IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-135

RALSTON DAVIS

APPELLANT

VS.

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, Ralston Davis, Defendant below, will be referred to as "Davis" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record documents will be by "RR," the transcript will be by "RT," the supplemental materials will be by the symbol "S" preceding the type of record referenced followed by the volume and page number(s). Davis' initial brief will be notated as "IB."

STATEMENT OF THE CASE AND FACTS

On December 22, 2005, Davis was indicted for the first-degree murders of Myosha Proby ("Proby"), Ravindra Basdeo ("Basdeo"), and Carlos Jones ("Jones") committed on December 2, 2005. (RRv1 10-12) The jury was sworn on June 17, 2009, and on June 22, 2009, trial commenced with Davis pursuing an insanity defense. (RTv6 760, 778, 806-18) On July 7, 2009, the jury rendered its verdict finding Davis guilty as charged on all counts and finding he possessed, discharged, and killed each victim with a firearm. (RRv4 606-11; RTv20 2493-96). The penalty phase commenced on July 13, 2009 and on the following day, the jury recommended death by a vote of eight to four for Proby's murder and life for the murders of Basdeo and Jones. (RRv4 665-67; RTv25 2950-51). The Spencer v. State, 615 So.2d 688 (Fla. 1993) hearing was held on September 10, 2009 (RTv26) and on January 7, 2010, the court sentenced Davis to death for

Proby's murder and life for the murders of Basdeo and Jones. (RRv5 769-84, 790-806).

On Wednesday, November 30, 2005, 21-year old Davis purchased a semi-automatic AR-15 .223 caliber assault rifle and two magazines for $900 from Randy Reddick ("Reddick") (RTv8 880-82, 894, 896-97). Reddick knew Davis through Reddick's younger brother and thought Davis was a nice person. Often, Reddick saw Davis around the neighborhood. (RTv8 894, 898-99) During the November 30th sale, around 3:00 p.m., and again the next evening, December 1st, Davis was acting normally; he was calm and collected. (RTv8 886-87, 895-96, 899).

On December 2nd, Jerry Nicholson ("Nicholson"), was working his BBQ stand at the Exxon Station at that intersection of Sunrise Boulevard and 31st Avenue. John Diggs ("Diggs") was at the station watching television in his truck and drinking beer. Between 10:00 and 10:15 p.m. that evening, Nicholson saw a man stop his car in the intersection on a green light, get on the car's hood or roof, and fire his rifle in the air. Nicholson called the police. Farrah Cyprien, Labrent Gray, and Diggs also heard these shots. (RTv8 1002; RTv9 1127-29, 1033-35, 1137RTv12 1504-07). Police from Lauderhill and Fort Lauderdale and Broward Sherrif's Office ("BSO") deputies responded to several calls of shots fired near the intersection of Sunrise Boulevard and 31st Avenue, but before they could arrive, the shooter had

gone. (RTv7 848-49; RTv9 1039; RTv10 1219-20; RTv13 1623-24).

Also on the evening of December 2nd, Proby and Hermione Harrell ("Harrell") had dinner in Proby's apartment and watched a movie. After the movie, Harrell started to get ready to go out for the evening, and Proby said she was going to call Davis while Harrell showered. Harrell, Proby, and Davis were acquaintances for the past few months. (RTv8 916). When Harrell got out of the shower, she could see Proby was upset and listened to Davis on the phone yelling and "fussing to someone else." (RTv8 916-18). As Harrell was watching, Proby was mouthing the words Davis was saying to her on the phone. Proby repeated that Davis told her he was going to come and kill her. After she hung up the telephone, Proby declined to call the police. (RTv8 919-21).

Jason Rolle ("Rolle") observed Davis as he arrived at Proby's apartment complex and make his way to her second floor apartment. Davis stopped his car near the entrance to the building, leaving the car on and radio blasting. Davis climbed the stairs with his rifle and one clip inserted and extra clip in hand. He was bleeding from the nose and mouth as though he had been in a fight, and looked serious, angry, and totally focused as walked. At the apartment door, he cocked the rifle as he banged on the door. Rolle heard shots fired. (RTv8 900-07, 910, 912).

About 15 minutes after his phone call to Proby, Davis knocked on her door and she opened it to him. (RTv8 920-21, 938). Harrell saw Davis in the open doorway. He was carrying a rifle at his side and was dressed all in black. His eyes looked as though he had been smoking or drinking something; he had a slight stagger and was unsteady on his feet as he entered the apartment and started yelling "You set me up, you set me up." Although Proby kept denying that her brother was involved, Davis continued accusing her of setting him up. (RTv8 921-23, 938-39). Next, using profanity, Davis ordered Proby to get down. When Proby got on her knees and folded her arms, Davis started shooting. As Davis shot her, Proby fell to the floor near the coffee table. Davis went around the table and got on top of it as he continued to shoot Proby; he shot her many times. At this point, Harrell jumped from the second floor balcony to escape and hid in the laundry room until the police arrived. She identified Davis from a photo lineup as the shooter. (RTv8 924-27, 941-42, 898-91).

Following the shooting of Proby, and about 20 to 30 minutes after the shooting in the intersection of Sunrise and 31st Avenue, Davis returned to that intersection and entered the Exxon Station lot. (RTv9 1130-32, 1138-40; RTv12 1507-09) There Davis approached Ravindra Basdeo ("Basdeo") as he sat in his car. Davis was angry, shouting, and cursing Basdeo. (RTv11

1286). Davis said to Basdeo, “You don’t know me” and had Basdeo open his mouth. Davis put his rifle into Basdeo’s mouth and pulled the trigger killing him. (RTv8 999-1000, 1002-05; RTv9 1130-32; RTv11 1274-75)

Next, Davis turned, spotted Diggs,[1] and approached him. Diggs knew Davis from another killing where Davis was a witness to his friend’s death. Diggs responded to Davis in the manner he thought Davis desired. Davis was telling Diggs “somebody played him out” or “done him wrong.” Just as Davis approached Diggs’ truck, Jones came out of the Exxon convenience store and Davis grabbed him. According to Diggs, Davis told Jones “don’t run or I’m going to kill you.” Davis put his left arm around Jones’ neck and shoulder and walked Jones back toward the store. Davis told Jones to get down or he would kill him. Jones was cooperative and got to his knees, but once on his knees, Davis shot him. (RTv12 1510-15, 1524-25)

Christian Gains and his girlfriend, Ebony Deadwyler, watched as Carlos Jones (“Jones”) exited the convenience store and Davis accosted Jones. Ruben Hamm heard Davis and Jones converse with one man saying “I work hard for my money” and the

[1] The jury was informed that on the Friday before Diggs testified in Davis’ case, he faced a possession of cocaine charge. The prosecutor spoke on his behalf, and asked that the judge not adjudicate Diggs. Diggs accepted the plea and was neither adjudicated nor put on probation. He was given a $670 fine. (RTv12 1529-32).

other replying, “Don’t run from me.” Davis was also heard telling Jones to get down or he would kill him. Jones got on his knees. As the police sirens could be heard approaching, Davis shot Jones three times, then casually returned to his car and left. (RTv9 1022-26; RTv11 1276-78, 1287, 1281-82, 1284-87; RTv12 1499-1502, 1522, 1524). Davis passed the police cruisers as they were entering the Exxon station; he pulled out of the station quickly which attracted the police (RTv11 1279-82, 1287; RTv12 1516-17).

Shortly after leaving the station, the police were able to locate Davis and started chasing him. He was still in the area of the Exxon and was driving through the Sunrise and 31st Avenue intersection as he was hanging out his driver’s side window. (RTv9 1038, 1041-42, 1047-49, 1061-62; RTv10 1219-24, 1235-36, 1248-51; RTv12 1517-18, 1534-36; RTv13 1602-05). Davis led the police West on Sunrise Boulevard. At one point, he entered a strip mall lot, but as the police cruiser followed him in, Davis performed a U-turn and drove his car at the officers forcing them to put their car in reverse to avoid a collision. Davis then stopped his vehicle about ten feet from the cruiser, and got out of his car. When the officers drew their weapons and ordered Davis to the ground, he looked at the female officer, who was wearing diamond stud earrings, and stated in an angry tone and demeanor, “I ain’t got my f***ing diamond earrings on.”

Davis, who was bleeding from his mouth, got back in his car and fled west on Sunrise Boulevard again with the police in pursuit. (RTv10 1222-25, 1229-30, 1238-40, 1242-43; RTv13 1606-07, 1616-19). During the chase, Davis eluded the police by running a red light, driving up on the sidewalk, and driving other cars off the road. When Davis reached the Florida Turnpike entrance at Sunrise Boulevard, he stopped his car and threw his keys out the window, but remained in his vehicle. With weapons drawn, the police shouted orders to Davis. Eventually, they had to pull Davis from his car. (RTv10 1225-26, 1240-41, 1249-51; RTv12 1534-36, 1544; RTv13 1608, 1619-20, 1623-24, 1629-30).

One officer secured the rifle which was on the front seat, and the other responding officers struggled to control Davis who was very combative. Davis was fighting, kicking, flailing with his arms and body, spitting blood, cursing, and yelling at the officers. (RTv10 1226-31, 1240-41, 1251-52; RTv12 1536-37, 1545; RTv13 1609-10, 1623-24, 1629-30). According to Officer Hagerty ("Hagerty"), Davis was "very angry, very combative, very violent." Davis' behavior was consistent with someone on cocaine, PCP, or Ecstacy. He was strong for his size and fought five officers. Hagerty agreed Davis' behavior might also be consistent with one mentally ill. During his arrest Davis cursed and said "Give me another bullet, B****, I'll put it between your eyes." Davis also said, "Hand me my AR-15 and a

bullet and I will kill you all." Neither Hagerty nor Officer Jeffrey heard Davis pray, recite prayer words or refer to God, however, during the hour after his arrest, Officer Wilson and Deputy Commor heard Davis make comments about God and statements with religious overtones. (RTv10 1229, 1240-42, 1252-53, 1256-57, 1553-54; RTv13 1609, 1623-24, 1629-31, 1637, 1643-44, 1648-53, 1655). Both hand and leg restraints had to be used and Davis was Tasered several times before he could be subdued. (RTv10 1230-31, 1240-41, 1254-56; RTv12 1536-37, 1539-41, 1548-49; RTv15 1867-69).

Following his arrest, Davis was taken to the hospital, but he declined any treatment except a CAT scan and cleaning of his abrasions. Davis "flat out" refused to have his blood drawn for testing or any procedures involving injections or puncturing of his skin. (RTv13 1645-47; RTv15 1872-73, 1877-78, 1880-82). Detective Carmody ("Carmody"), who had worked in a juvenile mental health institute for six years and had training in psychology before becoming a deputy, was with Davis at the hospital. They had conversations about New York as Davis thought Carmody was from New York, and because Davis was from there originally. Davis spoke of his time in the ROTC and of the Rastafarian religion and Lion of Judah. Davis discussed how his diet as a Rastafarian was different from that of a Roman Catholic. Davis mentioned he was on a mission. While at the

hospital, Davis and Carmody had normal conversations and Davis made eye contact. At no time did Davis appear to be hallucinating nor would he drift off when speaking. It was clear to Carmody that Davis knew he was at the hospital. Davis did not exhibit any mental infirmities Carmody had observed when he was working with juveniles in the mental health hospital. (RTv13 1645-47; RTv15 1874-78, 1882-84, 1889-90). Davis was later taken to BSO headquarters and turned over to the detectives. (RTv13 1645-47; RTv15 1878).

At the Broward Sheriff's Office headquarters, the detectives collected Davis' clothes and offered him something to eat and drink. Davis refused food, but requested water, which was supplied. (RTv14 1736-38; SRTv3 230-33) These activities were taped. Davis is asked for his personal information and they discuss his being born in New York City and his high school sports and ROTC activities. (RTv15 1739-47; SRTv3 234-42, 244-49). Davis is asked if he knows who the current President and Vice President are and he responds it is President Bush and Vice President Cheney. Davis explains he is a Democrat and voted for Kerry. (RTv15 1755-56; SRTv3 254-55) Also, Davis relates how many siblings he has and what his father does for a living. When asked about the car he was driving, Davis admits it is his. He asserted he bought the car when he had jobs, one of which was as a telemarketer to collect donations for the State Troopers.

(RTv15 1756-59; SRTv3 255-58) Davis was permitted to use the restroom, which he communicated to the detectives by stating he needed “to go sit on my throne.” (RTv15 1759-64; SRTv3 259-64).

