIM'S PRIOR ACTIONS. (Restated)

Patrick contends that the trial court improperly prohibited his counsel from eliciting testimony of Schumacher's alleged practice of meeting men in the park and bringing them home. He argues that the information was relevant since it was contrary to a portion of the state's case that Patrick targeted him from the beginning. Without elaboration, he also argues that it would have shown that Patrick was not the "aggressor." Contrary to Patrick's argument, the trial court did not abuse its discretion in ruling that the information was more prejudicial than probative.

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

limitation on the admission of evidence: 'Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.' § 90.403, Fla. Stat. (2006). The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. See Alston v. State, 723 So.2d 148, 156 (Fla. 1998); San Martin v. State, 717 So. 2d 462, 470-471 (Fla. 1998)(A trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed.); Ray v. State, 755 So.2d 604 (Fla. 2000); Zack v. State, 753 So.2d 9 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997)."Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." White, 817 So. 2d at 806; Trease, 768 So.2d at 1053, n.2; Huff, 569 So.2d 1247. The State submits that Patrick has not demonstrated an abuse of discretion in the instant case.

Here the State made a motion in limine to limit the defense from questioning witnesses about Schumacher's homosexuality and history of meeting men in the park. The defense argued that the information was relevant to whether or not Patrick targeted this man and who was the aggressor in the crime. The court ruled

that the information might inflame any jurors who harbored anti-homosexual feelings and did not shed any relevant information on what happened during the crime. (T. 1: 15-18) Prior to any testimony in the trial, the defense asked to court to revisit its prior ruling, again arguing that Schumacher had a steady habit of picking up male drug addicts in the park and allowing them to stay if they agreed to have sex with him. (R. 4:659-663) Counsel argued that the evidence would corroborate Patrick's story that he merely reacted (akin to self-defense) to a sexual advance by Schumacher and had not pre-planned the attack. The State countered that anything Schumacher had done with other men in the past was not relevant to the events on the night of the murder. The court again decided that the information would only impugn the victim's character and would not provide Patrick with a legitimate defense. The court also specifically cited to the tenor of the voir dire questioning and the anti-homosexual bias of many people when it again denied the defense's request to question in this area. (T. 7:798-809)

During the trial, defense counsel again requested leave from the court to ask Lyon about Schumacher's sexual habits and his relationship with other men. The court again denied that request, although it did allow the defense to do a proffer of the requested testimony. (T. 12:1300-03, 1310) Lyon explained that he knew Schumacher was a homosexual and they had had a sexual relationship at one point.

He told how Schumacher would bring men home whom he had met in the park or at bars, some of whom were addicts he tried to help. He acknowledged that Schumacher would, at times, have sex with those men. (T. 12: 1311-16) The court also allowed the defense to proffer testimony from Scott on the same topic. Scott also testified that Schumacher was gay and that he picked up men at Holiday Park which she thought was a dangerous habit since many were addicts. She thought he had stopped having sex after he broke his neck so she was upset when Patrick showed up. Schumacher did drink and she had seen him drinking with Patrick. She had no idea what addictions, if any, Patrick had. (T. 12:1337-41)

Martin Diez testified to the following:

> A. Yes, he was staying there so he can get on his feet. Schumacher was helping him out. He got a job at Eastern Ways as a welder a couple days before the incident and basically Eric told me he had planned to take him for his money and kill him from the beginning.
> Q. Now, what was he going to do if he had this plan to take the money and to kill him from the beginning, what was his plan with the job?
> A. Well, he was going to, he had the job as an alibi. He beat the ATM pin number out of Schumacher, got that information from him and then, and beat him to death.
> Q. What was his, did he tell you anything about his, him intending to be at work as an alibi for when people found Dr. Schumacher?
> A. Yes, he had it all set up. He even had a bag, a lunch packed and had the truck parked at the tri-rail station and had the whole thing set up. But instead of going through with that he decided to take out some money and he got caught by the police at some convenient store.

(T. 15:1660) The proposed information the defense wished to present in no way

contradicted this evidence. While Schumacher may have met his sexual partners in public places, that did not prevent Patrick seeing this meeting as an opportunity to rob and to kill him after that. The court had correctly directed the State to omit from Patrick's own statement and from Diez's testimony any information that Patrick did, indeed, target gay men to assault and to rob. The fact that Schumacher's desires allowed Patrick to carry out his plan does not mean that the plan did not exist.

Evidence regarding a victim's character is inadmissible. See § 90.404(1), Fla. Stat. (2009). Furthermore, evidence of homosexual acts are inadmissible if the singular purpose of attempting to interject it into a trial is to prove the bad character of a person or his propensity to commit a homosexual act. Guthrie v. State, 637 So.2d 35 (Fla. 2ndDCA 1994). There was no evidence in the trial, or in this purported testimony, that indicated that Schumacher was aggressive or acted in a way in this instance to trigger a valid self-defense claim. "This Court has not previously recognized that a nonviolent homosexual advance may constitute sufficient provocation to incite an individual to lose his self-control and commit acts in the heat of passion, thus reducing murder to manslaughter." Davis v. State, 928 So.2d 1089, 1120 (Fla. 2005). The court did not abuse its discretion by forbidding this testimony.

Patrick's reliance on Lewis v. State, 591 So.2d 922 (Fla. 1991) and Salgado v. United States, 278 F.2d 830 (1st Cir. 1960) do not assist his argument. The victim in Lewis was a minor who had been questioned by her parents on whether she was sexually active with her boyfriend; they had scheduled a gynecological examination for her as well. Her accusations against Lewis, who was not her boyfriend, came only days before the appointment and may have been a way to explain the impending results so as to not to implicate her behavior with her boyfriend. That testimony was directly relevant to the defense theory that she had a motive to fabricate her accusations against Lewis. Again, the proffered testimony here was only that Schumacher had met men in public before and had sexual relations with some of them. That behavior had no bearing whatsoever on the events on the night of the murder and would only inflame the jury against Schumacher's lifestyle. In Salgado, a court, in the late 1950's, allowed a witness to be impeached with his reputation for being a homosexual because the defense theory was that the witness asked to have sex with the defendant and was testifying against him because he had refused. While such a ruling might not be made currently, there the circuit court ruled that it was relevant to the witness's bias and motive. Here, Schumacher was not a witness to be impeached; he was a victim whose previous actions had no bearing on what Patrick did to him. This Court

should deny this claim.

ISSUE III

THE TRIAL COURT DID NOT ERR IN LIMITING CROSS-EXAMINATION OF DIEZ.

Patrick next argues that the trial court abused its discretion when it limited his cross-examination of Diez when it did not allow him to ask what Diez was feeling after he had been convicted in his own case and what he hoped to get for his testimony. He asserts that this restriction denied him his right to confront the witness under both the federal and state constitutions. The trial court properly limited the question to what was allowed under the evidence code. Further, all the information on what was promised and what happened to Diez after he testified at his deposition did come before the jury. There was no abuse of discretion.

The right to cross-examination is not without limits, as "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 294 (1985). The scope of cross-examination regarding a particular line of inquiry is "within the sound discretion of the trial court," and "it may exercise a reasonable judgment in determining when [a] subject is [inappropriate]." Alford v. U.S., 282 U.S. 687, 694, 51 S.Ct. 218, 220 (1931). "[T]rial judges retain wide latitude ... to impose

reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986). The trial court has discretion in ruling on the admissibility of evidence and the scope of cross-examination. Fla.Stat. § 90.612 (2000).

> The trial court's authority to impose restrictions on the presentation of evidence is recognized by Florida statute, which permits a trial court to "exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation" in order to "[f]acilitate, through effective interrogation and presentation, the discovery of the truth" and "[a]void needless consumption of time." § 90.612(1)(a)-(b), Fla. Stat. (2008). Further, a trial court has discretion to limit the presentation of evidence that is either irrelevant or outside the scope of a witness's knowledge. See §§ 90.403, 90.604, Fla. Stat. (2008).

McCray v. State, --- So.3d ----, 2011 WL 2637377 p. 19 (Fla. 2011).

Defense counsel sought to question Diez about what he hoped for during his testimony at the deposition since he had, by then, lost his own case. Previously Diez had said that he was not interested in getting anything for his testimony since he was going to win that case anyway. In explaining its ruling and the areas defense counsel could explore the court said:

> If you got something to show that he changed his testimony in light of the fact that he got favorable testimony from the State (sic), or that he was hoping to get a bargain or a deal from, or such a deal from the

> State, all of that is admissible. But what you're trying to get into stretches the rules of evidence and there is no provision in the rules of evidence to do what you want to do. So, I will sustain all objections that are made and I would caution you not to violate a Court order again.
> ...
> You can say, you know, you came forward with this to get a benefit and that benefit was a reduction in your sentence, wasn't it, so you made this up to get this. You can ask him that, but, you know, not you did this because you were hoping to get this, no, it is what he got, not what he was hoping for. But, you know, you can say you were hoping to get favorable treatment and you did get it, all of that is relevant but to start
> speculating with him and talking to him about numbers pulling out of the air, the Court can't allow you to do that. There's no provision under the rules to do that, even Gigglio doesn't allow you to do that and that's the federal case, there are ways to explore and to show his motive to this jury that he was looking for a benefit and so he came up with this contrived statement, according to the Defense, that this is what he's saying the defendant allegedly said and he was under threat of prosecution at the time looking at a lot of time and you can tell the jury -- what was he charged with?
> MR. RERES: Two counts of armed kidnapping and other felonies.
> ...
> THE COURT: Well, certainly you can ask him that, he was looking at life and now he's serving twenty, that's certainly a lot less than life.

(T. 15:1625-26, 1640-42) The court allowed counsel a wide latitude in bringing out Diez's motive to testify against Patrick by letting the jury know about Diez's case, the lack of promises, Diez's hope of favorable treatment, and that Diez ultimately only received twenty years on a case he had been facing multiple life sentences.

Diez was a prisoner in jail and was housed with Patrick for several weeks. At that time he was facing charges of his own for two counts of kidnapping and

one of burglary. Those charges carried life sentences. (T. 15:1670) Diez told his attorneys about Patrick's statements to him and they notified the state attorney's office while that case was still pending. Diez had no contact with either the police or the prosecutors before he wrote out Patrick's statement for his attorneys. (T. 15:1656-58) Prior to giving his deposition in the discovery phase of Patrick's case, Diez was convicted after a trial in his own case. After the deposition but before the trial here, Diez was sentenced. He received a twenty year sentence for all the charges. Neither the prosecution nor the police requested leniency in Diez's case or sentence although the prosecutor, subpoenaed by the defense, told the sentencing judge that Diez was promised nothing. (T. 15:1640-42, 1668-71) He repeatedly testified in this case that the state had promised him nothing for his testimony. (T. 15: 1656-58, 1666, 1668-71, 1678-80) Thus, the jury knew that Diez was facing multiple life sentences, was convicted, and had been sentenced to only twenty years. They also knew that law enforcement and the state promised Diez nothing in exchange for his assistance. Interestingly, the defense did not impeach Diez with his prior statement to the police, his written statement, or his deposition testimony during cross-examination since his account of what Patrick said to him was consistent throughout all of those.[2] More importantly, Diez's account did not

[2]The defense did impeach Diez extensively about his many instances of

change in any way even though he had lost his own case. The trial court was correct in ruling that Diez's vague hopes were not relevant. Furthermore, since all the information about Diez's case, his hope to help himself, and the fact that his sentence was reduced from the maximum did come before the jury for them to assess his credibility. Any error is harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). This Court should deny this appeal and affirm.

