IN THE SUPREME COURT OF FLORIDA

DOUGLAS BLAINE MATTHEWS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

___________________________/

CASE NO. SC10-1771
L.T. No. 2008-30969-CFAES
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

KATHERINE MARIA DIAMANDIS
Assistant Attorney General
Florida Bar No. 69116
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
katherine.diamandis@myfloridalegal.com

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

On February 28, 2008, a grand jury in and for Volusia County, Florida returned an indictment charging Appellant, Douglas Blaine Matthews, with the first-degree murders of Kirk Zoeller and Donna Trujillo, and with one count of burglary while armed. (V3:418-19).[1] Prior to trial, Appellant filed a number of pretrial motions attacking the constitutionality of various aspects of Florida's death penalty scheme.

Specifically relevant to this appeal, Appellant filed a motion to declare the heinous, atrocious, or cruel aggravator and corresponding standard jury instruction unconstitutional; a motion to declare the murder in the course of a felony aggravator and corresponding standard jury instruction unconstitutional; a motion objecting to the death qualification of the jury based upon Ring v. Arizona, 536 U.S. 584 (2002); and a motion to declare Florida's death penalty statute unconstitutional under Ring. (V3:456-72; V4:562-96). Appellant's motions were denied during a September 15, 2009 hearing. (V1:79-82, 94-96; V4:645-48). The trial court did not issue written orders, but orally denied each motion. (V1:79-82, 94-96).

[1] Citations to the record on appeal will be referred to by the appropriate volume number followed by the appropriate page number (V__:__).

Appellant's case proceeded to a jury trial before the Honorable R. Michael Hutcheson on May 19, 2010. (V15). The presentation of evidence concluded the afternoon of May 24, 2010. (V20). On May 25, 2010 the jury returned a verdict finding Appellant guilty of the first-degree premeditated murder and the first-degree felony murder of Kirk Zoeller, guilty of the lesser included offense of manslaughter of Donna Trujillo, and guilty of burglary while armed. (V6:1087-88; V21:2132-33).

The penalty phase took place on May 27, 2010 and concluded on May 28, 2010. (V22; V23; V24). The jury recommended to the trial court, by a vote of 10 to 2, that it impose the death penalty upon Appellant for the murder of Kirk Zoeller. (V6:1097; V24:2512-13).

After the Spencer[2] hearing, and the consideration of sentencing memorandums, the trial court set Appellant's sentencing for August 12, 2010. (V3:371-400; V6:1107-15; 1128-39).

The trial court followed the jury's recommendation, found four aggravating circumstances[3] that "far outweighed" the

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

[3] (1) The capital felony was especially heinous, atrocious, or cruel (given extremely great weight); (2) Appellant was previously convicted of a felony involving the use or threat of violence to a person (given great weight); (3) The capital felony was committed while Appellant was engaged in the

mitigating circumstances and sentenced Appellant to death for the murder of Kirk Zoeller. (V3:405-11; V6:1148-56).[4]

At approximately 6:30 p.m. on February 20, 2008, Justin Wagner went to victim Donna Trujillo's apartment. (V16:1248). Wagner testified he sold drugs from Trujillo's apartment. (V16:1257). Wagner knew Appellant from the streets, referred to him as "D," and testified they were friends. (V16:1247, 1249). Earlier that day, Wagner and Appellant were cutting up cocaine, and Wagner testified Appellant had a knife. (V16:1249-50, 1256). He described the knife as a big buck knife. (V16:1313).[5]

Also at victim Trujillo's apartment along with Wagner, was Appellant, victim Zoeller and, a couple. (V16:1257-62).[6] The couple left, and Wagner remained at the apartment with Trujillo, Zoeller, and Appellant. (V16:1260-61). Wagner testified Trujillo and Appellant went into her bedroom, and later Trujillo

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commission of a burglary/the capital felony was committed for pecuniary gain (considered as one aggravator and given significant weight); and (4) The capital felony was committed by a person previously convicted of a felony and on felony probation (given little weight). (V6:1149-51).

[4] Appellant was also sentenced to fifteen years for manslaughter, and to life imprisonment for burglary while armed; all sentences were ordered to run consecutively. (V6:1150).

[5] Teresa Teague would testify two days before the murder she gave Appellant a 9-12 inch knife. (V16:1340-41).

[6] Wagner referred to Zoeller as "Rooster." (V16:1261-62, 1264-65).

called Zoeller to come into the bedroom. (V16:1267-69). Wagner stayed in the living room. (V16:1266-67, 1269-70). Wagner described Zoeller as an "always happy" "beach bum" who was loved by all the "mom-and-pop stores on the beachside." (V16:1264, 1302).

Wagner testified he did not hear any sounds for awhile then "everyone started freaking out." (V16:1270). He heard screaming, and a sound consistent with something being slammed. (V16:1270). Within seconds, Zoeller came running out of the bedroom. (V16:1270-72, 1275). Appellant was right behind Zoeller, chasing him, on top of him, stabbing him with a knife. (V16:1272-73). Zoeller was screaming "help me." (V16:1272-74).

Wagner testified he got up and ran for the front door, and while he was trying to open the door, Appellant was over Zoeller stabbing him "over and over and over." (V16:1274, 1278). Zoeller was trying to get out of the apartment, and Appellant was stabbing him as he tried to get out. (V16:1277-78). Zoeller was screaming for help, and pleaded for Wagner not to go. (V16:1274).

After Wagner exited, he looked back and could see Appellant pulling Zoeller back and stabbing him "over and over" while Zoeller was trying to get away. (V16:1279-80). Appellant was

continually stabbing Zoeller, and did not try to leave the apartment prior to the stabbing. (V16:1276-77). Wagner testified there was no doubt Appellant was the aggressor. (V16:1317). Wagner was scared and ran out and down the street. (V16:1272, 1276).

Wagner ran to Teresa Teague's home. (V16:1282-83). Once there, Wagner heard Appellant pull up and he hid behind a fence. (V16:1284). According to Wagner, Appellant took off his blood-stained shirt outside of Teague's home and placed it into a clear plastic bag. (V16:1280-82, 1285-86).[7] Within two days of the incident, Wagner gave a statement to the police; he indicated at first he was scared and said he did not know anything, but later told the truth. (V16:1263-64, 1319-20). In Wagner's statement to the police, he stated he saw Appellant wiping a knife off outside Teague's home. (V16:1287). At trial, Wagner could not recall the statement but testified he told police what he saw. (V16:1287-88).

Wagner testified he previously was convicted twice for shoplifting. (V16:1285). Wagner also admitted to drug use on the night of the murder but maintained it did not affect his ability to recall what happened. (V16:1259-60). Wagner

[7] Wagner identified the shirt Appellant was wearing and it was entered into evidence at State's Exhibit #11. (V16:1280-82).

testified he had a court date moved for him by the State Attorney's Office when a medical issue arose with his mother-in-law. (V16:1295-96, 1315). No one promised Wagner his case would be dismissed or he would he assisted. (V16:1316). Finally, Wagner indicated his testimony was truthful. (V16:1316).

