IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-238

TERRY MARVIN ELLERBEE, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR OKEECHOBEE COUNTY, FLORIDA, (Criminal Division)

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Terry Marvin Ellerbee, was the defendant at trial and will be referred to as the "Defendant" or "Ellerbee". Appellee, the State of Florida, the prosecution below will be referred to as the "State." References to the records will be as follows: Direct appeal record - "R"; Trial and hearing transcripts - "T"; any supplemental records will be designated symbols "SR", and to the Appellant's brief will be by the symbol "IB", followed immediately by the volume number in arabic numerals and then by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On November 16, 2006, Appellant Terry Marvin Ellerbee, Jr. ("Ellerbee") was charged with: first degree murder; burglary of a dwelling; two counts of grand theft; cruelty to animals; and possession of a firearm or ammunition by a convicted felon. (R1 62-65) He filed a motion to suppress evidence taken from a Ford Explorer he stole and the camp building in which he stayed.

The jury trial began on June 1, 2009 and ended on June 8, 2009 with guilty verdicts on the murder, burglary, theft, and animal cruelty charges. (R1 224-25, T20 2001-2004) After the penalty phase trial, the jury recommended a death

sentence by a vote of eleven to one. (T25 2721-27) The trial court held a Spencer[1] hearing on July 27, 2009 and sentenced Ellerbee to death on January 29, 2010. (R1 571-596) The Court found three aggravating factors, all of which it gave great weight: Ellerbee was a felon currently on probation at the time of the murder; the murder was during a burglary merged with pecuniary gain; and the murder was cold, calculated, and premeditated ("CCP"). (R4 574-582) The court also found fifteen non-statutory mitigating factors: the defendant grew up without his mother who had rejected him (little weight); he had little proper parental guidance from his father (little weight); he had a difficult childhood (minimal weight); he had a history of drug and alcohol abuse (very little weight); he suffers from a poor self-concept (very little weight); his parents were divorced (very minimal weight); his mother was mentally ill (very little weight); his father abused his mother in front of him (little weight); his mother was cruel and unpredictable (little weight); he rarely saw his mother (very little weight); his father abused drugs and alcohol (little weight); he never completed any formal education (very little weight); he has a low 1.0. of 83 (very little weight); he suffered childhood physical trauma (very little weight); and he has a history of suicide attempts and self-destructive behavior (little weight). (R4 586-589)

[1]Spencer v. State, 133 So.2d 729 (Fla. 1961).

Amber Striker ("Reed")[2] met Ellerbee on an internet chat room and decided to move in with him after visiting him in the spring of 2006. She was pregnant (by someone else) at the time they first met. (T18 1700-01, 19 1755-63) They moved in with Evadean Hutchison[3] ("Hutchison") for several months in 2006. (T14 1230-32) Hutchinson kicked Ellerbee out after five months but allowed Reed to remain. Ellerbee stayed with his father and planned on going to live in an abandoned house on the Prairie with Reed and her newborn baby because he wanted to take care of them. (T19 1755-63, 1816)

On September 13, 2006 Reed asked to borrow Hutchison's Explorer to go to the Depart of Children and Families for food stamps; she was supposed to return it by ten that same morning. (T18 1702)When Reed did not return, Hutchinson repeatedly tried to call her with no luck. She then called Ellerbee later in the day who denied knowing where Reed or the car was. Hutchison spoke to him a number of times over the next several days and his story kept changing. He told her her car was impounded in Tampa and that he would try to get it back to her. Finally, he told her that the Okeechobee Sheriff's Department was impounding it while he watched. (T14 1233-36, 19 1810)

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[2]Her name at the time of the crimes was Amber Reed. All trial references to her were under the name of Reed so this brief will refer to her by that name.

In reality, however, Ellerbee had asked Reed to borrow the car, saying that he needed a ride to work. She went to pick him up and he then drove the car, saying that they were going away for a few days. They went to the Prairie, found a trailer, and broke into it. It had no water or electricity but Ellerbee hooked up the car battery so it could provide some electricity. He made numerous trips away from the trailer, always bringing items back, including a small .22 gun, a long .22 rifle, and a shotgun. (T18 1701-06, 19 1764-65)

The trailer Ellerbee stayed in was owned by Ann Jones ("Jones"). On September 20, 2006 Jones's husband noticed tire tracks on the grass which indicated that someone had driven on her property without her knowledge or permission. She drove out there the next day at seven thirty in the morning and saw a girl in her trailer. It looked like she had moved in. There was an Explorer parked next to it. The trailer had no electricity or water and the girl had a newborn infant. She told Jones that her boyfriend had said that they had permission to stay there. Jones gave her until the afternoon to leave and also called the police to report the car and trespass. (T14 1238-46) The Explorer was the one stolen from Hutchison. (T14 1256-57, 17 1608)

When Ellerbee returned, Reed told him about Jones's visit. He was nervous

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[3]She was also listed by the name of Emmadean Hutchison.

and jittery about being discovered. He immediately and quickly packed up but left a number of things behind. He took them to the red house ("red camp") he had known about for three years. It was really run down and he complained to her that he deserved better than something like it. He then left in a foul mood carrying four to six throwing knives and his guns, returning much happier at dusk with a blue SUV which had lots of dog hair in it. (T18 1707-10, 19 1810)

Thomas Dellarco ("Dellarco") lived about two and a half miles away from the trailer. (T14 1259) He was an older man who had health problems from gout and arthritis. (T14 1260-85, 15 1345-47) He was easily exhausted, was almost blind, had trouble hearing, and could barely walk even using canes. (T14 1282, 15 1292-94) His friends Ginger Brooks ("Brooks") and Sean Bennis ("Bennis") usually did his cleaning and yard work. (T14 1260-64, 15 1292-94) He was fastidious and very neat, keeping everything put away at all times. (T15 1289-91)

After installing Reed and her baby in the red camp, Ellerbee made his way over to Dellarco's house, his .22 caliber revolver in his pocket for the dogs and carrying the single shot rifle. He saw Dellarco in his yard and chatted at him; he also noticed the five or six dogs at the house. Dellarco gave him a cigarette and then left to do errands in town. Ellerbee left and returned in fifteen minutes. He shot the head dog Ricky three times and broke into the house. Dellarco was gone

for about an hour to an hour and a half. Ellerbee went through every room and found the cigarettes, the shotgun, and ammunition. (T15 1335-36; 19 1772-73, 1777-80, 1798, 1801, 1802-05)

When Dellarco returned, he saw his dog dead and was very upset. He came into his house where Ellerbee was hiding in the bedroom. Dellarco left the house to check on the remaining fivedogs and let them out. He then sat down at the table and started making telephone calls. He kept saying to himself that someone had been there and he should not touch anything. Ellerbee heard a recorded voice over the phone. As Dellarco was hanging up the phone, Ellerbee came out of the room and, from the door of the bedroom, shot him in the head as he was seated at the table. (T19 1779-80, 1782-83, 1785-88, 1797-99) Dellarco's head fell to the floor. Ellerbee put a jacket over his head, took him out to the garage, and covered him with a blanket. He then wiped up the blood with towels and scrubbed the floor. (T19 1784, 1788-90)

Brooks saw Ellerbee on the twenty-first at quarter to six in the evening when she went to Dellarco's house to clean, as had been previously arranged. He was outside the house and told her that Dellarco had gone to town and his girlfriend had cleaned the house. He offered her gas money for her trouble. She later identified Ellerbee in a photographic line up. (T14 1265-70)

None of Dellarco's family or friends heard from him after that day. They left numerous telephone messages on his recorder. (T14 1216-24)His sister Geraldine Brooks ("Brooks") called the Sheriff's department on the twenty-sixth and asked them to do a welfare check on him. (T14 1225-28) Phillip Harden, an auxiliary deputy with the Sheriff's office, went to Dellarco's home on the twenty-sixth in the evening. He found the house dark and there were no working vehicles present. He saw only three dogs in the yard. (T16 1413-17)

Bennis was worried about Dellarco and had left several messages for him. He drove out there on Monday but left when he remembered that Dellarco had an appointment. He saw no dogs in the yard. The garage door was almost shut and the house windows were all closed, which was very unusual since Dellarco always left them open at all times. He returned on Friday to check on him again. (T15 1296-99) He found the gate closed and no dogs around. All the windows were closed and the blinds drawn. The garage was completely closed now. He smelled something dead as he approached the house. He saw five dogs in the pool enclosure but their mother Ricky, the one closest to Dellarco, was missing. The five were acting really strange. (T15 1300-03) He entered the house and went into the laundry room to get dog food. He smelled a horrible odor and the house was a total mess. The kitchen was in disarray with dirty dishes and food sitting around.

The rest of the house looked like it had been ransacked. He found Dellarco's body under a blanket in the garage. He fed the dogs and called the authorities. (T15 1304-05, 1311-17)

Law enforcement found cigarette butts on the living room table, in both bedrooms, in the foyer, and around the pool. (T16 1430-33, 1437) Ellerbee's DNA was found on a number of the butts although some had another person's DNA profile although not Dellarco's. (18 1666-69, 1684, 1691) The blood found on the chair, blinds, and tile in the kitchen appeared to have been attempted to be cleaned. There were bloody drag marks from the kitchen to the garage. (T16 1441-43) Blood drops were present throughout the house. The pattern of blood smearing and wiping is consistent with Dellarco being shot at the kitchen table and falling against the floor and wall. (T16 1448-61) There were no usable fingerprints found in the house. The deputies did find the dead dog Ricky out at the edge of the yard. (T16 1463)

The Sheriff's department also found fresh tire tracks in the grass in a wooded area which led to the red camp on the twenty-ninth. Hutchinson's Explorer was parked behind the shack with its battery hooked up to a fan inside. (T17 1487-90) There were baby clothes and fresh food inside. (T17 1492) After thedeputies left to get a tow truck for the Explorer, someone came in during that time and took

a number of items. (T17 1494-96) Upon their return, the deputies found: six boxes of .22 caliber ammunition; a Domino's pizza box from Sebring inside which was a torn check of the victim made out to Reed; a shotgun and its ammunition; a man's shirt with the victim's Visa card in the pocket; a pair of men's jeans with the victim's wallet in the pocket; and numerous receipts with that Visa number on them. (T17 1500, 1506-24) Ellerbee's fingerprint was found on the shotgun shell box. (T17 1532-34) Reed identified the clothes as Ellerbee's. (T18 1720-23)

Law enforcement also searched Hutchison's Explorer. A pair of jeans was inside and had the keys to her Ford in the pocket. There were numerous ATM, store, and gas receipts drawn from Dellarco's account in a trash bag found inside. Dellarco's checkbook and partially completed checks were under the seat. Ellerbee's jacket was also inside. (17 1609-21, 1625-30; 18 1723)

When Reed asked why he was gone so long after he first put her in the red camp, Ellerbee said that he had to wait for the man to return home. (T18 1714) They then drove to a Wal-Mart in Sebring where Ellerbee bought a number of things for the baby. They then went to a motel and had a pizza. They returned to the red camp the next day, taking the pizza with them. (T18 1711-13, 1739-40; 15 1352-56, 1357-64) While cleaning his guns the next evening, Ellerbee told Reed that he had killed the man who owned the SUV and had shot the dog as well. He

had waited for the man to return to the house after he first saw him. (T18 1711-15)

During the week or so Reed and Ellerbee stayed at the red camp, they traveled around, using Dellarco's ATM/Visa card to purchase items. Ellerbee used the ATM card at a 7-11 store on September 24. (T15 1357-67; 17 1521-24; 18 1711-21) They attempted to cash some of his checks at a bank but were prevented from doing so by a teller. (T18 1711-15; 19 1767-69; 15 1374-79) The teller kept the check which turned out to have Ellerbee's fingerprint on it. (T16 1410) Sometime during that week, Ellerbee told Reed that he planned on disposing of the body and moving them into the house since the utilities would remain on for a while and it was a lot nicer than the shack they were in. (T18 1716-17)

They left the red camp after the police began searching the area. They went to a tent, spent another night in a hotel, and stayed with someone in a trailer. (T18 1724) They were traced by Ellerbee's cell phone to a mobile home in Keenansville. On October 2, 2006 the sheriffs arrested both Ellerbee and Reed and searched the trailer where they were staying. Inside Ellerbee's room, they found Ramen noodles like the ones found at the camp. They found ammunition for a .22 caliber long rifle and 20 gauge shotgun shells. Dellarco's bank card and pin number were there as well along with his shotgun which was in the closet. (T17 1570-72, 1583, 1588-89) Inside Ellerbee's jeans were the keys to Dellarco's SUV.