Afterwards, Davis was allowed to visit with his parents in the interview room. That visit was recorded. From the taped discussions Davis had with his parents following his arrest, Davis reported that during the evening hours of December 2, 2005, he got into a fight at an area club where his nose and jaw were injured. (RTv15 1781-82, 1787-88; SRTv3 287, 290-92, 318-19, 329) Davis admitted that Proby, who he identifies as “big sister,” betrayed him; Davis stated “she betrayed me, so I murdered her” and that he murdered an “Arab man or Indian boy” (Basdeo) because he had disrespected him by passing him on the road. Davis said he had Basdeo open his mouth. (RTv15 1782-83, 1814-15, 1824-27; SRTv3 287, 319, 325-29, 330-31). Davis claimed he killed because he was on a “mission, just taking care of business”. (RTv15 1785-87; SRTv3 290-92). He also stated that he had an AR-15 rifle for his defense and that he was able to talk to his father in a disrespectful manner because he had the rifle. (RTv15 1816-17; SRTv3 321). Davis noted that he had heard that other persons who were on cocaine and had been Tasered by the police had died. He then admitted to his parents that he had cocaine in his system when he was Tasered by the police, but he just shook off the effects of the Taser. (RTv15

1798-99, 1818-21; SRTv3 302-03, 324-25) Davis stated the police took $2000 for him and asked his mother to get it back from him. (RTv15 1797-98, 1831-32; SRTv3 301-02) He later tells his parents to stop questioning him because he is “on down side already.” (RTv15 1811; SRTv3 315)

From the two crime scenes, Proby’s apartment and the Exxon station, as well as from Davis’ car and clothes, forensic, blood/DNA, and ballistic evidence was recovered. Ballistics expert, Elaine Consuegra-Rodriguez was able to determine that 39 of the 40 casings recovered were fired from Davis’ AR-15 rifle, the remaining casing lacked sufficient characteristics to draw a conclusion. (RTv9 1150-54). Along with the rifle recovered from Davis, two magazines, each with more than a ten-bullet capacity were seized from Davis. (RTv12 1461)

Blood was found on the rifle and his clothes. Davis personally stipulated to the location of the swabs and samples taken from his rifle and clothing and agreed that that the State could just present the DNA matches. (RTv12 1462-63, 1465) That evidence revealed that material from the rifle muzzle matched Basdeo’s DNA and swabs/cuttings from rifle, Davis’ gloves, pants, and shirt matched Proby’s DNA. (RTv12 1464, 1467-69).

A search of Davis’ car resulted in the seizure of a plastic baggie containing white wafers. However, no drug pipes, matches or other drug paraphernalia were found. (RTv12 1476-79, 1490-

91). The substance was tested by Evelyn Ortiz, who determined that it was three grams of cocaine in rock form. (RTv13 1680-84)

Dr. Motte conducted the autopsies on Jones, Basdeo, and Proby. Jones was shot three times in his face, head, shoulder, forearm, and hand. His cause of death was a gunshot wound to the head and manner of death was homicide. Based on the angle of entry, the first shot to his face was as Jones was on his knees. These were close range wounds based on the burnt gunpowder/stippling found on the body. (RTv10 1179-82; 1188-92, 1202-03, 1205-06). Basdeo was shot as he sat in his car. The single shot entered the back of Basdeo's mouth leaving gunshot residue on his tongue, and exited the back of his head fracturing his jaw skull, and passing through his spinal cord. Basdeo died instantly of a gunshot wound to his head and his death was a homicide. (RTv10 1192-94, 1204-05). Proby's autopsy revealed that she had 23 entrance wounds to the back of her head, down her back, and buttocks. There were 20 exit wounds and she had extensive internal damage. Dr. Motte stated that Proby had "everything damaged from the heart and lungs, to the brain." She died from multiple gunshot wounds and her death was a homicide. He noted that if the first shot was to Proby's head, she would have been unconscious for the following 22 shots. (RTv10 1194-99, 1208-12, 1215)

Davis' raised an insanity defense, and in support, called

lay witnesses and doctors. Victoria Corcoran ("Corcoran") was the emergency medical technician at the Broward Sheriff's Office ("BSO") intake facility when Davis arrived. She took Davis' vital signs, but he was too violent, thus, he could not sign the intake form. (RTv13 1584-89, 1600). Corcoran checked the "hallucinations" box because Davis seemed to be talking to himself and giggling. She noted on the form "current bizarre behavior" and that Davis had been reported by the BSO deputy to be homicidal, easily agitated, and prone to violent episodes. Davis would not make eye contact with Corcoran. Without a degree in psychology, she assumed he had a psychological problem. (RTv13 1589-90, 1596-97).

According to Davis' mother, Marcia Davis ("Marcia") on Wednesday, November 30, 2005, Davis got into an argument with his father, who kicked him out of the house. (RTv16 2050-51) However, in the early morning hours of December 1st, Marcia called her son and told him to return home which Davis did. (RTv18 2051-53). On December 2nd, Davis talked to his mother for a while about the Church and gave her roses. He had not bathed or changed clothes since Wednesday and was "fidgety." Stating he was going to get breakfast at McDonald's, Davis left. When Davis returned later that night, he was wearing black gloves for driving and the same clothes. After talking to his father for a while, Davis received a cell phone call and left

(RTV16 2059-68). Later that night, two boys came to the house to report seeing Davis in police custody near the Turnpike. Marcia and her husband went to the scene, and afterwards, to the police station to talk to their son. (RTv16 2069-74). Marcia told the jury it would be good to see the un-edited DVD of her son in police custody. (RTv16 2079).

Ruth Davis recounted the days before the shooting and reported that her brother was acting differently than usual. She denied that Davis ever used cocaine, but admitted that she did not know that he used marijuana or that he had purchased a rifle. (RTv17 2087-90).

Dr. Ribbler, psychologist with training in neuropsychology, interviewed Davis, and reviewed reports, records, and witness statements. He opined that Davis appeared to be suffering from a brief psychotic disorder with hallucinations. (RTv11 1289-95, 1297-1303). Dr. Ribbler concluded Davis knew he was shooting a gun and killing people, but that Davis did not believe his acts were wrong; in fact, Davis believed he was doing right. It was Dr. Ribbler's opinion that Davis was legally insane on December 2nd. (RTv11 1349, 1365, 1374, 1384).

However, Dr. Ribbler admitted that Davis had no brain injury and had an IQ of 99. Davis self reported that on December 2nd he had gotten into a fight at a recording studio and was beaten up; he blamed Proby for setting him up as her

brother was involved in the fight. (RTv11 1355, 1357-58). Davis admitted he was a drug dealer, that his primary source of income was drugs, and that Proby was his customer. He denied using cocaine on the night of the crime, and stated his drug of choice was marijuana. (RTv11 1359-60). Also, Davis recounted in detail how he followed Basdeo into the Exxon, parked, got out of his car, ordered Basdeo to open his mouth, put the gun in Basdeo's mouth, and shot him. (RTv11 1359). Although cocaine was found in Davis' car that night and knowing that Davis chose not to take a blood test, Dr. Ribbler refused to take that into account because there was no blood test showing Davis was on cocaine at the time. He did not recall Davis telling his parents he was on cocaine that night (RTv11 1361, 1365). Dr. Ribbler admitted a substance-induced psychotic disorder is triggered by various drugs, including cocaine, and that it may not resolve itself promptly, but could persist for weeks or longer. (RTv11 1388).

Psychiatrist, Dr. Abby Strauss, met Davis about three years after the crime and reviewed 84 documents including police reports, medical reports, witness statements, Davis' hand written notes, and the DVD of Davis talking to the police and his parents. He spoke to Davis' parents and others who were with him from mid-November 2005 to the killings. Dr. Strauss concluded Davis was psychotic, but agreed Davis had no history of a bipolar disorder or other mood disorders and that on the

whole, Davis appeared normal, until his parents has started seeing the shift in their son before the crimes. (RTv15 1901-08, 1912-13, 1919, 1927-29, 1960). Dr. Strauss concluded Davis had suffered a brief psychotic disorder even though he was able to have cogent periods or conversations with others. (RTv15 1933, 1946, 1953-55). The doctor noted that the jail had prescribed Risperdal, an antipsychotic medication; but on occasion, Davis would refuse to take the drug. (RTv15 1948-52). Dr. Strauss did not do any testing himself, but relied on the tests of others. He admitted that Dr. Block-Garfield had noted on her April, 2006 report that Davis was suspected of malingering. (RTv15 1985-86). He also admitted that cocaine binges could induce auditory hallucinations and parallels the symptoms seen in psychosis; cocaine psychosis is more common than a brief psychotic disorder. (RTv15 1999)

Dr. Dennis Day, a psychologist, was court appointed to evaluate Davis. (RTv17 2091-94). Following his review of witness statements, medical records, and talking to Davis, he came to the conclusion that on December 2nd Davis was suffering from a brief psychotic disorder. (RTv17 2095-98). He made this diagnosis partly based on the fact that he had no information that Davis was on drugs at the time, that he assumed no drugs were getting into the jail where Davis was incarcerated, and that he had never seen a drug induced psychosis last for three

months. (RTv17 2100-08, 2129) While Dr. Day was aware Davis was an admitted drug dealer with regular access to cocaine, and he is now aware that Davis refused to give a blood sample, he had not taken that refusal into account when he developed his diagnosis. However, he did not think that changed his opinion. Dr. Day also was unaware that Davis had admitted to Harrell using drugs other than marijuana or that Davis looked like he was on drugs at the time he came to Proby's apartment that night. (RTv17 2112-17, 2125)

In rebuttal, the State presented Dr. Lori Butts, a forensic psychologist and attorney. (RTv17 2147-49). She too was court appointed. (RTv17 2149-50). Dr. Butts interviewed Davis three times (for one to two hours each time) and reviewed records, depositions, reports, and materials related to the case. Thrice, she reviewed the DVD of Davis' police interview and conversation with his parents. When Dr. Butts did her interview of Davis, his attorney was present. (RTv17 2151-53) She testified that although she could not rule out a psychotic disorder, she opined that there was evidence of malingering and that Davis was not legally insane at the time of the crime because he knew what he was doing, that shooting human beings could result in their deaths, and that he knew that this was wrong. (RTv17 2153, 2181-82). The DVD was significant to Dr. Butts' diagnosis because on the DVD Davis is seen recounting the

events leading up to the crimes in terms of betrayal and anger. Also after being interviewed by multiple people over the years, Davis recounted the events to the doctors in almost rote fashion. According to Dr. Butts, who had reviewed the reports of Drs. Ribbler, Strauss, and Day, "there needs to be a distinction between [Davis'] recounting of the events now and what was going on at the time and his recounting of the events now are much less relevant than the information that we have closer in time. And so, now it's been shaped in a different way and been presented in a different way than the behaviors indicate." (RTv17 2155-56).

Dr. Butts found Davis was malingering based on the jail records, Davis' girl friend's notes, Dr. Block-Garfield's competency evaluation, some of Dr. Bannon's psychological testing, statements from the DVD, and her own interviews with Davis. (RTv17 2156-60) From the jail intake forms, Dr. Butts saw inaccuracies and possible untruthfulness by Davis. (RTv17 2160-61) From Dr. Bel's reports, Dr. Butts found significant the different, ever changing presentations Davis gave for why he was in jail. Davis told the jail medical staff that he hears the voice of God, but later says that he heard voices all his life which is not true. The staff was looking to rule out malingering. (RTv17 2162-65) The fact that Davis is telling Dr. Bel that he "is hearing voices constantly" and that the voice is

telling me to ask you what you're asking" are statements inconsistent with real mental illness or hallucinations. They are exaggerated statements. (RTv17 2165). Also significant is the fact that Davis by December 8, 2005, is answering questions with questions. This is significant because it showed Dr. Butts that Davis' presentation was shifting. Again, Dr. Bel wanted to rule out malingering. (RTv17 2166) On December 8th, Dr. Bel decides to put Davis on Risperdal which is an antipsychotic. The low dosage prescribed was appropriate for someone who is psychotic, as well as for someone with a behavior management problem as the drug calms the person. (RTv17 2166).

According to Dr. Butts, when someone is psychotic, there is consistency within his delusional belief system; while the person is in an altered reality, that reality all fits together. However, with Davis, there was a daily shift in his presentation. As a jail doctor noted, "At times [Davis] acts bizarrely in an atypical way, appearing to want to be seen disorganized and mentally ill than he really is." (RTv17 2167-68) When Dr. Butts interviewed Davis, he said that in January 2006, he had told the jail that he was suicidal because he wanted to be moved from the room. This, to Dr. Butts, indicated Davis was admitting to being manipulative. Also, by February 20, 2006, there is indication the Risperdal is being discontinued, which is far shorter than the time line relied

upon by the defense experts. (RTv17 2170-71).

Of further significance to Dr. Butts were the notations in the diary kept by Davis' girl friend. In it, the girl friend noted on January 9, 2006, that Davis had told her that if he had thought she had cheated on him he would have killed her. The girl friend recorded: "I thought I saw [Davis] and his mom saying stay making them think you crazy, but I was trying not to look at them." (RTv17 2172) These notes show that the time for the alleged psychotic behavior was much shorter (early January 2006) than the time used by the defense (March 2006); by January 2006, Davis was exhibiting goal-directed instructions to continue to appear crazy. (RTv17 2172)

Davis' April 23, 2006 responses to Dr. Block-Garfield during her competency evaluation, after the Risperdal had been discontinued, were blatant malingering responses. (RTv17 2173-74) Likewise, the testimony from Davis' initial public defender, Dorothy Ferraro, that Davis appeared crazy must be discounted when considered in light of the girl friend's diary entry that Davis was angry because he did not want a public defender. His outburst was not necessarily that of a mentally ill person, but that of an angry person. (RTv17 2174-75).