Teresa Teague, a friend of Appellant's, testified he came to her home the evening of February 20, 2008. (V16:1330-31, 1329, 1334). Appellant came in with no shirt on, wearing only his blue jeans, and sneakers. (V16:1338-39). Earlier in the day, Teague saw Appellant wearing a white Sean John shirt. (V16:1339-40). The shirt was clean, and she did not see him in it again. (V16:1340).

When Appellant first came to Teague's home, he was in and out in minutes. (V16:1343). Teague's bathroom was near the front door, she had cleaned it earlier in the day, and now there was blood on the shower curtain and in the bathtub. (V16:1335-38). Appellant came back 20-30 minutes later. (V16:1343). Teague testified Appellant did not look right, and she asked him if he was okay. (V16:1342).

Suddenly, there were lights everywhere. (V16:1344). Police cars were zooming up and down the road, and helicopters

were in the air. (V16:1344). Teague indicated she could see search lights. (V16:1344). She asked Appellant what was going on, and Appellant responded "all that" was for him. (V16:1345-46). Teague asked Appellant what he did and prodded him for an answer. (V16:1346, 1348-49). Appellant told Teague that he had run into a couple of people "that probably wish they had not run into him that evening." (V16:1346, 1348). When asked what happened, Appellant told Teague "I just eliminated a couple of problems." (V16:1348-49).

There was a knock at Teague's door; the police were there and they were looking for someone. (V16:1352-53). When Teague went to open the door, Appellant took off his jeans and "zoomed" into the bedroom telling a woman who was already in bed to move over. (V16:1353-54, 1357). Appellant was wearing only his boxer shorts and socks, and got into the bed saying "I need to lay -- I've been in bed." (V16:1354-56). Teague invited the police in and eventually gave then permission to search her home. (V16:1357). Teague gave a statement to the police that evening. (V16:1361).

Teague testified she previously was convicted of two felonies, and three misdemeanor check fraud offenses. (V16:1341-42). The State Attorney's Office asked for a

misdemeanor trespass warrant for Teague to be recalled; she had been unaware of the warrant. (V16:1387-90).

On the evening of February 20, 2008, Daytona Beach police officers were dispatched to an apartment complex at 139 Halifax Avenue. (V15:1149-50, 1197). The officers were called because there was a man sitting in front of the apartment building asking for help. (V15:1197-98). When they arrived, Officers Penny Dane and Abisai Roman discovered victim Kirk Zoeller sitting "Indian style" outside. (V15:1151, 1198). Zoeller was covered with blood, was gasping for air and was described as "pulsing." (V15:1151, 1198). Roman shined his light on Zoeller and every time his body pulsed, blood came out of a wound on his neck. (V15:1152). Roman asked Zoeller if he was okay, but he was non-responsive. (V15:1155, 1198).

Officers Dane and Roman noticed that victim Donna Trujillo's apartment was open; the officers entered to make sure the suspect was not there and to see if any other victims needed assistance. (V15:1155-56; V17:1502-03). Blood was all over the floor and walls of the apartment. (V15:1161-63). Officer Dane noticed blood throughout the kitchen; from the kitchen she could not see into the bedroom and she went to check it. (V15:1163, 1165-66).

Victim Donna Trujillo was laying on the bed, her face covered with a pillow. (V15:1168-69). At first, Dane did not realize a body was on the bed as Trujillo was covered with a pillow, and her body blended with the bedding. (V15:1166-71).[8] Once the pillow was removed, blood was noticed on Trujillo's body; she did not appear to be alive. (V15:1171-72, 1202). Dane went to the door of the apartment, emergency responders where there working on victim Zoeller and she told them she had another victim inside. (V15:1171-72). Someone came in to work on victim Trujillo. (V15:1172, 1215). Outside, Zoeller was laid down, a sheet covered his body and he was pronounced dead at the scene. (V15:1173, 1203, 1208).

Daytona Beach Police Department Detective Joseph Miller was asked to assist in the murder investigation and based upon a tip went to Teresa Teague's home at approximately 10:45 p.m. (V16:1401-02). Teague let him and other law enforcement officers into her home. (V16:1403-04). Teague gave officers consent to look around. (V16:1406). In the living room, Miller saw a pair of sneakers with blood on them. (V16:1406-07). As he stepped closer to the bedroom, he noticed jeans on the floor with blood on them. (V16:1407-08).

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[8] Dane testified she stood at the bedroom doorway for ten to fifteen seconds before she could determine what she was seeing. (V15:1166-67).

Miller entered the bedroom. (V16:1408). Appellant was hiding under a large pile of clothes, and Miller noticed a portion of Appellant's arm. (V16:1408). He ordered Appellant to show him his hands several times, and Appellant began to comply. (V16:1408). Eventually Appellant fully complied and was apprehended. (V16:1408, 1419-20). Appellant was wearing only boxer shorts and socks. (V16:1417-18).

Detectives later obtained a search warrant for Teague's home. (V16:1409-10). During the search of the home, a Dr. Seuss bag was found on a shelf. (V17:1436). Inside the bag, a plastic bag was found containing Appellant's white bloody shirt. (V17:1436-38). Under that bag, victim Zoeller's wallet was found. (V17:1439, 1441-42).

Daytona Beach crime scene technician Richard Kay photographed, documented and collected evidence related to the murders. (V17:1446, 1448, 1450). At the murder scene, Kay collected the pillow that was atop Trujillo. (V17:1462-64). At Teague's home, Kay took the following items into custody: Appellant's sneakers, his jeans, his white shirt, and victim Zoeller's wallet. (V17:1467-81). A citation in Appellant's name was found stuffed inside his jeans pocket. (V17:1475-77, 1504-05).

Kay later went to the homicide investigation unit to take photographs of Appellant, an oral swab of his mouth, and ten swabs from his hands. (V17:1482-83, 1485-86, 1488-89). Kay did not notice any injuries on Appellant, and the photos he took were entered into evidence. (V17:1484, 1487-88).

Florida Department of Law Enforcement DNA analyst Joy Mapp received the evidence from the murder investigation and testified to the following key facts:

- Appellant's white Sean John shirt tested positive for blood, and the samples taken from the shirt matched the DNA profile of victim Zoeller;
- Samples taken from stains on Appellant's sneakers matched the DNA profile of victim Zoeller;
- Samples taken from stains on Appellant's jeans matched the DNA profile of victim Zoeller;
- All the swabs from Appellant's fingers tested positive for blood; the four that gave the quickest presumptive test for DNA were tested and victim Zoeller's DNA was found on each swab; victim Trujillo's DNA was located on one swab but in a mixture at numbers that were statistically lower than for victim Zoeller.

(V18:1573-89, 1592-1605).

Dr. Marie Hermann, the chief medical examiner for Volusia and Seminole counties, performed the autopsies on both victims. (V18:1656, 1664). Victim Trujillo[9] died of multiple stab wounds, and the manner of the death was a homicide. (V18:1664). There were three stab wounds to the head and neck area, and five stab wounds to the chest. (V18:1665). The wounds appeared to have been inflicted in close sequence. (V18:1678). In addition to the stab wounds, Trujillo's left shoulder was dislocated. (V18:1675). Dr. Hermann testified there were no defensive wounds and it appeared that Trujillo had not offered much resistance. (V18:1675-76).