(T17 1585; 18 1722-23) The .22 caliber revolver that Ellerbee used to shoot the dog was lying on the floor of his room. (T17 1555-58, 1579; 19 1818-19) He had previously tossed the rifle he used to kill Dellarco into the bushes when the police began searching the red camp area. (T18 1724)

Detective T.J. Brock ("Brock") interviewed Ellerbee after his arrest. Ellerbee initially denied killing Dellarco or his dog but admitted to taking his truck, using his credit card, and trying to cash his checks. (T19 1767-73) Brock took Ellerbee outside the station to let him smoke. While outside, Brock told him to tell the truth. Ellerbee then admitted to killing Dellarco. He agreed to say so on tape and in front of the prosecutor and other detective who were present. (T19 1777-81) During his ensuing statement Ellerbee said that he wanted to slip out of the house but was afraid Dellarco would see him. When Dellarco was using the telephone, he got nervous so he came out of the room, "threw" the gun on his shoulder, and shot him with his eyes closed even though the rifle had a scope on it. He said that he was there in the first place because he was desperate, hungry, and needed to take care of Reed and her baby. (T19 1782-90) He did not go to the house intending to kill anyone; the shooting just happened. Dellarco never threatened him. (T19 1793-94) He just wanted to scare him. (T19 1797-99) He admitted to taking Dellarco's wallet and $300 in cash. (T19 1791) Ellerbee

admitted to watching the police when they found the body and searched the red camp. (T19 1809-14)

The State presented Ellerbee's journal to the jury in the penalty phase trial. His family had turned it in to the sheriff in January 2006 because they were concerned that he was planning on committing crimes like burglary and murder because inside it Ellerbee had made lists of what he would need to move to the Prairie and to commit those crimes as well as possible targets for them. (T21 2013-14, 2032-44) The State also presented evidence that Ellerbee had previously been convicted of two counts of grand theft and possession of a firearm for which he was on probation at the time of this crime. (T21 2016-20) Finally, Dellarco's sister Geraldine Baker, his brother Danny Liatti, and his friend Marilyn Brunnell made victim impact statements. (T21 2046-58)

Ellerbee presented evidence through his friends and family of a troubled and abusive childhood. His father, Terry Ellerbee, Sr., spent much of his time in bars and crack houses from where Ellerbee would often call to be picked up. His mother had a drinking problem as well and hated him. She would lock the refrigerator, denying him food, and wanted nothing to do with him. She was "pure evil" and had mental problems. She abused Ellerbee both physically and psychologically. She in turn was abused by Ellerbee's father. She left and Ellerbee lived with his

father who loved and raised him. They would spend much of their free time doing outdoor activities like hunting, fishing, and camping.

While Ellerbee was a sweet child to neighbors, he had mood swings as well. He would be outgoing and helpful at times but moody and angry at others. He had an anger problem and was aggressive at times. He committed a burglary when he was between 10 to 12 years old. He also used crystal meth and was addicted to for a while, as could be seen from his mouth and teeth. He got out of control when he smoked the drug and the habit led him to steal. His father had him Baker acted once because of the drug use. His father had gotten Ellerbee a job in Okeechobee. (T21 2059-2116; 23 2308-2433; 24 2442-2477)

The defense presented Michael Riordan (Riordan) as a mental health expert. He evaluated Ellerbee and determined that he showed indications of Fetal Alcohol Syndrome. Ellerbee had three or four major head injuries while growing up. He drank from the age of five on and used crystal meth with his father. Ellerbee had horrible grades in school but performed well with mechanical tasks and heavy equipment. (T22 2123-54) Riordan had Ellerbee perform psychological tests which showed brain damage. He was diagnosed as bi-polar at sixteen but never received any treatment. He had anger management problems and was suicidal. Ellerbee would self-medicate by using crystal meth. (T22 2155-77) Riordan had no

information that Ellerbee actually used any drugs on the day of the crime, nor that he was incapable of planning and making decisions. (T22 2247)

In rebuttal, the State presented the clinical and forensic psychologist Gregory Landrum ("Landrum"). He reviewed all the records on Ellerbee as well as Riordan's reports and interviews with him. He met with Ellerbee twice. He found no record of Ellerbee ever being diagnosed with a bi-polar disorder; the only suggestions of that come solely from Ellerbee's family. Landrum did not did not believe that Ellerbee met the criteria for such a diagnosis. He did think Ellerbee had a substance abuse induced mood disorder which had not manifested during the two or three years he had been in jail despite not being on medication and in a very stressful situation. Also, Fetal Alcohol Syndrome's symptoms are apparent early in childhood, none of which Ellerbee displayed. (T24 2479-2509) Ellerbee did appear to have attention deficient hyper-activity disorder which then evolved into Oppositional defiant disorder which in turn morphed into a conduct disorder. He appears to have a still evolving antisocial personality disorder and is narcissistic. (T24 2512-17)

Ellerbee discussed his actions on the Prairie and with the crime. He told Landrum that he survived by burglarizing houses. He watched Dellarco's house from the woods for some time before he approached it. He called Dellarco out and

asked for a cigarette. Dellarco chatted with him and offered a ride. Ellerbee commented to Landrum that it was a good thing he had not taken the ride or else the authorities would never have found the body. (T24 2520-23) Ellerbee hid until Dellarco left and then went back into the yard and shot the one dog three times. He went through the house, drank some lemonade, and watched television while waiting for Dellarco to return. When Dellarco returned, Ellerbee aimed in his direction to scare him. He was going to take the body to the SUV but decided against it because it was too heavy. He took money from Dellarco's wallet and left. Outside, he encountered a woman asking about the victim. He took the SUV into town and bought some drinks. He returned to the house later and took the wallet. (T24 2524-28) The account was generally consistent with what Ellerbee had told Brock; that consistency is not consistent with a cognitive disorder with memory problems. Ellerbee said he was not on crystal meth at the time of the crime. Based on his interview, Ellerbee's actions during the crime, the historical records, and the tests done by Riordan do not give enough information to support a conclusion that Ellerbee had brain damage. He neither committed the crime while under the influence of an extreme mental or emotional disturbance nor did he have any major mental illness. (T24 2528-33)

SUMMARY OF ARGUMENT

Point I: Trial counsel's argument about felony murder is not ineffective on the face of the record since it may have been a strategic choice given the evidence against Ellerbee.

Point II: The trial court properly instructed the jury on and then found the murder was committed in a cold, calculated, and premeditated manner based on the evidence in the record**.**

Point III: The death penalty is proportional given the three weighty aggravators and the minimal mitigation.

Point IV: The court properly instructed the jury on the aggravating factor that the victim was particularly vulnerable given the evidence presented at trial even though it later held it was not proven beyond a reasonable doubt.

Point V: The trial court did not abuse its discretion in allowing the state to ask Riordan if he called the jail upon diagnosing Ellerbee with a bi-polar disorder.

Point VI: The trial court adequately considered all the mitigation evidence.

Point VII: The trial court properly denied the motion to suppress the evidence from the Red Camp since Ellerbee had no standing since he was a trespasser and burglar.

Point VIII: The trial court did not abuse its discretion in denying Ellerbee's request for a special verdict form on the theory of first degree murder.

Point IX: This Court has repeatedly held that the felony murder aggravator in Florida Statute 921.141(d) is constitutional.

Point X: The trial court made the requisite findings in its sentencing order and properly weighed both the aggravating and mitigating circumstances in reaching its sentencing decision.

Point XI: The trial court properly found the aggravating factor that Ellerbee committed the crime while on probation since there is no requirement that the crime be linked to the fact of that probation

Point XII: Ellerbee's death sentence does not violate the United States and Florida constitutions because Apprendi v. New Jersey, 530 U.S. 466(2000), and Ring v. Arizona, 120 S. CT. 2348 (2002), do not apply to Florida's capital sentencing scheme.

ARGUMENT

POINT I

ANY CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT APPARENT ON THE FACE OF THE RECORD. (Restated)

Ellerbee asserts that his trial counsel was per se ineffective because he argued incorrect, unlawful theories for innocence of felony murder and, thus, left the jury no choice but to find him guilty of first degree murder. He further claims that the alleged ineffectiveness is apparent on the face of the record and is proper to consider on direct appeal. He also inserts an alternative argument that counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984). Ellerbee then proposes that a better theory of defense was one of necessity which would have negated the burglary charge, thus allowing the jury to consider whether the shooting was accidental. Contrary to these assertions, any claim of ineffectiveness is not apparent from the record and this claim should be presented as a post-conviction claim for relief. Furthermore, the claim is without merit.

> With rare exception, ineffective assistance of counsel claims are not cognizable on direct appeal. *See Kelley v. State*, 486 So.2d 578, 585 (Fla.1986); *State v. Barber*, 301 So.2d 7, 9 (Fla.1974); *see also Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla.1987) ("There are rare exceptions where appellate counsel may successfully raise the issue on direct appeal because the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to

require the trial court to address the issue.")

Martinez v. State, 761 So.2d 1074, 1078 n. 2 (Fla.2000). This is not that kind of rare case. The record does not show ineffectiveness on its face based on the closing arguments cited by Ellerbee. Counsel may have deliberately chosen to pursue this argument as a strategy in light of Ellerbee's confession and the overwhelming evidence of his guilt. Such a decision is not in a trial record. Furthermore, the face of the record does not reflect a failure by counsel to challenge and to test the prosecution's theory of the case. Counsel cross examined each of the witnesses, vigorously attacking and impeaching Reed's statements and testimony, and challenged the State's case in his closing argument. Whatever its merits, this claim of ineffective assistance of counsel should be addressed in post conviction proceedings.

Additionally, the standard of review for this claim is under Strickland.

> *Cronic*'s presumed prejudice standard is only available in extreme circumstances where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' The 'failure must be complete .... [C]ounsel [must] fail[ ] to oppose the prosecution throughout the ... proceeding as a whole,' rather than merely 'at specific points' in the proceeding. *Cronic* itself did not find defense counsel constitutionally deficient even though counsel was a real estate attorney appointed to defend a complex mail fraud case with only twenty-five days to prepare a defense.

Harvey v. Warden, Union Correctional Institution, 2011 WL 37824 (11th Cir.

2011)(citations omitted). The United States Supreme Court ruled that it is the Strickland standard of review that must be used in examining whether counsel was ineffective for conceding, essentially, a defendant's responsibility for a murder in the guilt phase in order to concentrate on the penalty phase. Florida v. Nixon, 543 U.S. 175, 178 (2004). In that case, the State had overwhelming evidence of guilt as well as a detailed confession which the defense could not hope to dispute. Counsel conceded his client's guilt to first degree murder during opening argument. The Court determined that counsel's strategy had preserved his client's right to trial, to a full presentation of evidence against him by the State, right to challenge the admissibility of evidence, the right to cross-examine witnesses, and right to appeal. The Court emphasized the difference between a strategy of concession and a guilty plea. Id. at 188. The Court further stated that "Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared." Id. at 191. On remand, The Florida Supreme Court likewise found that counsel's performance was not deficient. Nixon v. State, 932 So.2d 1009, 1018 (Fla. 2006).

Harvey v. State involved a residential armed robbery, burglary, and two counts of first degree murder. Harvey and a co-defendant burgled a home where a couple was present. After the men had taken property, they went outside to discuss

what to do with the couple. Counsel ended up conceding guilt to premeditated murder during his opening statement; he did so because he had to fashion a defense around Harvey's confession which he knew would be admitted into evidence. Harvey v. State, 946 So.2d 937, 943 (Fla. 2007). Counsel testified at an evidentiary hearing that his strategy was to concede Harvey committed second degree murder but contest the first degree charge on the issue of intent, even given the felony murder issues. Id. Using a Strickland standard of review based upon the holding in Nixon, the Florida Supreme Court did not determine whether counsel was ineffective because it found that there was no prejudice.

> Trial counsel said nothing more to the jury than what Harvey said during his confession to police. The evidence against Harvey was overwhelming even without counsel's admission that Harvey committed first-degree murder. *See, e.g., Patton v. State*, 784 So.2d 380 (Fla.2000) (finding the facts counsel conceded were supported by overwhelming evidence and even if counsel had denied these facts, there was no reasonable possibility the jury would have rendered a different verdict). We cannot say, given all of the evidence introduced at trial, there is a reasonable probability that, but for any errors by counsel, the result of the proceeding would have been different, i.e., that our confidence in the outcome has been undermined.

Id. at 944.

The situation in this case is very close to that in Harvey and the Strickland standard is the appropriate one to use in analyzing any ineffectiveness of counsel claims, either now or in the future. In the present case, trial counsel faced a

similarly daunting prosecution case. The State had witnesses putting Ellerbee with the stolen vehicles, with the dead man's property, at the crime scene on the day of the murder, forensic evidence of his DNA inside the house around the murder scene, his possession of the gun that killed the dog Ricky, and two confessions, one to Reed and another on tape to the authorities. He seemingly tried to parse a defense which complied with the evidence he knew was coming in, but skated between completely conceding guilt, as was done in Nixon and Harvery, and arguing something so preposterous that he would lose all credibility and any sympathy he might have with the jury for the penalty phase which was surely following. Essentially, he was asking for jury nullification based on Ellerbee's explanation of accidentally hitting Dellarco and the fact that only one shot was fired inside the house.