ISSUE IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GIVING THE VOLUNTARY INTOXICATION INSTRUCTION. (Restated)

Patrick next claims that the trial court erred in instructing the jury on voluntary intoxication at the State's request. He argues that since the court relied on a case decided when voluntary intoxication was a defense, and it is no longer, that it abused its discretion. He fails to fully address this claim by not arguing why the court's decision was in error or how it possibly prejudiced him. His sole comment on possible prejudice is that the court's decision allowed the State to undermine a defense not presented; he does not explain how this decision was in any way detrimental to the defense he did present. This issue is procedurally

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"snitching" or testifying against other inmates for the prosecution. The only instance of the defense impeaching him with his deposition testimony was in

barred. Furthermore, it is without merit since the trial court was well within its discretion in giving this instruction.

Patrick's failure to fully and adequately brief this issue constitutes a waiver and he is not entitled to relief on it. "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990); See Coolen v. State, 696 So. 2d 738, 742 n.2 (Fla. 1997) (stating that a failure to fully brief and argue points on appeal constitutes a waiver of these claims.); see also Victorino v. State, 23 So. 3d 87, 103 (Fla. 2009) ("We have previously stated that '[t]he purpose of an appellate brief is to present arguments in support of the points on appeal.'" (quoting Duest)). This issue should be denied.

A trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. Carpenter v. State, 785 So.2d 1182, 1199-1200 (Fla.2001); see also James v. State, 695 So.2d 1229, 1236 (Fla.1997); Kearse v. State, 662 So.2d 677, 682 (Fla.1995).)."Discretion is abused only when the judicial action is

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regards to Diez hope that his work with the federal agents might help him with his

arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." White, 817 So. 2d at 806; Trease, 768 So.2d at 1053, n.2; Huff, 569 So.2d 1247.

Jury instructions must include all essential and material elements of the crime charged. State v. Delva, 575 So.2d 643, 644 (Fla.1991). Any deficiency in the jury instructions requires that a contemporaneous objection be made at trial. Id. However, if counsel fails to object at trial, an error in the jury instructions may be raised on appeal if the error is fundamental. Id. To be considered fundamental "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. (quoting Brown v. State, 124 So.2d 481, 484 (Fla.1960)); J.B. v. State, 705 So.2d 1376, 1378 (Fla.1998) ("An error is fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.").

In requesting the voluntary intoxication instruction the prosecutor said:

> I'm not arguing that the Defense is using that as a defense, but I want them to know that that makes no difference on the burden of proof in the case.

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state cases. (T. 15:1678)

(T. 15:1773) and:

> So, I've got to, you know, at least discuss the things that the jury heard on that tape. By just saying the fact that he said he was paranoid, he was taking drugs, that's not a defense to any of the laws prescribed in this case...

(Id. at 1858) She made quite clear that she was addressing the facts that had come into evidence that Patrick was abusing drugs and alcohol on the night of the crimes. Such evidence had indeed come in through his statement to the police and the testimonies of Lyon and Scott. (T. 12:1287, 1324, 16:1792, 1803-5, 1825-28, 1830-33) Clearly the trial court did not abuse its discretion when it gave an instruction where there was evidence in the record to which it pertained. This Court should affirm the verdicts.

ISSUE V

THE TRIAL COURT PROPERLY DENIED THE MOTIONS TO SUPPRESS. (Restated)

Patrick next argues that the trial court's denial of his motions to suppress both the evidence seized from his duffle bag and his confession was reversible error. He claims that Deputy Bukata illegally detained him by asking Patrick his name and date of birth. The State argues that the evidence elicited at the evidentiary hearing soundly supports the trial court's factual findings and its rulings were correct under the governing law. This claim should be denied.

The review standard is that "a presumption of correctness" applies to a court's determination of historical facts, but a de novo standard applies to legal issues and mixed questions of law and fact which ultimately determine constitutional issues. Smithers v. State, 826 So.2d 916 (Fla. 2002); Connor v. State, 803 So.2d 598 (Fla. 2001); Parker v. State, 873 So.2d 270, 279 (Fla. 2004). The trial court's ruling on the voluntariness of a confession should not be disturbed unless it is clearly erroneous. Escobar v. State, 699 So. 2d 988, 993-994 (Fla. 1997); Davis v. State, 594 So. 2d 264, 266 (Fla. 1992). Where the evidence is conflicting, the trial court's finding will not be disturbed. Thomas v. State, 456 So. 2d 454 (Fla. 1984); Calvert v. State, 730 So. 2d 316, 318 (Fla. 5th DCA 1999). See Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) (finding even though defendant's former lover encouraged defendant to confess, partly out of fear of prosecution as accomplice, as a whole, defendant's will not overborne by any official misconduct).

"When, as here, a defendant challenges the voluntariness of his or her confession, the burden is on the State to establish by a preponderance of the evidence that the confession was freely and voluntarily given." DeConingh v. State, 433 So.2d 501 (Fla. 1983). "In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that

there was coercive police conduct." State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), citing Colorado v. Connelly, 479 U.S. 157 (1986). "The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained." Sawyer, 561 So.2d at 281.

A trial court's ruling on a motion to suppress must be sustained if the trial court applied the right rule of law and its ruling is supported by competent substantial evidence. State v. Glatzmayer, 789 So. 2d 297, 301 n. 7 (Fla. 2001). The evidence presented at the suppression hearing supported the trial court's denial of the motion to suppress.

The trial court held an evidentiary hearing, after which it made the following factual findings:

> On September 27,2005, Broward Sheriff Deputy Kurt Bukata was at a BP gas station on Atlantic Boulevard in Pompano Beach, Florida. While at the station, he was approached by the clerk/attendant, Joanne Decembre, asking for his help to remove two men from the property. Bukata testified that the BP station participated in the police trespass program. Bukata approached the men. One of them he recognized from previous contacts as David Houghton. He did not know the other person. When he asked for a name, he was given the name, Eric Patrick. He was also given a date of birth. He did not detain the man at the time. He saw the man pick up a duffle bag and leave as he had been directed.
>
> Bukata did a computer check on the name and date of birth, He found out that there was a warrant for Eric Patrick. He caught up with Defendant and arrested him for the warrant. He noticed wounds on

> Defendant's right hand. Defendant became very belligerent and stated that if he'd had a gun he would have used it. He also told Bukata that his brother had used his name.
>
> Bukata took Defendant's duffle bag and the contents inside into custody, but did not search inside the bag before placing it into the cruiser.
>
> Detective David Nicholson was investigating the homicide of a person named Steven Schumaker. Nicholson had interviewed the alleged victim's neighbors, Jenny Scott and Robert Lyons. Both persons stated that the last person that they had seen with the alleged victim was Defendant. They identified Defendant as having a shaved head with tattoos on his arms and back. They knew him as Eric. After viewing several photos, they both positively identified Defendant.
>
> On September 27,2005, Defendant was brought to an interview room for questioning at approximately 6:07 p.m. When seeing the detectives, Defendant stated, "boy this must be serious-2 detectives." Defendant further stated "you know I'm no dummy, I know what this all about..I've been waiting for you, I need to get this off my chest." At 6: 11 p.m., Defendant was advised of his Miranda rights. Defendant agreed to speak with the detectives without an attorney.
>
> ...
>
> This Court finds that Defendant's statements to the detectives were freely and voluntarily made. As a matter of fact, Defendant was talking about the homicide before the detectives were able to interrupt to advise him of Miranda. This Court finds from the totality of the circumstances that the evidence obtained and statements made in this case were lawfully obtained.

(R. 4:612-14) The court's findings are supported by the record and its legal conclusions are proper.

The court specifically found that Bukata did not detain Patrick when he initially encountered him. At the hearing, Bukata told how he was talking to a fellow deputy at the gas station that day when an employee of the station asked

him to get two men to leave the station property. Prior to that Bukata had made no contact with Patrick who was one of the men indicated by the employee. (T. 21:2368-69) Bukata then drove closer to the men, exited, and told them the clerk wanted them to leave. After that, he asked the men their names and dates of birth to complete his field identification card for the trespass warning. Patrick gave him that information and also volunteered an identification number that Bukata knew was false. Patrick picked up his belongings and said that he wanted to leave. Bukata said okay. Patrick left. (Id. 2372-75, 2378) Clearly, Bukata did not detain Patrick, nor did Patrick feel detained, since he then walked away. This stop was akin to the first kind discussed in Taylor v. State, 855 So.2d 1, 14–15 (Fla.2003), where a person may have a consensual encounter with an officer that involves only minimal police contact during which a citizen may either voluntarily comply with a police officer's requests or choose to ignore them and leave. Patrick both complied and then left.

Bukata then checked Patrick's identity through law enforcement data bases which informed him that a person with the same name and date of birth had a warrant. That possible warrant gave Bukata the reasonable suspicion necessary to detain Patrick until the warrant was confirmed. After he received that information, he drove to where Patrick was and contacted him again. Bukata was wary since

Patrick had already been deceitful with him and might be trying to hide something. Bukata approached him and cuffed him while explaining that there was a possible warrant for his arrest. The warrant was confirmed within minutes and Bukata arrested Patrick. (Id. 2380-82) Bukata noticed Patrick had fresh injuries on his knuckles. (Id. 2384-85) Once in the car Patrick was quite belligerent. (Id. 2383) The duffle bag was placed into property at the station by Bukata since the jail would not take it. (Id. 2409-10)

This evidence clearly supports the trial court's factual findings that Patrick's detention was proper and legal with Bukata following established procedures when confronted with a person with a felony warrant. As the trial court noted Herring v. United States, 128 S.Ct. 695 (2008) held that "to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." Clearly such behavior did not occur here and, therefore, suppression of the evidence was not available.

Patrick does not here address the voluntariness of his statement other than through the alleged illegal detention. As the trial court correctly noted, Patrick

wanted to talk to the police and signed the waiver form to do so after the detectives had read and gone over his Miranda rights. The trial court properly denied the suppression motion and this Court should affirm.

ISSUE VI

THE AUTOPSY PHOTOGRAPHS WERE PROPERLY ADMITTED. (Restated)

Patrick alleges that the trial court erred in allowing the State to admit several photographs from the autopsy to which he objected as gruesome and prejudicial. He argues that the photographs were unnecessary since the medical examiner could verbally describe the wounds and the state of the body. The state maintains that the court properly admitted the photographs since the witness said they were necessary to explain her testimony and findings. There was no abuse of discretion and this Court should affirm.