Dr. Ribbler looked at the Personality Assessment Inventory test given in April 2006, but not the one given in January 2006 which showed that Davis appeared to be malingering. Davis'

answers in January 2006 fell outside the normal range and he was not being honest which might lead an evaluator to form a somewhat inaccurate impression. According to Dr. Butts' review, Davis was exaggerating his symptoms in January 2006. (RTv17 2175). Based on the various test results she reviewed, Dr. Butts concluded they indicated malingering. (RTv17 2177-81).

Dr. Butts recognized that there was a consensus among the doctors that Davis understood the consequences of his behavior and that he knew that shooting a gun at a person would kill the person, thus, Dr. Butts concentrated on whether Davis knew what he was doing was legally wrong. (RTv17 2181-82). She focused on the fact that according to John Diggs, Davis was trying to conceal his rifle (holding it down at his side, next to his leg) when he was at the Exxon station and that as soon as the sirens were heard to be approaching, Davis sped out of the lot. (RTv17 2183). Dr. Butts also considered the fact that when Davis found himself boxed, in when he first pulled into the strip mall, he drove his car at the police officers, ran a red light, and swerved around cars. (RTv17 2184-85). When Dr. Butts inquired further of Davis when his answers to her became rote, he would respond "I don't know," which indicated to her, Davis was unsure where to go with his answers because he was unsure of the implications those answers may have on his story. (RTv17 2185).

Also, Dr. Butts believed Davis knew his behavior was wrong

and unlawful, because Davis claimed he did not know that he was being followed by the police, even though Davis had stopped in the strip mall and was confronted by the officers before restarted his flight. The fact that he later surrendered by throwing his keys from the car is further indication he knew right from wrong, and that what he had done was wrong. Further, the fact that he used the word "murdered" when speaking of his killing of Proby and Basdeo shows he knew what he did was wrong. Likewise, when Davis is heard on the DVD distinguishing God's law from Society's law, such establishes that he knew the difference between the two standards of right and wrong. (RTv17 2185-88) Dr. Butts was of the opinion that when Davis killed his three victims, he knew the consequences of his behavior and knew that it was wrong. (RTv17 2189-90).

Dr. Butts recognized that there was no toxicology report because Davis refused any needles, but the DVD interview shows Davis stating he had cocaine in his system. The fact that there was no apparatus for smoking cocaine in his car did not refute the fact that Davis could have smoked the drugs before getting into the car, especially given the fact that he admitted to smoking marijuana earlier in the day. (RTv17 2214-16, 2222-23) Davis' behavior was consistent with being on cocaine and other drugs. (RTv17 2224). Although Dr. Butts could not rule out completely the psychotic disorder diagnosis, to her, the more

"parsimonious" diagnosis was that involving a substance abuse situation. Davis did not have a history of mental illness and taking Risperdal for three months is a very short period of time for someone who is psychotic. Also, Davis has not had another episode during the three-plus years he has been in jail, and it is very rare that there was no recurring event. Dr. Butts opined that Davis was not legally insane on December 2nd because he knew the consequences of his behavior, knew he murdered three people, and knew it was wrong. Also, Davis fled the police and called his actions "murder." (RTv17 2225-27).

During the penalty phase, Davis' mother, Marcia, testified and recounted Davis' life growing up in New York City, Florida, and Jamaica. She spoke of the family's financial difficulties, leaving Davis and his siblings in Jamaica with relatives, and how the children were ill treated there. (RTv23 2701-26). Davis also had been sent to live with his grandparents in New York for a period, but when they had a disagreement with him, his grandmother kicked him out of the house at the age of 14 or 15. Only after the police required her to let him return given his age, did he return. After that incident, Davis did not always have enough to eat, and had to wait outside after school for his grandmother to return home. (RTv23 2729-32) Marcia reported that Davis was picked on at his United States schools because of his accent, but that he was a very kind and affectionate child

who always looked for friends and considered all those he met to be friends. Davis was never violent, and always obeyed his mother. (RTv23 2716-17, 2735-36). Marcia explained that Davis and his siblings did not have a good relationship with their father who had been in the military and had a "military way" of doing things. While their father loved his children, he did not always show affection. (RTv23 2728-29). Eventually, Marcia brought Davis and the rest of her children to Florida. (RTv23 2732-33). After the murder of his friend, Davis became withdrawn. The Davis depicted on the DVD was not the Davis Marcia knew. (RTv23 2734-38).

Ruth Davis ("Ruth"), Davis' younger sister, recounted the terrible conditions under which she and her brother lived in Jamaica. They had little food, and Davis would run away from home. (RTv23 2741-43) In school in Miami, students would pick on Davis. He received a bloody nose, lost a tooth, and had his arm broken during these incidents. (RTv23 2743-45). Davis did not have much of a relationship with his father. (RTv23 2745). According to Ruth, Davis was loving and very kind. The siblings would play together, and Davis taught them how to ride a bike. Davis was outgoing and friendly; he was never violent. Davis would use his car to pick up friends for school and would give his friends lunch money. (RTv23 2745-47). Ruth noticed changes in her brother a few days before the murders. Daren Davis,

seven years Davis' junior, also related that Davis was a good brother and that he visits him in jail. (RTv23 2752-54).

Marjorie Morrison-Smith ("Smith"), a friend of the family for ten years, knows Davis as a kind, sweet, loving person. Davis was always helpful, and loaned her $2000 when her car needed repairs. Davis would give Smith rides whenever needed. Children loved hanging out with Davis. He would take Smith and her children for ice cream. (RTv23 2749-50).

Kerron Matthew ("Matthew"), a high school friend, stayed in touch with Davis even though she moved to New York. In school, Davis acted as her big brother and would give her lunch money when needed. Davis also gave others money. He was a good friend, and never violent. Coming from Trinidad, Matthew experienced the same harassment as Davis. (RTv23 2756-58)

Pamela Richardson is a friend of Davis. She finds him generous. They communicate periodically and he has always been a good person. Davis would drive her when she did not have a car and he would take her, and her sister to dinner. (RTv23 2759-60). Charesse Sanford ("Sanford") is the mother of Davis' child. Davis was never violent to her or others. Sanford has taken her son to jail to see his father. (RTv23 2761-65).

Davis testified in the penalty phase and related the incident where his friend, Courtney Carrol, was stabbed and how he tried to save his friend's life by administering CPR and

trying to drive him to the hospital. (RTv24 2779-80). Turning to the week of the murders, he admitted that on November 30th, he was to meet a person to whom he was to sell cocaine, but the person never showed, and Davis ended up spending the night in his car. (RTv24 2780). After getting a few hours sleep, he woke feeling different and having lots of energy. The rest of the day was peaceful and seemed to be going in slow motion. He was hearing a voice, his "sixth sense" which he trusted. People were being nice to him, and he to them. In a "spirit of forgiveness," Davis decided to visit a person who was in a coma and to forgive him even though that person had done something to Davis. Also, on December 1st, Davis went in search of a bible. He also bought some food, but gave it away to others who needed it. He gave money so some children could buy ice cream. Later in the day, the voice told Davis to buy a watch and gloves. (RTv24 2780-84)

Davis also related the December 2nd incident at the music studio where he got into a fight when he told those at the studio to be quiet as he was on his cell phone, possibly talking to Proby, and he could not hear. As a result, Davis was pushed from the studio, but his phone was dropped inside. After he climbed on top of one of the patron's cars, the patrons "jumped" him and beat him. One of the patrons mentioned going to get his pistol, but the voice told Davis the man was bluffing. However,

when Davis spotted his keys and cell phone, he grabbed them, got in his car, and went for his own rifle. (RTv24 2784-88).

Later, Davis recalled standing on his own car in an intersection of Sunrise and 31st firing his rifle. This was before he went to Proby's house. Everything just "clicked" and Davis knew what his mission was. Davis denies that Proby set him up. (RTv24 2788-90). After leaving Proby's apartment, Davis was just following "the voice" when he hung out of his car window shooting. With respect to the "diamond earring comment" to the officer, Davis did not know why he said that. He had just bought his first pair of diamond earrings, but did not know the officer was wearing earrings and did not think officers wore jewelry on duty. Davis denied that the person depicted on the DVD and having done the things he did was representative of his character. He feels horrible about the three deaths, and wishes he could take them back. (RTv24 2790-93).

On cross-examination, Davis admitted he purchased the AR-15 semi-automatic rifle days before the murder and before being beaten up at the studio. Davis offered he was the person who physically shot and killed the victims, but it was not him mentally or spiritually. Davis denied recalling the specifics of Proby's the killing, and wanted the prosecutor to focus on the portion of the DVD where he discussed his "mission" instead of where he stated he was a "coldhearted killer" and where he

admitted he “murdered.” Davis admitted he earned money selling drugs and that the $1000 he threw on the studio floor was from selling cocaine. (RTv24 2793-99) When questioned about what he said on the DVD and killing Basdeo, Davis said “I’ll let you (the prosecutor) answer that.” Davis accused the prosecutor of not focusing on the “big picture,” when asked about his actions during the murder of Basdeo, but then admitted the “big picture” was the murder of three people. (RTv24 2799-2800) Davis claimed that when sane, he is nothing like what he was on December 2nd. (RTv24 2800-02). Davis claimed not to recall certain statements he made as he confronted and shot Jones. (RTv24 2802-04)

Davis stated the voice he heard appeared to be an adult male voice. (RTv24 2804-05). He does not recall all of the events of the murders, but recalled enough to relate them to his doctors. Again, Davis asked the prosecutor to focus on the statements talking about God and the bible, not on the facts of the killings or his statements about violence. (RTv24 2806-09).

Dr. Brannon, a forensic psychologist, first tested Davis in January 2006, interviewed him ten times, and reviewed various reports, records, and statements. (RTv24 2815, 2821, 2823-31) Dr. Brannon took into account the testimony from the lay witnesses discussing Davis’ childhood history, home life, and abuse at school. (RTv24 2831-36). It was Dr. Brannon’s opinion that on December 2nd, Davis was suffering a “brief psychotic

reaction" and the homicides were committed while Davis (1) was under the influence of an extreme mental or emotional disturbance; (2) extreme duress; and (3) his ability to conform his conduct to the requirements of the law was substantially impaired. Dr. Brannon agreed "duress" requires suffering from external not internal provocation. (RTv24 2845-48, 2852).

By an eight to four vote, the jury recommended death for Proby's murder and life for the deaths of Basdeo and Jones. (RRv4 665-67). The court sentenced Davis to death for Proby's murder finding four aggravators,[2] four statutory mitigators,[3] and ten non-statutory mitigators[4]. Davis was sentenced to life in prison for the murders of Basdeo and Jones with the sentences to run consecutively to each other and consecutive to the death sentence. (RRv5 791-805).

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[2] (1) prior violent felony (contemporaneous murders of Basdeo and Jones) (great weight); (2) heinous atrocious or cruel ("HAC")(great); (3) cold, calculated, and premeditated ("CCP")(great); and (4) felony murder (burglary)(slight weight)

[3] (1) no significant history of prior criminal activity (little weight); (2) extreme mental or emotional disturbance (moderate); (3) capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (moderate); and (4) age (slight)

[4] (1) grew up in poor environment (slight weight); (2) abandoned as a child (little); (3) physically and mentally abused as child (little); (4) comes from broken home (slight); (5) compassion and generosity (slight); (6) proper courtroom behavior (slight) (7) victim unconscious immediately (slight); (8) loves and cares for family (little); (9) lacked support and guidance as a child (slight); and (10) can be rehabilitated, average IQ, no learning disability, not psychopath, not anti-social (little)

SUMMARY OF THE ARGUMENT

Issue I - The DVD, State's Exhibit 44, does not contain the portion of his interview where he invoked his right to remain silent, although it contains a statement where Davis is told that his rights will be explained. This portion was not played in open court and defense counsel admitted he had not viewed the entire DVD. Hence the issue is unpreserved. If the merits are reached, the jury was given the DVD to view, during deliberation. However, there is no evidence the jury viewed this portion of the DVD. Further, even if it were viewed, there was no error as the portion included is not a comment on Davis' rights or one fairly susceptible of being a comment on his rights. Alternately, advising the jury Davis would be read his rights, even if deemed error, is harmless.

Issue II - The motion to suppress the DVD showing Davis' conversation with his parents was proper as Davis had no reasonable expectation of privacy in the police interrogation room, the police did not foster any expectation of privacy, and Davis' parents were not used as agents of the police. However, even if the DVD should have been suppressed, such was harmless.