Dr. Hermann testified victim Zoeller was approximately 5 feet, 5 inches tall, and weighed 174 pounds. (V18:1682). He died of multiple stab wounds, and the manner of his death was a homicide. (V18:1682). Dr. Hermann testified there were a total of twenty-four stab wounds. (V18:1682). There were eleven stab wounds to the head and neck area, one of which Hermann considered to be a fatal wound. (V18:1683-84). The depth of the wounds were a minimum of 4 inches, some fractured his skull, while the potentially fatal passed through Zoeller's neck and into his spine. (V18:1683-86). An x-ray of Zoeller's head

[9] Trujillo was just over 5 feet tall, and weighed 94 pounds. (V18:1664). Appellant testified he is 6'3" and in 2008 he weighed 209 pounds. (V19:1746).

revealed a piece of metal that appeared to be the point of a knife consistent with where a stab wound was inflicted. (V18:1696-98).

Zoeller had seven stab wounds to his chest. (V18:1687). One of these wounds entered the chest cavity and damaged the left lung causing blood loss and hypoxia. (V18:1687-90). Dr. Hermann considered this wound to be life threatening, and testified the minimum depth of the wound was six inches. (V18:1687-89). Other wounds entered into the ribs, and Dr. Hermann testified these would have required some force when inflicted. (V18:1690).

Zoeller had four stab wounds to his back, two of which Dr. Hermann considered to be fatal. (V18:1690-91). Both wounds damaged Zoeller's lungs, and would have caused them to collapse. (V18:1691). One of the wounds went approximately six inches into Zoeller's body. (V18:1691).

Zoeller also suffered a long deep incised wound on the side of his scalp. (V18:1693). This wound would have resulted in significant blood loss. (V18:1698). There was also a stab wound that went through Zoeller's eye socket resulting in bleeding into the eye globe. (V18:1693-95). Two defensive wounds were found on Zoeller's left forearm. (V18:1692).

Dr. Hermann testified Zoeller's injuries were inflicted in a short period of time, and were consistent with him moving around while being attacked. (V18:1702). Each injury would have caused some degree of pain and would have resulted in blood loss. (V18:1702). The amount of external and internal bleeding suffered was extensive. (V18:1704).[10] Dr. Hermann further testified it would have been a period of minutes between the infliction of the wounds and the time Zoeller would have lapsed into unconsciousness. (V18:1703-04). During this time, Zoeller would be conscious, aware and feeling pain. (V18:1703-04, 1716). Lastly, Dr. Hermann opined that the wounds inflicted upon victim Trujillo and Zoeller were inflicted with the same type of knife. (V18:1704). The State rested after the presentation of Dr. Hermann's testimony. (V18:1716).

Appellant testified in his defense. The defense recalled crime scene technician Richard Kay, and Detective James Broderick was called to introduce Appellant's tape recorded interview the night of the murders.

Appellant testified that victims Trujillo and Zoeller were arguing over drugs in her living room, and the argument continued into the bedroom. (V19:1752). According to

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[10] Photos of Zoeller's injuries were entered into evidence. (V18:1693-95, 1698-1701).

Appellant, after a couple minutes things got quiet and Zoeller came out implying he wanted more dope. (V19:1752).

Appellant testified he was sitting on the futon with Justin Wagner and when he got up, Zoeller grabbed his wrist and they started "going at it." (V19:1752-53, 1772-73). Appellant testified Zoeller had a knife, that he was able to pin Zoeller against a wall and from there he could see victim Trujillo in the bedroom with a pillow over her face; Appellant believed she was dead or dying. (V19:1753-54, 1758).

According to Appellant, Zoeller cut his side, he asked him to "let it go" but Zoeller still came at him. (V19:1754). Appellant testified he was just throwing his arms out, trying to keep Zoeller away. (V19:1754). During the fight, Appellant testified he was able to grab Zoeller's wrist and pry the knife from his hand. (V19:1754).

Appellant testified they continued to fight, and Zoeller kicked him in the testicles. (V19:1755). After that, Appellant indicated he cramped up and fell. (V19:1755). He said he felt Zoeller's hands on him, and then he "just snapped." (V19:1755). Snapped, Appellant testified, means to "blackout" and he maintained there were moments he did not remember. (V19:1758-59).

Appellant testified he thought Zoeller was trying to kill him, and it was not his intent to kill him, but he did in fact kill him in a "self-defense way." (V19:1758-59, 1765). He said he had no idea how many times he cut Zoeller until his attorney showed him or told him. (V19:1759). Appellant testified he did recall leaving the apartment and said he dropped the knife inside the front door. (V19:1760-61).[11] Appellant indicated during the day he was using hallucinogenic mushrooms, morphine, and cocaine. (V19:1748).[12]

Appellant denied killing victim Trujillo, denied putting his shirt in the plastic bag, denied putting Zoeller's wallet in the bag, and denied the statements to Teague regarding the people who wished they had not run into him, and the problems he eliminated. (V19:1761, 1762-63, 1765).

On cross-examination Appellant admitted he had five felony convictions. (V19:1766). He maintained he did not remember stabbing Zoeller, but remembered everything else. (V19:1767). Appellant agreed that when Zoeller came out of the bedroom he

[11] Law enforcement did not find the knife. (V15:1155; V17:1466).

[12] The detective that interviewed Appellant the night of the crimes testified Appellant did not appear to be under the influence of anything. (V19:1850, 1903-04). During the penalty phase, Appellant's expert testified Appellant reported to him the night of the crimes he was intoxicated on hallucinogenic mushrooms, morphine, marijuana, and alcohol. (V23:2365).

was acting fine. (V19:1769-70). However, he testified Zoeller said if Appellant did not give him dope, he would take it from him and when the Appellant got up, Zoeller swung at him first. (V19:1771-73). Appellant indicated he was "buddies" with Wagner and he did not have any problems with Teague, who had even offered her home as a place to stay. (V19:1767).[13]

Regarding being cut, Appellant indicated that if his shirt was not cut that was because it was pulled up, and he said he did not tell police he was cut because it was just was "one of those things I wasn't thinking about telling them." (V19:1775-77). When asked why he did not tell police he blacked out, Appellant responded "[y]ou tell me." (V19:1782). Appellant admitted to taking his shirt off, and washing blood off at Teague's home. (V19:1784). He also admitted he was running from the police. (V19:1785).

Appellant recalled crime scene technician Richard Kay and questioned him regarding five photos he took the night of the murders. (V19:1814-24). The photos were of Appellant's fingers, arm, and abdomen, and were entered into evidence. (V5:797-806; V19:1814-24). While Kay agreed there were some red marks on Appellant's skin, he did not believe that the marks

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[13] During his statement to police Appellant indicated he wanted Teague to call his family for him. (V19:1893-94).

were cuts from a knife, or that they were relevant to this case. (V19:1816-24, 1831-36). Kay did not notice any fresh blood or anything to indicate that Appellant had been stabbed or cut. (V19:1820-21, 1823-24, 1831-36).