The admission of photographic evidence is within the trial judge's discretion and a ruling on this issue will not be disturbed unless there is a clear showing of abuse. Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995). See Davis, 859 So.2d at 477; Ray, 755 So. 2d at 610; Zack, 753 So. 2d 9; Jent v. State, 408 So. 2d 1024 (Fla. 1981). Even gruesome photographs are admissible "[a]bsent a clear showing of abuse of discretion by the trial court." See Rose v. State, 787 So. 2d 786, 794 (Fla. 2001); Gudinas v. State, 693 So. 2d 953 (Fla. 1997).

In Doorbal v. State, 983 So.2d 464 (Fla.2008) this Court explained:

> "The test for admissibility of photographic evidence is relevancy rather than necessity." Crime scene photographs are considered relevant when they establish the manner in which the murder was committed, show the position and location of the victim when he or she is found by police, or assist crime scene technicians in explaining the condition of the crime scene when police arrived. This Court has upheld the admission of autopsy photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds.
>
> However, even where photographs are relevant, the trial court must still determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jur[ors] and [distract] them from a fair and unimpassioned consideration of the evidence." In making this determination, the trial court should "scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point."

Douglas v. State, 878 So.2d 1246, 1255 (Fla.2004) (citations omitted) (alterations in original) (quoting *Pope v. State*, 679 So.2d 710, 713 (Fla.1996); *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990); *Marshall v. State*, 604 So.2d 799, 804 (Fla.1992)). The admission of photographs will also be upheld if they are corroborative of other evidence. See *Czubak v. State*, 570 So.2d at 928. The admission of the photographs of a deceased victim must be probative of a disputed issue, *see Almeida v. State*, 748 So.2d 922, 929 (Fla.1999), but we have advised "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Chavez v. State*, 832 So.2d 730, 763 (Fla.2002) (quoting *Henderson v. State*, 463 So.2d 196, 200 (Fla.1985)).

Id. at 497-98.

Under the abuse of discretion standard, substantial deference is paid to the trial court's ruling which will be upheld "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980); see Ford v. Ford, 700 So.2d 191, 195(Fla. 4th DCA 1997); Trease, 768 So.2d at 1053, n. 2. This standard is one of the most difficult for an appellant to satisfy. Ford, 700 So.2d at 195.

Gertrude Juste ("Juste"), the medical examiner in this case, was questioned by the parties and the court about which photographs from the autopsy she needed for her testimony. Juste and the parties went through a number of photographs, eliminating most of them, and selected the fewest necessary for her to use to demonstrate what she found to the jury. (T. 14:1467-78) The court examined each photograph individually as it was being discussed by Juste. Id. Juste also explained why she needed the photographs with the skin or scalp pulled down since the injuries were internal and not visible otherwise. (Id. 1472-73) The photographs were necessary to show the injuries in the brain. (Id. 1474) In response to defense counsel's question on whether she could just testify without using photographs, Juste replied:

> I don't know whether you can or cannot understand from my description of the injuries. I really don't know. Some people can easily

> picture, you know, what you're saying when you're saying words, but other people might need to actually see what you are talking about.

Id. 1475. Given Juste's statement the trial court clearly did not abuse its discretion in allowing the admission of these select photographs. This Court should affirm.

ISSUE VII

THE PROSECUTOR'S CLOSING ARGUMENT WAS PROPER AND THE ISSUE IS NOT PRESERVED FOR APPEAL. (Restated)

Patrick next alleges that the prosecutor's closing argument during the guilt phase trial was improper on three different occasions. First, he contends that the prosecutor improperly lessened the requirement for jury unanimity for guilt when she told them they need not be unanimous on the theory of first degree murder. Second, he contends she improperly included Schumacher's truck as a basis for the robbery since it was not included in the original indictment. Patrick failed to fully argue these two issues and cites no cases to support his contentions. The third aspect of the argument he finds objectionable was the prosecutor's comment that Patrick showed no remorse and bragged about the killing as an attack on his character. The State initially notes that none of these issues were preserved for appeal nor do they constitute fundamental error even if found to be improper. All these claims are without merit and the case should be affirmed.

Defense counsel did not object on any of these instances during the argument so they are not preserved for appeal. (T. 16:1886-1912, 1940-66) Poole v. State, 997 So.2d 382, 389–90 (Fla.2008) (concluding that the failure to raise contemporaneous objections to the prosecutor's comments waived any claim concerning the comments for appellate review notwithstanding a subsequent motion for mistrial). "Unobjected-to comments are grounds for reversal only if they rise to the level of fundamental error." Merck v. State, 975 So.2d 1054, 1061 (Fla.2007). Fundamental error is error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty ... could not have been obtained without the assistance of the alleged error." Poole, 997 So.2d at 390 (quoting Card v. State, 803 So.2d 613, 622 (Fla.2001)). As will be argued below, none of these instances constituted fundamental error.

The law allows a jury to convict a defendant of first degree murder without agreeing on whether the murder was premeditated or felony-murder. See Schad v. Arizona, 501 U.S. 624 (1991) (finding no denial of due process where jury permitted to agree on verdict without unanimously agreeing the homicide was committed under either the premeditated or felony murder theory); Mansfield v. State, 911 So.2d 1160, 1178 (Fla.2005) (jury unanimity not required on theory of first degree murder); Williams v. State, 967 So.2d 735 (same); Valdez v. State,

728 So. 2d 736, 739 (Fla. 1999) (rejecting claim of constitutional error arising from custom of charging with general indictments of premeditated first-degree murder and prosecuting under alternate theories of felony or premeditated murder). Thus, the prosecutor's argument was a correct statement of the law and not objectionable. (T. 16:1897-98) Finally, Patrick failed to sufficiently present or argue this issue in his brief. Duest, 555 So. 2d at 852 (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived).

The next instance that Patrick argues was improper involved the prosecutor including the truck among the listed property stolen by him during the crime of felony murder. He does not argue that the prosecutor improperly expanded the robbery charge based on the theft of the truck, just that the felony murder theory was improperly expanded. Again, he references the argument but does not develop it sufficiently to be cognizable on appeal. Duest, 555 So. 2d at 852. Furthermore, his argument fails because the indictment only charged him with first degree murder without specifying the theory or the supporting facts, as is allowed under the case law cited above. The jury can use the facts presented at trial to establish the basis for a first degree murder conviction nor does the underlying felony for a

felony murder conviction even need be charged. Kormondy v. State, 845 So.2d 41 (Fla. 2003) (rejecting the claim that death qualifying aggravators must be alleged in the indictment and individually found by a jury). The argument merely conformed to the evidence brought forth during the trial and was not improper. Even if it were improper, any error was not fundamental since it would not have affected the verdicts in either the guilt or penalty phase. Poole, 997 So.2d at 390.

The final instance complained of by Patrick was that the prosecutor unfairly attacked his character. He contends she did so when in arguing that: Patrick was without remorse for the killing; cleaned himself up and made lunch while Schumacher was in the bathtub; and that the killing was vile and disgusting. (T. 16:1942, 1952-53, 1965-66) He construes these statements as attacks on his character rather than a description of the events that actually took place. Again, defense counsel failed to object to these arguments on that basis during the trial.[3]

The comments about Patrick's lack of remorse came during the guilt phase rebuttal argument, not the penalty phase. The prosecutor, in arguing Patrick's lack of remorse, was directly commenting on his counsel's argument that Patrick was sorry for what he did which could be seen from the videotaped confession. Defense counsel repeatedly throughout his argument emphasized that Patrick was truthful

in his statement and was remorseful. Here are some examples:

> ... my god, this man is guilty of a lot of things but he's still a human being and he's still sorry for what he did and he acknowledged what he did.

(T. 16:1915)

> He knew his guilt just like the detective said, I think your conscience got to you. And what does Eric say, yeah, this has been bothering me, you know, I was hoping against hope that I didn't hurt him that bad.

(Id. 1924) Counsel also talked about the reasons Diez came forward. “He says the reason he testified against Eric Patrick is because he was offended by this man's attitude. (Id. 1920) The prosecutor’s statements on why Diez testified and on whether Patrick was remorseful was in direct response to the defense argument and, thus, were invited responses based on defense counsel's closing argument. A prosecutor's comments are not improper where they fall into the category of an “invited response” by the preceding argument of defense counsel concerning the same subject. See Barwick v. State, 660 So.2d 685, 694 (Fla.1995); Dufour v. State, 495 So.2d 154, 160 (Fla.1986); Walls v. State, 926 So.2d 1156, 1166 (Fla. 2006). Furthermore, these comments were not fundamental error. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986) (holding prosecutor's reference in closing argument to having seen the defendant "grinning from ear to ear" during the

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[3]Counsel objected to the comment about making lunch on the grounds that it was not a fair comment on the evidence. (T. 16:1953)

testimony of a State witness was not fundamental error); see also Kokal v. Dugger, 718 So.2d 138 (Fla.1998) (isolated comment in guilt phase argument harmless).

The prosecutor's mentioning of Patrick's actions after he put Schumacher in the tub were also in response to the defense's argument that his actions were a result of a frenzy and not calm and calculated as Diez had said. Some examples of the defense argument are:

> the State [doesn't] even have a first degree murder, not by felony theory, not by premeditated theory ... see that for all the terrible things that this man did it was a measure of loss of control through repressed feelings of guilt, shame at the things he had let himself do, the things he had become, where his life was. ...
>
> We talked about this in voir dire, none of this makes any sense. This is not a rational killing. This is an explosion of emotion beyond any reason or logic, beyond any intent.

and "He certainly doesn't conduct some carefully orchestrated plan as Martin Diez tells you to escape, to get away with it." (T. 16:1915-16) It was to this that the prosecutor commented on how Patrick changed his clothes, cleaned up, and made a lunch, all things discussed by Patrick in his statements and a lunch was indeed found in the truck. (T. 13:1405-07, 15:1660, 1663, 16:1821-24, 1837-38) Again, her argument was an invited response and allowable. Barwick, 660 So.2d at 694; Dufour, 495 So.2d at 160; Walls, 926 So.2d at 1166.

Finally, Patrick mentions the prosecutor's use of the word vile and disgusting as being character attacks on him. Initially, the examples cited by him

involved her calling the photographs disgusting and the murder itself vile. (T. 16:1965-66) Those comments cannot logically be construed as an attack on Patrick himself, only his handiwork. Furthermore, these also were in rebuttal after an argument where defense counsel himself repeatedly called the crime horrible and disgusting. Counsel went on to say:

> They [the acts] are horrible and, you know, it speaks to just how despicable and low this person had become in life that he didn't come to his senses immediately and say, oh my God, what did I just do to this man, 911, hello. It took a couple of days. It took them finding him. You know, I can't defend his character, doesn't have much of it, but he is a human being and he did feel bad about what he did and he never intended for this to happen. ...
>
> This is one of those horrible things in life that just happened.