Ellerbee bears the burden of proving that his attorney's trial strategy was objectively unreasonable and that, but for the concession, a reasonable probability exists that the outcome of his trial would have been different. See Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2064, 2068. Trial counsel Glenn began his closing argument by saying "this case has a lot of facts, bad facts." (R20 1912) He then went on to say:

> This is case about an accidental shooting. The government has two theories of guilt. Let's talk about a murder. One is to prove premeditated murder. The second, that if you don't believe that, it's a felony murder. Well, ladies and gentlemen, the defense has two theories of not guilty.
>
> One, is it's an excusable homicide. And if you don't believe that, two, that this is a manslaughter....
>
> Now, let's talk about premeditated murder. Government has to prove Mr. Dellarco is dead. Done. Government has to prove that his death was a result of something Terry Ellerbee did. Done. I got up here and first told you that this was a case about an accidental shooting. Those are not contested issues.

(Id. 1913-14) Glenn then discussed premeditation, all the while emphasizing Ellerbee's statement that the killing was accidental. It was in this context, of trying to refute the State's argument on each theory of first degree murder, that he said what Ellerbee contends is incorrect.

> Let's talk about felony murder. The State's second theory of guilt is that Mr. Ellerbee committed a felony murder. Now, felony murder, they're unique in the sense that they don't have to prove premeditation. Felony murder requires same two things as premeditated murder. Mr. Dellarco is dead, Terry Ellerbee killed Mr. Dellarco. That's all the same, we never challenged that. This is a case about an accidental shooting.
>
> This is where it gets a little muddy and you really need to digest the jury instruction when you go back into that room. The death occurred as a consequence of and while Terry Ellerbee was engaged in a felony. Consequence of means result of. Mr. Bakkedahl made a big deal about this during his closing argument. ... [H]is intent was a miss shot.
>
> Now, this is where it gets very very very tricky and it's important to look at the consequence of. They want you to believe that at the time the shot occurred Mr. Ellerbee was performing a felony. At

the time the shot occurred Mr. Ellerbee was not performing a felony. Mr. Ellerbee was performing a distraction. He had a .22 caliber single shot. He wanted to get Thomas Dellarco out the front door so he would not be seen. So he could run out the back towards the fence away from the pool. What better way to do that than to create a loud boom with a .22 caliber shot. The man's old, you know the first thing he's gonna do is bolt to the front door. Mr. Ellerbee will be able to sneak out the back. He was not engaged in the commission of a felony at the time he created that boom.

Let's talk about defense theories. I told you that the government has two theories of guilt. One is premeditated murder. Two is felony murder. Well, the Defense has two theories as well.

One is excusable homicide and two is manslaughter. I got up here and I told you this is a case about an accidental shooting. Now, excusable homicide is a -there are divisions of the law that provide for excusable homicide under certain circumstances. These circumstances, if shown will allow you to find Terry Ellerbee not guilty of murder when the killing occurred by accident and with the heat of passion or finding sudden sufficient provocation.

Terry Ellerbee can be found to have also committed homicide. Let's ask yourself the scenario that Terry Ellerbee told you happened. The fact it was an accident, the fact that intended a miss shot, the fact that it was sudden. Maybe it's an excusable homicide. You can find him not guilty of these charges, and I'm talking about the murder charges only, if you find that it was excusable under the way he had explained it to you. Because, ladies and gentlemen, there is no evidence that he did not tell the truth in the second half of his statement. The first half, I admit, he denied it, he did. Second half, he had a heart to heart with T.J. Brock and he comes in and he tells the truth. Even Mr. Brock still thinks he was telling the truth. Ask yourselves, all this evidence I've seen over the last two days, does Terry Ellerbee make sense? I submit to you it does. I mean, what it comes down to, it comes down to the lack of physical evidence around the bullet wound, down to the way he was -- Mr. Dellarco was placed into the garage. Mr. Ellerbee's statements are clear that this was an accidental shooting. And there is no evidence otherwise. Circumstantial evidence is evidence of things that came after the

> shooting or evidence of intent to steal. One is not even remotely related to the other.
>
> We are not asking to you feel sorry for Terry Ellerbee, I'm asking you to do your job and look at what the evidence has proved.
>
> Let's talk about the manslaughter instruction. Same two elements apply. Government must prove that Dellarco is dead. Government must prove that Terry Ellerbee killed Dellarco. Where is the difference? Government must prove that the death of Mr. Dellarco was caused by culpable negligence. That's a -- you're gonna read the instruction on this when the judge gives it to you. What is culpable negligence? Each of us have a duty to act reasonably toward other. If you have a violation of that without duty without any more conscious intent to do harm, that violation is negligence. Culpable negligence is more than failure to due ordinary care toward others. In order for negligence to be culpable negligence, it must be heightened negligence. Culpable negligence is of course the conduct showing a lessor disregard through the indictment for the State to impose to dispose through the state of the Defendant. Reckless disregard for human life or safety. No one who was clearly thinking, I'm sorry, clearly thinking, okay, you should not have pointed a gun in a restroom, where there was a human being. That was negligent, willful negligence. Culpable negligence says if that's the case, you are responsible for that negligence, criminally responsible.
>
> If he intended a miss shot and he pulled the trigger and there was somebody that could have been hit, that's culpable negligence. That is not first degree murder. Is not felony murder.
>
> This is a difficult case, bad facts. ...
>
> ... But I submit, based on the evidence you've seen, as difficult as it might be, as a based on what Terry Ellerbee has told you, you know deep down inside culpable negligence fits. What he did was wrong, but find him guilty of the correct wrong.

(T20 1924-30) As in Harvey, Glenn said nothing in his argument that was not in Ellerbee's confession. He just tried to twist it to avoid a murder conviction. Glenn tried to convince the jury that the burglary had ended by the time Dellarco

reentered his house, a difficult argument to make but one which, if the jury accepted it, could negate the underlying felony and, thereby, the felony murder. Given the state of the evidence, counsel could argue little else.

As detailed in the statement of facts, the State had overwhelming evidence of Ellerbee's guilt. First, he gave a voluntary taped confession admitting to: surveilling the house for a while; going over there that day armed with multiple weapons; killing the dog (rather than leaving to find another place); taking the money and other items; waiting in the house for Dellarco to return; shooting him; cleaning up the blood while putting the body in the garage; and talking to Reed about them staying in the house for a while, much like he had long planned for to do. (T19 1781-1816) The State had Reed's testimony about Ellerbee's actions as well as his admission to killing Dellarco and his dog. (T18 1701-1715) Brooks saw him at the house near the time of the murder. (T15 1260-85) Ellerbee's DNA was found throughout Dellarco's house and his fingerprints were found on a check and a box of ammunition consistent with that from the house. (T17 1532-34, 1608-22; 18 1637-94) The revolver found in his room was the one used to shoot Ricky. Multiple witnesses saw him and Reed in Dellarco's SUV. There was overwhelming evidence of Ellerbee's guilt for first degree murder, either premeditated or felony murder. Ellerbee cannot show any prejudice from Glenn

using this strategy to combat the felony murder theory.

Ellerbee's dependence on Chandler v. Illinois, 542 N.E. 2d 1290 (Ill. 1989) does not assist his argument. Needless to say, it is from a foreign jurisdiction and has no bearing whatsoever on Florida law. The facts of Chandler, and this case are quite similar to those in Harvey discussed above. As noted, counsel in Harvey, and Nixon, conceded that each defendant was guilty of both premeditated and felony murder during their arguments. The Florida Supreme Court, after being directed to do so by the United States Supreme Court, found that counsels' actions were not prejudicial, and in Nixon not even deficient, given the vast amount of incriminating evidence in a death case where a penalty phase trial loomed. The same is true here.

Finally, Ellerbee offers that a "valid" defense would have been necessity given the desperation Ellerbee allegedly felt for taking care of Reed and her baby. Necessity is inapplicable to this factual scenario. The essential elements of the necessity defense were recited in Linnehan v. State, 454 So.2d 625 (Fla. 2d DCA 1984):

> [D]efendants must have reasonably believed that their action was necessary to avoid an imminent threatened harm, that there are no other adequate means except those which were employed to avoid the threatened harm, and that a direct causal relationship may be reasonably anticipated between the action taken and the avoidance of

the harm.

Id. at 626 (quoting United States v. Cassidy, 616 F.2d 101, 102 (4th Cir.1979)). Ellerbee was the one who took a two week old baby and its mother away, in a stolen car, from a stable and safe home to camp in abandoned buildings in the Florida summer heat with no working utilities, food, or water. At any time, he could have driven the stolen car back and let the other two resume their life with Hutchison. He alone was responsible for their situation.

Furthermore, counsel may have made a strategic choice to follow this theory over another, again a reason why this issue is not properly addressed on direct appeal. A deliberate, considered strategic choice is not ineffective. Arbelaez v. State, 889 So.2d 25, 31-32 (Fla. 2005); Orme v. State, 896 So.2d 725 (Fla. 2005)(agreeing "a defendant has the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the complained about conduct was not the result of a strategic decision"). The ability to create a possibly more favorable strategy later (although that is not the case with a necessity defense here), also does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). This claim is without merit.

POINT II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON AND THEN FOUND THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER. (Restated)

Ellerbee next asserts that the trial court erred in finding the aggravator that the killing was committed in a cold, calculated, and premeditated ("CCP") manner. He argues that the court's conclusions were based upon speculation and were internally inconsistent. The State disagrees and submits that the CCP aggravator was supported by substantial, competent evidence. This court should affirm.

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

cert. denied, 522 U.S. 970 (1997). See Gore v. State, 784 So.2d 418, 432 (Fla. 2001); Boyd v. State, 910 So.2d 167, 191 (Fla. 2005); Conde v. State, 860 So.2d 930, 953 (Fla. 2003); Aguirre-Jarquin v. State, 9 So.3d 593, 608 (Fla.2009). "This Court has concluded that 'competent substantial evidence' is tantamount to 'legally sufficient evidence' and "[i]n criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt." Almeida v. State, 748 So.2d 922, 932 & n. 20 (Fla.1999) (quoting Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981))." Williams v. State, 967 So.2d 735, 761 (Fla. 2007).

A Court may give a jury instruction on aggravators if there is credible and competent evidence to support it. Hunter v. State, 660 So.2d 244, 252 (Fla.1995); Welch v. State, 992 So.2d 206, 215-216 (Fla. 2008). 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)(trial court instructed on HAC but later found it unproved.) Simply because the State does not prove an aggravating factor does not mean that there was insufficient evidence of the factor to allow a jury to consider it.

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair

> determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know. The judge should not in any manner inject his preliminary views of the proper sentence into the jurors' deliberations, for after the jury has rendered its advisory sentence the judge has the affirmative duty to decide the sentence in the context of his exposure to the law and his practical experience. As we acknowledged in Dixon, "to a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality" can serve as a buffer where the jury allows emotion to override the duty of a deliberate determination.

Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925; Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); Bowden v. State, 588 So.2d 225, 231 (Fla. 1991), cert. denied, 503 U.S. 975 (1992)(where evidence of robbery presented, court must instruct on the relevant aggravator even if the court later finds it unproved). As seen from the discussion below, there was sufficient evidence for the court to give this instruction to the jury.

In discussing 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). "[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 Guardado v. State, 965 So.2d 108, 117(Fla. 2007): this Court reasoned:

> ... that to support the CCP aggravator, a jury must find (1) 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); (2) that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) that the defendant exhibited heightened premeditation; and (4) that the defendant had no pretense of moral or legal justification. *(citations omitted).*

The murder in this case falls squarely within that definition, with substantial, competent evidence supporting the CCP aggravator. Ellerbee argues that the facts in evidence are essentially capable of various interpretations and the trial court speculated in reaching its conclusions. The facts, when taken as a whole rather than parsed out separately, clearly show the heightened premeditation and other

elements necessary to sustain the CCP aggravator. The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. Ellerbee had a careful plan or prearranged design to murder Dellarco. He had contemplated such a crime previously, using as a possible target an individual he knew. While that plan alone may not be sufficient to find CCP, *in conjunction with* the other evidence it shows the necessary level of calculation and premeditation required to support this aggravator.