Issue III - The transcript of the DVD was utilized properly as a demonstrative aid. It was properly authenticated and the jury was given the correct instruction.

Issue IV - The CCP finding is supported by competent,

substantial evidence. However, if it should not have been found, such is harmless beyond a reasonable doubt.

Issue V - The HAC finding is supported by competent, substantial evidence. However, if it should not have been found, such is harmless beyond a reasonable doubt.

Issue VI - The sentence is proportional.

Issue VII - Proby's statement that Davis was coming to kill her was admitted properly as Harrell heard this and Proby was relating it to her as it was being said by Davis. However, if it should have been excluded, any error was harmless beyond a reasonable doubt.

Issue VIII - The court did not abuse its discretion in permitting mental health expert, Dr. Butts, to testify about the implications of Davis' behavior in jail as observed and testified to by his original attorney, Dorothy Ferraro.

Issue IX - The defense objections claiming the prosecutor's penalty phase cross-examination of Davis was argumentative, were overruled properly; the court did not abuse its discretion.

Issue X - The trial court followed the law and correctly denied Davis' request for a special instruction and verdict form requiring jury to find unanimously each aggravating factors beyond a reasonable doubt.

ARGUMENT

ISSUE I

NO COMMENT WAS MADE ON DAVIS' RIGHT TO REMAIN SILENT (restated)

Davis claims it was error for the jury to view the DVD of State's Exhibit 44 during deliberations as it contained the detective's notification to Davis that he was going to read him his rights and Davis could decide what to do. This issue is not preserved, but even if it were, there is no evidence the jury viewed this portion of the DVD and even if it were viewed, it is not fairly susceptible of being considered a comment on Davis' right to remain silent.

Pre-trial, the parties agreed to have Davis' invocation of rights removed from the DVD. At trial, great pains were taken to ensure that the portion where the rights were discussed were removed from the DVD. (RR.v1 11-13; RT.v13 1566-68, 1658-69, 1701-03, 1725; RT.v14 1726-1732, 1734, 1753-54, 1777-79). A copy of the redacted tape was provided to counsel before it was entered into evidence. In court, the parties reviewed the DVD to ensure that the invocation of rights had been removed and later the prosecutor confirmed in open court that such was done and that the portion that was to be redacted had been redacted. (ROA.v14 1752-54)

The DVD was played for the jury which shows that the rights portion was removed.

> RALSTON DAVIS: Nah. We used to call Illinois. [**referring to telemarketing calls**]
>
> Det. Carmody: Did you?
>
> RALSTON DAVIS: That's what made me think, I used to wonder was it real, the script we was reading, it said -- hey, I stuck to the script, that's it, I stuck to the script.
>
> Det. Carmody: That was it? So whatever they -- whatever they told you to read that's what you read?
>
> Ralston Davis: A job is a job.
>
> DET CARMODY: All right.
>
> RALSTON DAVIS: More water.
>
> DET CARMODY: Yep.
>
> DET. ILARRAZA: You got plenty there. **Just chill out.**

(RTv14 1758-59). This was about 42 minutes into the DVD played for the jury and then the DVD, based on the clock on the interview room wall, moved instantaneously forward from 4:35 AM to 4:40 AM. (SRTv7 392-93). Later during the playing of the DVD for the jury, it was noted that the DVD has skipped back to a period before Davis was given his Miranda[5] warnings and the prosecutor moved the DVD forward to the point where Davis' parents enter the interrogation room. (RTv15 1778).

Prior to deliberations, the DVD was misplaced by the clerk,

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

but eventually found. (RTv19 2448-54) The court afforded the parties the opportunity to verify that the DVD located was the exhibit. The DVD and DVD player were sent to the jury during deliberations. (RTv19 2458, 2462-69).

On appeal, Davis' request for a transcript of the DVD in evidence was granted which revealed that the following discussion was contained on the DVD:

> RALSTON DAVIS: Nah. We used to call in Illinois.
>
> Det. Carmody: Did you?
>
> RALSTON DAVIS: That's what made me think, I used to wonder was it real, the script we was reading, it said -- hey, I stuck to the script, that's it, I stuck to the script.
>
> **Det. Carmody: That was it? So whatever they -- whatever they told you to read that's what you read?**
>
> **Ralston Davis: That was my job.**
>
> **DET. CARMODY: I hear you, Man.**
>
> **DET. ILARRAZA: Davis --**
>
> **RALSTON DAVIS: (Unintelligible)**
>
> **DET. ILARRAZA: Yeah -- before we go on to talking about what happened tonight, I have to go over your rights. You know what your rights are, right, under the law?**
>
> **RALSTON DAVIS: Remain silent?**
>
> **DET ILARRAZA: Well, yeah. Let me go over them and then you can decide what you want to do, okay, it will be up to you.**
>
> DET CARMODY: That's it.

DET CARMODY: All right.

RALSTON DAVIS: More water, Cap.

DET. ILARRAZA: You got plenty there. Just chill out.

(SRTv3 278-79) (emphasis supplied). Based on the playing of the DVD during the relinquishment period, the reinserted portion occurred one hour, fifteen minutes and six seconds into the playing of the DVD and that the clock on the interview room wall moved from 5:16 AM back to 4:25 AM (SRTv7 395).

During the relinquishment of jurisdiction, it was determined that the DVD in evidence was the only DVD submitted to the Clerk and that it contained the above referenced comments. Defense counsel admitted he had not viewed the DVD completely. (SRv7 404-06, 408, SRv8 425-26 Order on Relinquishment of Jurisdiction dated) Now, Davis complains that the statements by Detective Ilaraza ("Ilaraza") are fairly susceptible of being a comment on his rights. This issue is not preserved because counsel had the DVD before it was played for the jury and did not object. However, even if that is overlooked, the fact that the DVD seemed to skip back to a point in time before the Miranda rights were given, counsel had the opportunity to review the DVD at that point and make his objections. The fact he did not, renders the issue unpreserved. Likewise, when the DVD was misplaced by the Clerk and when found the parties were given another opportunity to check the DVD,

defense counsel, had no objection to the DVD being sent to the jury. This issue is unpreserved under Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (holding for issue to be cognizable on appeal, it must be the specific contention raised below, otherwise fundamental error must be proven).

Assuming arguendo this Court reaches the merits, the record reflects that there is no evidence the jury actually viewed the portion of the DVD Davis alleges is error, and without question there was no discussion or argument made before the jury. It is pure speculation that the jury saw that portion of the DVD and pure speculation the jury would conclude that it was a comment on Davis' right to remain silent. Even so, a review of the statements by Ilarraza reveals that it is not a comment on Davis' invocation of rights.

Davis points to a myriad of cases where there was questioning of witnesses or argument on the defendant's invocation of his rights. See Wainwright v. Greenfield, 474 U.S. 284, 289-90 (1986) (noting in closing argument "prosecutor reviewed the testimony of Officer Pilifant and Detective Jolley and suggested that respondent's repeated refusals to answer questions without first consulting an attorney demonstrated a degree of comprehension that was inconsistent with his claim of insanity."); State v. Thornton, 491 So.2d 1143 (Fla. 1986) (noting officer testified that after he gave Miranda rights

defendant "replied, 'yes,' that he understood, and he did not answer any questions at the initial time of arrest"); State v. Kitchen, 490 So.2d 21 (Fla. 1985) (finding codefendant's closing argument in joint trial that Kitchen did not refute the testimony of a witness that stated Kitchen admitted to being the aggressor was a comment on Kitchen's right not to testify, but remanding to district court to apply the appropriate harmless error analysis); West v. State, 553 So.2d 254 (Fla. 4th DCA) (noting I asked him if he understood his rights and he said, "Yes" he did. And, I asked him if he would answer any of my questions and--"), disapproved on other grounds, State v. Norstrom, 613 So.2d 437 (Fla. 1993); Garron v. State, 528 So.2d 353 (Fla. 1988) (noting prosecutor as "two questions: whether he believed appellant was 'coherent,' and whether appellant indicated he understood his constitutional rights. Detective Phillips answered yes to both questions."); David v. State, 369 So.2d 943 (Fla. 1979) (finding prosecutor's comment that there was no evidence and "why didn't he [defendant] say anything was comment on rights), disavowed by, Long v. State, 494 So.2d 213 (Fla. 1986) (disavowing *per se* reversible error standard). As that is not the situation here, those cases are inapplicable.

Davis points in particular to West to suggest it was fairly susceptible that the jury interpreted the DVD to be a comment on his rights as Ilarraza's statement they would go over Davis'

right and Davis could decide what to do is followed by Davis' conversation with his parents. (IB 41). The state disagrees as the detective did not state that Davis understood his rights given him or that he asked him if he would answer any questions and Davis refused. Assuming for argument's sake the jury saw this portion of the DVD, Ilarraza's statement is more akin to what revealed in Thomas v. State, 367 So.2d 260 (Fla. 3d DCA 1979) and Holland v. State, 340 So.2d 931 (Fla. 4th DCA 1976).

The courts in Thomas and Holland found that the testimony could not reasonably be construed as a comment on the right to remain silent. In Thomas, the police officer testified he had asked the defendant to read the Constitutional Rights Warning Interrogation Form, to put his initials next to each right, and that the defendant complied. Thomas, 367 So.2d at 263. Likewise in Holland, the arresting officer testified that he read the defendants their rights from the card which were:

> 1. You have the right to remain silent and refuse to answer questions. Do you understand?
>
> They both gave no answer.
>
> . . .
>
> Knowing and understanding your rights as I explained them to you, are you willing to answer my questions without an attorney present?

Holland, 340 So.2d at 932. In the instant case, Davis was advised that his rights would be read to him and he could decide

what to do. This is not a comment on his invocation of rights nor is it fairly susceptible of being construed as a comment on Davis' right to remain silent. See Hall v. State, 403 So.2d 1321, 1324 (Fla. 1981) (finding there was no comment on defendant's right to remain silent where officer testified he gave defend his rights and that defendant understood them).

However, if this Court determines that the comment is fairly susceptible of being construed as a comment on Davis' right to remain silent; such is harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129, 1135-36 (Fla. 1986). Davis suggests that the jury could have used the comment to reject his insanity defense and the statutory mental mitigators in the penalty phase. However, davis' defense was insanity, thus, he was admitting he committed the crimes, thus, whether he spoke to the police or not did not did not impact the defense nor did it cause the jury to convict, especially given the evidence presented against him.

Harrell and Diggs, who knew Davis before the shooting, and witnessed him shoot and kill Proby, Basdeo, and Jones. Harrell testified Davis announced he was coming to kill Proby and watched as he shot her 23 times with an assault rifle while accusing her of setting him up. Diggs testified he saw Davis approach Basdeo and shoot him before accosting and shooting Jones. Davis had Basdeo open his mouth so he could shoot him

and was complaining someone “done him wrong.” Jones was shot after he complied with Davis’ command and got on his knees. (RTv8 916-18, 920-25; RTv12 1507-17).

Also, the forensic testimony from the medical examiner and the experts in DNA analysis and ballistics confirmed the eye-witness accounts of the shootings. (RTv9 1150-54; RTv10 1188-89, 1192-94, 1198-99, 1202-03; RTv12 1462-65, 1467-69). Harrell reported that Davis looked as though he had been smoking or drinking something based on his eyes and how he was unsteady on his feet. (RTv8 923). Davis told his parents he “murdered” Proby and Basdeo; that he was on cocaine; and to leave him alone as he was already “on the down side.” (RTv15 1782-83, 1798-99, 1811, 1814-15, 1818-21, 1824-27; SRTv3 302-03, 315, 324-25; SRTv3 287, 315, 319, 325-29, 330-31) Some of the officers who came into contact with Davis that night reported that his behavior was consistent with being on a substance such as cocaine. (RTv10 1229, 1240-42, 1252-53, 1256-57, 1553-54; RTv13 1609, 1623-24, 1629-31, 1637, 1643-44, 1648-53, 1655). Crack cocaine was found in Davis’ car after his arrest. (RTv12 1476-79, 1490-91; RTv13 1680-84). The fact that the DVD contains Ilarraza’s statement he would read Davis his rights is harmless in light of this evidence as the jury had ample evidence to show Davis killed with premeditation while he was under the influence of cocaine, not a psychotic disorder. Likewise there is no

error in the penalty phase. No connection was drawn between the invocation and Davis' sanity or the mental mitigators. In fact, th, jury distinguished between Proby's revenge murder and those of Basdeo and Jones. Further, the trial court found the statutory mental mitigators, thus, it is clear that Ilarraz'a statement had no impact on the guilt of penalty verdicts. Even if the jury saw Ilarraz's statement to Davis, it was harmless beyond a reasonable doubt, and this Court should affirm.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO SUPPRESS THE DVD OF DAVIS' CONVERSATION WITH HIS PARENTS (restated)

Davis asserts that the court erred in denying his motion to suppress his conversation with his parents while in the police interrogation room after he had invoked his right to remain silent and requested counsel. The court properly denied the motion to suppress as Davis had no reasonable expectation of privacy in the police interrogation room, the police did not foster any expectation of privacy, and Davis' parents were not used as agents of the police. Moreover, even if the conversations should have been suppressed, any error was harmless beyond a reasonable doubt.