(Id. 1936) The prosecutor may have picked up on counsel's choice of words but she did not use them to attack Patrick's character. Further, these were isolated comments and cannot constitute fundamental error. This Court should deny the appeal on this issue and affirm.

ISSUE VIII

THE TRIAL COURT EMPLOYED THE CORRECT LEGAL STANDARD IN DENYING THE MOTION FOR JUDGEMENT OF ACQUITTAL. (Restated)

Patrick next argues that the court used an incorrect legal standard in denying the defense's motion for judgement of acquittal on first degree murder and,

presumably, although not stated, that the case should be reversed. He does not argue that there were insufficient facts to support premeditated or felony murder or that the court would have ruled differently if it had used some different standard. The State maintains that the trial court did use the correct legal standard and that there was sufficient evidence in the record to support a denial of a judgement of acquittal. Furthermore, the issue is unpreserved for appeal since there was no contemporaneous objection, nor is there fundamental error since the evidence existed to support the charges. J.B., 705 So. 2d at 1378; Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Relief is unwarranted.

> A trial court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. *Taylor v. State*, 583 So.2d 323, 328 (Fla.1991).Where there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the trial court should submit the case to the jury. *Id.* Once competent, substantial evidence has been submitted on each element of the crime, it is for the jury to evaluate the evidence and the credibility of the witnesses. *Davis v. State*, 703 So.2d 1055, 1060 (Fla.1997).

Pearce v. State, 880 So.2d 561, 571-72 (Fla. 2004). Here the trial court explicitly cited to this standard and subsequently used it in analyzing whether the motion should be granted on both the murder and kidnapping charges. (T. 16:1846-50)

> All right. The Court has to look at the evidence at this juncture in the

> light most favorable to the State in determining whether a prima facie case has been made out and with regard to count one, premeditation seems to always be an argument and that's why I cited into the record the case law, what the Supreme Court says how premeditation can be proven, the injuries, all of the relevant facts and circumstances.

(Id. 1846) The court then spoke the words quoted by Patrick. The court was merely using a short hand to state the law on a judgement of acquittal, seemingly recognized by both parties since neither objected to the court's statement.

Premeditation is a factual issue for the jury. Asay v. State, 580 So. 2d 610, 612 (Fla. 1991) Courts use different standards of review depending on whether there is direct or circumstantial evidence to prove it. Where the evidence of premeditation is direct, whether in whole or in part: as with other factual findings, a jury's finding of premeditation will be sustained if supported by competent, substantial evidence in the record. See, e.g., Wheeler v. State, 4 So. 3d 599, 605 (Fla. 2009). When the evidence of premeditation is wholly circumstantial then not only must the evidence be sufficient to support the finding of premeditation, but the evidence, when viewed in the light most favorable to the State, must also be inconsistent with any other reasonable inference. Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). The issue of inconsistency is a jury question and the verdict will be sustained if supported by competent, substantial evidence. Id. In both, it is up to the jury to determine whether there is premeditation, which the trial court here

alluded to.

Here, there was substantial evidence of both the kidnapping and the robbery to serve as the underlying statutorily enumerated felony to reach a felony murder conviction so the court did not err in denying the motion on that ground. More than a mere intent to kill, premeditation is a fully-formed conscious purpose to kill. Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986). "This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act." Id. Premeditation is a factual issue to be determined by the jury and, like other factual matters, may be established by circumstantial evidence. Id.

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned. No definite length of time for it to exist has been set and indeed could not be.

Larry v. State, 104 So. 2d 352, 354 (Fla. 1958). Where premeditation is sought to be proved by circumstantial evidence, the evidence must be inconsistent with every other reasonable inference. Cochran, 547 So. 2d at 930. This question of inconsistency is for the jury to determine. Id.

In this trial there was both direct and circumstantial evidence of premeditation. Patrick told Diez that he had planned to kill Schumacher long before he actually did. (T. 15:1660) The circumstantial evidence of premeditation consisted of: the violence of the attack with internal injuries including brain hemorrhaging and swelling as well as the crushed windpipe which had to be caused by sustained, massive force; Patrick's statement that he stopped the beating several times at Schumacher's request but then began again; the number of punches which resulted in injuries to Patrick's hands which caused him then to use an object to continue the beating; the movement of the beating from the bed to the floor near the foot of it; the force used in the blows demonstrated by the blood spatter; the lack of injuries on Patrick indicating no resistance by Schumacher; and so forth. Circumstantial evidence of premeditation can include the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. Spencer v. State, 645 So.2d 377, 381 (Fla.1994). There was competent, substantial evidence in the record to support the verdict on this charge and the court did not err in denying the motion for a judgement of acquittal. This Court should affirm.

ISSUE IX

THERE WAS NO CUMULATIVE ERROR IN THE GUILT TRIAL. (Restated)

Patrick next claims that the cumulative errors in the guilt phase trial so infected the verdict that he should be granted a new trial. First, Patrick failed to sufficiently present or argue this issue in his brief and it should be denied on that basis. This issue is insufficiently pled. See Johnston v. State, 63 So.3d 730, 745 (Fla. 2011) (holding argument waived because defendant fails to "identify the alleged error, describe the factual determination he believes was necessary, or even set out the facts he believes are pertinent to the claim."); Anderson v. State, 822 So.2d 1261, 1268 (Fla. 2002) (finding claim waived where defendant "failed to brief and explain what the alleged cumulative errors are, and what their impact is on this case"); Coolen, 696 So.2d at 742 n. 2 (stating that failure to fully brief and argue points on appeal "constitutes a waiver of these claims"); Duest, 555 So.2d at 852 (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived).

Additionally, the challenges to his guilt phase raised in Issues I-VIII were meritless and/or insufficiently pled under Duest and, consequently, do not establish cumulative error. Patrick has failed to show error on the individual claims so he

has not shown cumulative error. This Court should affirm the convictions.

In Penalver v. State, 926 So.2d 1118, 1137 (Fla. 2006), this Court explained the cumulative error analysis as follows:

> The commission of an error by the trial court is only considered harmless where there is no reasonable possibility that the error contributed to the verdict. *See Walton v. State*, 847 So.2d 438, 446 (Fla. 2003). Moreover, even when we find multiple harmless errors, we must still consider whether "the cumulative effect of [the] errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." *Brooks v. State*, 918 So.2d 181, 202 (Fla. 2005) (quoting Jackson v. State, 575 So.2d 181, 189 (Fla. 1991)). In assessing the cumulative effect of such errors, we have considered whether (1) the errors were fundamental, (2) the errors went to the heart of the State's case, and (3) the jury would still have heard substantial evidence in support of the defendant's guilt. *Id.*

Moreover, where the individual errors asserted are meritless or are procedurally barred, a claim of cumulative error fails. Griffin v. State, 866 So.2d 1, 22 (Fla. 2003). See Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (finding where allegations of individual error are found to be without merit, a cumulative error argument based on the asserted errors must likewise fall); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998) (same).

Patrick's challenges to his guilt phase raised in Issues I - VIII are meritless and/or insufficiently pled under Duest, and, as such, do not establish cumulative error. This Court should affirm the convictions.

ISSUE X

THE PENALTY PHASE JURY WAS INSTRUCTED PROPERLY. (restated)

Patrick points to three instructions given the jury during the penalty phase: (1) advisory sentencing role of the jury; (2) lack of a requirement for a unanimous recommendation; and (3) prejudice or sympathy should not play a role in reaching a recommendation. He argues that the court erred in giving each since the jury's responsibility was diluted, there should be a unanimous jury recommendation, and preventing the jury from exercising mercy. Patrick fails to fully articulate and analyze why these instructions were erroneous nor does he demonstrate any prejudice from them. This issue is procedurally barred. Furthermore. These instructions are the standard jury instructions and this Court has repeatedly upheld them. This issue is without merit and the sentence should be affirmed.

Patrick fails to adequately brief this issue so it is procedurally barred and waived. Duest, 555 So.2d at 852 (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Patrick references the objections trial counsel filed and raised below without further elaboration. He also mentions that counsel asked for some special instructions, again without elaboration. This Court in Jackson v.

State, 25 So.3d 518 (Fla. 2009) found the defendant waived appellate review of his objections to those instructions because "[s]uch summary arguments are insufficient to raise these claims on appeal." Id. At 533.

The Jackson court also stated that it rejected the proposition "that the giving of the standard penalty phase instructions, without further special instructions, constitutes reversible error. Id. This Court has consistently held that the standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly state the law, and do not denigrate the role of the jury. See Jones v. State, 998 So.2d 573, 590 (Fla.2008); Miller v. State, 926 So.2d 1243, 1257 (Fla.2006); Perez v. State, 919 So.2d 347, 368 (Fla.2005); Card, 803 So.2d at 628; Brown v. State, 721 So.2d 274, 283 (Fla.1998). Furthermore, since standard jury instructions are presumed correct and are preferred over giving a special jury instructions, the proponent has the burden of proving the court abused its discretion in giving standard instruction. Stephens v. State, 787 So.2d 747, 755-56 (Fla. 2001); Elledge v. State, 706 So.2d 1340 (Fla. 1997); Phillips v. State, 476 So.2d 194 (Fla. 1985). Patrick has failed to do this. The sentence should be affirmed.

ISSUE XI

THE PROSECUTOR'S PENALTY PHASE ARGUMENT WAS PROPER. (Restated)

Patrick argues that he is entitled to be resentenced because the prosecutor

made improper arguments in her closing for the penalty phase trial, allegedly arguing an improper aggravator of lack of remorse, minimizing the jury's role in recommending the death penalty, and that the jury had to return a death sentence if one aggravator outweighed the mitigation. The prosecution's comments are misconstrued by Patrick and were not improper. Furthermore, Patrick lodged no objection to any of these comments at the time they were made and has, therefore, failed to preserve them for appellate review, nor are they fundamental error. This issue is without merit and the sentence should be affirmed.

At no time did the defense object to any of the comments he now alleges were improper. This entire issue is waived since there were no contemporaneous objections made. Since there were no objections, these claims can only be raised on appeal if the alleged errors are fundamental. Card, 803 So.2d at 622; Poole, 997 So.2d at 393 (Penalty phase argument on defendant's lack of remorse not fundamental error). For the errors to be fundament they must reach "down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error." Urbin v. State, 714 So.2d 411, 418 n. 8 (Fla.1998) (quoting Kilgore v. State, 688 So.2d 895, 898 (Fla.1996)); Walls, 926 So.2d at 1176 (improper comments in penalty phase closing constitute fundamental error only if

they taint the jury's recommended sentence). Since none of these comments rise to the level of fundamental error, there are no grounds for reversal. See Merck, 975 So.2d at 1064; Poole, 997 So.2d at 394.