Appellant called Daytona Police Department Detective James Brodick to introduce the statement he gave to police the night of the murders.[14] (V19:1849-1896). After describing the fight for the knife, Appellant was asked what happened next, and Appellant responded "I'm guilty." (V19:1864). When asked what he was guilty of Appellant answered:

> I mean, it was either me -- the dude was trying -- was trying to get me. When I probably grabbed the knife he did not let up. He kept on trying to get it. He kept up.
>
> He kicked me in my nuts. And then, all of a sudden, my grip (phonetic), it went like that, and I just started swinging.
>
> (V19:1864).

Appellant was asked how many times he stabbed Zoeller, and he responded that he was not "really stabbing," he was swinging. (V19:1864-65, 1886). He said it was not his intention to stab

[14] Appellant's statement was the subject of litigation prior to trial, with the trial court allowing the statement into evidence with redactions. Ultimately, the State would choose not to use the statement, however, Appellant introduced the taped statement offering it to rebut the charge of recent fabrication he alleged the prosecutor put forth during his cross-examination. (V2:292-311, 332-46; V4:675-77, 690, 747-48, 753, 755-56; V5:813; V18:1553; V19:1798-1809, 1844).

Zoeller, he did not know what his intention was. (V19:1886). Appellant later would say the State was going to kill him. (V19:1872). He indicated Wagner was as shocked as he was and tried to grab Zoeller, but backed away. (V19:1875, 1898). Appellant said he gave his bloody shirt to Wagner, and denied taking anything from the apartment. (V19:1876-78). He indicated he did not know where his shirt was. (V19:1877).

During cross-examination Brodick was shown the photos Appellant had introduced through technician Kay. Brodick testified the photos did not depict any fresh injuries and he concluded they were not relevant to the murder investigation. (V19:1900-02). Further, Brodick indicated Appellant never told him he blacked or that he was injured. (V19:1902-03). Lastly, Brodick testified one would not be able to see victim Trujillo from the location Appellant claimed he saw her. (V19:1904-05).[15]

In rebuttal, the State presented the testimony from victim Zoeller's brother. (V20:1920). He testified Zoeller was on Social Security disability, that his ankle shattered in an accident and the injury affected his ability to walk and move quickly. (V20:1920-22). He also testified his brother's

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[15] During his statement, Appellant said he saw Trujillo from the wall by the kitchen. (V19:1887). Officer Dane testified from the kitchen area she could not see Trujillo's body. (V15:1170-71).

shoulder was injured in a car accident and he demonstrated to the jury his brother's limited ability to raise his arm. (V20:1921-22).

The State and Appellant presented their closing arguments. (V20:1932-2047). The following day, May 25, 2010, the jury returned for deliberations.[16] (V21). The jury returned a verdict finding Appellant guilty of the first-degree premeditated murder and the first-degree felony murder of Kirk Zoeller, guilty of the lesser included offense of manslaughter of Donna Trujillo, and guilty of burglary while armed. (V6:1087-88; V21:2132-33). The trial court adjudicated Appellant guilty. (V21:2162-63).[17]

Appellant's penalty phase took place May 27-28, 2010. (V22; V23; V24). The State presented three witnesses that offered victim impact evidence: victim Zoeller's brother, his brother's fiancé, and his girlfriend. (V22:2198-2202, 2205-18). A Florida Department of Corrections probation officer testified Appellant was on probation for possession of cocaine at the time

[16] The trial court charged the jury on Appellant's theory of self-defense. (V21:2077-81).

[17] The trial court found Appellant violated his 2008 probation for possession of cocaine due to these convictions, but postponed sentencing until his sentencing in the instant case. (V21:2158-60). Appellant was later sentenced to five years for violating his probation. (V3:408-09).

of the murder. (V5:779-85; V22:2219-21).[18]

The State also presented evidence, through a North Carolina detective, that Appellant was convicted of robbery after he and another male robbed a convenience store using pellet guns. (V5:786-91; V22:2222-29).[19] Finally, Matthew Hawotte testified in 2002 Appellant attacked him, beat him, robbed him, and urinated all over his body. (V22:2232-46). Appellant was subsequently convicted of robbery. (V5:792-96; V22:2246-47).[20]

Appellant chose not to testify during the penalty phase, but presented the testimony of a friend, three family members, and two doctors. (V22:2252-2308; V23:2324-2431). Friend Anthony Slater described Appellant as a good-hearted person who helped him find his mother's lost cat. (V22:2254-55). Slater last saw Appellant in 2002. (V22:2258). Appellant's family members testified Appellant started having behavior problems as a child. (V22:2263-64, 2277-78, 2301-01). Appellant's mother sought counseling for him, and later placed him in group homes. (V22:2277-78, 2283-85). Appellant's brother, mother, and sister all testified regarding an incident when Appellant was

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[18] Appellant's conviction and sentence was admitted into evidence as State's Exhibit #43. (V5:779-85).

[19] Appellant's conviction and sentence was admitted into evidence as State's Exhibit #44. (V5:786-91).

[20] Appellant's conviction and sentence was admitted into evidence as State's Exhibit #45. (V5:792-96).

approximately twenty-one years old where he was beaten, lost consciousness, and was hospitalized. This incident, according to the testimony, may have affected Appellant's speech, and personality. (V22:2269-72, 2286, 2303-04).

Two experts testified during the penalty phase on Appellant's behalf. Psychiatrist Jeffery Danzinger was asked to review Appellant's medical records, interview him, and offer an opinion with regard to any mental health diagnosis or symptoms. (V23:2324-25). Danzinger met with Appellant on October 21, 2009 for a little over two hours. (V23:2327, 2387-88)

Appellant's records contained diagnoses of conduct disorder through his preteen and teenage years. (V23:2332-33, 2337, 2346, 2350). The records also reflected that Appellant had difficulty controlling his anger and was involved in stealing and fighting. (V23:2352-54, 2356-57).

Danzinger diagnosed Appellant with antisocial personality disorder. (V23:2373-74). In addition, Danzinger offered his opinion that "a bipolar disorder may best fit the facts." (V23:2368-69). During cross examination, Danzinger was questioned regarding his notation on his February, 2010 report to "rule out bipolar disorder." (V6:1041; V23:2388). Danzinger explained this meant he was considering the diagnosis but had

not made it. (V23:2388). Danzinger testified he would still leave the notation on his report to "rule out bipolar" because he had not seen Appellant in a manic episode to "clinch it." (V23:2390). Danzinger was certain regarding Appellant's antisocial personality disorder diagnosis. (V23:2390).

Also during cross examination, Danzinger did not disagree that Appellant knew right from wrong when he committed the murder. (V23:2379). He agreed Appellant could choose to abide by the law and could make the choice not to murder. (V23:2379).

Psychologist Charles Golden was asked to complete a neuropsychological evaluation of Appellant. (V23:2417, 2419). Appellant scored within normal limits on the tests administered by Golden. (V23:2423-25, 2427). Golden testified Appellant's overall cognitive ability is average and his IQ is 104 which is slightly above average. (V23:2422, 2429). Golden's testing suggested normal cognitive development and did not indicate any cognitive or neuropsychological deficits, injuries, or problems. (V23:2429-30).