In Connor v. State, 803 So.2d 598, 608 (Fla. 2001), this Court set forth the standard of review for the denial of a motion to suppress stating:

> [A]ppellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues....

See also, Welch v. State, 992 So.2d 206, 214 (Fla. 2008).

Following the police chase, Davis was taken into custody. While still at the arrest site, Davis' parents arrived at the scene and talked to Detective Carmody ("Carmody"). Carmody told Davis' father that he could not talk to his son at that time because he was going to be taken to the hospital. However, Carmody agreed to call Davis' parents once Davis arrived at the BSO headquarters, and this was done. (RTv15 1871-72). After he was treated at the hospital, Davis was brought to the police station where he met with the detectives in an interrogation room set up with audiovisual record equipment. Davis' conversations and activities in the room were recorded. After Davis invoked his Miranda rights, Carmody announced "some people here want to see you" and Davis' parents entered the interview room. They were permitted to talk to Davis and that conversation was recorded surreptitiously during which Davis admitted he had cocaine in his system and that he "murdered" that evening. (SRTv3 283-84).

The court denied Davis' motion to suppress the statement finding that Miranda applies to police interrogations and that

the police had not interrogated Davis. Further, the court found that the parents were not agents of the police and that the police had not sent the parents into the room with directions to elicit statements from Davis. Instead, Davis' comments were volunteered. (RTv12 1437-39; RTv13 1572-73).

Davis contends this was error because Carmody fostered an expectation of privacy when he told Davis and his parents that he was going to close the door and that they should knock if they want him, after which, the Detective left them alone. For support he points to State v. Calhoun, 479 So.2d 241 (Fla. 4th DCA 1985); Cox v. State, 26 So.3d 666 (Fla. 4th DCA 2010); Allen v. State, 636 So.2d 494 (Fla. 1994); State v. Munn, 56 S.W.3d 486 (Tenn. 2001); and People v. A.W. 982 P.2d 842 (Colo. 1999). Each is distinguishable as Davis was an adult, he did not ask to speak to his parents in private, and the police did not suggest that his conversations would be private. Lowe v. State, 650 So.2d 969 (Fla. 1994); Williams v. State, 982 So.2d 1190, 1194 (Fla. 4th DCA 2008); Johnson v. State, 730 So.2d 368 (Fla. 5th DCA 1999). The motion to suppress was denied properly.

It is well recognized that there is no reasonable expectation of privacy by a person in custody. See Lanza v. New York, 370 U.S. 139 (1962); Lazelere v. State, 676 So.2d 394, 405 (Fla. 1996); Allen, 636 So.2d at 496-97; Boyer, III v. State, 736 So.2d 64, 66 (Fla. 4th DCA 1999) (finding no reasonable

expectation of privacy in police interrogation room where defendant "neither asked for privacy, nor was it offered, and the police said and did nothing that would reasonably foster a sense of privacy in the conversation"); United States v. Duncan, 598 F.2d 839, 850 n.7 (4th Cir. 1979) (recognizing no expectation of privacy in police interrogation room). The exception to this principle arises where the police deliberately foster an expectation of privacy in order to circumvent the defendant's rights, Allen, 636 So.2d at 497, or where the police use a third party as an agent to interrogate the defendant after his invocation of rights. See Rolling v. State, 695 So.2d 278, 290 (Fla. 1997)

In Lowe, after invoking his Miranda rights, the police permitted Lowe's girlfriend to talk to him and he confessed to the robbery/murder. This Court found that the girlfriend was not acting as an agent even though the police acknowledged Lowe may talk to his girlfriend and that the police had merely acquiesced to her request to see Lowe. Lowe, 650 So.2d at 972-73. Similarly, in Williams, 982 So.2d at 1194 the appellate court found that the motion to suppress the surreptitiously recorded conversation of defendant in police interview room was proper as defendant had not asked for privacy, and there was no suggestion he had any privacy. Also, in Johnson, 730 So.2d at 369-70, there was no basis to suppress the defendant's

conversation with his live-in girlfriend which was secretly taped as the police did not discuss whether the conversation would be private and the girlfriend was not sure if the conversation were private. The court alternately determined that the admission was harmless.

Conversely, in Calhoun, 479 So.2d at 243, the defendant who had invoked his Miranda rights asked to speak to his brother "privately" and the police "exited the room giving every indication that the conversation was to be secure and private." The court agreed that the statement should have been suppressed. However here, Davis did not ask to talk to his parents in private and the police did nothing to suggest that they were affording Davis any privacy other than shutting the door which had been shut the entire time. The fact the detectives left the room does not in and of itself foster a reasonable expectation of privacy in an interrogation room. See Boyer, 736 So.2d at 66-67 (distinguishing Calhoun based in part on fact police did nothing to indicate conversation in interview room was private)

Davis's suggestion that there should be an exception for the child-parent relationship as considered in In re Agosta, 553 F.Supp 1298 (D. Nev. 1983), should be rejected. As stated in United States v. Davies, 768 F.2d 893, 899 (7th Cir. 1985), "every federal court, other than Agosto, that has considered the claim for a privilege based solely on the parent-child

relationship has rejected the claim." Given that Davis was the accused adult, not the accuser as in Agosta, the tenuous basis for the privilege is under cut, and should be rejected.

Cox, 26 So.3d at 669-77 also is distinguishable. There, Cox invoked his Miranda rights, but detectives sent another officer into the interview room to pose as a "family friend" to try to convince him it was in his best interest to talk to the police. Before agreeing to give a statement, Cox obtained assurances from the officer that "no recording was being made and the conversation was being conducted in private." Id. at 672. Next, the police brought into the interview room Cox's co-defendant to whom they had promised leniency if he could obtain incriminating statements from Cox. Id. at 673. These factors were found to have fostered an expectation of privacy in Cox and the co-defendant, found to be an agent of the State, was the foil through which the police deliberately elicited statements from Cox after he had invoked his rights. Neither factor is present in the instant case. Davis was never told his conversations in the interview room were private nor were his parents asked to elicit incriminating statements.

Allen, 636 So.2d at 496-97 does not further Davis' position. Noting the defendant was 15 years old, this Court agreed that the statements made to police after the defendant's mother asked to see her son should have been suppressed given

§39.037(2), Fla. Stat. (Supp 1990) which is not at issue here. This Court reiterated that a surreptitiously obtained jailhouse confession need not be suppressed where there was no improper police coercion or where the police did not foster an expectation of privacy. Id at 496-97.

In Munn, the defendant came to the police station with his parents and siblings. The interrogation room was equipped with a hidden surveillance recording device, and the detective utilized a tape recorder he placed in plain view on the table. During a subsequent interview on the same day in the same interview room, the Detective turned on the tape recorder once again. After a period of time, Munn's mother entered the interview room and the detective asked Munn if he wanted to talk to his mother by himself. When Munn stated he wanted to talk to her, the detective turned off the recorder on the table, left the room, and shut the door. Id. at 491, 495. Munn confessed to his mother. Id. at 491. When the detective returned, Munn agreed to tell him what happened, but did not want it taped. Id. at 491. Some time thereafter, Munn's father entered the interview room and Munn also confessed to his father. Id. at 491-92. Munn made incriminating statements to the detective and the detective then showed Munn the waiver of rights form which Munn acknowledged he understood, but refused to sign. Id. at 492. Additional incriminating statements were made by Munn to

the police before his arrest. Id. at 493.

The Tennessee Supreme Court focused on the fact that Munn was unaware of the hidden recording devices, but that an expectation of privacy was fostered by:

> The police officers' collective actions in turning off the audio tape recorder at the defendant's request; asking if he wanted to talk alone with his mother; excusing themselves from the room; and closing the door both deceived and assured the defendant and his mother that they would be free to talk in private without anyone hearing their conversation.

Id. at 495. The same ruling was made with respect to the conversations Munn had with his father. Id. The court concluded that the police had "both deceived and assured the defendant and his parents that they were free to talk in private."

Again, such is not the case here. There was no recording device visible in Davis' interview room to be turned off in order to lull Davis into believing his conversations were private. Davis did not ask to talk to his parents in private and he did not put on any evidence at trial that his parents asked for privacy when talking to their son. Furthermore, the detective gave no indication or assurances that the conversation would be private. For these same reasons, A.W., 982 P.2d at 843-44 is distinguishable, as well as, the fact that it was not decided on Fourth Amendment grounds, but decided based on state law regulating wiretapping and eavesdropping. There the detective repeatedly assured the defendant's father that there

was no one behind the two-way mirror in the interview room and that he would be outside the door, but "would not be listening to the conversation between the juvenile and his father." Id.

Given the fact that Davis was given no assurances his conversation was private, the police did nothing to foster a sense of privacy, and they did not ask Davis' parents to get a confession from their son, Davis' statements to his parents were admitted properly. However, if this Court determines otherwise, the admission was harmless beyond a reasonable doubt under DiGuilio. Harrell and Diggs watched Davis kill three victims, the forensic evidence confirmed their accounts, and the police officers and Harrell reported that Davis looked as though he were on drugs. The State incorporates here its harmless error analysis contained in Issue I. The admission of the tape on which Davis confirmed that he killed Proby because she betrayed him and Basdeo because he was disrespectful renders Davis' admissions to his parents harmless. Likewise, the fact cocaine was found in Davis car and he appeared to be under the influence of drugs renders his admission to his parents harmless.

ISSUE III

THE COURT DID NOT ABUSE ITS DEICRETION IN PERMITTING THE JURY TO USE A TRANSCRIPT OF THE DVD INTERVIEW AND CONVERSATION WITH HIS PARENTS AS AN AID (restated)

Davis asserts that use of a transcript of the DVD of his statements was error because counsel objected to its accuracy as

he had not had an opportunity to verify the lated version of the transcript. Davis did not ask for additional time from the court to conduct a review. Instead, voir dire of Detective Ilarraza was conducted wherein he testified that he had verified the accuracy of the transcript after having viewed the DVD. The jury was told that the transcript was merely an aid and that the evidence was the DVD recording. When there appeared to be a discrepancy in the transcript, the court had the jurors surrender the transcripts. Use of the transcript as an aid, was proper and this Court should affirm.

The standard of review for a demonstrative aid is abuse of discretion. See Williams v. State, 967 So.2d 735, 752 (Fla. 2007); Chamberlain v. State, 881 So.2d 1087, 1102 (Fla. 2004) McCoy v. State, 853 So.2d 396 (Fla. 2003); Martinez v. State, 761 So.2d 1074 (Fla. 2000). Discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable. Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla. 2000); Huff v. State, 569 So.2d 1247 (Fla. 1990). In Martinez, 761 So.2d at 1083, this Court held: "the jury may view an accurate transcript of an admitted tape recording as an aid in understanding the tape so long as the unadmitted transcript does not go back to the jury room or become a focal point of the trial." "[W]here a transcribed version of an audio-video tape is used as an aid to the jury and there is no stipulation as to its accuracy, trial

courts should give a cautionary instruction to the jury regarding the limited use to be made of the transcript." Id. at 1086 (citations omitted). This Court, in McCoy, 853 So.2d at 402, 4004-05 found the use of the transcript proper, even absent a stipulation, based on a subsequent authentication and that the jury was instructed properly regarding use of the transcript.

Here, there was no stipulation by the defense to the accuracy of the transcript, purportedly because Davis' counsel had not had an opportunity to do so. (RTv13 1660). His failure to identify specific offending portions should render this claim unpreserved. Steinhorst, 412 So.2d at 338 (holding for issue to be cognizable on appeal, it must be specific contention asserted below). However, if this Court reaches the merits, the record shows that Ilarraza testified that he was present when the DVD was created and he could be seen on the DVD entering and exiting interview room as well as questioning Davis. (RTv13 1662-63). Further, he testified that he watched the DVD several times, made corrections on the transcript, and that from his viewing, fairly and accurately reflects what is on the DVD. (RTv13 1663-66). The trial court found Ilarraza was present during the taping, recognized the voices of those depicted on the DVD and was capable and properly authenticated the transcript. Also, the court agreed to instruct the jury as to the proper use of the transcript. (RTv13 1668-69).

The court instructed the jury:

> I have admitted the transcript for the limited and secondary purpose of aiding you in following the content as you listen and view the DVD recording.
>
> However, you are specifically instructed that whether the transcript correctly or incorrectly reflects the content of the recording is entirely for you to determine based upon your own examination of the transcript in relation to your hearing of the DVD recording itself as the primary evidence of its own content; and if you should determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.
>
> Furthermore, since this is a limited and secondary exhibit, you will not have that – this will not go back with you to the jury room during your deliberations. In other words, you will not be able to just rely on the transcript. . . . it is not going to be back in the jury room.