Patrick cites to the prosecutor's comment "No remorse there" as her arguing a non-statutory aggravator. (T. 27:3220) That is not the case. The defense argument had argued in the guilt phase that Patrick was remorseful and truthful. The prosecutor questioned him in the penalty phase on whether he took responsibility for all of his actions. Patrick denied doing certain things and generally put the onus for his behavior on his drug use at the time of the crime, again asserting that it did not plan this crime. The prosecutor was rebutting that when she made this comment in arguing that the crime was cold, calculated, and premeditated. She in no way argued that the existence of remorse could be used as an aggravator itself. Finally, the one use of the word "remorse" was isolated and does not constitute fundamental error. Poole, 997 So.2d at 393-94.

The prosecutor also did not minimize the jury's or court's role in determining Patrick's penalty. She argued that it was the choices Patrick made that led to him committing this crime and ending up here in a penalty phase trial; she did not say the jury was not responsible for its recommendation. She is arguing the facts of the crime proved the aggravators and they were weighty.

> The aggravators have gotten piled up and piled up and piled up and here we are and it is time. The aggravators are here. The aggravators are weighted and the aggravators outweigh any mitigation that's been shown.
>
> He [bears] the responsibility, Ladies and Gentlemen, for this. He [bears] it himself and no one else. This is a choice he made all by himself. He was alone in that apartment with Steven Schumacher on that night when he chose to do this. He was alone when he beat him. When he gags him. When he hog-tied him. He was alone when he strangled him. He was alone when he did all of this. He [bears] this responsibility himself.
>
> The aggravators outweigh the mitigation. Each aggravator in and of themselves outweigh the mitigation but piling on all seven they outweigh the mitigation. ...

(T. 27:3222) This argument was not improper and certainly does not reach fundamental error.

Finally, the prosecutor did not misstate the law with regards to how the jury should weigh the aggravators and mitigators. As she began her argument the prosecutor said:

> ... you'd be given the law on how to gage (sic) those, how to weigh those out and be given a different set of instructions just like you were before. You will have a packet to take back with you in the jury room and you will be asked to go back and weigh those.
>
> ...
>
> The way you're going to do that is this, you're going to hear the law and you're going to find that you will be told that if you find that one aggravating circumstance has been proven to you beyond a reasonable doubt, and that's the standard I have to prove to you, if I prove one aggravating circumstance to you beyond a reasonable doubt then you must determine whether any mitigating circumstances exist.
>
> If you find that any mitigating circumstances exist that then you find if they outweigh the aggravating circumstances, you decide then

> what weight to give them.
>
> If there's mitigating circumstance, does that mitigating circumstance outweigh an aggravating circumstance that's been proven to you and you're the ones that are going to decide what weight to give an aggravating circumstance that's been proven to you, what weight to give a mitigating circumstance that's been proven to you or shown to you in determining whether or not to recommend the death sentence or a life sentence.

(T. 27: 3201-3) That is a correct statement of the law and she clearly told the jury that they must follow the court's instruction which would tell them how to properly weigh the aggravators and mitigators. It was in this context that her later comment about the sufficiency of a single aggravator would allow a death recommendation if the jury so weighed the evidence. Again, her comment was a correct statement of the law. See State v. Dixon, 283 So.2d 1 (Fla.1973) ("When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by ... mitigating circumstances...."). Finally, the jury is presumed to follow the court's instructions on the law. U.S. v. Olano, 507 U.S. 725, 740 (1993); Burnette v. State, 157 So.2d 65, 70 (Fla. 1963). This Court should affirm the sentence.

ISSUE XII

THE TRIAL COURT DID NOT IMPROPERLY CURTAIL THE DEFENSE'S CLOSING ARGUMENT. (Restated)

In his next issue Patrick contends that the trial court improperly curtailed his

counsel's closing argument in the penalty phase. This contention is without merit since the argument was improper and the court correctly sustained the prosecution's objections to it.

Patrick's counsel argued what Patrick's life would be like in prison saying he would have few choices on a daily basis and that it would be stark and harsh. The prosecution objected three times during this portion of the argument and each time the court sustained those objection. At one point the court admonished counsel to "stick to the facts and inferences in this case." (T. 27:3241-42) There was no evidence presented in the penalty phase trial on which to base counsel's speculations of what his life would be like in prison.

The argument was improper because it urged consideration of factors outside the scope of the jury's deliberations. Jackson v. State, 522 So.2d 802, 809 (Fla. 1988).

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Bertolotti v. State, 476 So.2d 130, 134 (Fla.1985). Here counsel was arguing facts and inferences not in evidence and the trial court properly stopped counsel from doing so. It did not abuse its discretion in so doing. This Court should affirm.

ISSUE XIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE DEFENSE EXHIBIT OR TESTIMONY IN THE PENALTY PHASE. (Restated)

Patrick next argues the trial court erred in removing a number of slides from Fichera's power-point demonstration and limiting his testimony on the background of his mother and father. He contends that the photographs, slides, and testimony were relevant to the jury's choice and went to a non statutory mitigator of multi-generational family dysfunction. The State notes that the court did allow testimony and slides on Patrick's mental health history and family background growing up in a violent and dysfunctional family. The court did not abuse its discretion in limiting the mitigation evidence as it did.

Admission of evidence is within the court's discretion and its ruling will be affirmed unless there has been an abuse of discretion. Williams, 967 So.2d at 748; Ray, 755 So.2d 604; Zack, 753 So.2d 9. Discretion is abused when the action is arbitrary, fanciful, or unreasonable. Trease, 768 So.2d at 1053, n.2; Huff, 569 So.2d 1247.

The defense had earlier withdrawn its notice of mental health mitigation and, thus, caught both the court and the prosecution unaware when it announced that it was going to present Fichera to testify on mental health issues in addition to

mitigation from the other witnesses and on multigenerational family dysfunction. (T. 24:2809-11) The defense had shown the prosecutor the slide show the witness was going to use during his testimony the Friday before the Monday he was due to testify. (Id.) In that slide show there were three pictures to which the prosecutor objected which depicted an electric chair, a gurney used to administer the lethal injection, and a jail cell. The defense maintained they were relevant to provide the jury with a visual symbol of the choice they had to make. The prosecutor thought them inflammatory and irrelevant. (T. 24:2810-19) As argued previously and incorporated here, §90.403 Fla. Stat. allows a court to exclude evidence which is more prejudicial than probative. The court did not abuse its discretion in refusing to allow the defense to show these pictures to the jury.

The defense also sought to bring in substantial information and pictures regarding Patrick's mother's childhood and upbringing in Nazi Germany. The State objected on both relevance and prejudicial grounds. The court ruled:

> Where mother grew up and under what conditions is not relevant to Patrick's life. That's meant to either, number one, curry favor, or, number two, inflame." ...
>
> Her testimony regarding Mr. Patrick's background is certainly very relevant in these proceedings, but what happened to her, while unfortunate, you know, does not cast or show Mr. Patrick's redeeming values.

(T. 24:2815-16) The trial court repeatedly said that any information from the

mother or this witness on her ability to raise or to protect Patrick and on the conditions in the family home as he grew up were proper. Although requested by the court, the defense never presented case law to support its position. The court also removed from the slides those showing only information on the grandparents poverty and limited education as well as the background of his father unless the item was relevant to Patrick's own upbringing or family members' behavior to him, deeming such evidence irrelevant. (T. 25:2970-81) Again, the court did not abuse its discretion in limiting this testimony, the defense presented no case law to support its position, and this action was taken at the time it was because the defense had only just notified the prosecution of the existence of the power point display. Patrick's reliance on State v. Larzelere, 979 So.2d 195 (Fla. 2008) does not assist him since that case involved mitigation evidence of sexual abuse of the defendant and other girls in her family while she was growing up, nor did the case stand for the proposition that Patrick wished. It did not say evidence of poverty and hard lives from past generations was admissible as mitigation evidence for Patrick. The trial court did not abuse its discretion and this Court should affirm the sentence.

ISSUE XIV

THE DEATH SENTENCE IS PROPORTIONAL (restated)

Patrick suggests that his death sentence is not proportional. The State disagrees given the seven aggravators, merged to six, found in this case and the non-statutory mitigation factors, most of which were given little or no weight.

This Court had stated: "[t]o determine whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases where a death sentence was imposed. Pearce, 880 So.2d at 577 (Fla. 2004)." Boyd v. State, 910 So.2d 167, 193 (Fla. 2005). See Fitzpatrick v. State, 900 So.2d 495, 526 (Fla. 2005); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). This Court's function is not to re-weigh the factors, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So.2d 6 (Fla. 1999).

Patrick points to the non-statutory mitigation he offered at trial and during the Spencer hearing and adds that his mandatory incarceration for life would keep him out of society as a basis for imposing a life sentence4 and finding the death sentence disproportionate. He argues that the aggravation should be discounted

[4] Patrick did not raise the mandatory life sentence as a mitigating factor in his sentencing memo, and such was not addressed by the trial court. As such, it should not be used a basis for challenging the trial court's sentencing decision.

and that not every strangulation murder is HAC. However, he offers no cases where this Court has found a death sentence with such aggravation disproportionate. In fact, he offers no cases on proportionality.

Here, the trial court found seven aggravating factors merged into six: (1) under sentence of imprisonment, (2) prior violent felony, (3) felony murder merged with pecuniary gain, (4) HAC, (5) CCP, (6) victim particularly vulnerable due to age or disability. (R 960-64). The court rejected the statutory mitigator of extreme mental or emotional disturbance, but found it as a non-statutory mitigator of little weight. Also, the court found 24 non-statutory mitigators, but gave weight only to 17. This Court should find the death sentence proportional here. See Russ v. State, 2011 WL 4389041, 17 (Fla. 2011) (determining sentence was proportionate based on strangulation, beating, and stabbing of victim where felony murder, HAC, CCP, and pecuniary gain were found along with nine non-statutory mitigators); Johnston v. State, 841 So.2d 349 (Fla. 2002) (finding death sentence proportionate where defendant beat, raped, and strangled his victim and the trial court found four aggravators including the three that were found in the instant case, one statutory mitigator, and numerous nonstatutory mitigators; Johnston v. State, 863 So.2d 271, 286 (Fla. 2003) (concluding sentence was proportional based on two aggravating circumstances, one statutory mitigating factor, 26 nonstatutory mitigating factors);

Blackwood v. State, 777 So.2d 399 (Fla. 2000) (finding sentence proportional based on HAC for strangulation murder, one statutory and eight nonstatutory mitigators); Nelson v. State, 748 So.2d 237, 246 (Fla. 1999) (sentencing proportional for murder committed during course of felony, HAC, and CCP, one statutory and several non-statutory mitigators); Hauser v. State, 701 So.2d 329 (Fla. 1997) (holding sentence proportional where victim strangled and HAC, CCP, and pecuniary gain aggravators outweighed one statutory and four nonstatutory mitigators).

ISSUE XV

THE SENTENCING ORDER WAS PROPER. (restated)

Patrick challenges the sentencing claiming: (1) aggravator were weighted improperly, (2) improper doubling, (3) use of the felony murder aggravator was improper, (4) HAC, CCP, and "victim vulnerable due to age or infirmity" are unsupported, (5) the statutory mitigator of extreme mental or emotional distress should have been found, (6) non-statutory mitigation was weighted improperly, and (7) lack of proportionality. (IB 91-97). The State disagrees.