Ellerbee had a long standing "dream" of living on the Prairie by burglarizing houses and trailers there. He knew about the Red Camp and planned to use it as a base of operations. He decided to take Reed and her baby out there and live out this scheme. [T19 1755-63, 1816] He removed those two from a safe environment where they had shelter and support and put them into a very rough and dangerous existence, especially for a newborn infant. Ellerbee's "desperation" and hunger were self-generated and cannot in any way be used to justify any of the crimes he committed. If he truly was desperate to help Reed and the baby, he could have used the stolen vehicle to drive them back to town. The evidence shows that he was not desperate; he was living out his fantasy at the expense of Reed, her baby, and his victims. He also admitted to finding Dellarco's house and watching it for some time. He was drawn to it because it was deep in the woods and he would not be

detected inside it. [T24 2522] See Wuornos v. State, 644 So.2d 1000, 1008 (Fla. 19994) (Picking an isolated location to commit the murder is evidence supporting CCP.).

He set off to Dellarco's after being ousted from the trailer in the early morning and having to set Reed up in the Red Camp. He was angry because "he deserved better." So he set off for Dellarco's house, the one he had been casing, not with a bag or two in which to bring back food, but with five throwing knives, a revolver, and a rifle, the guns loaded. [T15 1335-36; 19 1707-10, 1772-73, 1777-80, 1798, 1801, 1802-05, 1810] He specifically took the revolver with him that day to shoot the head dog, thereby proving that he had found that house and knew about the dogs before that day. [T19 1801] A knife or maybe the revolver might be for protection. The four additional knives and the *single shot* rifle *with a scope on it* [T19 1797-99] would surely hamper an operation supposedly done simply to break into a house unnoticed and to carry off as many necessities as possible.

Ellerbee reached the house, approached Dellarco, and chatted with him. He then hid in the woods until Dellarco left.[4] He then went in the house, searched it,

[4]Ellerbee says that the trial court was inconsistent in its analysis. IB at 37. The court's analysis was not inconsistent but was incorrect in the statement that Ellerbee entered the house after Dellarco returned. Its conclusions were, however, correct and based on the record. See Dade County Sch. Bd. v. Radio Station

and stayed for an hour to an hour and a half. He searched the entire house. [T19 1802-05] He ate and watched television while he waited for Dellarco to return.[T24 2524] Ellerbee explained to Reed that he was gone for such a long time because he had to wait for Dellarco to return. [T18 1714] He told Landrum that he would have killed Dellarco if he had been offered a ride with him, *before he ever entered the house*. [T24 2523] It is apparent from Ellerbee's own words, apart from his self-serving statements that the killing was an accident, that he had intended to kill Dellarco when he went to the house that day. He had a plan.

Ellerbee heard Dellarco drive up outside and park outside the gate. He watched Dellarco walk up to the house and see Ricky, his favorite dog, dead in the yard. [T19 1785-86] Dellarco came in and looked for the other dogs. Ellerbee had apparently locked up the other dogs, so Dellarco ***had to exit the house, go outside and to the back*** in order to release his dogs. He had some trouble getting them out of the enclosure because he had to swat at them to get them to move. [T19 1786-87] Rather than taking that opportunity to leave the house, Ellerbee apparently

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WQBA, 731 So.2d 638, 644 (Fla. 1999) ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record."); Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla.1979) ("Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it.").

watched Dellarco, who was slow and had trouble walking, and waited for him to return to the interior. Both the procurement of a weapon and the failure to leave when given the opportunity have been repeatedly found by this Court to be competent, substantial evidence to support the CCP aggravator. See Buzia v. State, 926 So.2d 1203, 1214 (Fla.2006); Alston v. State, 723 So.2d 148, 162 (Fla.1998); Aguirre-Jarquin v. State, 9 So.3d 593, 607 (Fla. 2009) (Defendant went armed to the burglary, had chance to leave but walked through the house looking for the victim before killing her.).

Ellerbee remained hidden in the bedroom while Dellarco returned, sat down at the table, and made a phone call. [T19 1782-83, 1785-87] Ellerbee told Brock that he was scared when Dellarco used the phone, which may not have been true, but does show that the trial court's reference to it was not speculation. [T19 1793, 1795] Ellerbee walked out of the bedroom, propped his shoulder against the doorjamb, and used the single shot rifle, not the revolver he had used on the dog, pointed it at Dellarco, and shot him once in the head. [T19 1787-88, 1797-99] Despite his claims that it was an accident and he only wanted to scare Dellarco, Ellerbee chose to use the rifle with the scope and propped himself against the doorjamb, perhaps to steady the shot. Several witnesses testified that Ellerbee was an experienced hunter and excellent with guns. [T21 2065, 2077, 2082, 2095,

2107, 2114] Dellarco was seated *with his head down* when Ellerbee shot him. [T19 1797-99] Dellarco never threatened or confronted him. [T19 1794] Evidence of the victim's lack of resistance or provocation has been held to support both the "cold" element of CCP and the requirement of a lack of any "pretense of justification" for the killing. See Williamson v. State, 511 So.2d 289 (Fla. 1987) (finding no pretense of justification for stabbing fellow inmate where victim had made no threatening acts toward defendant).

The evidence at trial also substantiated that Ellerbee had indeed been back to the Dellarco house several times after the murder, in accord with his thoughts in the journal and what he told Reed. Bennis saw no dogs in the yard on Monday the twenty-fifth. The garage was partially closed and the gate was open. [T15 1296-99] Harden checked on the house the next day, the twenty-sixth. He saw three dogs in the yard. [T16 1413-17] Bennis returned on Friday, the twenty-ninth, and found the gate closed, the garage shut, and the dogs all locked in the rear pool enclosure with no access to the yard. [T15 1300-03] Clearly, Ellerbee was using the house and had been back there several times.

All of the evidence cited above come from the record, mostly from Ellerbee’s own mouth, and are not speculation. The facts outlined above also provide sufficient evidence for this aggravator.

> Premeditation can be established by examining the circumstances of the killing and the conduct of the accused. The CCP aggravator can "be indicated by circumstances showing 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." *Swafford v. State*, 533 So.2d 270, 277 (Fla.1988). In a number of cases, we have cited the defendant's procurement of a weapon in advance of the crime as indicative of preparation and heightened premeditated design. *See, e.g., Bell v. State*, 699 So.2d 674, 677 (Fla.1997) (purchasing a gun after stating that he intended to kill the victim); *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 that defendant had 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); *Davis v. State*, 461 So.2d 67 (Fla.1984) (same); *Eutzy v. State*, 458 So.2d 755, 757 (Fla.1984) (finding that defendant procured gun in advance). Taking a victim to an isolated location or choosing an isolated location to carry out an attack can also be indicative of a plan or prearranged design to kill. *See, e.g., Thompson* (driving victims to an isolated area and forcing them to lie on the ground); *Wuornos* (luring victim to isolated location). Lack of resistance or provocation by the victim can indicate both a cold plan to kill as well as negate any pretense of justification. *See, e.g., Thompson* (noting that there was no indication that one of the victims resisted the defendant); *Eutzy* (noting no evidence of a struggle); *Williamson v. State*, 511 So.2d 289 (Fla.1987) (finding no pretense of justification for stabbing fellow inmate where victim had made no threatening acts toward defendant). The manner in which a murder is carried out can also indicate a cold and calm plan. *See, e.g., Eutzy* (shooting victim once in the head execution-style).

Franklin v. State, 965 So.2d 79, 98 -99 (Fla.,2007). That case's facts are instructive.

> The killing in the instant case has all of the hallmarks of CCP. Franklin procured a weapon earlier in the day, long before he actually chose his victim. Franklin engaged the victim in conversation earlier in the night and was able to assess the surroundings and the victim's situation, i.e., a single individual in an isolated location. Franklin stated his intent to return to the location and "get" the victim. When he arrived at the scene, Franklin again voiced his intent to shoot the victim when he told McCoy that "this is gonna hurt, but only for a minute." There was no resistance or struggle by the victim, who complied with Franklin's order to get out of his car and down on the ground and asked Franklin not to shoot him. However, while the victim was complying with Franklin's orders, Franklin shot him in the back without provocation. Further, Franklin took no precautions to hide his face or his vehicle from the victim, but he did wear gloves in order to avoid leaving his fingerprints at the scene. All of these facts are supported by sufficient competent evidence in the record, either through witness testimony, forensic evidence, or Franklin's own confessions.

Id. ... "What is required is a heightened form of premeditation which can be demonstrated by the manner of the killing. Those that are executions or contract murders fit within that class." Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988) citing Routly v. State, 440 So.2d 1257 (Fla.1983), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). Competent, substantial evidence supported the court's finding.

Ellerbee's cited cases do not assist him. The defendant in Geralds v. State, 601 So.2d 1157 (Fla. 1992) did not commit the burglary while armed, thereby allowing the possibility that he had intended to avoid the victim. As noted,

Ellerbee went armed with multiple weapons. The killing in Richardson v. State, 604 So.2d 1107 (Fla. 1992) involved a relationship breakup, a heated argument, and the victim following the defendant as he walked away.

Finally, even if this Court finds that CCP was not an appropriate aggravator, the error is harmless. The merged aggravators of felony murder/pecuniary gain and on probation for prior felonies remain. This Court has affirmed such sentences. Pope v. State, 679 So.2d 710, 716 (Fla.1996)(sentencing proportional with two aggravators, two statutory mental health mitigators and several nonstatutory mitigators). The trial court gave each of the aggravators great weight and gave the mitigators all little or minimal weight. The trial court had competent, substantial evidence supporting its finding of CCP. This Court should affirm.

POINT III

THE DEATH PENALTY IS PROPORTIONAL. (Restated)

Ellerbee next claims that the trial court erred in assigning weight to various of his mitigating factors and that the death sentence is disproportional in his case. The State respectfully disagrees. The sentence is proportional and should be upheld.

This Court has stated repeatedly that the purpose of proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. Urbin v. State, 714 So.2d 411 at 416-417 (Fla. 1998); Terry v. State, 668 So.2d 954 (Fla. 1996). Additionally, the task has been explained as follows:

> We later explained: 'Our law reserves the death penalty only for the most aggravated and least mitigated murders.' *Kramer v. State*, 619 So.2d 274, 278 (Fla.1993).(FN21) Thus, our inquiry when conducting proportionality review is two-pronged: We compare 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). Furthermore when reviewing the relative weight attached to either aggravating or mitigating factors, this Court will not disturb the conclusions of the trial court absent an abuse of discretion. See, Alston v. State, 723 So.2d 148, 162 (Fla. 1998)(finding where detailed sentencing order identified mitigators, weight assigned each is within court's discretion); Cole v. State, 701 So.2d 845, 852 (Fla. 1997)(deciding mitigator's weight is within judge's discretion, subject to abuse of discretion standard). And finally, when reviewing the evidence in support of the aggravating and mitigating factors, this Court will not disturb the findings of the trial court as long as there is substantial and competent evidence in the record to support their existence. Stephens v. State, 787 So. 2d 747 (Fla. 2001). Applying the facts of the instant

case to these legal principles and standards of review, it is clear that jury's eleven to one recommendation for death coupled with the trial court's sentence of death was proper and must be affirmed on appeal.

The court found three aggravating factors, all of which it gave great weight: Ellerbee was a felon on probation at the time; the murder occurred during a burglary merged with pecuniary gain; and CCP. The court also found fifteen non-statutory mitigating factors. Its sentencing order addressed all of these and discussed each at length.

> 1. **That the defendant grew up without his mother and was raised by his father for the most part, and the defendant felt rejected by his mother**. The defense did sufficiently establish this. For a variety of reasons and a number of circumstances involved, the defendant was raised by his father and had very little contact and guidance from his mother. What limited contract there was, was for the most part unpleasant. The State also concedes this has been proven. This Court assigns this little weight.
> 2. **That the defendant had little proper parental guidance from his father**. The evidence demonstrated that the Ellerbee's were very poor. Mr. Ellerbee, the defendant's father, worked extremely hard when work was available. He usually did manual labor, truck and tractor driving on local ranches and dairies. He drank excessively and used drugs from time to time. They moved around often and rarely had a stable home. The defendant was exposed to drug use and alcohol by his father and others. However, this Court is convinced that as imperfect as his father was, he loved the defendant and spent as much free time with his son as he could. He would take the defendant when he was a child to work with him and ride the tractor, as at times, there was no one to watch the defendant while his father worked~ Mr. Ellerbee took the defendant to hog and deer hunt and to fish. Mr.

Ellerbee never physically abused the defendant, although he may have spanked him. Mr. Ellerbee provided for his son as best he could given their circumstances and never neglected ,or abandoned him. They often worked together. This Court finds this mitigator proven to the extent that Mr. Ellerbee was far from perfect, had a hard life, drank too much, and could have been a better father and provided a much better example to his son. This Court assigns this very little weight.