(RTv13 1705-06)

Davis points to portions of the official record of Exhibit 44 and to demonstrative aid Exhibit 44A which shows that at one point Davis appears to deny using drugs, but to another portion which has Davis stating in part "I have cocaine in my system" (SRTv3 302-03) as proof that the accuracy of the demonstrative aid transcript is "problematic." (IB at 59). Davis claims that the transcript is inconsistent with his syntax (IB at 60) and may have become the focal point for the jurors. (IB at 63) However, the challenge to the syntax as an asserted basis for relief was not identified for the trial court, thus this assertion is unpreserved. Steinhorst, 412 So.2d at 338.

Moreover, none of these complaints takes into account that the jury was instructed to listen to the DVD and not rely on the transcript if it found errors. The jury was given the appropriate cautionary instruction and jurors are presumed to following the court's instructions. See United States v. Olano, 507 U.S. 725, 740 (1993) (finding presumption jurors follow instructions); Burnette v. State, 157 So.2d 65, 70 (Fla. 1963) (same). The DVD was played for the jury and it was up to the jury, as the fact finder, to determine what was said on the DVD. The fact that Davis would not stipulate to the accuracy of the transcript does not render the transcript unusable. Furthermore, Davis' stated basis for not stipulating was that he had not reviewed the corrected transcript.

Also, contrary to Davis' position, Ilarraza was the person who could authenticate the DVD and transcript because when he was not in the room with Davis, he was viewing the conversations from a separate room, he was familiar with the voices of the parties, and was checking the DVD against the transcript. (RTv13 1662-64). See Grimes v. State, 244 So.2d 130, 135 (Fla. 1971) (finding transcript could be authenticated by detective who took defendant's statement and verified transcript was same as tape recording and such transcript was properly published to jury)

Also, the argument that the jurors missed visual evidence because they were looking at the transcript is not well taken as

the jurors were also reported to be looking at the DVD as it was played. The court found the jury was looking at both the transcript and the DVD. (RTv14 1749-52) It is mere speculation that the jury would disregard the court's instruction and rely solely upon a transcript it had been told was not evidence and did not have during deliberations.

Finally, any alleged error is harmless under DiGillio given the eye-witness testimony describing Davis' actions as he shot three victims and appeared to be under the influence of narcotics as outlined in the harmless error analysis under Issue I and reincorporated here. Moreover, the transcript was not given to the jury during deliberations, while the DVD was sent to the jury room. This Court should affirm Davis' conviction.

ISSUE IV

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CCP AND FOUND THE AGGRAVATOR (restated)

Davis maintains it was error for the court to instruct the jury on the CCP aggravator and to find the aggravator proven. (IB 64) The State disagrees as Davis announced he was coming to kill Proby, procured the weapon, and methodically shot her once in the head and 22 times in the back with an assault rifle. The jury was instructed properly and CCP is supported by substantial competent evidence. This Court should affirm.

Review of the finding of aggravation is to determine if the

right rule of law was applied and whether competent, substantial evidence supports the court's finding. Boyd v. State, 910 So.2d 167, 191 (Fla. 2005). A court may give a jury instruction on an aggravator if there is credible and competent evidence to support it. Welch v. State, 992 So.2d 206, 215-16 (Fla. 2008); Hunter v. State, 660 So.2d 244, 252 (Fla. 1995). It is not error for a court to give a proper instruction on the aggravator even if it could not have existed as a matter of law. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993).

With respect to CCP, this court has stated:

> 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 trial court concluded that Davis "set about to kill Ms. Proby in a methodic manner with substantial reflection and thought" and that he "carried out the murder as a matter of course." (RRv5 795). The court found Davis had purchased the assault rifle two days before the murder and that he had spoken to Proby "prior to his arrival to her home and explicitly told her that he was going to come to kill her" and subsequently "showed up at her apartment with weapon in hand and a vast amount of ammunition" and "coldly and calmly walked from his car to her apartment." (RRv5 795). The court determined that Davis "accused Ms. Proby of setting him up, and then told her to 'get the f*** down," to which she offered no resistance. Defendant then proceeded to shoot Ms. Proby twenty-three times." (RRv5 795). The Court reasoned:

> The circumstances of this offense show that there was not a fit of rage which was manifested suddenly, but rather a contemplative act, and involved heightened premeditation. The facts in this case fail to demonstrate that the killing was prompted by emotional frenzy. Rather, witnesses described the Defendant as calm, serious, and focused just prior to and during Ms. Proby's killing. Jason Rolle, ... observed the Defendant arrive at the complex, park his car, and walk up to Ms. Proby's apartment, leaving his vehicle running. Mr. Rolle described the defendant as having

> a serious look and seeming totally focused. ... Further, the fact that the Defendant shot Ms. Proby twenty-three times indicated that he "focused specific attention and care in assuring that [the victim] did not survive." See, Cruse v. State, 588 So.2d 983, 993 (Fla. 1991).
>
> The Defendant had the opportunity to reflect on his actions and abort his intent to kill. However, he chose to remain inside Ms. Proby's apartment, confronting her with accusations of setting him up, and ordered her to the floor before proceeding to shoot her twenty-three times. Furthermore, the fact that a defendant may be emotionally or mentally disturbed, or is a chronic drug user, 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." (c.o.)
>
> A pretense of moral or legal justification is a claim of justification or excuse that . . . nevertheless rebuts the otherwise cold and calculating nature of the homicide. (c.o.) However, in this case, there was no such evidence to rebut the CCP aggravator. The evidence in this case established that the Defendant confronted Ms. Proby and accused her of setting him up. However, this subjective belief of having been wronged by Ms. Proby does not constitute a valid pretense of moral or legal justification. Revenge is not a valid ground upon which a pretense of moral or legal justification may be predicated. (c.o.) .Purely subjective beliefs of the defendant, without more, do not establish a pretense of legal or moral justification. (c.o.)

(RRv5 795-97)

Davis takes issue with the trial court's findings of "cool and calm reflection," "careful plan or prearranged design," and "heightened premeditation." Further he suggests that this alleged error is not harmless. The State disagrees.

Cool and Calm Reflection[6] - Davis asserts that the State's theory was that Proby's death was done out of an uncontrollable anger, thus, it does not show CCP. However, as the trial court found, Davis spoke to Proby prior to his arrival at the apartment and "explicitly told her that he was going to come kill her." (RRv5 795). Harrell said 15 minutes past between the call and Davis' arrival (RTv8 921). The rifle was purchased two days before the murders and Davis brought two magazines with him for the assault rifle. Once at the apartment, Davis "coldly and calmly walked from his car to [Proby's] apartment, accused her and told her to get down." (RRv5 795) Although Proby denied betraying Davis, she offered no resistance and complied with his order; she got on her knees, and folded her arms. Only then did Davis shoot her, most likely in the head first, then another 22 times down her back and buttocks. The court found no emotional frenzy, rather Davis "focused specific attention and care in assuring that [Proby] did not survive. (RRv5 796). These facts support CCP. See Cruse v. State, 983, 991-93 (Fla. 1991).

[6] Davis cites White v. State, 616 So.2d 21, 22-23 (Fla. 1993) for the proposition that CCP is improper given a defendant's drug use. This Court stated: "While the record establishes that the killing was premeditated, the evidence of White's excessive drug use and the trial judge's express finding that White committed this offense "while he was high on cocaine" leads us to find that this aggravating factor was not established beyond a reasonable doubt." Id. Here, there was no express finding by the court regarding Davis' drug use, in fact, Davis adamantly denied using cocaine, although it was the State's position that Davis was on cocaine. White does not further his position.

Davis suggests there was an intensity of emotion and anger which, under Richardson v. State, 604 So.2d 1107 (Fla. 1992) negated cool and calm reflection. However, Davis had the period of time from the music studio to get his rifle, the drive to Proby' apartment, the walk to her second floor apartment, and the time he confronted her in her apartment to reflect on his actions. Davis did not deviate from his announced goal. In Richardson, although that defendant brought a weapon to the victim's trailer, Richardson did not bring it into the trailer and it was only after a fight erupted and the victim followed Richardson outside to the gun's location did Richardson kill the victim. This Court likened Richardson's action to a man "enraged by a domestic dispute" not one acting coldly. In Maulden v. State, 617 So2d 298 (1993) and Cannady v. State, 620 So.2d 165 (Fla. 1993), this Court rejected CCP finding "mad acts" were the product of an escalating domestic dispute.

However, this Court has stated with respect to CCP:

> "the record lacks evidence showing the type of ongoing, highly emotional dispute needed to refute a finding of cool and calm reflection."
>
> . . .
>
> In addition, in later cases, we have specifically declined to recognize a "domestic dispute exception." *See Turner v. State*, 37 So.3d 212, 224 (Fla.) ("[T]his Court made it clear in Lynch [v. State, 841 So.2d 362, 377 (Fla. 2003)] that it 'does not recognize a domestic dispute exception in connection with death penalty analysis.' "), *cert. denied*, ––– U.S. ––––,

> 131 S.Ct. 426, 178 L.Ed.2d 332 (2010); *Carter v. State*, 980 So.2d 473, 485 (Fla. 2008) ("Domestic situations are evaluated in the same manner as other cases.").

Silvia v. State, 60 So.3d 959, 971, 974 (Fla. 2011). See also, Allred v. State, 55 So.3d 1267, 1279 (Fla. 2010) (opining "even if [a] murder did, in fact, 'arise from a domestic disturbance,' such a defense would not preclude a finding of CCP.) There is no evidence of an ongoing domestic dispute, thus, Richardson and Maulden do not further Davis' attempt to equate the simmering violence in those cases to a basis to negate CCP here. Furthermore, Davis never deviated from his announced intent and he executed his plan methodically and thoroughly as Proby complied with his demand for her to get on the floor.

Pointing to Spencer v. State, 645 So.2d 377, 384 (Fla. 1994), Davis claims that finding the two statutory mental health mitigators negates the "cold" component of CCP. (IB 69). However here, the trial court pointed to Evans v. State, 800 So.2d 182 (Fla. 2001) and 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.'" In Evans, this Court rejected the challenge to CCP based on the mental health mitigation and pointed to the case facts to show Evans' was capable of planning. Here, the record shows that Davis

formulated his plan to kill Proby based on a perceived betrayal and he went for his weapon. Davis brought extra ammunition with him and calmly made his way to Proby's apartment where he had her get on the floor and was undeterred by her protestations that she did not set him up.

Careful Plan or Prearranged Design - Santos v. State, 591 So.2d 160 (Fla. 1991) cannot form a basis for rejecting CCP here, because the "domestic dispute exception" was rejected in Lynch, 841 So.2d at 377. Likewise, mental mitigation merely is a factor in assessing CCP, Besaraba v. State, 656 So.2d 441, 445 (Fla. 1995); it does not preclude the finding of CCP. See Evans, 800 So.2d at 193. Likewise, merely because Davis had already purchased the assault rifle does not negate CCP. After deciding Proby was his target because she betrayed him, Davis went for his rifle and drove to Proby's to kill her. Advanced procurement is merely one indicator of CCP; "CCP can be indicated by the circumstances showing **such facts as** advanced procurement of a weapon, lack of resistance **or** provocation, and the appearance of a killing carried out as a matter of course. Swafford v. State, 533 So.2d 270 (Fla. 1988) (emphasis supplied). CCP has been found in cases where the defendants already possessed guns; the focus is on whether the defendant brings a weapon to the scene. See also, Ibar v. State, 938 So.2d 451 (Fla. 2007); Thompson v. State, 648 So.2d 692, 696 (Fla. 1994) (explaining that defendant

took precaution of carrying a gun and a knife with him to meeting with victims); Wuornos v. State, 644 So.2d 1000, 1008 (Fla. 1994) (noting defendant armed herself in advance of attack on victim); Huff v. State, 495 So.2d 145 (Fla. 1986) (stating that defendant brought murder weapon to the scene of the crime). Here, Davis decided to kill Proby and brought his weapon to the scene. CCP was proven.

Heightened Premeditation - Citing Almeida v. State, 748 So.2d 922, 933 (Fla. 1999) and Mahn v. State, 714 So.2d 391 (Fla. 1998), Davis suggests that his crime was spontaneous, and not CCP. However, Davis testified that after being beaten up at the music studio, he sat down on the sidewalk while he was "trying to figure out what to do next." (RTv24 2786). He told his parents that he was in a fight and that Proby betrayed him so he "murdered" her. Such shows that Davis blamed Proby for his beating and calmly "figured out" he was to kill her with his assault rifle. The CCP finding is supported by competent, substantial evidence and should be affirmed.