Aggravation Sub-issues - Review of the finding of aggravation is to determine if the correct rule of law was applied and whether competent, substantial evidence supports the court's finding. Boyd, 910 So.2d at 191. "The weight to be

given aggravating factors is within the discretion of the trial court, and it is subject to the abuse of discretion standard." Buzia v. State, 926 So.2d 1203, 1216 (Fla. 2006). Discretion is abused when the judicial action is arbitrary, fanciful or unreasonable. Trease, 768 So.2d at 1053, n.2.

Weight assigned aggravators - Patrick claims disproportionate weight was given the aggravators of "under felony supervision," "prior violent felony," and "felony murder." (IB 91-92) However, the weight assigned an aggravator is within the trial court's sound discretion. Buzia, 926 So.2d at 1216. Patrick has not offered or shown where the court abused its discretion. Patrick offers no reason to call into question the trial court's assessment; it has not been shown to be fanciful, arbitrary, or unreasonable.

Doubling of aggravators - Patrick claims there was improper doubling given the court's finding of "under felony supervision" for the 1997 carjacking and the "prior violent felony" aggravator based on the same carjacking. (IB 91). This Court has held repeatedly that there is no improper doubling as the "prior violent felony" aggravator is addressed to a prior conviction and the "under felony supervision" is addressed to supervision status. In Waterhouse v. State, 429 So.2d 301, 306-07 (Fla. 1983), receded from on other grounds, State v. Owen, 696 So.2d 715, 720 (Fla. 1997), this Court held that application of the prior violent felony

and "on probation" aggravators for the same felony was not improper doubling as the "previous conviction and the parole status were two separate and distinct characteristics of the defendant, not based on the same evidence and the same essential facts." See Muhammad v. State, 494 So.2d 969, 976 (Fla. 1986); Lusk v. State, 446 So.2d 1038 (Fla. 1984).

To the extent Patrick's claim could be read as a claim of improper doubling based on the use of the contemporaneous robbery to support the prior violent felony and felony murder aggravators, such is not improper doubling. The prior violent felony aggravator is also supported by the 1997 carjacking and the felony murder aggravator is also supported by the contemporaneous kidnapping. See Holland v. State, 773 So.2d 1065, 1077 (Fla. 2000) (finding no improper doubling where "the trial court based the 'prior violent felony' aggravator not only on the attempted sexual battery, but also on the attempted murder and a previous conviction in Washington, D.C., for assault with intent to commit robbery. The trial court based the 'murder in the course of a felony' aggravator not only on the attempted sexual battery, but also on the robbery of Officer Winters' gun.")

Felony murder aggravator - Patrick claims that the finding of the felony murder aggravator based on his contemporaneous felony convictions violates the prohibition against double jeopardy and that it is an improper "automatic"

aggravator. Patrick offers no argument in support, thus, the matter should be deemed waived. See Duest, 555 So.2d at 852. Furthermore, with respect to the double jeopardy claim, the issue is unpreserved. Patrick challenged the aggravator only on the grounds it was an automatic aggravator. (R 354-55; T 2313). This matter is unpreserved and fundamental error has not been shown. Relief should be denied. See Steinhorst, 412 So.2d at 338.

With to the asserted double jeopardy violation, the claim is meritless. This Court has stated: "[t]he guarantee against double jeopardy consists of three separate constitutional protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" State v. Collins, 985 So.2d 985, 992 (Fla. 2008) (citations omitted). None of these protection are implicated where the defendant is convicted of first-degree murder under felony murder, convicted of the underlying felony, and the felony murder aggravator is applied for sentencing. See Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). The aggravator is merely a sentencing selection factor to assist the jury is choosing between two legal sentences, life or death. At the time of conviction, the defendant is death eligible and death is the statutory maximum

sentence. Id. As such, the finding of an aggravating factor does not twice put the defendant in jeopardy or increase his punishment.

Turning to the claim of an "automatic aggravator," the felony murder aggravator was found based on the contemporaneous convictions of robbery and kidnapping. (R 961). Contrary to Patrick's assertion, this aggravator is not an automatic aggravator. Repeatedly, this Court has rejected this claim. See, Dufour v. State, 905 So.2d 42, 69 (Fla. 2005);Ault, 866 So.2d at 686; Blanco v. State, 706 So.2d 7, 11 (Fla. 1997). Patrick has failed to offer a basis for this Court to reconsider its well settled law.

HAC - Patrick asserts that the court erred in finding HAC. Patrick claims the medical examiner did not testify as to the sequence of the action in this case, and did not state that the victim was conscious throughout the episode, thus, HAC was not supported. The evidence establishes the Schumacher was conscious during the attack. The medical examiner reasoned that there was no basis to tape Schumacher's mouth if he were already dead, and opined that all the injuries suffered were pre-mortem. (T 14:1522-23). This murder was HAC.

HAC focuses on the experiences of the victim before death. This Court has stated that fear, emotional strain, mental anguish or **terror** suffered by a victim before death is an important factor in determining whether HAC applies. See

James, 695 So.2d at 1235; Pooler v. State, 704 So.2d 1375, 1378(Fla. 1997). Further, the victim's knowledge of his/her impending death supports a finding of HAC. See Douglas v. State, 575 So.2d 165 (Fla. 1991); Rivera v. State, 561 So.2d 536, 540(Fla. 1990). In Buzia, 926 So.2d at 1214, this Court recognized that a victim's perception of imminent death need only last seconds for this aggravator to apply. When evaluating the victim's mental state, common-sense inferences from the circumstances are allowed. See Swafford v. State, 533 So.2d 270, 277 (Fla. 1988).

Here, the trial court found HAC based on:

> The medical examiner, Dr. Gertrude Juste, testified that the victim in this case had head and neck injuries and considerable bruising. She stated that "dead people don't bruise" meaning that the victim was alive for all of the injuries that he received as the hands of the Defendant. She opined that the victim died from blunt force trauma and strangulation.
>
> The State proved beyond a reasonable doubt that three of the victim's teeth had been knocked out from the blows Defendant inflicted to his mouth and face. The victim's injuries were consistent with having been hit with a wooden box that was found in the bedroom. The victim, after the brutal beating ... was taken into the bathroom where he was placed into the tub and hog-tied (on his belly with arm and feet bound in an upward position). The victim's mouth was covered by duct tape and his face covered and secured by duct tape. Dr. Juste also found that the victim's brain was swollen and that he had sub-arachnoids hemorrhaging from the blows that he received. She also noted that there was hemorrhaging in the victim's neck, indicating that after Defendant beat, bound, and gagged the victim, Defendant strangled him.

(R 962).

Blood was found at the head of Schumacher's bed, but his body was found hog tied in the bath tub. (T 12:1347-54). There was blood spatter in the bedroom, bloody foot prints on the tile floor, and large blood stains on the bedroom carpet. (T 13:1391-97). According to Dr. Juste, there was blunt force trauma to Schumacher's head, face, and mouth, teeth had been knocked out, and there was hemorrhaging under the brain membrane. Schumacher was found on his belly with tape over his mouth. While Schumacher was able to get some air, the tape and Schumacher position significantly reduced his ability to breath. (T 14:1489, 1494-1510) There was hemorrhaging all through the larynx, and a linear fracture to the trachea which could have been caused by someone standing on the victim's throat. (T 14:1489, 1494-1518). The blunt force trauma to Schumacher's head and strangulation occurred at the same time. (Id. 1518-19). Dr. Juste opined there was no reason to tape Schumacher's mouth if he were already dead. (Id. 1518-23).

Patrick confessed to the police that he kept hitting Schumacher and tied him up to prevent him from calling the police. (T 16:1789-91) Moreover, Patrick stated he taped Schumacher's mouth to keep him from screaming. (Id. 1792; 1794-95, 1834-37). Further, even after Patrick hit his victim and Schumacher kept asking not to be bound, Patrick admitted Schumacher screamed loudly as he was

taped, bound and put in the bath tub. (Id. 1807-08, 1821-24, 1832-33). This indicates Schumacher was alive and conscious during the attack and before his strangulation, for why else would Patrick have hogtied Schumacher and taped his mouth except to immobilize and silence a conscious man. Based on these facts, the HAC aggravator is supported by competent, substantial evidence, the proper law was applied, and this Court should affirm.

Pointing to Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989) and Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983) Patrick claims HAC is not proper here. Both cases are distinguishable. In Rhodes, the evidence was that the victim was either "knocked out" or drunk. In Herzog, HAC was rejected because the victim was "under heavy influence of methaqualone previous to her death," "it [was] unclear what amount of punishment was inflicted by the defendant's own hand prior to the time of the murderous acts," and the eyewitnesses testified the victim was unconscious. Here, Patrick confessed that Schumacher was screaming, mumbling, and talking after the attack began. (T 16:1807-08)[5]

[5]Martin Deiz testified that Patrick admitted that when he asked Schumacher for his ATM card, Schumacher resisted, and Patrick beat him and saw the fear in Schumacher's eyes. Schumacher screamed when Patrick beat him, broke his nose, and cut his face. This attack took place in the bedroom after which, Patrick taped Schumacher's face, hogtied him, and put him in the bathtub to make it look like a home invasion robbery. Schumacher was begging for his life, but Patrick did not care; Patrick enjoyed the begging. (T 15:1661-62)

This Court has affirmed HAC in similar circumstances as present here. In Russ, 2011 WL 4389041, 15, this Court upheld HAC for a death from blunt force trauma, strangulation, and stabbing, in part based on the reasoning there was no logical reason for the defendant to employ multiple means to kill his victim had she been rendered unconscious prior to the attack. This Court has upheld HAC even where "the medical examiner could not affix unconsciousness at any particular point, Sather was alive when strangled and when set on fire." Willacy v. State, 696 So.2d 693, 696 n.8 (Fla. 1997). HAC has been upheld were the victim was beaten to death. See Douglas v. State, 878 So.2d 1246, 1261 (Fla. 2004); Dennis v. State, 817 So.2d 741, 766 (Fla. 2002) (upholding HAC where victims were conscious for part of attack); Bogle v. State, 655 So.2d 1103, 1109 (Fla. 1995) (finding HAC where victim was struck in the head and was alive during infliction of most of the attack); Wilson, 493 So.2d at 1023 (affirming HAC where victim was brutally beaten before being shot). This Court should affirm the HAC finding here.

Patrick also claims that HAC should not have been found because there was no competent substantial evidence he intended to torture Schumacher. Such is not the standard and this Court recently reiterated:

> HAC concentrates "on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death,

> rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death." . . . Thus, there does not need to be a showing that the defendant intended or desired to inflict torture; the torturous manner of the victim's death is evidence of a defendant's indifference.