After deliberation, the jury recommended, by a vote of 10 to 2, that the death penalty be imposed on Appellant for the murder of Kirk Zoeller. (V6:1097; V24:2512-13). A Spencer hearing took place on August 5, 2010. The State and defense

presented sentencing memorandums which the trial court reviewed and considered. (V3:371; V6:1107-15, 1128-39). The State did not present any further evidence during the Spencer hearing. (V3:371-72).

Appellant's sentencing took place on August 12, 2010. (V3:399-400). Appellant chose not to testify at sentencing. (V3:377-78), but presented the testimony of his son's mother who asked the court to spare his life. (V3:373, 375).

The trial court followed the jury's recommendation (giving it "great weight") and sentenced Appellant to death for the murder of Kirk Zoeller. (V3:405-11; V6:1148-56).[21] In sentencing Appellant to death, the trial court found the following four aggravating circumstances: (1) the capital felony was especially heinous, atrocious, or cruel (given extremely great weight), (2) Appellant was previously convicted of a felony involving the use or threat of violence to a person[22] (given great weight), (3) the capital felony was committed while Appellant was engaged in the commission of a burglary/the capital felony was committed for pecuniary gain (considered as one aggravator and given significant weight), and (4) the

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[21] Appellant was also sentenced to fifteen years for manslaughter, and to life imprisonment for burglary while armed; all sentences were ordered to run consecutively. (V6:1150).

[22] Two prior unconnected violent felonies.

capital felony was committed by a person previously convicted of a felony and on felony probation (given little weight). (V6:1149-51).

As to the mitigating circumstances, the trial court found the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance but assigned this mitigator "little weight," noting the testimony from the expert witnesses and the family members was "very weak." (V6:1151). The trial court also identified the mitigator of the capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (V6:1152). This mitigating circumstance was likewise afforded only "little weight," the trial court stating:

> [O]n the night in question of the murder this mitigator is diluted somewhat from the testimony during the guilt phase of a state witness, Theresa Teague whose apartment the Defendant had fled to following the murder and was found hiding there a short period of time after the murder.
>
> Ms. Teague testified that when the Defendant arrived at her apartment he made statements to the effect that he had run into a couple of people who probably wished they had not run into him and he also made a statement to the effect that he had eliminated a couple of problems. This seems to go a long way to negate his inability to appreciate the criminality of his conduct on the night of the murder.

(V6:1152).

Lastly, the trial court found thirty-eight non-statutory mitigating circumstances (afforded slight to great weight). (V6:1152-55). In sum, the trial court concluded the aggravating circumstances "far outweigh" the mitigating circumstances. (V6:1155). The trial court sentenced Appellant to death for the murder of Kirk Zoeller. (V6:1155).

Appellant now appeals to this Court seeking relief.

SUMMARY OF THE ARGUMENT

The trial court properly denied Appellant's motions to declare the HAC aggravator, and the "in the course of a felony" aggravator, unconstitutional. Appellant's vagueness and overbreadth challenge to the HAC aggravator has been consistently rejected by this Court, and Appellant offers no reason for this Court to retreat from its precedent. Likewise, Appellant's argument the "in the course of a felony" is unconstitutional as it constitutes an automatic aggravator has been rejected by this Court numerous times. Appellant offers no reason for this Court to retreat from its precedent.

The trial court properly denied Appellant's motions based upon Ring v. Arizona, 536 U.S. 584 (2002). This Court has repeatedly rejected challenges to Florida's capital sentencing scheme brought under Ring. Additionally, Appellant's Ring claim fails because the prior violent felony and under a sentence of imprisonment aggravators are present in this case, and Appellant's jury found him guilty of burglary while armed.

Lastly, Appellant's claim that Florida's death penalty scheme is unconstitutional under Ring is without merit because in Florida, unlike Arizona, the maximum penalty for first-degree murder is death. A defendant in Florida is eligible for a death

sentence upon conviction by a jury at the guilt phase. The additional procedures set forth in the penalty phase proceedings govern the issue of whether a defendant will be selected for an already-authorized sentence of death. Because death is the maximum sentence for first-degree murder, Appellant's claim based on Ring must fail as his sentence has not been enhanced.

Although not raised by Appellant, there was sufficient evidence presented to support Appellant's conviction. Justin Wagner witnessed Appellant stab victim Zoeller multiple times as Zoeller tried to flee. Appellant then attempted to destroy evidence, ran from police, and hid. Zoeller's blood was found on Appellant's clothing, and on his person. Lastly, when asked what happened the night of the murders, Appellant responded "I just eliminated a couple of problems."

Although not raised by Appellant, his death sentence is proportional in relation to other death sentences that this Court has upheld. Four aggravating circumstances exist in this case. Notably, the prior violent felony and HAC aggravators were found, and are among the weightiest aggravators in the statutory sentencing scheme. Given the strong aggravation compared to the weak mitigation, Appellant's death sentence is proportionate.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DECLARE SECTION 921.141(5)(h), FLORIDA STATUTES, AND THE CORRESPONDING STANDARD JURY INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED. (Restated by Appellee).

Appellant filed a motion to declare the heinous, atrocious, or cruel (HAC) aggravator and corresponding standard jury instruction unconstitutional. After a hearing, the trial court properly denied Appellant's motion.

On appeal, Appellant contends the heinous, atrocious, or cruel aggravator and its corresponding standard jury instruction are unconstitutionally vague and overbroad. Appellant's contention is without merit. As the issue presented involves pure questions of law, appellate review is *de novo*. Trotter v. State, 825 So. 2d. 362, 365 (Fla. 2002).

In Espinosa v. Florida, 505 U.S. 1079 (1992), the United States Supreme Court held that Florida's prior HAC jury instruction was unconstitutionally vague. However, as recognized by Appellant, this Court promulgated a new instruction. See Appellant's Initial Brief at p. 15; In re: STANDARD JURY INSTRUCTIONS CRIMINAL CASES-NO. 90-1, 579 So. 2d 75 (Fla. 1991); Fla. Std. Jury Instr. (Crim.) 7.11.

In Hall v. State, 614 So. 2d 473, 478 (Fla. 1993), regarding a challenge to the constitutionality of the HAC aggravator, this Court held the new instruction "defines the terms sufficiently to save both the instruction and the aggravator from vagueness challenges." See also Merck v. State, 664 So. 2d 939, 943 (Fla. 1995) (rejecting overbreadth challenge to HAC standard jury instruction). Indeed, this Court recognized in Francis v. State, 808 So. 2d 110, 134 (Fla. 2001) since Hall, the constitutionality of the HAC aggravator instruction has been consistently upheld. See also Victorino v. State, 23 So. 3d 87, 103-104 (Fla. 2009) (rejecting challenge HAC aggravator is vague and overbroad).

The standard jury instruction was read to Appellant's jury and delivered to the jury room for deliberations. (V6:1101-02; V24:2490, 2497, 2506-07). Appellant offers this Court no colorable argument to retreat from its holdings. Appellant only cites to cases decided prior to the pronouncement in Hall, and appears to have merely raised this issue for preservation purposes. See Appellant's Initial Brief at pp. 13-17.