However, if this Court finds otherwise and strikes CCP, the death sentence should be affirmed as the CCP finding is harmless beyond a reasonable doubt. Singleton v. State, 783 So.2d 970, 979 (Fla. 2001) (finding sentence proportional with prior violent felony and HAC); Blanco v. State, 706 So.2d 7 (Fla. 1997) (finding sentence proportional for shooting death of

victim based on prior violent felony and felony murder); and Heath v. State, 648 So.2d 660 (Fla. 1994) (affirming sentence based on prior violent felony and felony murder aggravators).

ISSUE V

THE TRIAL COURT PROPERLY FOUND HAC (restated)

Davis also challenges the court's giving of the HAC instruction and the finding of the aggravator. Contrary to Davis' position, the trial court applied the correct rule of law and the HAC aggravator is supported by substantial competent evidence. However, if this Court finds otherwise, the finding is harmless beyond a reasonable doubt. The sentence should be affirmed.

"In reviewing a trial court's finding of an aggravating factor, we review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding." Boyd, 910 So.2d at 191. HAC focuses on the experiences of the victim before death. This Court has repeatedly 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 v. State, 695 So.2d 1229, 1235(Fla.1997); 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 v. State, 926 So.2d 1203, 1214 (Fla. 2006), this Court recognized that 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)).

This Court has reasoned:

> The HAC aggravator generally does not apply to execution-style killings unless the State presents additional evidence that the defendant acted to physically or mentally torture the victim. *See Victorino*, 23 So.3d at 104–05; *see also Rimmer*, 825 So.2d at 327. **However, "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel."** *Hudson*, 992 So.2d at 115 (*quoting James v. State*, 695 So.2d 1229, 1235 (Fla. 1997)). This includes instances "where the victim is acutely aware of his or her impending death." *Id.* (*citing Gore v. State*, 706 So.2d 1328, 1335 (Fla. 1997)).

McGirth v. State, 48 So.3d 777, 795 (Fla. 2010) (emphasis supplied).

Here, the trial court found:

> The heinous, atrocious, or cruel aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death. The crime must be conscienceless or pitiless and unnecessarily torturous to the victim. See, Victorino v. State, [23 So.3d 87 (Fla. 2009], and the cases cited therein.
>
> The necessary element of this aggravator is not the intention of the killer to inflict pain, but rather

the focus is on the victim's Perceptions and awareness and awareness of the circumstances. Buzia ... Orme v. State, 34 Fla. L. Weekly S638 (Fla, Nov. 19, 2005....

The testimonial evidence of eyewitness Hermione Harrell. . . established that about 15 minutes prior to coming to her apartment, the Defendant called Ms. Proby on the telephone and told her that he was going to come kill her. . . . The Defendant then arrived at Ms. Proby's apartment banging on her door and brandishing a high powered assault rifle. After entering, he began making accusatory statements at Ms. Proby, and soon thereafter ordered her to "get the [f***] down." . . . Without resisting, Ms. Proby complied, kneeling down on her living room floor and folding her arms. Ms. Harrell testified that the Defendant then began shooting Ms. Proby at close range, and as she fell to the floor, he continued shooting her. . . . Ms. Proby had advanced knowledge that she was about to be shot. She had the mental awareness of what was occurring and that her death was impending.

The killing was not sudden and unexpected. . . . Fear and emotional strain of the victim may be considered as contributing to the heinous nature of the murder, even where death is instantaneous. . . . When victims are acutely aware of their impending deaths, such murders are especially heinous, atrocious or cruel. . . . Moreover, the victim's mental state may be evaluated for the purpose of such determination in accordance with common sense inferences from the circumstances. . . .

The murder of Ms. Proby was especially heinous, atrocious and cruel. The evidence, demonstrating the escalating circumstances culminating in her murder, support the inference that she experienced extreme fear, emotional strain, and was aware of her impending murder. There can be no doubt that Ms. Proby suffered immeasurable fear and terror as the events played out, from the inception when Defendant stated on the telephone that he was going to come kill her, to the point when he showed up at the door with the rifle in hand. This was followed by the Defendant, while still armed, making accusatory statements at Ms. Proby and then ordering her to the floor. The Court finds that the killing was undoubtedly conscienceless, pitiless,

and unnecessarily torturous.

(RRv5 793-94).

Davis points to Diaz v. State, 860 So.2d 960, 967 (Fla. 2003); Santos, 591 So.2d at 163; Rimmer v. state, 825 So.2d 304 (Fla. 2002) to support his position that HAC should not have been found. In Diaz, unlike with Proby, the victim, Charles, had no advanced warning of Diaz's intent until Diaz arrived and tried to shoot him one morning. While the gun misfired the first time, Diaz reloaded and killed his victim in short order. In Santos the defendant happened upon his victim on the street, and although she tried to run, he caught her moments later and shot her in the head. Although Santos had told his victim earlier he would kill her, he did not tell her he was coming to her location as Davis told Proby. In Rimmer, there was no indication that the victims would be shot until the first was fired into the first victim. The second shot was fired in quick succession into the second victim, thus, the second victim had just moments to contemplate his impending death.

Here, Davis announced his intent, and any doubt Proby may have had vanished as Davis appeared at her door armed with an assault rifle and continued to accuse her of setting him up. No amount of protestations dissuaded Davis, as he ordered Proby to her knees. At this point, Proby, resigned to her fate, folded her arms, and awaited Davis' barrage of 23 bullets. This Court

should affirm the trial court's finding of HAC as was done in Pooler, 704 So.2d at 1378. There, the victim was told two days before the shooting that Pooler planned to kill her, and "[a]ny doubt she may have had about the sincerity of Pooler's threat must have been dispelled when he visited her apartment that morning with a gun," chased her down and shot her.

However, if this Court determines that HAC was not proven, the death sentence remains appropriate, even if just the prior violent felony and felony murder aggravators are considered. See Blanco, 706 So.2d at 11 (finding sentence proportional for shooting death of victim based on prior violent felony and felony murder); and Heath, 648 So.2d at 660 (affirming sentence based on prior violent felony and felony murder aggravators)

ISSUE VI

THE DEATH SENTENCE IS PROPORTIONAL (restated)

Davis asserts that his death sentence is not proportional considering his mental mitigation. The State disagrees given that there were three contemporaneous homicides, only moderate weight was given the statutory mental mitigation, and this was not a case where the defendant suffered lifelong mental health problems. This Court should find the sentence proportional.

This Court 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 v. State, 880 So.2d 561, 577 (Fla. 2004).” Boyd v. State, 910 So.2d 167, 193 (Fla. 2005). See Hodges v. State, 55 So.3d 515, 542 (Fla. 2010); 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).

Robertson v. State, 699 So.2d 1343, 1344-45 (Fla. 1997); Kramer v. State, 619 So.2d 274 (Fla. 1993); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); Almeida v. State, 748 So.2d 922 (Fla. 1999), the cases cited by Davis, are distinguishable. Unlike Robertson, Kramer, and Fitzpatrick, Davis killed three victims on December 2nd, although he was sentenced to death for Proby’s murder alone. In Almeida, there was one victim on the evening of his crime, however, there was evidence he had killed two prostitutes in the weeks leading up to the final murder. Also in Roberson and Fitzpatrick, there was long history of mental illness and or low emotional age, while here, all of the experts recognized that Davis had no history of mental infirmities, the jury rejected the claim of temporary insanity, and only moderate weight was given the statutory mental mitigators. In Kramer, this Court found the sentence disproportionate in part because the facts “suggests nothing

more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk. This case hardly lies beyond the norm of the hundreds of capital felonies....” Kramer, 619 So.2d at 278. Conversely here, none of the victims could be considered culpable in their own murders, none instigated a physical confrontation with Davis, rather all submitted to his demands, kneeling (Proby and Jones) and opening his mouth (Basdeo) before Davis shot them.

In support of proportionality, the State relies on Singleton v. State, 783 So.2d 970, 979 (Fla. 2001) (finding sentence proportional with prior violent felony and HAC along with three statutory mitigators including defendant's age (69), impaired capacity, and extreme mental or emotional disturbance, and several nonstatutory mitigators were found, including that defendant suffered from mild dementia); Blanco v. State, 706 So.2d 7 (Fla. 1997) (finding sentence proportional for shooting death of victim based on prior violent felony and felony murder with one statutory mental mitigator and 11 non-statutory mitigators); and Heath v. State, 648 So.2d 660 (Fla. 1994) (affirming sentence based on prior violent felony and felony murder aggravators, despite the existence of the statutory mitigator of extreme mental or emotional disturbance). Should this Court affirm the HAC and CCP aggravators as well, proportionally is supported by Smithers v. State, 826 So.2d 916,

931 (Fla. 2002) (upholding sentence based on three aggravators (prior violent felony/contemporaneous murder, HAC, and CCP), both statutory mental mitigators, and several nonstatutory mitigators).

ISSUE VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING HARRELL TO TESTIFY THAT PROBY STATED THAT DAVIS IS "GOING TO COME KILL ME" (restated)

It is Davis' position that it was error to permit Harrell to testify that Proby was mouthing to her what Davis was saying on the telephone as such was hearsay. Contrary to Davis' position, the statement falls under a valid hearsay exception and the trial court did not abuse its discretion on overrule the Davis' hearsay objection.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. See Williams v. State, 967 So.2d 735, 748 (Fla. 2007); Ray v. State, 755 So.2d 604, 610 (Fla. 2000); Zack v. State, 753 So.2d 9, 25 (Fla. 2000); Cole v. State, 701 So.2d 845, 854 (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. Trease, 768 So.2d at 1053, n. 2.

During questioning by the prosecutor, the following transpired:

A. ... after I got out (sic) the shower, she (Proby) was – she looked kind of upset.

Q. So what happened next?

A. She told me she called him (Davis) and he was irate, he was upset about something, so when she called him, she told me he was upset, she let me hear him over the phone, and I can hear him fussing to someone else.

. . .

A. After the conversation over the phone she had me so scared, so I turned to her and told her she should call the police, because he told her that he was going to kill her.

MR. HARRIS (defense counsel): Objection to what she said, hearsay.

THE COURT: Sustained.

BY MR. CAVANAGH:

Q. Well, let’s go into the context of that.

A. Okay.

Q. Tell us what was going on. Was there a time that she [Proby] was on the phone.

. . .

Q. Were you there?

A. Yes, I was sitting right there.

Q. Were you watching her reaction to what was being said?

A. Yes.

Q. And was she, as things were being said to her in that present sense time, was she giving you --- were you obtaining a present sense of what was going one?

A. Yes. 'Cause as soon as he said that –

. . .

Q. All right. As she's on the phone, was she mouthing words to you.

A. Yes.

Q. As they were being said to her?

A. Yes.

Q. All right. And what was that?

MR. HARRIS: Objection, again, still hearsay.

THE COURT: Overruled, exception.

THE WITNESS: He told her, she repeated, he's going to come kill me.

(RTv8 918-20).

Neither the prosecutor nor trial court stated the basis for the exception to the hearsay rule. However, this Court has stated: "'even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling.'" Robertson v. State, 829 So.2d 901, 906 (Fla. 2002) (citation and emphasis omitted).

Section 90.803(1)-(2), Fla. Stat. (2009), provide exceptions to the hearsay rule:

> (1) SPONTANEOUS STATEMENT - A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.
>
> (2) EXCITED UTTERANCE - A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Harrell's testimony regarding Davis' threat is admissible under either provision as Proby was upset as she was talking to Davis on the phone and repeating contemporaneously his threats.

A hearsay statement is admissible under §90.803(1) where it is spontaneous and describes or explains an event as it is occurring or immediately thereafter. Depravine v. State, 995 So.2d 351, 367-71 (Fla. 2008). The focus is on whether the statement is contemporaneous with or how much time past between the event and the statement. Id. Here, Proby was mouthing to Harrell the words Davis was speaking to her and also stated he was going to come and kill her. This all transpired as Proby was on the phone with Davis and as Harrell listened in or as she watched Proby talking to Davis. Proby's statement qualifies as a spontaneous statement under §90.803(1); it was made as Davis was announcing his intent to Proby. Proby has no time to reflect as she was just repeated what Davis was saying.

Also, the statement is admissible as an excited utterance.

In order for a statement to qualify as an excited

> utterance exception to the hearsay rule pursuant to section 90.803(2), Florida Statutes (2007), "the statement must be made: (1) 'regarding an event startling enough to cause nervous excitement'; (2) 'before there was time to contrive or misrepresent'; and (3) 'while the person was under the stress or excitement caused by the event.'" *Hudson v. State*, 992 So.2d 96, 107 (Fla. 2008) (*quoting Henyard v. State*, 689 So.2d 239, 251 (Fla. 1996)).

Hayward v. State, 24 So.3d 17, 29 (Fla. 2009); Williams v. State, 967 So.2d 735, 748 (Fla. 2007).