3. **That the defendant suffered from a difficult childhood**. As referenced above, this Court finds this to be sufficiently proven. He grew up,. along with his siblings, extremely poor. His family had little financial resources at it's disposal. His mother did not want him to live with her, so he was raised primarily by his father. He did not have a stable upbringing. This Court assigns this minimal weight.

4. **That the defendant had a history of drug and alcohol abuse**. This Court is satisfied this defendant used crystal methamphetamine, alcohol, and other drugs excessively during his life. However, there was no evidence presented of that at the time of this murder and the days leading up to it. Therefore, because his past drug and alcohol abuse had nothing to do with this murder, the Court assigns this very little weight.

5. **That the defendant suffers from a poor self-concept**. Specifically, the defense alleges, "His mother threw his belongings on the front yard as a kid. Physical and emotional abuse was (sic) common in the household. Food deprivation occurred by the mother". While this Court agrees there was testimony presented to support these allegations, this would seem to merge with grounds I, 2, 3, and perhaps others. This Court also considered the testimony of Dr. Riordan presented on the defendant's behalf. It is difficult for this Court to determine what "self-concept" is and even harder to quantify it. There was some evidence to support this, but this Court assigns very little weight to this.

6. **The defendant's parents were divorced and he was from a broken home**. This was clearly established by the evidence and the State concedes this. The defendant's parents were divorced during his youth and consequently he came from a broken home. This Court assigns very minimal weight to this.

7. **That the defendant's mother suffered from mental illness**. This

Court is satisfied this was established by the evidence and the State concedes this. However, as the defense itself points out above, the defendant had very little contact with his mother after a certain age. This Court is at a loss as to how this mitigates the defendant's actions, therefore it is assigned very little weight.

8. **The defendant's father abused his mother in front of him**. This Court finds this also sufficiently established by the evidence, and the State concedes this. The Court will assign this little weight.

9. **The mother was cruel and unpredictable**. Although the defendant's mother denied this allegation, this Court is satisfied it was established by the defense. In addition the State agrees this was established. This Court assigns this little weight. Again, after a certain point in his life, the defendant had very little if any contact with his mother.

...

11. **That the defendant's father abused drugs and alcohol**. This mitigator has been proven and the State properly concedes this. The record at the trial showed Mr. Ellerbee was an alcoholic, and sometimes abusive and violent, especially to his wife. There was also sufficient evidence of his drug abuse. But the Co~ notes that Mr. Ellerbee never excessively abused the defendant. This Court assigns this little weight.

12. **That the defendant never completed any formal education**. This was established by the evidence and the State concedes this. This mitigator is assigned very little weight.

13. **That the defendant has a low I.Q. of 83**. This was sufficiently proven as the State concedes, even though his LQ. was described as low average, this in no way affected his ability to navigate through his life. This factor is accorded very little weight.

14. **That the defendant suffered childhood physical trauma**. There was evidence presented by the defense that the defendant fell out of his bunk bed at a young age and another incident where he got into a fight and was knocked out. There was also evidence that he may have been spanked by his father. However, both of these incidents, especially the bed incident, were very minor injuries. They resulted in no significant trauma and required no significant medical attention. The defendant's father testified that after the defendant fell out of his

bed onto the floor at a few years of age, it required seven stitches when he was taken to the hospital. The second occurred when the defendant was 19 years old. The hospital records reflect this resulted in "mouth lacerations" and a "minor head injury" and he was "unresponsive" when treated at the hospital. He was treated with Motrin, sutures, and diagnosed with a head injury. Dr. Riordan, a defense witness, testified the description in the records were consistent with a bloody nose and bloody lip. There was no showing by the defense how, if at all, these minor injuries that were remote in time to this murder are relevant to mitigate the defendant's crime. Therefore, this is appropriately assigned very little weight.

15. **That the defendant has a history of suicide attempts and self-destructive behavior**. This mitigator was proven by the evidence as the State concedes. This Court assigns this little weight as these are matters that, t he defendant himself initiates and can control if he were so inclined. This factor is assigned little weight.

...

17. **That the defendant was under the influence of intoxicants before, during, and after this incident**. As to any drug use after this murder, including up to the defendant's arrest, even if proven, simply has no relevance in mitigation to this defendant's culpability and what punishment should be imposed. Therefore, any evidence of drug use after this incident is assigned very little weight.

This Court finds and agrees that there is evidence that the defendant used illegal drugs in a significant amount throughout his youth. However, there is little to no evidence that he was under the influence of drugs or alcohol on the day he murdered Mr. Dellarco. In fact, Dr. Riordan testified that on the day of the murder there was no indication from the defendant himself that he was using drugs. Dr. Riordan also testified that the defendant was capable of "planning, but with difficulty. Therefore, this Court assigns very little weight to the evidence he had been using drugs in his past. (See defense mitigator #4). Since there is no evidence presented that the defendant was using drugs the day of the murder, much less under the influence of any drug and had the ability to plan things, this Court finds this simply unproven.

...

20. **That the defendant would adjust to prison life adequately**. The Defense has sufficiently proven this as the State concedes. Tills Court assigns very little weight to this factor.

21. **That the defendant has mental health issues. Specifically, suffering from Cognitive Disorder, Bi-Polar Disorder, A.D.D./A.D.H.D., Memory and attention defecits**. (Sic) Regarding these mitigators, the Court carefully considered the testimony of the two experts, Dr. Landrum and Dr. Riordan. The defendant's I.Q. was found to be in a low average range of intelligence. Specifically, about eighty percent of the population scored better than the defendant. Depending on the person, this intelligence determination could be attributable to a variety of factors including genetics', brain injuries, and fetal alcohol syndrome. Dr. Landrum, the State expert, testified he did not believe the defendant had a cognitive disorder. Dr. Riordan, the Defense expert, characterized the defendant as having "a cognitive disorder-not otherwise specified". He opined that this could be, .based on head injury, fetal alcohol syndrome, or drug use. As previously discussed above, this Court finds the head injuries to be very minor and superficial. Dr. Riordan testified that the defendant "may" suffer from fetal alcohol syndrome [emphasis added]. Dr. Landrum disagreed by stating that in his opinion, the defendant did not suffer from fetal alcohol syndrome. Dr. Landrum testified that the average LQ. of a fetal alcohol syndrome child is sixty, which is in the mildly retarded range. He also described a fetal alcohol child's physical characteristics. These included smaller head sizes (microcephaly), smaller "slits" for the eyes, flattened faces, and lessened clefts beneath the nose. He testified that these persons exhibit delays in walking, speech development, and are often seen in Head Start programs. Dr. Landrum said there developmental issues are "very apparent". The Court, of course, observed the physical appearance of the defendant in court. He exhibited none of the physical characteristics of a fetal alcohol syndrome child referenced above. No other evidence was presented to support this mitigator i.e. from medical records of birth, physician testimony, or from his parents. In fact, Mr. Ellerbee denied his wife drank during her pregnancy with the defendant. The defendant's mother testified he was born healthy. Also, as discussed above in defense mitigator number 17, this Court found proven the

defendant abused drugs and alcohol in his past. Therefore, this Court finds the defendant's LQ. was in the low average range, but he was not mildly retarded, and did not suffer from fetal alcohol syndrome and had no significant brain injury that would support this Court finding he suffered from a cognitive disorder. The Court assigns little weight to the defendant having a cognitive disorder.

As to the bi-polar diagnosis, the Court also considered both experts testimony. They disagreed with each other. Dr. Landrum testified that the defendant was not bi-polar. Dr. Riordan testified during his direct testimony that the defendant had been diagnosed in his youth as being bi-polar. Dr. Riordan relied on, to be candid sketchy, records from New Horizons, hospital records, and the Okeechobee County Jail. He conceded these findings in the record that the defendant was bi-polar were "self-reporting" that is, from the defendant himself and/or his family. These claims made it into the defendant's various records. Dr. Riordan agreed that no professional had made such a diagnosis. When confronted with the actual New Horizons records, they reflected a finding that the defendant was diagnosed with "oppositional defiant disorder", and not a bi-polar diagnosis. Dr. Riordan agreed, "I don't see it [the bi-polar diagnosis] in those papers". Therefore, this Court finds this as not sufficiently proven by the Defense.

Likewise, as to the mitigator that the defendant suffered from A.D.D./A.D.H.D. was not sufficiently established by the Defense. The Defense expert, Dr. Riordan, testified on direct examination that the defendant was tested and found to "have problems with his attention" and "he was found to be distractable", ... "he had problems with his organizational skills, and uh .... which are symptoms that overlap with attention deficit hyperactivity disorder, and he was evaluated, uh ... or at least an evaluation was begun for attention deficit disorder hyperactivity disorder, but the disorder. was not established". Later, under cross examination, he confirmed that the defendant wasn't diagnosed with A.D.H.D. at least two more times. Therefore, there is no evidence that the defendant suffered from A.D.D./A.D.H.D. In fact, the Defense evidence itself contradicts this claim.

As to memory deficits, again the experts disagreed. Dr. Landrum was of the opinion that the defendant did not have any

> significant memory deficits based on his examination of the records and the defendant's actions the day of the murder and given the defendant's recollection of his actions the day of the murder as told to law enforcement. Dr. Riordan testified that in his opinion, the defendant did suffer from memory deficits based on a single test called a Story Memory Test. This test consists of the defendant listening to a tape recording of a story. At the end of the story, he is asked to tell the examiner what he (the defendant) can remember about the story. And then he is asked to listen several more times and the process is repeated. Based on this, and no other tests, Dr. Riordan found the defendant was [memory 1 impaired at some level and that he makes extensive use of writing things down to keep track of what he thinks he needs to have. This Court finds this simply not proven based on this evidence.

[R4 585-594] There was competent, substantial evidence supporting the trial court's findings and it did not abuse its discretion in assigning weight to the non-statutory mitigators it found. See Elledge v. State, 706 So.2d 1340, 1347 (Fla.1997) (The "weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard."; Shellito v. State, 701 So.2d 837, 844 (Fla.1997) (The weight given to mitigating circumstance from an abusive childhood is also within the trial court's discretion.); Robinson v. State, 761 So.2d 269, 277 (Fla.1999) (upholding trial court's decision to assign little weight to brain damage as mitigation where no evidence indicated that the impairment affected the defendant's actions).

Ellerbee cites Thompson v. State, 647 So.2d 824 (Fla. 1994) as support for finding his sentence disproportionate. In Thompson, the proportionality analysis was conducted upon the totality of the circumstances after three of the four aggravators were stricken, leaving just the felony murder aggravator and eight non-statutory mitigators. There were no facts at all about what happened when the defendant confronted the employee. Similarly, this Court in Terry v. State, 668 So.2d 954 (Fla. 1996) found sentence was not proportional because the case could have been a robbery gone bad and both aggravators came from that one crime. In Terry, this Court focused on the fact that the impetus for the murder was unclear, thus, causing the Court to discount this when considering the totality of the facts. However, in this case, Ellerbee went to the house armed with multiple firearms and knives which belies his claim that he only wanted to get some food and never planned to commit violence. He shot the dog with the gun he specifically brought along for that task. He then waited inside the house, both eating and watching television, until Dellarco returned. He told Reed that he was gone so long because he had to wait for the victim to return. He killed Dellarco, who was sitting at a table and not threatening Ellerbee in any way, with a single gunshot to the head from a rifle with a scope on it. Witnesses attested to the fact that he was an excellent marksman and had a lot of experience with guns. The facts of this

murder are clear and CCP was properly found. On this fact alone, Terry and Thompson are distinguishable. Ellerbee did not hold up a business, with the shooting occurring quickly during the theft and where the clerk could have resisted or threatened the defendant in some way. His story of the shooting being accidental is simply unbelievable given the evidence and was concocted to minimize his culpability.

Likewise, Johnson v. State, 720 So2d 232 (Fla, 1998) is of no assistance to Ellerbee. There, this Court discounted the prior violent felony aggravator based on the underlying facts of those convictions including that one was based on a brotherly dispute, and the others were based on contemporaneous convictions for actions taken by a co-defendant against the victim. The facts here are more egregious and are all committed in a cold, calculated, and premeditated manner, during the course of a burglary planned and committed by Ellerbee. There is strong aggravation here with mitigation having little weight, thus making this sentence proportional, unlike what was determined in Johnson.