The trial court properly denied Appellant's motion attacking the HAC aggravator and corresponding jury instruction. Appellant is not entitled to any relief.

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DECLARE SECTION 921.141(5)(d), FLORIDA STATUTES, AND THE CORRESPONDING STANDARD JURY INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED. (Restated by Appellee).

Appellant filed a motion to declare the "in the course of a felony" aggravator and corresponding standard jury instruction unconstitutional. After a hearing, the trial court properly denied Appellant's motion.

On appeal, Appellant contends the "in the course of a felony" aggravator and corresponding standard jury instruction are unconstitutional because rather than "narrowing" the class of persons eligible for the death penalty, it "automatically" expands the class of persons eligible for the death penalty. Appellant's Initial Brief at p. 19. Appellant's contention is without merit. As the issue presented involves pure questions of law, appellate review is *de novo*. Trotter v. State, 825 So. 2d. 362, 365 (Fla. 2002).

This issue has been decided adversely to Appellant numerous times by this Court. In Ault v. State, 866 So. 2d 674, 686 (Fla. 2003), this Court observed:

> Ault argues that the aggravating circumstance that the murder was committed in the course of committing a specified felony is unconstitutional

> because it constitutes an automatic aggravator and does not narrow the class of persons eligible for the death penalty. This Court has repeatedly found the murder in the course of a felony aggravator to be constitutional. *See Hitchcock v. State,* 755 So.2d 638, 644 (Fla. 2000); *Blanco v. State,* 706 So.2d 7, 11 (Fla. 1997) (containing citation to numerous cases in which this Court has upheld and applied the murder in the course of a felony aggravator); *Banks v. State,* 700 So.2d 363, 367 (Fla. 1997); *Mills v. State,* 476 So.2d 172, 178 (Fla. 1985) (rejecting argument that murder in the course of a felony aggravator creates automatic aggravating circumstance for all felony-murder cases because Legislature has reasonably determined that first-degree murder committed in course of another dangerous felony is aggravated capital felony). This Court has also rejected constitutional challenges to the murder in the course of a felony aggravator based on equal protection, due process, and cruel and unusual punishment. *See, e.g., Clark v. State,* 443 So.2d 973, 978 (Fla. 1983); *Menendez v. State,* 419 So.2d 312, 314–15 (Fla. 1982). Thus, there is no merit to this claim.

(emphasis supplied); see also Heath v. State, 3 So. 3d 1017, 1032-1033 (Fla. 2009) (finding trial counsel was not ineffective for failing to raise meritless claim that "in the course of a felony" aggravator acts as unconstitutional automatic aggravator or "doubler," i.e., the same facts that support felony murder conviction support application of aggravator).

This Court has also failed to find that appellate counsel was ineffective for failing to raise the meritless claim that "in the course of a felony" aggravator is unconstitutional because it constitutes an automatic aggravator and does not

narrow the class of persons eligible for the death penalty. Stephens v. State, 975 So. 2d 405, 425-426 (Fla. 2007); Arbelaez v. State, 898 So. 2d 25, 46-47 (Fla. 2005).

Appellant offers this Court no reason or rationale to retreat from its precedent. Appellant appears to have merely raised this issue for preservation purposes. See Appellant's Initial Brief at p. 20. The trial court properly denied Appellant's motion. Appellant is not entitled to any relief.

ISSUE III

THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S OBJECTION TO THE DEATH QUALIFICATION OF HIS JURY BASED UPON RING v. ARIZONA, 536 U.S. 584 (2002). (Restated by Appellee).

Appellant filed a motion objecting to the death qualification of his jury based upon Ring v. Arizona, 536 U.S. 584 (2002). After a hearing, the trial court properly denied Appellant's motion.

Appellant asserts the aggravating circumstances set forth in Florida Statutes Section 921.141(5) must be alleged in the indictment, and must be found by a unanimous jury beyond a reasonable doubt. Appellant acknowledges he is raising this issue for preservation purposes. Appellant's Initial Brief at p. 22.

In Appellant's case, two prior violent felony convictions were presented to the jury, as well as evidence that Appellant was on felony probation at the time of the murder. Under settled Florida law, Appellant has no cognizable Ring claim because both the prior violent felony and under a sentence of imprisonment aggravators were found by the trial court. This Court has made that fact clear:

> Hodges filed pretrial motions to bar imposition of the death sentence on the basis that Florida's capital sentencing scheme is unconstitutional under *Ring.* Hodges now contends that because this Court has

> wrongly interpreted the impact of *Ring* on Florida's death sentencing scheme, the trial court erred in denying his motions. Hodges asserts that this Court has erred in concluding that *Ring* is not implicated where one of the aggravating circumstances found by the trial court is that the defendant has been previously convicted of a prior violent felony. Hodges also asserts that this Court has erred by concluding that Florida may allow nonunanimous jury sentencing recommendations. Hodges' arguments are without merit.
>
> This Court has repeatedly held that Ring does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable. *See, e.g., Victorino v. State,* 23 So.3d 87, 107-08 (Fla. 2009)[felony probation]. Hodges offers no argument in opposition to this holding that has not been previously considered by this Court. Thus, he offers no persuasive reason to depart from precedent. Similarly, Hodges offers no reason for this Court to recede from its holding, *see, e.g., Frances v. State,* 970 So.2d 806, 822 (Fla. 2007), that Florida's capital sentencing scheme need not require unanimous sentencing recommendations. Given that the aggravating factors of prior violent felony and under a sentence of imprisonment indisputably apply in the instant case—Hodges was convicted of robbery and aggravated assault prior to sentencing in this case and was on parole at the time of the Belanger's murder—Hodges is not entitled to relief on the basis of Ring.

Hodges v. State, 55 So. 3d 515, 540-541 (Fla. 2010) (alteration in original) (emphasis supplied); Bevel v. State, 983 So. 2d 505, 526 (Fla. 2008) (noting where one of the aggravating circumstances is a prior violent felony this Court has consistently held that Ring does not apply).

Furthermore, Appellant's jury found him guilty of burglary while armed and the trial court found the aggravator that the capital felony was committed during the course of a felony. As such, Ring is not implicated on this additional ground. As this Court enunciated in Baker v. State, 71 So. 3d 802, 824 (Fla. 2011):

> Moreover, we have previously explained that Ring is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony. *See McGirth v. State*, 48 So.3d 777, 795 (Fla. 2010) (citing *Robinson v. State*, 865 So.2d 1259 (Fla. 2004)). In this case, Baker was convicted of both home invasion robbery and kidnapping by a unanimous jury during the guilt phase of his trial. Accordingly, Ring is not implicated. *See Cave v. State*, 899 So.2d 1042, 1052 (Fla. 2005) (holding that the defendant was not entitled to relief under *Ring* where the jury unanimously found the defendant guilty of robbery and kidnapping during the guilt phase).