Russ, 2011 WL 4389041, 14. Here, Patrick admitted Schumacher was alive and screaming after he hit and hogtied him. As he put tape over his victim's mouth, Schumacher was "gurgling a little bit" after which Patrick put him in the bath tub. (T 16:1789-92, 1794-95, 1807-10). This Court should uphold the finding of HAC. However, even if this Court rejects HAC, the death sentence remains appropriate based on the valid aggravation of "under sentence of imprisonment," prior violent felony, felony murder, CCP, and victim vulnerable. The State relies upon is argument in Issue XIV incorporated here.

CCP - Patrick asserts CCP should not have been found as there was no evidence of a careful plan or that he procured a weapon in advance. (IB 94) Contrary to Patrick's position, the court applied the correct rule of law and its findings are supported by the evidence.

> 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.

> ... 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." ... The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." ... 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.

Philmore v. State, 820 So.2d 919, 933 (Fla. 2002) (quoting Farina v. State, 801 So.2d 44, 53-54 (Fla. 2001)). "[T]he facts supporting CCP must focus on the manner in which the crime was executed, e.g., advance procurement of weapon, lack of provocation, killing carried out as a matter of course." Lynch v. State, 841 So.2d 362, 372 (Fla. 2003).

In finding CCC, the court concluded:

> . . . There are several facts in this case which suggest that Defendant had a plan:
>
> > a. Defendant told a cell mate, Martin Diez, that he had planned to kill the victim.
> > b. Defendant put the victim in the bath tub, bound and gagged him so the victim would not cry out for help and after killing the victim, pulled the shower curtain closed to conceal the body.
> > c. Defendant cleaned up the crime scene . . . .
> > d. Defendant packed a lunch and left it in the victim's truck that he had stolen as a part of his alibi that he had been at work when the murder occurred.
> > e. Defendant set the thermostat in the apartment to sixty (60) degrees to slow down the decay of the body.

> . . . The element of premeditation is supported not merely by the method used to kill (strangulation, the forceful blows to the victim's face, knocking out three teeth, and the blows to the head with the wooden box) but by Defendant's statements to Diez. . . .

(R 963-64)

According to Diez, Patrick's cell mate, Patrick admitted confessed that from the beginning he had planned to take Schumacher for his money and to kill him while making the crime look like a home invasion robbery. Patrick met Schumacher in Holiday Park, pretended to be homosexual, as was Schumacher, and Schumacher took Patrick back to his house. As part of his plan, Patrick stated he would use his new job as a welder as his alibi. (T 15:1659-62). Patrick reported that after leaving the house with Schumacher's ATM, he returned to double check that Schumacher was dead, and put him in the bathtub to be out of sight and so the blood would drain into the tub. Patrick deviated from his plan to use his job as an alibi; instead he used the ATM and was arrested (T 15:1662-63).

From this, that court properly found CCP. Stein v. State, 632 So.2d 1361 (Fla. 1994) (reasoning CCP focuses on manner crime is executed, including advanced procurement of weapon, lack of provocation, or killing as matter of course); Stano v. State, 460 So.2d 890, 893 (Fla. 1984) (explaining CCP primarily goes to state of mind, intent, motivation). Here, there was a prearranged plan to kill, stage the scene to make it look like a home invasion robbery, and create an

alibi. (T 1659-63). The killing was done as a matter of course after Schumacher relinquished his ATM card. Patrick could have left the scene with Schumacher hogtied, without killing him. This Court has upheld CCP where there was a prearranged plan to kill, staging of the scene, and prepared alibi. See Guardado v. State, 965 So.2d 108, 117 (Fla. 2007); Buzia, 926 So.2d at 1214-15 (upholding CCP where defendant had opportunity to leave victims' residence without killing).

Patrick claims his request for the statutory mental health mitigator, although not found by the court, negated CCP. In Evans v. State, 800 So.2d 182 (Fla. 2001), this Court stated that the finding of mental mitigation "does not mean that he cannot have the ability to experience a 'cool and calm reflection' and make a 'careful plan or prearranged design to commit murder.'" CCP in Evans was affirmed, in spite of the mental mitigation, because the case facts showed Evans' was capable of planning. Id. See Owen v. State, 862 So.2d 687, 701 (Fla. 2003) (relying on Evans to reject defendant's claim his mental illness negated CCP). Patrick has not shown that his alleged mental health problems negated his heightened premeditation and cold execution of this murder. However, even if this Court rejects CCP, the death sentence remains appropriate based on the remaining valid aggravation of "under felony supervision" prior violent felony, felony

murder, HAC, and "victim vulnerable." The State relies upon is argument for proportionality, Issue XIV, incorporated here.

Victim vulnerable due to age or infirmity - In a single, conclusory sentence, Patrick maintains this aggravator is unconstitutional as it does not narrow the category of victims for purposes of the death penalty. (IB 94). Pre-trial, he asserted the aggravator was unconstitutional because it is vague and overbroad. (R 72-90). His appellate argument is insufficiently pled under Duest, 555 So.2d at 852; the claim should be found waived. Moreover, it is meritless as this Court has upheld this aggravator against similar challenges. See Francis v. State, 808 So.2d 110, 138 (Fla. 2001) (finding aggravator constitutional against a vague and overbroad challenge as "not every murder victim will be a person who is of advanced age or disabled and that the "terms 'particularly vulnerable' and 'advanced age' are "clearly comprehended by the average citizen").

With respect to the assertion the evidence does not support the aggravator, the State disagrees. The court pointed to the fact Schumacher was 72 years old at the time of his death, that Lyon testified that Schumacher had neck problems, difficulty getting around, and was in overall poor health. Dr. Juste noted that Schumacher had had elbow surgery. (R 964).

Lyon testified Schumacher had a "real bad neck problem" having broken his neck recently; he had problems with mobility, and an elbow injury. Overall, Schumacher's physical condition was "very poor." The rod for his back was removed recently, and Schumacher could not get around well. Schumacher had difficulty getting his grocery out of his truck, so Lyon would do the shopping for Schumacher. Lyon also would take Schumacher to doctor's appointments, and helped him around the house. Although he was not supposed to drive, if necessary, Schumacher would drive, but never after dark. (T 12:1277-82). Schumacher's neck injury was confirmed by Jennie Scott who visited Schumacher daily and helped him. Scott took care of Schumacher as he recovered from his broken neck. She would give Schumacher his walker when he needed it. At the time of the murder, Schumacher was moving a little better, but not as he had once moved. (T 12:1320-21) Dr. Juste noted Schumacher had a finger missing, and had surgical scars on his neck and lower back. (T 13:1497, 14:1526) However, Dr. Juste did not find Schumacher to be an invalid and unable to take care of himself; he was in relatively good health. Schumacher did however have morphine in his system which is usually prescribed for pain relief. (T 14:1535-36).

The aggravator of victim vulnerable has been applied where the victim was of advanced years and had physical difficulties. See Wade v. State, 41 So.3d 857,

866 (Fla. 2010) (victim vulnerable aggravator applied for killing of frail retired couple); Nelson v. State, 850 So.2d 514, 518 (Fla. 2003)(victim vulnerable aggravator found by the trial court where victim was 78 years old and wore hearing aids); Woodel v. State, 985 So.2d 524, 531 (Fla. 2008) (victim vulnerable aggravator established for death of 74 year old woman who had limited mobility due to recent surgery and was taking pain medication). Francis, 808 So.2d at 137-39 is distinguishable. There both victims were in "reasonably good health" and "[n]o particular disability was shown." However here, witnesses who knew Schumacher testified he was recovering from a broken neck, had difficulty with his mobility, and used a walker on occasion. Schumacher's physical limitations support the aggravator, whereas such limitations were not shown to exist for the victims in Francis. This Court should affirm.

Mitigation Sub-issues - This Court, in Campbell v. State, 571 So.2d 415 (Fla. 1990), established the standard of review for mitigating circumstances: (1) whether a circumstance is truly mitigating in nature is a question of law and subject to de novo review; (2) whether a mitigator has been established is a question of fact and subject to the competent, substantial evidence test; and (3) the weight assigned to a mitigator is within the judge's discretion. See Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000); Trease, 768 So.2d at 1055 (receding in part

from Campbell and holding a mitigator may be assigned "little or no" weight); Mansfield v. State, 758 So.2d 636 (Fla. 2000); Alston, 723 So.2d at 162; Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996).

Weight given mitigation - Without argument or supporting fact and law, Patrick asserts the court failed to give his mitigation "sufficient weight." (IB 95). Such a conclusory allegation should be found waived under Duest, 555 So.2d at 852. Moreover, the weight assigned a mitigating circumstance rests with the sound discretion of the trial court and may be given little or no weight. Trease, 768 So.2d at 1055; Cole, 701 So.2d at 852 (noting weight assignment is reviewed under the abuse of discretion standard). Abuse of discretion is shown when the judicial action is arbitrary, fanciful, or unreasonable. Green v. State, 907 So.2d 489, 496 (Fla. 2005). Here, each factor urged upon the court was considered and the rationale for accepting or rejecting the mitigator was outlined with record support. Weights were assigned and Patrick has failed to show an abuse of discretion in those assignments.

Extreme mental or emotional disturbance - It is Patrick's assertion the court erred in rejecting the statutory mitigator of extreme mental or emotional disturbance. The State disagrees. The court identified the offered mitigation, discussed record findings, and determined that "extreme" mental or emotional

disturbance was not established, but that the non-statutory mitigator was proven but warranted "little weight." (R 965, 970-72). The record supports this.

This Court has stated:

> This Court will not disturb a trial court's rejection of a mitigating circumstance if the record contains competent, substantial evidence to support the trial court's rejection of the mitigation. . . . There must be a rational basis for the trial court's rejection of such mitigation at a capital sentencing proceeding. . . . "[T]he trial court may accept or reject the testimony of an expert witness just as the judge may accept or reject the testimony of any other witness." . . . The trial court is entitled to reject apparently unrebutted testimony of a defense mental health expert if the trial court finds that the facts do not support the testimony. . . .

Durousseau v. State, 55 So.3d 543, 560 (Fla. 2010) (citations omitted).

In its sentencing order, the court noted that Patrick did not request a jury instruction on any statutory mitigating factors, but that he presented evidence and argument at the Spencer hearing and in his memorandum to suggest the statutory mitigator of extreme mental or emotional disturbance. The Court concluded no evidence of the **statutory** mitigator was presented (R 964-65), then explained:

> 21. Defendant was under the influence of an extreme emotional or mental disturbance at the time of the killing.
>
> This statutory mitigating circumstance was not presented to the jury. In fact, the defense withdrew its notice to the State that Defendant intended to rely upon mental health mitigation. Over objection, this Court allowed Dr. Christopher Fichera to testify at the penalty phase. Both Dr. Fichera and Dr. Allan Ribbler testified at the Spencer hearing. It is undeniable that the Defendant has experienced

some difficulties in his life. Other than being treated for depression, Defendant has denied having any mental illness. (PSI, p.12).

. . .

The Court finds that Defendant had time to reflect on the impending homicide. Defendant reached logical decisions on how to kill the victim and then move the victim into the bathroom to avoid or delay detection. Defendant gagged the victim to prevent him from screaming or crying for help. Defendant hogtied a seventy-two year old man with obvious disabilities to prevent him from escaping.