This Court has affirmed death sentences under similar circumstances. See Johnson v. State, 660 So.2d 637, 648 (Fla.1995) (upholding death sentence for stabbing death of elderly female inside her home during a burglary where court found three aggravators-prior violent felony, committed for financial gain, and

HAC-outweighed fifteen nonstatutory mitigators); Hunter v. State, 660 So.2d 244 (Fla. 1995) (finding sentence proportional based on two aggravators - prior violent felony conviction and felony murder/robbery along with no statutory mitigators and 10 non-statutory mitigators); Diaz v. State, 860 So.2d 960, 971 (Fla. 2003) (finding sentence proportionate where two aggravators (CCP and previous violent felony) were balanced against four statutory mitigators and remorse and history of family violence); Miller v. State, 770 So.2d 1144 (Fla. 2000) (affirming sentence with aggravation of felony murder/robbery-merged pecuniary gain and prior violent felony balanced against 10 non-statutory mitigator); Mendoza v. State, 700 So.2d 670, 679 (Fla. 1997) (concluding death sentence was proportionate for 25 year old defendant who killed robbery victim with a single gunshot and had aggravation of prior violent felony and pecuniary gain outweighing mitigation of defendant's alleged history of drug use and mental health problems); Pope v. State, 679 So.2d 710, 716 (Fla. 1996) (finding sentence proportional for robbery/murder robbery of girlfriend where two aggravators (pecuniary gain and prior violent felony) were balanced against two statutory mitigator (extreme mental/emotional disturbance and impaired capacity to appreciate criminality of conduct) and several non-statutory mitigator); Heath v. State, 648 So.2d 660 (Fla.1994) (affirming death sentence based on two aggravators (prior violent felony and felony

murder/robbery, despite existence of statutory mitigator of extreme mental/emotional disturbance). Ellerbee's death sentence is proportionate and should be affirmed.

POINT IV

THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO INSTRUCT THE JURY ON THE AGGRAVATOR OF THE VICTIM BEING PARTICULARLY VULNERABLE DUE TO ADVANCED AGE. (Restated)

Ellerbee claims that the trial court erroneously instructed on the "vulnerability due to advanced age or disability circumstance" aggravator. He argues that this particular aggravator is only applicable if Dellarco was actually disabled or if he was actually vulnerable because of his age, neither of which he asserts was true. The State contends that no such error occurred and there was sufficient evidence to warrant the court instructing on this aggravator. This matter is simply without merit and this Court should affirm.

Where there is evidence of a mitigating or aggravating factor present at a trial, the trial court is required to give an instruction on that factor. Stewart v. State, 558 So.2d 416, 420 (Fla. 1990); Bowden v. State, 588 So.2d 225, 231 (Fla. 1991), cert. denied, 503 U.S. 975 (1992)(where evidence of robbery presented, court must

instruct on the relevant aggravator even if the court later finds it unproved); Welch v. State, 992 So.2d 206, 215-216 (Fla. 2008). However, the state must prove applicable aggravating circumstances beyond a reasonable doubt before a court can apply it. Williams v. State, 386 So.2d 538 (Fla.1980).

A Court may give a jury instruction on aggravators if there is credible and competent evidence to support it. Hunter v. State, 660 So.2d 244, 252 (Fla.1995); Welch, 992 So.2d at 2215-216. 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)(trial court instructed on HAC but later found it unproved.) Simply because the State does not prove an aggravating factor does not mean that there was insufficient evidence of the factor to allow a jury to consider it.

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know. The judge should not in any manner inject his preliminary views of the proper sentence into the jurors' deliberations, for after the jury has rendered its advisory sentence the judge has the affirmative duty to decide the sentence in the context of his exposure to the law

> and his practical experience. As we acknowledged in Dixon, "to a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality" can serve as a buffer where the jury allows emotion to override the duty of a deliberate determination.

Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925; Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); Bowden, 588 So.2d at 231.

In Henry v. State, 649 So.2d 1366 (Fla.1994) the trial court did not find that the murder was committed during the course of a felony although it had instructed the jury on that. At trial, evidence was presented that the robbery victim had jewelry in her purse or a container which was missing after her murder. There was also evidence that the defendant had no money before the murder but after had sold some jewelry in order to buy cocaine. This Court held that evidence sufficient to warrant presenting to the jury the issue of whether the murder was committed during the commission of a felony.

The trial court in Welch instructed on CCP but later did not find it. This Court held that the instruction was proper since the State had presented relevant evidence supporting CCP. The Medical Examiner testified that it took Welch seven to thirty minutes to kill the victims. Welch had also written a threatening note earlier to the victim. He cleaned up after the murders and stole items. The Court held that this was credible evidence supporting CCP. Welch, 992 So.2d at 2215-

216.

The first case in this state to consider this aggravator was Francis v. State, 808 So.2d 110 (Fla. 2001). This Court held that the aggravator was not vague and that "the legislature intended to make this aggravating circumstance fact-sensitive" in particular cases rather than simply relying on a chronological age. Id. at 139. In the Francis case, this Court found that "the manner of the death and the nature of the wounds appear to have very little relationship to the vulnerability of the victims prior to their death." The Court found that it did not apply because the evidence showed that the two victims were healthy, active 66 year old women who required no assistance in their daily lives. Id.

In Miller v. State, 42 So.3d 204 (Fla. 2010) this Court upheld the aggravator where the victim was physically healthy but suffered from the beginning stages of Alzheimer's Disease. She was targeted because of her inability to recall events which had just happened. In Woodel v. State, 985 So.2d 524 (Fla. 2008) the victim was not targeted because of her disability but had limited use of her arm due to a previous injury and, thus, could not defend herself well. Id. at 531. This Court also specifically stated that a significant disparity in age between the victims and their attacker is a proper consideration for this aggravator and the finding of this aggravator is not dependent on the defendant targeting his or her victim on account

of the victim's age or disability. Woodel v. State, 804 So.2d 316, 325 (Fla. 2001).

Here, Dellarco was 72 years old who had a number of health problems, including gout and arthritis. (T14 1260-85, 15 1345-47) He was easily exhausted doing the most ordinary of tasks, was almost blind, had trouble hearing, and could barely walk even using canes. (T14 1282, 15 1292-94) He could no longer complete even standard upkeep on his house and yard. His friends Brooks and Bennis did his cleaning and yard work. (T14 1260-64, 15 1292-94) Bennis had lived with him until shortly before Dellarco was killed and did most of the chores and errands. He stocked the house with groceries because of Dellarco's disabilities. (T15 1292-94) Dellarco was planning on moving in with his relatives because he could no longer take care of himself living alone. He was actively trying to sell his house and Brooks was coming over to get it ready for the realtor to show it. (T 15 1281-85, 1317-21) Dellarco was much more physically disabled and vulnerable than the victims in Woodel and Miller. Furthermore, while there was no direct evidence explicitly saying so, it is likely that Ellerbee targeted Dellarco, rather than some of the other area residents, because he saw an elderly old man who lived alone. He, in fact, told Reed that no one would miss the old man because he had no family around. (T18 1716-17) There was sufficient evidence presented to the jury for the court to instruct on this aggravator.

Even if this Court determines that it was error for the court to give this instruction, any error is harmless. "[S]ince Florida juries do not issue findings as to aggravating and mitigating factors, the courts are required to presume that unsupported factors did not weigh with the jury, provided the jury was properly instructed." Johnson, 612 So.2d at 576. Where the jury is properly instructed and the trial court does not find the circumstance to exist, any error is harmless. Id.; Johnson v. State, 438 So.2d 774, 779 (Fla.1983) (Trial court instructed on HAC and great risk to many people, neither of which it found.); Sochor v. Florida, 504 U.S. 527 (1992); Henry, 649 So.2d 1366.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO ASK RIORDAN IF HE CALLED THE JAIL UPON DIAGNOSING ELLERBEE WITH A BI-POLAR DISORDER. (Restated)

Ellerbee argues that the trial court erred in allowing the prosecution to ask Dr. Riordan whether he called the jail to alert the authorities of his diagnosis and Ellerbee's possible need for medication. He contends that the information was irrelevant and biased the jury against Riordan, Ellerbee's only mental health expert. The trial court did not abuse its discretion in allowing the question and

answer. This claim is without merit and should be denied.

Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. Williams v. State, 967 So.2d 735, 748 (Fla. 2007); San Martin v. State, 717 So. 2d 462, 470-471 (Fla. 1998)(A trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed.); Ray v. State, 755 So.2d 604 (Fla. 2000); Zack v. State, 753 So.2d 9 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997)."Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." White v. State, 817 So. 2d 799, 806 (Fla. 2002); Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla. 2000); Huff v. State, 569 So.2d 1247 (Fla. 1990). The State submits that Ellerbee has not demonstrated an abuse of discretion in the instant case.

As Ellerbee notes, the prosecutor asked Riordan if he called the jail to its personnel of his diagnosis of bi-polar disorder in Ellerbee. Trial counsel objected on the basis of relevance and the State argued the question went to witness bias. (T22 2263) The court allowed the question since it went to bias and credibility but warned the State from using it to impugn Riordan's ethics. (Id. at 2264) The State

then limited the question to that single issue and only argued Riordan's lack of action reflected on the credibility of his diagnosis. (T25 2649) "[T]he decision as to whether a particular question properly goes to interest, bias, or prejudice lies within the discretion of the trial judge." Morrison v. State, 818 So.2d 432, 448 (Fla.2002)(quoting Charles W. Ehrhardt, Florida Evidence § 608.5 (1997 ed.). In Tanzi v. State, 964 So.2d 106 (Fla. 2007) this court upheld the impeachment of an expert witness with prior, unrelated act of misconduct, finding that an expert's actions showing bias toward the defense were relevant to his credibility as a mental health expert. Here, the issue is one of inaction but the same principle applies.

Finally, any error is harmless. The jury heard Riordan's testimony. They knew that there was no documentation of any previous diagnosis for any mental illness or disorder. Evidence of his outdoor skills and ability to plan were there as well. They also heard Landrum's opinion to the contrary regarding Ellerbee's mental state and health. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986) This claim should be denied.

POINT VI

THE TRIAL COURT ADEQUATELY CONSIDERED ALL MITIGATION EVIDENCE. (Restated)

Ellerbee claims that the trial court failed to consider the statutory mitigators although it did instruct the jury on them. He argues that this was reversible error because the error was not harmless. Specifically, he contends that the court simply dismissed the statutory mitigators of age, extreme mental or emotional disturbance, and no significant criminal history rather than properly evaluating them. The trial court, however, did consider all the evidence presented by the defense and in the trial in its very detailed sentencing order. This Court should affirm the sentence.

This Court has stated that a trial court must expressly evaluate in its sentencing order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence. Campbell v. State, 571 So.2d 415, 419 (Fla.1990); see also Rogers v. State, 783 So.2d 980, 995 (Fla.2001); Griffin v. State, 820 So.2d 906, 913 (Fla.2002). Here, as conceded by Ellerbee, the trial court did instruct the jury on these statutory mitigators. [T24 2583-85;25 2709-10] In Groover v. State, 640 So.2d 1077 (Fla.1994) the defendant argued that the trial court failed to consider nonstatutory mitigation in its sentencing order. This Court rejected that contention and held that "[w]hen a trial judge instructs a

jury that it can consider nonstatutory mitigating evidence, '[w]e must presume that the judge followed his own instructions to the jury.'" Id. (quoting Johnson v. Dugger, 520 So.2d 565, 566 (Fla.1988)). The same reasoning applies to statutory mitigators as well. This Court should presume that the trial court considered these mitigators.

While Ellerbee is correct that the court wrote "the Defense presented no statutory mitigating factors," (R4 585) its analysis did not end there. During the penalty phase trial the State presented evidence of Ellerbee's prior felony convictions and his probationary status. (T21 2016-32) Tellingly, Appellant did not submit this statutory mitigator, or any of the others, for the trial court's consideration in his sentencing memorandum, essentially bowing to the evidence at the trial and abandoning his pursuit of these three statutory mitigators. [R 285-287] The trial court considered and discussed that evidence when it found the aggravator regarding Ellerbee being on active felony probation. [R4 574-575] This evidence and the court's analysis are directly counter to a finding of lack of significant criminal history and the sentencing order implicitly found the statutory mitigator of lack of significant criminal history not proved or withdrawn.

The trial court specifically addressed all the mental health evidence presented at the trial and hearings in its discussion of the non-statutory mitigators

requested by Ellerbee in his sentencing order. Landrum opined Ellerbee suffered only from substance abuse, oppositional defiant, and conduct disorders. Riordan opined that he had a possible cognitive and bi-polar disorder. Neither of the experts characterized any possible disorder as "extreme." The evidence did not support this statutory mitigator. Again, Ellerbee did not request the statutory mitigator regarding mental health in his sentencing order, thereby abandoning his pursuit of it. [R4 574-575] The court analyzed the evidence presented by both Riordan and Landrum in detail. [R4 591-594] It found only one mental health non-statutory mitigator (cognitive disorder) proven at all; all the others it found to be not proven. Id. It is simply false to state that the court failed to consider or to evaluate this mitigator. The trial judge found and considered evidence of appellant's mental state at the time of the crime when it discussed the non-statutory mitigators. Blackwood v. State, 777 So.2d 399, 410 (Fla. 2000). This claim is without merit.