(emphasis supplied)[23]; see also Ellerbee v. State, 2012 WL 652793, *13 (Fla. March 1, 2012) (rejecting Ring Claim where defendant was found guilty of contemporaneous burglary and stating this "Court has consistently held that a defendant is not entitled to relief under *Ring* if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact

[23] In Baker this Court also recognized it has "repeatedly and consistently" rejected claims that Florida's scheme is unconstitutional under Ring. Baker, 71 So. 3d at 802.

that support an aggravator."); Smith v. State, 28 So. 3d 838, 873-874 (Fla. 2009) (Ring claim without merit where jury found defendant guilty of sexual battery and kidnapping).

Additionally, this Court has directly rejected Appellant's argument the jury must reach a unanimous decision on the aggravating circumstances. See Zommer v. State, 31 So. 3d 733, 752-753 (Fla. 2010); McWatters v. State, 36 So. 3d 613, 644 (Fla. 2010); Abdool v. State, 53 So. 3d 208, 228 (Fla. 2010); Poole v. State, 997 So. 2d 382, 396 (Fla. 2008). Lastly, Appellant's argument regarding the indictment is misplaced and has been consistently rejected by this Court. See Pham v. State, 70 So. 3d 485, 496 (Fla. 2011) (noting this Court has repeatedly rejected the argument that aggravating circumstances must be alleged in the indictment); Hernandez v. State, 4 So. 3d 642, 665 (Fla. 2009) (same); see also State v. Steele, 921 So. 2d 538 (Fla. 2005) (noting that the lack of notice of specific aggravating circumstances in an indictment does not render a death sentence invalid).

Based on this Court's precedent, the trial court properly denied Appellant's Ring motion. Appellant is not entitled to any relief.

ISSUE IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL BASED UPON RING v. ARIZONA, 536 U.S. 584 (2002). (Restated by Appellee).

Appellant filed a motion to declare Florida's death penalty unconstitutional based upon Ring v. Arizona, 536 U.S. 584 (2002). After a hearing, the trial court properly denied Appellant's motion.

Appellant asserts Florida's death penalty scheme is unconstitutional as the judge rather than the jury makes the findings of fact necessary to impose a death sentence. Appellant acknowledges this issue had been decided adversely to him in Miller v. State, 42 So. 3d 204 (Fla. 2010), but raises the instant claim for preservation purposes. Appellant's Initial Brief at pp. 23-26.

Notwithstanding the fact Appellant does not have a cognizable Ring claim as discussed above, Appellee will address Appellant's instant claim.

In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In Harris v.

United States, 536 U.S. 545 (2002), the Court made clear that Apprendi did not apply to all factors that are used to determine an appropriate sentence. It only applied to those facts that increased the statutory maximum for the offense. In Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court applied Apprendi to Arizona's capital sentencing scheme. This application was based upon the Arizona Supreme Court's determination that the maximum sentence to which a defendant was exposed by a conviction for first-degree murder was life imprisonment. See State v. Ring, 25 P.3d 1139, 1151 (Ariz. 2001).

In contrast to Arizona's statutory scheme, this Court has held, both before and after Ring, that the maximum sentence to which a Florida defendant is exposed by a conviction for first-degree murder is death. Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Mills v. Moore, 786 So. 2d 532, 536-37 (Fla.), cert. denied, 532 U.S. 1015 (2001). Because death is the statutory maximum for first-degree murder in Florida, Apprendi and Ring do not apply. In Florida, the determination of death-eligibility is made upon conviction for first-degree murder at the guilt phase, and not at the penalty phase as in Arizona. See Bottoson v. Moore, 833 So. 2d 693, 699-701 (Fla.), cert. denied, 537 U.S. 1070 (2002) (Quince, J., concurring) (noting

that Ring does not affect Florida's capital sentencing scheme because a defendant is exposed to the maximum sentence of death upon conviction for first-degree murder). Because death is the maximum sentence for first-degree murder in Florida, Appellant's claim collapses because nothing triggers the Apprendi/Ring holdings.

Florida's sentencing procedures govern the selection determination, resolving whether the defendant will be selected for an already-authorized sentence of death under proscribed procedures ensuring individualized sentencing. Under Florida law, as this Court has held, first-degree murder is a capital felony; as such, it may be punished by death or life imprisonment. The fact that a separate statute exists which requires procedures above and beyond the jury's verdict of guilt does not affect the statutory maximum for first-degree murder. See Bottoson, 833 So. 2d at 699-701. (Quince, J., concurring) ("Thus, in both capital and noncapital cases there is a separate sentencing proceeding after the verdict of guilty. The fact that there is a separate sentencing proceeding does not negate the fact that the Legislature has delineated a statutory maximum sentence which cannot be exceeded without proceeding beyond what is provided for under chapter 921."). The jury's verdict at the

guilt phase exposes a defendant to a possible sentence of death and authorizes the additional procedures required for the subsequent imposition of a death sentence. Florida uniquely chose to provide defendants with additional protections against improper death sentences by affording double checks against both the jury and judge findings; these added safeguards guarantee compliance with the Eighth Amendment without sacrificing any Sixth Amendment rights.

Finally, this Court has repeatedly rejected challenges to Florida's capital sentencing scheme under Ring. See Ault v. State, 53 So. 3d 175, 206 (Fla. 2010) (noting continued rejection of Ring challenges); see also Abdool, 53 So. 3d at 228 (recognizing this Court has rejected argument to revisit its opinions in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), and find Florida's sentencing scheme unconstitutional). Indeed, this Court has addressed and rejected Appellant's instant argument:

> Rigterink alleges that Florida's capital sentencing scheme fails to satisfy the constitutional requirements articulated in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and that Florida's capital sentencing scheme is unconstitutional because the judge, rather than the jury, determines the sentence and the jury's recommendation need not be unanimous. This Court has consistently rejected similar challenges to Florida's capital sentencing scheme, and Rigterink has merely presented his general objections to this Court's prior

precedent.

For example, in *Frances v. State*, 970 So.2d 806, 822 (Fla. 2007), this Court addressed the challenges that Rigterink raised in this case concerning Florida's capital sentencing scheme:

> [I]n over fifty cases since Ring's release, this Court has rejected similar Ring claims. *See Marshall v. Crosby*, 911 So.2d 1129, 1134 n. 5 (Fla. 2005), *cert. denied*, 547 U.S. 1143, 126 S.Ct. 2059, 164 L.Ed.2d 807 (2006). As the Court's plurality opinion in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), noted, "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." *Id.* at 695 & n. 4 (listing as examples *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), and *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)); *see also King v. Moore*, 831 So.2d 143 (Fla. 2002) (denying relief under *Ring*).

. . .

Additionally, this Court has rejected claims that *Ring* requires the aggravating circumstances to be individually found by a unanimous jury verdict. *See Hodges v. State*, 885 So.2d 338, 359 nn. 9–10 (Fla. 2004); *Blackwelder v. State*, 851 So.2d 650, 654 (Fla. 2003); *Porter v. Crosby*, 840 So.2d 981, 986 (Fla. 2003). . . .

Rigterink v. State, 66 So. 3d 866, 895-96 (Fla. 2011) (emphasis supplied); see also Deparvine v. State, 995 So. 2d 351, 379 (Fla. 2008) (rejecting argument that Florida's death penalty

statute is unconstitutional because it allows a judge, rather than a jury, to find the aggravating factors for a death sentence, and because it does not require jury unanimity in making its recommendation). Appellant is not entitled to any relief on this meritless claim.