Defendant's experts never testified that Defendant did not know that he was doing wrong.6 Dr. Ribbler did opine that Defendant scored low on anger regulation and that Defendant was an "angry guy." Dr. Fichera opined that Defendant was an angry, confused severely troubled adult. His opinion was that this was the result of and that Defendant was a product of multi-generation dysfunction.

This Court cannot place great weight on the presence of this mitigation especially in light of the planning that went into the binding and gagging of the victim; Defendant's attempt to cover up this murder by lowering the thermostat in the apartment to slow the decay of the body; Defendant's attempt to cover up the blood stains with a laundry basket; Defendant's packing a lunch so that it would be found in the victim's truck and Defendant's attempt to mislead the police in his confession.

The Court notes that the information that these doctors relied upon was predicated upon the self report of the Defendant. There were limited records from the Defendant's juvenile commitments.

This Court finds that Defendant's diagnoses do not reach the level of statutory mitigating factors. The Court gives this circumstance little weight.

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[6] In Globe v. State, 877 So.2d 663, 675 (Fla. 2004), this Court rejected the assertion the trial court refused to consider mental health mitigator where the court had noted the defendant was capable of distinguishing between right and wrong as some weight was given the mitigation. See Francis, 808 So.2d at 140.

(ROA.R6 965, 970-72).

The record reflects that while Dr. Fichera opined Patrick met the standard for the statutory mitigator, such was based on Patrick's alleged "pre-disposition" for violence given his upbringing. When asked to consider the fact Patrick had admitted to planning the robbery/murder and that he waited for the victim to fall asleep before commencing his attack, Dr. Fichera said such was consistent with a person "pre-disposed" to violence. (R. 6:1054, 1062). The court disagreed that such was the result of an extreme mental or emotional disturbance, although such was found to be non-statutory mitigation. The court reasonably resolved the factual conflict and did not abuse its discretion in assigning the factor little weight. However, even if this statutory mitigator should have been found, the sentence remain appropriate as the sentencing analysis would not be altered given the seven aggravator, including prior violent felony, HAC, and CCP, the weightiest of aggravation. See, Buzia, 926 So.2d at 1216; Chamberlain v. State, 881 So.2d 1087, 1109 (Fla. 2004). This Court should affirm.

Proportionality - The State relies on its analysis set forth in Issue XIV and reasserts that the sentence is proportional.

ISSUE XVI

FLORIDA'S CAPITAL SENTENCING IS CONSTITUTIONAL. (restated)

Although recognizing this Court has found Florida's capital sentencing statute constitutional, Patrick asserts it is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) and points to United States District Court Judge, Jose E. Martinez's ruling in Evans v. McNeil, case no. 08-14402-civ-Martinez (S.D. Fla. June 20, 2011) for support. Other than listing in a footnote the constitutional challenges he raised below, Patrick makes no further argument.

Issues of law are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994), however, Patrick makes no argument and the matter should be deemed insufficiently argued and the issue waived. See, Jackson, 25 So.3d at 533 (deeming issue waived as defendant summarily argues the court erred and points to those portions of the record where counsel objected); Rose, 985 So.2d at 509 (opining "Rose has merely stated a conclusion and referred to arguments made below. Thus, we consider the issue waived for appellate review."); Duest, 555 So.2d at 852.

With respect to the impact a federal district court's ruling may have on Florida courts, this Court has long held that "[e]ven though lower federal court rulings may be in some instances persuasive, such rulings are not binding on state courts." State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976). See Board of County

Comm'rs v. Dexterhouse, 348 So.2d 916 (Fla. 2nd DCA 1977); Brown v. Jacksonville, 236 So.2d 141 (Fla. 1st DCA 1970). This also has been recognized by the Eleventh Circuit Court of Appeals where it opined: 'The only federal court whose decisions bind state courts is the United States Supreme Court. . . . '[S]tate courts when acting judicially, which they do when deciding cases brought before them by litigants, are not bound to agree with or apply the decisions of federal district courts and courts of appeal.'. . ." Doe v. Pryor, 344 F.3d 1282, 1286 (11th Cir. 2003) (citation omitted). The federal district court's decision in Evans does not call into question this Court's Ring jurisprudence.

Likewise, Evans does not undermine this Court's precedent determining that death eligibility occurs at time of conviction, Mills, 786 So.2d at 537, and the repeated rejection of the challenges to Florida's capital sentencing based on Ring. See Perez, 919 at 377; Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003); Porter v. Crosby, 840 So.2d 981 (Fla. 2003); King v. Moore, 831 So.2d 143 (Fla. 2002). See also Proffitt v. Florida, 428 U.S. 242, 245-46, 251 (1976); Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984).

Moreover, the district court in Evans, erred when it failed to follow this Court's determination that under Florida law, the statutory maximum for first-

degree murder is death and that death eligibility occur at the time of conviction under Mills, 786 So.2d at 537 as this Court is the ultimate expositor of Florida law. See Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) (recognizing state courts are "ultimate expositors of state law" and federal courts are bound "bound by their constructions except in extreme circumstances.") Furthermore, as the Supreme Court explained in Harris v. United States, 122 S.Ct. 2406 (2002), "Apprendi [v. New Jersey, 530 U.S. 466 (2000)] said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights." In light of this statement, which also explains Ring, no action taken following the jury verdict in Florida first-degree murder case increases the penalty faced as the statutory maximum is death. As such, the district court in Evans erred in reasoning otherwise.

Also, the federal district court erroneously suggested Ring requires the State to prove the aggravators outweigh the mitigators. The Supreme Court has rejected such a conclusion. In Kansas v. Marsh, 548 U.S. 163 (2006), the Supreme Court reversed a decision that had held Ring required the State to prove aggravation outweighed mitigation. Rather, the Supreme Court concluded Ring did not overrule that portion of Walton v. Arizona, 497 U.S. 639 (1990), which held the

states may require a defendant to bear the burden of proving mitigation outweighed aggravation in a particular case.

Further, the federal court's conclusion in Evans that Ring requires the jury specify the aggravators it found and do so unanimously for Florida capital sentencing statute to be constitutional, is contrary to United States Supreme Court precedent. In Schad, 501 U.S. 624, the Court held that jury agreement on the factual basis of a conviction was not required. Instead, so long as the jury as a whole found that there was sufficient evidence to convict a defendant, the Constitution was satisfied. Moreover, in Johnson v. Louisiana, 406 U.S. 356 (1972), and Apodaca v. Oregon, 406 U.S. 404 (1972), the Supreme Court held that juries did not even have to be unanimous. Finally, in Griffin v. United States, 502 U.S. 46 (1991), the Court not only approved of general verdicts, but also held that a general verdict had to be upheld if there was legally sufficient evidence to sustain it on one basis even if the evidence was insufficient to sustain it on a different basis. In doing so, the Supreme Court recognized that this might result in sustaining a conviction on a theory upon which the jury did not actually rely but found that this possibility did not violate the Constitution. Id. at 48-49. Given this body of precedent, it is entirely possible that convictions have been affirmed even though every single member of jury voted to convict the defendant based on a

theory that the State did not prove beyond a reasonable doubt without offending the Constitution. As such, the federal district court's suggestion that imposition of a death sentence in similar circumstances violates the Constitution is simply incorrect and Patrick's reliance on Evans is similarly incorrect.

Equally incorrect is the federal district court's analysis of the advisory sentencing recommendation. The Supreme Court has recognized that the jury plays such a significant role in sentencing in Florida that a sentence may be overturned because of its consideration of an invalid aggravating circumstance even where the trial court's sentencing order did not reflect the same error. Espinosa v. Florida, 505 U.S. 1079, 1081-82 (1992). Moreover, in Jones v. United States, 526 U.S. 227, 250-51 (1999), the Court held that a Florida sentencing jury does "necessarily engag[e] in the fact-finding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." In the face of these binding United States Supreme Court decisions, the federal district court was simply wrong to find that Florida's capital sentencing statute was unconstitutional because of a lack of "meaningful fact finding" by a jury. This is all the more clear when one considers that Jones is the basis for the Apprendi line of cases, of which Ring is a part. Apprendi, 530 U.S. at 476.

As a final point, Patrick was convicted of the contemporaneous felonies of robbery and kidnapping, and had a prior violent felony conviction for a 1997 armed carjacking, and he was under supervision for that crime when he killed Steven Schumacher in this case. The jury was instructed on these aggravators and all were found by the trial court as aggravation. (R 959-61). Consistently, this Court has upheld death sentences finding Ring does not apply where either the prior violent felony, felony murder, or under sentence of imprisonment aggravators have been proven. See, Hodges v. State, 55 So.3d 515, 540 (Fla. 2010); Victorino, 23 So.3d at 107–08; Robinson v. State, 865 So.2d 1259, 1265 (Fla. 2004) (announcing "prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with Ring"); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (same). This Court should affirm.

ISSUE XVII

CUMULATIVE ERROR IN THE PENALTY PHASE HAS NOT BEEN SHOWN. (restated)

Other than the style of the issue, the sum total of Patrick's claim of cumulative error is encompassed in a single sentence asserting the "sentence of death must be vacated due to the cumulative effect of the penalty phase errors." (IB at 99). This issue is insufficiently pled. See Johnston, 63 So.3d at 745 ((holding argument waived because defendant fails to "identify the alleged error, describe

the factual determination he believes was necessary, or even set out the facts he believes are pertinent to the claim."); Anderson, 822 So.2d at 1268 (finding claim waived where defendant "failed to brief and explain what the alleged cumulative errors are, and what their impact is on this case"); Coolen, 696 So.2d at 742 n. 2; Duest, 555 So.2d at 852. In Penalver, 926 So.2d at 1137, this Court explained the cumulative error analysis requires the reviewing court to assess the cumulative effect of the errors found and determine whether (1) the errors were fundamental, (2) the errors went to the heart of the State's case, and (3) the jury would still have heard substantial evidence in support of the defendant's guilt." Moreover, where the individual errors asserted are meritless or are procedurally barred, a claim of cumulative error fails. Griffin, 866 So.2d at 22; Downs, 740 So. 2d at 509.

Patrick's challenges to his penalty phase raised in Issues X - XIII and XV - XVI,[7] are meritless and/or insufficiently pled under Duest, and, as such, do not establish cumulative error. This Court should affirm the death sentence.

[7] Issue XIV is a challenge to proportionality of the death sentence which is an analysis this Court conducts, irrespective, of whether the trial court discussed the matter or whether the defendant raised it on appeal. See Floyd v. State, 913 So.2d 564, 578 (Fla. 2005); Porter v. State, 564 So.2d 1060 (Fla. 1990). As such, it would not enter into a cumulative error analysis on appeal.

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on J. Rafael Rodriguez, 6367 Bird Road, Miami, Florida 33155, this 17th day of October, 2011.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately on October 17, 2011.

_____

LISA-MARIE LERNER
Assistant Attorney General