Here, Harrell reported that Proby was upset as she talked to Davis on the phone and that she was mouthing Davis' words to Harrell as they spoke. Harrell could hear Davis was upset, and Proby reported that Davis was irate. Proby stated that Davis was going to kill her as he was telling her this. Receiving a death threat is a starting event and Proby was reported to be upset. She made this report contemporaneously with the event, thus, she had no time to contrive or misrepresent the threat. Likewise, the event was occurring as Proby was making her statement, thus, she was still under the stress of the threat. The statement that Davis was going to kill Proby was admissible as an excited utterance. See Hudson v. State, 992 So.2d 96, 108 (Fla. 2008) (finding phone call from victim to third party explain defendant planned to kill him was admissible as excited utterance).

However, even if the statement should not have be admitted, such was harmless beyond a reasonable doubt under DiGullio.

With respect to the guilt phase, there remained the evidence that Davis showed up at Proby's door with a loaded assault rifle and an extra magazine. He accused her of setting him up, and demanded she get down. When she got on her knees, he shot her in the head and an additional 22 times down her back as she lay prone on the floor. This was witnesses and recounted by Harrell and evinces premeditated murder. Additionally, Davis' decision to bring the assault rifle to the scene, his statements to his parents regarding why he "murdered" Proby, his appearance of being on cocaine from his eyes and stagger as well as his statement to his parent not to bother him "he was on the downside already all support premeditated murder and rejection of the insanity defense. (RTv8 916-18, 920-25; RTv9 1150-54; RTv10 1188-89, 1192-94, 1198-99, 1202-03, 1229, 1240-42, 1252-53, 1256-57, 1553-54; RTv12 1462-65, 1467-69, 1476-79, 1490-91; RTv13 1609, 1623-24, 1629-31, 1637, 1643-44, 1648-53, 1655, 1680-84; RTv15 1782-83, 1798-99, 1811, 1814-15, 1818-21, 1824-27; SRTv3 302-03, 315, 324-25; SRTv3 287, 315, 319, 325-29, 330-31)The State reincorporates its harmless error analysis contained in Issue I.

Davis also suggests that CCP and HAC are no longer supported if the statement is deemed inadmissible. Davis' cold, calculated and premeditated intent may be gleaned from his actions separate and apart from the challenged statement. He

fails to recognize that he admitted to his parents that he "murdered" Proby because she betrayed him and that he testified that he got into a fight at the music studio and thought about what he would do next. Once he focused on Proby as his "mission" he retrieved his rifle and went to her apartment where he accused her and shot her 23 times. CCP remains intact.

Likewise, HAC is intact as there was no question regarding Davis' intent when he arrived at Proby door with his assault rifle and accused her of betrayal. She tried to convince him otherwise, but he continued to accuse her and ordered her to her knees. During this time, Proby had time to contemplate her impending death. However, even absent both HAC and CCP, the death sentence is warranted. The State incorporates its analysis from Issues IV, V, and VI. This Court should affirm the convictions and sentence.

ISSUE VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DR. BUTTS TO TESTIFY ABOUT THE CAUSE OF DAVIS' BEHAVIOR WHEN DOROTHY FERRARO SAW HIM IN JAIL (restated)

Contrary to Davis' position, the court did not abuse its discretion in finding Dr. Butts, as an expert, could rely on the diary kept by Davis' girlfriend and the testimony offered by Dorothy Ferraro ("Ferraro"), Davis' original public defender, regarding his reaction to her when she visited him in jail on

December 21, 2005. The court properly determined that the diary and a witness' testimony is relevant evidence upon which experts rely and whether the evidence is speculative goes to the weight not the admissibility. (RTv17 2139-40). Dr. Butts added such factors are thing usually relied upon in her profession and that the evidence assisted her in coming to the conclusion Davis was angry, not mentally ill. (RTv17 2175). This Court should affirm.

The standard of review for the admission of evidence is abuse of discretion. 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 at 604 (Fla. 2000); Zack, 753 So.2d at 9. Discretion is abused when the action is arbitrary, fanciful, or unreasonable. Trease, 768 So.2d at 1053, n.2.

It is axiomatic that an expert may rely upon hearsay in arriving at an opinion, provided that the hearsay is of the type reasonably relied upon by experts in the field. Section 90.704, Florida Statutes (2009), makes this clear by providing that facts or data upon which an expert bases an opinion need not be admissible in evidence if they are of the type reasonably relied upon by experts in the subject. "Section 90.704, Florida Statutes (2007), permits an expert to base an opinion on inadmissible facts or data made known to the expert outside the courtroom." Smith v. State, 7 So.3d 473, 501 (Fla. 2009)

"Section 90.705(1) permits the expert to testify without prior disclosure of the underlying facts or data. Thus, an expert may express an opinion and base the opinion on facts of which the expert does not have personal knowledge without the use of a hypothetical question." Id. "The hearsay rule poses no obstacle to expert testimony premised, in part, upon tests, records, data, or opinions of another, where such information is of a type reasonably relied upon by experts in the field." Burnham v. State, 497 So.2d 904, 906 (Fla. 2d DCA 1986).

During the proffer of her testimony, Dr. Butts explained that she relied upon Ferraro's testimony with respect to Davis' demeanor when she visited Davis and on the reports of relatives and friends to form her opinion. Further, Dr. Butts testified that reports of relatives and other witnesses are the type of things experts rely upon in the regular course of their business to form an opinion. (RTv17 2139) Before the jury, Dr. Butts reiterated that she relied upon Ferraro's description of Davis; behavior and the notes provided by Davis' girlfriend recording that Davis was angry because he did not want a public defender. (RTv17 2174-75). Based on the proffer, confirmed by her testimony, there was no abuse of discretion in permitting Dr. Butts to form her opinion about Davis' mental state based on the diary and Ferraro's testimony.

In Fassi v. State, 591 So.2d 977, 978 (Fla. 5th DCA 1991)

the court found it was reversible error to admit expert testimony comparing spray painted graffiti to the defendant's handwriting as "a comparison of such completely different mediums should be viewed skeptically" and was speculative. That is not the issue that was raised at trial, and Fassi is more akin to a challenge to scientific evidence under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Likewise, Ruth v. State, 601 So.2d So.2d 9, 11-12 (Fla. 2d DCA 1992) does not address the issue raised at trial, namely, whether a mental health expert may rely upon the testimony and reports of lay witnesses to render an opinion. In Ruth, the expert's "opinion testimony was the only evidence presented indicating that the plane was used to smuggle drugs. Yet, there was no evidence to support [the expert's] conclusion. It was purely speculation and, as such, was inadmissible." Here, Dr. Butts was relying on the eye-witness reports of those who saw and spoke to Davis, and such is the type of information mental health experts rely upon in the regular course of their business to render opinions.

Even if this testimony should have been excluded, such was harmless beyond a reasonable doubt. DiGullio. Dr. Butts gave support from medical reports, psychological testing, her conversation with Davis, and the viewing of the DVD for her conclusion that Davis was malingering/feigning mental illness and was not legally insane at the time of the crime. This

opinion could have been drawn separate and apart from the testimony that he was angry that a public defender was appointed. That fact was one of many facts Dr. Butts used to form her opinion. (RTv17 2153, 2156-60, 2162-68, 2172-73, 2175-77, 2181, 2185-90). This Court should affirm.

ISSUE IX

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING OBJECTIONS TO THE MANNER IN WHICH THE PROSECUTOR CROSS-EXAMINED DAVIS DURING THE PENALTY PHASE (restated)

Here, objections raised and overruled during the prosecutor's cross-examination of Davis during the penalty phase are identified as error. Davis asserts that the questions were argumentative and the examination should not have been permitted to degenerate in the fashion it did. (IB 95-96).

Pursuant to section 90.612(1), the trial court "shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence, so as to . . . (a) Facilitate, through effective interrogation and presentation, the discovery of the truth . . . and (c) Protect witnesses from harassment or undue embarrassment." It is well settled that a "criminal defendant is privileged to testify in his own behalf or to refuse to testify. Once he becomes a witness, however, he may be examined the same as other witnesses on matters which illuminate the quality of his testimony."

Johnson v. State, 380 So.2d 1024, 1026 (Fla. 1979) (citing Mead v. State, 86 So.2d 773 (Fla.1956). "When a defendant voluntarily takes the stand, he is under an obligation to speak truthfully and accurately. The credibility of a witness and the weight to be given his testimony is a matter to be determined by the trier of fact." Johnson, 380 So.2d at 1026. "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters." See §90.612(2). A trial court's rulings on the scope of cross-examination are subject to an abuse-of-discretion standard of review. See McCoy v. State, 853 So.2d 396, 406 (Fla. 2003). Discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable. Trease, 768 So.2d at1053, n.2.

In the penalty phase, Davis testified he sold cocaine and that a few days before the murders he started hearing a voice (RTv24 2780-84). When he got into a fight on the day of the murder, he went for his rifle. (RTv24 2784-88). He related that everything just "clicked" and he knew what his mission was, which involved Proby, after which, he killed Proby and the others. (RTv24 2788-90). Davis denied that the person depicted on the DVD or having done the things he did was representative of his character. He felt horrible about the three deaths, and

wishes he could take them back. (RTv24 2790-93). On cross-examination, the State explored Davis' contention he had heard a voice, that these acts were out of character for him, and whether the killings were intentional in response to perceived betrayal or disrespect.

Ault v. State, 53 So.3d 175, 193-94 (Fla. 2010) provides:

> We have explained that "[e]vidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed." *Merck v. State*, 763 So.2d 295, 298 (Fla. 2000) (citing Wickham v. State, 593 So.2d 191, 194 (Fla. 1991)); *see also Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (noting that a mitigating circumstance can be "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death).

"When the defendant chose to testify in his own behalf during the sentence proceedings, the issue of guilt had been decided adversely to him. A defendant who takes the stand as a witness in his own behalf occupies the same status as any other witness, and all the rules applicable to other witnesses are likewise applicable to him." Booker v. State, 397 So.2d 910, 914 (Fla., 1981). Davis put at issue his mental status by seeking the two statutory mental mitigators, and put at issue his credibility by testifying. As such, the prosecutor, in this adversarial hearing, had the duty to test the evidence and Davis' credibility. The court was well within its discretion in

determining that the prosecutor's questions were not violative of §90.612(1). In order to obtain relief, Davis must show that no jurist would have ruled as the instant trial court ruled. Davis has not met his burden.

Moreover, even if the objections should have been sustained, any error was harmless under DiGullio as is evidence from the fact the jury recommended life for two of the three murders and the trial court found the statutory mental mitigation established.

ISSUE X

THE REQUEST FOR A SPECIAL VERDICT FORM AND INSTRUCTION REQUIRING JURY TO FIND AGGRAVATORS UNANIMOUSLY (restated)

Citing Ring v. Arizona, 536 So.2d 584 (2002), Davis asserts that it was error for the trial court to deny his request for a special instruction and verdict form requiring the jury to find unanimously each aggravating factors beyond a reasonable doubt. However, he concedes that this Court has rejected his argument in State v. Steele, 921 So.2d 538 (Fla. 2005). Questions of law are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994), however, this Court has rejected such claims repeatedly, and Davis has not offered a basis for reversal here.

As this Court stated in Steele, 921 So.2d at 545-47:

> ... the standard jury instructions require the jury to determine whether one or more aggravating circumstances exists, and if so, to weigh any

> aggravators against any mitigating circumstances. See Fla. Std. Jury Instr. (Crim.) 7.11, at 132-33. The instructions also provide that the jury's advisory sentence need not be unanimous, that a majority vote is necessary for a death recommendation, and that a vote of six or more jurors is necessary for a life recommendation. See id. at 133.
>
> Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist.
>
> ...
>
> The requirement of a majority vote on each aggravator is also an unnecessary expansion of *Ring*. . . Even if *Ring* did apply in Florida-an issue we have yet to conclusively decide-we read it as requiring only that the jury make the finding of "an element of a greater offense." *Id*. **That finding would be that at least one aggravator exists-not that a specific one does. But given the requirements of section 921.141 and the language of the standard jury instructions, such a finding already is implicit in a jury's recommendation of a sentence of death**. Our interpretation of *Ring* is consistent with the United States Supreme Court's assessment of Florida's capital sentencing statute. In *Jones v. United States*, 526 U.S. 227, 250-51, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the Court noted that in its decision in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), in which it concluded that the Sixth Amendment does not require explicit jury findings on aggravating circumstances, "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved."

In convicting Davis, the jury unanimously found him guilty of not only Proby's premeditated murder, but two other first-

degree murders of Basdeo and Jones. This Court has rejected repeatedly challenges to Florida's capital sentencing under Ring where there is a prior violent felony. See Perez v. State, 919 So.2d 347, 377 (Fla. 2005) (rejecting challenges to capital sentencing under Ring and Furman); Porter v. Crsoby, 840 So.2d 693 (Fla. 2003) (finding death is statutory maximum and repeating rejection of Ring arguments); King v. Moore, 831 So.2d 143 (Fla. 2002). This Court should affirm.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the conviction and death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Paul R. Petillo, Esq., Office of the Public Defender, 421 Third Street, West Palm Beach, FL 33401 this 26th day of October 2011.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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