ISSUE V (Supplemental)

THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT.

While Appellant has not contested the sufficiency of the evidence to sustain his conviction, this Court has a duty to address the sufficiency of evidence in each capital case. See Overton v. State, 801 So. 2d 877, 905 (Fla. 2001); Fla. R. App. P. 9.142(a)(6). Appellee submits that the evidence was sufficient to support Appellant's conviction. Appellant's jury found him guilty of first-degree premeditated murder and first-degree felony murder. (V6:1087-88).

Justin Wagner witnessed Appellant chasing victim Kirk Zoeller. Appellant was on top of Zoeller repeatedly stabbing him as he tried to get away. Zoeller pleaded for help, and as a frightened Wagner fled, he could see Appellant pulling Zoeller back and stabbing him over and over again. There was no doubt Appellant was the aggressor. There were a total of twenty-four stab wounds inflicted upon Zoeller, all within a short period of time. Some of the wounds were as deep as six inches, and at least one of the wounds was inflicted with such force it left the tip of the knife in Zoeller's skull.

Appellant would leave the murder scene covered in Zoeller's blood. He attempted to hide at Theresa Teague's home. There he

tried to destroy and dispose of evidence linking him to the murder. Appellant took off his blood-stained shirt and placed it in a bag with Zoeller's wallet. He washed the blood off his body. When the police knocked on the door, he ran into a bedroom and hid under a pile of clothes until he was ordered out and apprehended by police.

Appellant (five-time convicted felon) would never tell police his story about how he "blacked out" nor would he tell police Zoeller cut him. Appellant did not have any fresh injuries on him the night of the murder, and the photos he claims depicted injuries were submitted to the jury for their consideration.

Lastly, Appellant told Teague that he had run into a couple of people "that probably wish they had not run into him that evening." (V16:1346, 1348). And when she asked what happened, Appellant indicated "I just eliminated a couple of problems." (V16:1348-49).

While Appellant wished to rely on a self-defense theory, under the facts of this case, the jury was authorized to reject it. The State presented sufficient evidence to support Appellant's conviction. His conviction should be affirmed.

ISSUE VI (Supplemental)

APPELLANT'S DEATH SENTENCE IS PROPORTIONATE.

Lastly, while Appellant does not challenge the proportionality of his sentence, Appellee recognizes that this Court is required to address the proportionality of each death sentence on direct appeal. Green v. State, 907 So. 2d 489, 503 (Fla. 2005). As such, Appellee will address this issue.

This Court has previously stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999). This Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So. 2d 6, 12 (Fla. 1999).

The trial court found and weighed the following four aggravating circumstances as follows:

(1) the capital felony was especially heinous, atrocious, or cruel (given extremely great weight);

(2) Appellant was previously convicted of a felony involving the use or threat of violence to a person[24] (given great weight);

(3) the capital felony was committed while Appellant was engaged in the commission of a burglary/the capital felony was committed for pecuniary gain (considered as one aggravator and given significant weight);

(4) the capital felony was committed by a person previously convicted of a felony and on felony probation (given little weight). (V6:1149-51).

This Court has recognized that HAC is one of the most serious aggravators in the statutory sentencing scheme. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Moreover, this Court has stated "[q]ualitatively, prior violent felony and HAC are among the weightiest aggravators set out in the statutory sentencing scheme." Hodges v. State, 55 So. 3d 515, 542 (Fla. 2010). Both of these weighty aggravators are present in Appellant's case, along with two other aggravating circumstances.

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[24] Two prior unconnected violent felonies.

In contrast, Appellant's mitigation case was weak. While the trial court found both mental health mitigators, they were afforded only "little weight." (V6:1151). As to the mitigating circumstance, the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance, the trial court found the evidence offered in support of this circumstance was "very weak." (V6:1151). As to the mitigating circumstance, that the capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, the trial court found:

> [O]n the night in question of the murder this mitigator is diluted somewhat from the testimony during the guilt phase of a state witness, Theresa Teague whose apartment the Defendant had fled to following the murder and was found hiding there a short period of time after the murder.
>
> Ms. Teague testified that when the Defendant arrived at her apartment he made statements to the effect that he had run into a couple of people who probably wished they had not run into him and he also made a statement to the effect that he had eliminated a couple of problems. This seems to go a long way to negate his inability to appreciate the criminality of his conduct on the night of the murder.

(V6:1152)(emphasis supplied). The trial court also found thirty-eight non-statutory mitigating circumstances (afforded slight to great weight). (V6:1152-55). In sum, the trial court

found the aggravating circumstances "far outweigh" the mitigating circumstances. (V6:1155).

Appellee submits that Appellant's case is proportionate to other capital cases. See Pham v. State, 70 So. 3d 485 (Fla. 2011) (death sentence proportionate in stabbing death where trial court found prior violent felony aggravator, defendant engaged in commission of burglary/kidnapping, HAC, and CCP aggravators outweighed mental health mitigation, traumatic childhood, and stable employment); Davis v. State, 2 So. 3d 952 (Fla. 2008) (four aggravating circumstances, including HAC and CCP, outweighed three statutory mitigators and numerous nonstatutory mitigators); Merck v. State, 975 So. 2d 1054 (Fla. 2007) (finding death sentence proportionate where two aggravating factors of HAC and prior violent felony outweighed one statutory mitigator, the defendant's age, and numerous nonstatutory mitigators including defendant's difficult family background, his alcoholism and alcohol use on the night of the murder, and his capacity to form and maintain positive relationships); Rose v. State, 787 So. 2d 786 (Fla. 2001) (death sentence proportionate where four aggravators, including HAC and prior violent felony, outweighed substantial mental mitigation and depraved childhood); Spencer v. State, 691 So. 2d 1062 (Fla.

1996) (death sentence proportionate where two aggravating circumstances, prior conviction for a violent felony and HAC, outweighed two mental health mitigators, and a number of nonstatutory mitigators including drug and alcohol abuse, paranoid personality disorder, sexual abuse by father, honorable military record, good employment record, and the ability to function in a structured environment); Lawrence v. State, 698 So. 2d 1219 (Fla. 1997) (death sentence proportionate where three strong aggravators, HAC, CCP, and under sentence of imprisonment, outweighed five nonstatutory mitigators including a learning disability, a low IQ, a deprived childhood, the influence of alcohol, and a lack of a violent history). Given the strong aggravation and relatively weak mitigation present in this case, this Court should find that Appellant's death sentence is proportionate.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM Appellant's convictions and sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Paula C. Coffman, Esquire, Office of Criminal Conflict & Civil Regional Counsel, Post Office Box 561229, Orlando, Florida 32856-1229, this 9th day of March, 2012.

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,

PAMELA JO BONDI
ATTORNEY GENERAL

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KATHERINE MARIA DIAMANDIS
Assistant Attorney General
Florida Bar No. 69116
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
katherine.diamandis@myfloridalegal.com

COUNSEL FOR APPELLEE