Ellerbee specifically argues that the trial court's failure to consider the age mitigator was prejudicial. Initially, given that he had three felony convictions and was on probation before he turned 21 years old itself belies this mitigator. Generally, young age is a mitigator when it is evidence of inexperience. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Ellerbee's prior *felony* convictions show experience, not youthful immaturity and inexperience. Furthermore, any error by

the trial court to consider this mitigator is harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.1986). The trial court found four substantial aggravating circumstances, including murder committed during the course of a burglary and CCP. It gave little or minimal weight to the twenty-three mitigating circumstances discussed in the sentencing order. Even if the trial court had expressly considered this statutory mitigation, there is no reasonable doubt that the trial court would have imposed the death penalty. Indeed, the trial court stated that the "aggravating circumstances substantially outweigh the ... mitigating factors." [R4 594] See Blackwood, 777 So.2d at 410(finding trial court's failure to consider statutory mitigator of age was harmless); see also Singleton v. State, 783 So.2d 970, 977 (Fla.2001) (holding that trial court's error in failing to address nonstatutory mitigation was harmless because the mitigators would not outweigh the aggravation in the case); Bates v. State, 750 So.2d 6 (Fla.1999); Orme v. State, 25 So.3d 536 (Fla. 2009). The sentence should be affirmed.

POINT VII

THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS THE EVIDENCE FROM THE RED CAMP. (Restated)

Ellerbee next argues that the trial court's denial of his motion to suppress the evidence seized from the Red Camp was reversible error. He argues that the order stating the reasons was flawed and that, therefore, the result was as well. The trial court properly denied the motion since Ellerbee did not establish that he had a legitimate expectation of privacy in the property or structure. Kyllo v. United States, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

A trial court's ruling on a motion to suppress must be sustained if the trial court applied the right rule of law and its ruling is supported by competent substantial evidence. State v. Glatzmayer, 789 So. 2d 297, 301 n. 7 (Fla. 2001). In its order denying this particular motion to suppress, the trial court confused the property owned by Jones (the initial trailer) with that owned by Brown (the Red Camp). However, the evidence presented at the suppression hearings supported the trial court's denial of the motion to suppress. "[T]he trial court's ruling on an evidentiary matter will be affirmed even if the trial court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling." Muhammad v. State, 782 So.2d 343, 359 (Fla.2001); Dade County School Bd. v.

Radio Station WQBA, 731 So.2d 638, 644 (Fla.1999) ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.")

The trial court found that Ellerbee had not established that he had a subjective expectation of privacy in the Red Camp nor that it was one that would be reasonably recognized by society. (R5 637) In fact, Ellerbee presented no evidence whatsoever at the hearing on his motion to suppress the evidence seized from the Red Camp. Furthermore, at no point in any of the motions to suppress did any information come out that Ellerbee had ever actually been in, stayed at, or resided at the Red Camp. Consequently, he did not establish the requisite "standing" to object to the search. (SR 172-201) The State presented testimony from Durfee and a recorded telephone call with the property owner, Grace Helen Brown. She stated that she owned the property for twenty years and gave no one permission to be on it. She then gave the police permission to search it to their hearts' content. She specifically stated that they did not need to get a warrant. (SR 183-85, 195-201) Finally, when arrested, Ellerbee himself told Durfee that Hutchinson's blue vehicle was at some woman's house whose name he did not know, thereby negating any suggestion that he was squatting or had and expectation of privacy. (SR 51) As noted before, Hutchinson's SUV was

discovered at the Red Camp and towed by the police. Relief should be denied.

POINT VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ELLERBEE'S REQUEST FOR A SPECIAL VERDICT FORM. (Restated)

At trial Ellerbee requested a special verdict form for the guilt phase on the theory of first degree murder, differentiating between premeditated murder and felony murder. He now argues that the trial court abused its discretion in denying that request and wants a new trial. The law in Florida is clear that such a special verdict is not required and is within the trial court's discretion to grant or to deny. This claim is meritless and should be denied.

In Florida, standard jury instructions are presumed correct and are preferred over giving a special jury instructions; therefore, the proponent has the burden of proving the court abused its discretion in giving standard instruction. Stephens v. State, 787 So.2d 747, 755-56 (Fla. 2001); Elledge v. State, 706 So.2d 1340 (Fla. 1997); Phillips v. State, 476 So.2d 194 (Fla. 1985). The Florida Supreme Court has rejected a requirement that there be special verdict forms for determining whether the jury found premeditated murder or felony murder, but did not prohibit them. In Re: Standard Jury Instructions in Criminal Cases-Penalty Phase of Capital Trials,

22 So. 3d 17(Fla. 2009). That decision was in keeping with the state case law.

> In Brown v. State, 473 So.2d 1260 (Fla.1985), the Court held that it was proper for the trial court to refuse the use of special verdict forms which would have indicated whether first-degree murder conviction was based upon premeditated or felony-murder. In Buford v. State, 492 So.2d 355 (Fla.1986), Buford's argument was that in light of various theories of first-degree murder presented to the jury, a special verdict form was required to insure that the jury did not convict him under a theory and factual setting which would prohibit the imposition of the death penalty. The Court held that a special verdict form is not required to determine whether a defendant's first-degree murder conviction is based upon premeditated murder, felony murder or accomplice liability. Id., at 358.

Cummings-El v. State, 863 So.2d 246, 257 (Fla.,2003). The trial court did not abuse its discretion by denying Ellerbee's request and instead giving the standard jury instruction for first degree murder.

"A general guilty verdict rendered by a jury instructed on both first-degree murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation." Crain v. State, 894 So.2d 59, 73 (Fla.2004); Miller v. State, 42 So.3d 204, 227 (Fla. 2010). Here, there was amble evidence that this was a felony murder given that Ellerbee went in the house to steal and killed Dellarco while he was still inside. Further, as argued previously and incorporated here, the evidence also established that the murder was

premeditated. Ellerbee left the Red Camp armed with multiple guns and knives, with one gun specifically for the dogs and, presumably, the rifle with the scope for Dellarco. He waited in the house for Dellarco to return home and hid in the bedroom when Dellarco entered rather than leaving through the back door or a window. He then shot Dellarco, moved his body into the garage, and stole the wallet and money. This is substantial evidence of premeditation. The general form was appropriate in this situation. This claim should be denied.

POINT IX

THE FELONY MURDER AGGRAVATOR IN FLORIDA STATUTE 921.141(D) IS CONSTITUTIONAL. (Restated)

Ellerbee submits that the felony murder aggravator is unconstitutional because it fails to adequately narrow the class of persons eligible for the death penalty and cannot justify the harsh penalty of death. He cites to decisions in other states which rejected this as an aggravator. This Court has repeatedly stated this aggravator is constitutionally valid. This claim should be rejected.

Both this Court and the federal courts have repeatedly rejected claims that the "felony-murder" aggravator is unconstitutional because it constitutes an "automatic" aggravating factor. See Banks v. State, 700 So.2d 363, 367 (Fla.

1997)(finding felony murder instruction constitutional); Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997) (finding felony murder instruction is not vague, over broad, or an automatic aggravator); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995) (finding no merit to claim that felony murder aggravator instruction acts as automatic aggravator); Mills v. State, 476 So.2d 172, 178 (1985) (concluding that the legislature's determination that a first-degree murder committed in the course of another dangerous felony was an aggravated capital felony was a reasonable determination); Lowenfeld v. Phelps, 484 U.S. 231 (1988); Blystone v. Pennsylvania, 494 U.S. 299 (1990); Johnson v. Dugger,932 F.2d 1360 (11th Cir. 1991).

Relying upon the Wyoming, Tennessee, and North Carolina state supreme courts, Appellant raises essentially the same argument, which should be rejected. Even if Appellant's argument is read as based upon the constitutional guarantees of the Eighth and Fourteenth Amendments, this Court has already rejected those arguments in Clark v. State, 443 So.2d 973 (1983), cert. denied, 104 S.Ct. 2400, 467 U.S. 1210, 81 L.Ed.2d 356 ("felony-murder" aggravator comports fully with the constitutional requirements of equal protection and due process as well as the prohibition against cruel and unusual punishment). This claim should be denied.

POINT X

THE TRIAL COURT MADE THE REQUISITE FINDINGS IN ITS SENTENCING ORDER AND PROPERLY WEIGHED BOTH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES IN REACHING ITS SENTENCING DECISION. (Restated)

Ellerbee argues that the trial court failed to make written findings that sufficient aggravating circumstances exist to justify the death penalty and that insufficient mitigating circumstances exist to outweigh them pursuant to §941.141(3), Fla. Stat.. The State disagrees noting the detailed discussion and analysis the trial court made of all the proposed aggravators and mitigators. The trial court independently and adequately weighed all the evidence and, in so doing, made the requisite findings.

Under §921.141(3), Fla. Stat, notwithstanding the jury's recommendation, the court must weigh the aggravation and mitigation, and if it finds death the appropriate sentence, put in writing its finding as to the facts "(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." In its sentencing order the trial court said:

> This Court has carefully heard and considered the evidence presented in both the guilt and penalty phases of the trial, the evidence presented at the Spence/ hearing, and has had the benefit of the sentencing

> memoranda. Phillips v. State, 705 So.2d 1320 (Fla. 1983).
> ...
> In addition, this Court recognizes that the State must prove these statutory aggravating factors beyond a reasonable doubt. Card v. State, 453 So.2d 17 (Fla. 1984), Johnson v. State, 438 SO.2d 774 (Fla. 1983), Williams v. State, 386 So.2d 538 (Fla. 1980), Alford v. State, 307 So.2d 433 (Fla. 1975), Parker v. State, 873 So.2d 270 (Fla. 2004), and that the defense mitigating circumstances must be reasonably convincing and/or established by a greater weight of the evidence.
> ....
> In carefully weighing the aggravating factors that were established by the State beyond a reasonable doubt, against the mitigating factors established by the Defense, it is not simply a quantitative analysis, but a qualitative one. It is the Court's duty to look to both the quality and the nature of the aggravating and mitigating circumstances which have been established. Under such an analysis, and upon reflection and consideration, the proven aggravating circumstances substantially outweigh the, non-statutory mitigating factors.

[R:4 572, 574, 594]. The court began its detailed analysis by individually examining each of the five aggravators requested by the State, striking one of them. It then went through each of the non-statutory mitigators presented by the defense and thoroughly discussed each. The trial court clearly made the requisite findings as required by the statute.

Review of orders imposing death sentences have not been for talismanic incantations, but for the content outlining the factual findings as to aggravation and mitigation, the weight assigned each, and the reasoned weighing of those factors in determining the sentence. This Court explained that to comply with §921.141(3),

the judge "must (1) determine whether aggravating and mitigating circumstances are present, (2) weigh these circumstances, and (3) issue written findings." Layman v. State, 652 So.2d 373, 375 (Fla. 1995). As provided in Bouie v. State, 559 So.2d 1113, 1115-16 (Fla. 1990) the written order provides for meaningful review, and must contain factual findings and show the sentencing court independently weighed the aggravators and mitigators to determine the appropriate sentence of life or death. This Court requires each statutory and non-statutory mitigator be identified, evaluated to determine if it is mitigating and established by the evidence, and deserved right. Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995). See Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (holding court may assign mitigator no weight). The sentencing order in Ferrell was found lacking because the court had not set forth its factual findings/rationale in other than conclusory terms. Ferrell, 653 So.2d at 371. Such is not the case here. The order meets the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990), Bouie, and §921.141 as each aggravator and mitigator was discussed, weighed, and factual findings set out. Only then did the court balance the factors before imposing the sentence. The court made the required findings and completed the proper analysis. Williams v. State, 967 So.2d 735, 761 (Fla. 2007) (Failure of trial court to include in its sentencing order for defendant convicted of first-degree murder, the precise words

finding that sufficient aggravators existed to justify death sentence, did not warrant vacation of death sentence; it was clear from trial court's order that it found sufficient aggravators existed to jury sentence of death, as trial court stated that the aggravators were proven beyond a reasonable doubt and were not outweighed by the statutory and non-statutory mitigating evidence.) Its sentencing order should be affirmed.

POINT XI

THE AGGRAVATING FACTOR THAT ELLERBEE COMMITTED THE CRIME WHILE ON PROBATION WAS PROPERLY GIVEN SINCE THERE IS NO REQUIREMENT THAT THE CRIME BE LINKED TO THE FACT OF THAT PROBATION. (Restated)

Appellant contends that it was error for the trial court to instruct the jury upon and find the aggravating circumstance that he was under a sentence of imprisonment, or placed on community control or on felony probation since there was "no link or nexus between his status of being on probation and the murder." [IB at 77] This issue was not preserved for appeal and is without merit.

Appellant's claim, as now raised, is not subject to appellate review. "For an issue to be preserved for appeal . . . it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.'" Archer v. State, 613 So. 2d 446,

448 (Fla. 1993) (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)). Further, Rule 3.390(d) of the Florida Rules of Criminal Procedure provides in pertinent part that "[n]o party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which the party objects and the grounds of the objection*. . . ." (emphasis added).

Here, Ellerbee failed to object to the instruction on the same basis as is now presented on appeal. At trial, Appellant initially opposed the instruction on the basis that it was vague and overbroad. [R1 154-56] At no time before the trial court did Appellant object to the instruction because the State had failed to link Ellerbee's status of being on probation to the instant offense. Counsel used the same argument the written motion contained when he argued it before the trial court. [SR2 226-27] See Buford v. Wainwright, 428 So. 2d 1389, 1390 (Fla. 1983) (objection to principal instruction preserved for appellate review where "trial counsel specifically requested that the instruction which the trial court intended to give include 'requirements that the State show that as a principal that Mr. Buford have the conscious intent that the crime [murder] be committed and that he say a word or do an act toward the commission or toward the incitement ... [of the crime].'"). Ellerbee's newly developed objection to this aggravator should be

summarily rejected.

Even if the issue is reviewable, Appellant is not entitled to relief. This Court has previously addressed the applicable standard of review regarding a claim that the trial court improperly instructed the jury: "[A] trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. Kearse v. State, 662 So. 2d 677, 682 (Fla.1995)." Carpenter v. State, 785 So. 2d 1182, 1199-1200 (Fla. 2001). Concerning the trial court's order finding the aggravating circumstance, this Court limits its "review to ensuring that the trial court applied the correct rule of law and, if so, that there is competent, substantial evidence to support its findings." Caballero v. State, 851 So. 2d 655, 661 (Fla. 2003).

"The 'under sentence of imprisonment' aggravating circumstance exists when 'the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.' § 921.141(5)(a), Fla. Stat. (1999)." Taylor v. State, 855 So. 2d 1, 28 (Fla. 2003). It is undisputed that Ellerbee was on felony probation at the time of the murder. Ellerbee had previously been convicted on June 22, 2005 of two counts of grand theft of a firearm and one count of dealing in stolen property, all felonies, in Osceola County and had been sentenced to seventy-seven days in jail and placed

on probation. [E2 260-264 State's Exhibit 152]. There had never been a requirement in Florida law that this aggravator have a link to the crime.

> Custodial restraint has served in aggravation in Florida since the "sentence of imprisonment" circumstance was created, and enactment of community control simply extended traditional custody to include "custody in the community." *See* § 948.001, Fla. Stat. (1985). Use of community control as an aggravating circumstance thus constitutes a refinement in the "sentence of imprisonment" factor, not a substantive change in Florida's death penalty law.

Trotter v. State, 690 So.2d 1234, 1237 (Fla. 1996). While Ellerbee is free to hypothesize as the reasons this aggravator was originally developed, there is no support for his theory in Florida law. Accordingly, because the trial court applied the correct rule of law and that there was substantial, competent evidence to support the aggravating circumstance, no error occurred.

Appellant's reliance upon and analogy to the avoid lawful arrest aggravator is not persuasive. Because any killing could arguably be to avoid lawful arrest, this Court has held that

> [t]he aggravator of killing with the intent to avoid lawful arrest applies to witness elimination. . . . In such cases, the mere fact of a death is not enough to invoke this factor . . . . Proof of the requisite intent to avoid arrest and detection must be very strong . . . . The evidence must prove that the sole or dominant motive for the killing was to eliminate a witness.

Trease v. State, 768 So. 2d 1050, 1055-1056 (Fla. 2000) (internal citations;

quotation marks omitted; emphasis added). As previously discussed, the aggravator of under a sentence of imprisonment does not, theoretically or factually, apply to every murderer. Thus, again, Appellant's argument is without merit.

Finally, even if the Court were to determine that the "under sentence of imprisonment" aggravator was somehow improper under the circumstances, Appellant is not automatically entitled to relief. Rather, "[w]here an aggravating factor is stricken on appeal, the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence." Anderson v. State, 841 So. 2d 390, 407 (Fla. 2003). In light of the remaining two aggravators, CCP and that the murder was committed while Ellerbee was engaged in the commission of a burglary, and the minimal mitigating evidence, any such error would be harmless and the death sentence would stand. Accord, e.g., Jennings v. State, 782 So. 2d 853, 863 n.9 (Fla. 2001); Zakrzewski v. State, 717 So. 2d 488, 492-493 (Fla. 1998); Geralds v. State, 674 So. 2d 96, 104 (Fla.1996); Reaves v. State, 639 So. 2d 1, 6 (Fla.1994).

Based upon the foregoing, this issue should be denied.

POINT XII

ELLERBEE'S DEATH SENTENCE DOES NOT VIOLATE THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE APPRENDI V. NEW JERSEY, 530 U.S. 466(2000), AND RING V. ARIZONA, 120 S. CT. 2348 (2002), DO NOT APPLY TO FLORIDA'S CAPITAL SENTENCING SCHEME. (Restated).

Ellerbee argues that Florida's capital sentencing scheme is unconstitutional thereby mandating a reversal of his death sentence and an imposition of a life sentence. Specifically, he challenges the lack of specific findings by the jury regarding aggravating factors, the lack of unanimity of the jury's penalty phase recommendation, and argues that Florida's sentencing scheme requires more than one aggravating factor to support a death sentence. All of these claims are without merit and should be denied.

Initially, this Court has rejected both the Sixth and Eighth Amendment challenges to the death penalty statute. While questions of law are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994), Ellerbee has offered nothing new to call into question the well settled principles that death is the statutory maximum sentence, death eligibility occurs at time of conviction, and that the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence.

Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001); Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death is maximum penalty and repeated rejection of arguments aggravators had to be charged in indictment, submitted to jury and individually found by unanimous jury). See Perez v. State, 919 So.2d 347, 377 (Fla. 2005) (rejecting challenges to capital sentencing under Ring and Furman); King v. Moore, 831 So.2d 143 (Fla. 2002). Florida's capital sentencing is constitutional. See Proffitt v. Florida, 428 U.S. 242, 245-46, 251 (1976) (finding Florida's capital sentencing constitutional under Furman); Hildwin v. Florida, 490 U.S. 638 (1989)(noting Sixth Amendment does not require case "jury to specify the aggravating factors that permit the imposition of capital punishment in Florida"); Spaziano v. Florida, 468 U.S. 447 (1984); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003).

Apprendi v. New Jersey, 530 U.S. 466(2000) does not apply; the death penalty is not an increase in the statutory maximum for first-degree murder, but is within the stated statutory maximum. Because death is a statutory sentence, the judge may determine the facts relating to a death sentence just as a judge does with other sentences within the statutory maximum. Apprendi concerns what the State must prove to obtain a conviction, not the penalty imposed for that conviction. Also, Apprendi does not effect prior precedent with respect to capital sentencing

schemes such as Florida's. Apprendi, 120 S.Ct. at 2366. This Court has repeatedly rejected the application of Apprendi to the Florida capital punishment system and has rejected the need to list the aggravating factors in an indictment. Mills, 786 So. 2d 532; Mann v. Moore, 794 So.2d 595, 599 (Fla. 2001); Porter v. Crosby, 840 So.2d 981. Those cases also held that the statutory maximum under § 775.082 is death.

In reaching its conclusion, the Court in Mills analyzed the statute which listed life as the first punishment. The version of § 775.082(1), Fla. Stat.(2006) in effect at the time of Ellerbee's trial refers to a sentence of death first and then to a sentence of life without parole. If the 1979 statute at issue in Mills made death an available sentence, as this Court held that it did, then the 2006 statute applicable to Ellerbee leaves no doubt that death is not an "enhanced sentence" under Apprendi. Because that is so, a death sentence is not an "enhancement" of the sentence -- it is a sentence that a defendant convicted of a capital felony is eligible to receive.

Moreover, even if Apprendi is somehow applicable to Florida's capital sentencing scheme, that result would not help Ellerbee. Ellerbee has a contemporaneous felony conviction (burglary). The felony aggravator falls outside the scope of Apprendi and, under the facts of this case, can support a sentence of death even if the other aggravators are not considered. Apprendi expressly

excluded prior convictions from the matters that must be found by a jury before "sentence enhancement" is allowable. The State does not concede that a sentence of death, in Florida, is an "enhanced sentence" as that term is used in Apprendi. This Court has rejected challenges under Ring v. Arizona, 120 S.Ct. 2348 (2002) where the defendant has a contemporaneous felony conviction. Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting that "felony murder" and the "prior violent felony" aggravators justified denying Ring claim); Jones v. State, 845 So.2d 55, 74 (Fla.2003)(rejecting a Ring claim where prior violent felony and felony murder were two of the aggravating circumstances since jury unanimously found each in guilt phase); See also Davis v. State, 2 So.3d 952, 966 (Fla. 2008) (rejecting Ring claim where "prior violent felony" aggravator was based on contemporaneous convictions for murder, and "murder in the course of a felony" aggravator was based on felony murder conviction); Ault v. State, --- So.3d ----, 2010 WL 3781991 (Fla. 2010).

Even if Apprendi is somehow applicable to capital sentencing, there is no basis for relief because of the manner in which Florida's death penalty statute operates. Ellerbee's argument that aggravators are "elements of the crime" has been expressly rejected by this Court. Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995); Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988), aff'd, 490 U.S. 638, 109

S.Ct. 2055, 104 L.Ed.2d 728 (1989). Relief must be denied.

1. Trial court properly advised the jury of its responsibility when it gave the standard jury instructions.

The trial court gave the jury the standard instructions at the penalty phase trial. The Florida Supreme Court reaffirmed the propriety of the standard instructions after Ring. See Hannon v. State, 941 So.2d 1109, 1150 (Fla. 2006) (rejecting hybrid claim that standard instruction on advisory role of jury violated Caldwell and Ring); Robinson v. State, 865 So.2d 1259, 1266 (Fla. 2004) (same); Cooper v. State, 856 So.2d 969, 977 n.8 (Fla. 2003). Ellerbee has not presented any reason for this Court to retreat from its prior rulings.

2. A single aggravating factor is sufficient to support a death sentence.

It is Ellerbee's position that § 921.141 does not contemplate the imposition of a death sentence based upon a single aggravator. This Court has rejected such claims and Ellerbee has not offered a basis for rejecting such precedent.

Ellerbee claims § 921.141 does not provide for single aggravator cases and focuses on the plural word circumstances in the phrase "sufficient aggravating circumstances" found in § 921.141(2)(a) and (3)(a). He argues that the language is not the equivalent to “one or more” and clearly intends for the jury to find more than one in order to recommend death. He alleges that the statute clearly did not

envision single aggravator cases or it would have explicit language to that effect. § 921.141 is not ambiguous and this Court has found previously that single aggravator cases are constitutional.

In 1973, this Court was called upon to determine if Florida's death penalty statute was constitutional. State v. Dixon, 283 So.2d 1, 2-3 (Fla. 1973), superseded by statute as stated in State v. Dene, 533 So.2d 265 (Fla. 1988). Before this Court in Dixon was the exact language at issue here. Interpreting the statute, in light of a challenge that the aggravators were vague and did not "provide meaningful restraints and guidelines for the discretion of judge and jury," this Court stated: "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided...." Dixon, 283 So.2d 1, 8-9. Based upon this interpretation, a single HAC aggravator sentence was affirmed in LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978). Since then, this Court has affirmed several single aggravator cases. See Rodgers v. State, 948 So.2d 655 (Fla.2006); Butler v. State, 842 So.2d 817, 832-34 (Fla. 2003); Blackwood v. State, 777 So.2d 399 (Fla. 2000); Cardona v. State, 641 So.2d 361 (Fla. 1994), denial of postconviction relief reversed, 826 So.2d 968 (Fla. 2002). In Burdick v. State, 594 So. 2d 267, 271 (Fla. 1992), the Court held that “It is a well-established rule of statutory construction

that when a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment." Here, the this Court has long interpreted the statute as it was written post Furman that a single aggravator is all that is needed. The Legislature readopted the statutes after those decisions, thus adopting the Florida Supreme Court's case law. Consequently, they have now adopted the one aggravator standard as if it was written into the statute.

3. Unanimous 12 person jury

Ellerbee also argues that the jury must unanimously make find specific findings required under § 921.141(3), Fla. Stat. (IB 55). His claims that the death penalty is unconstitutional for failing to require juror unanimity, findings of fact in the jury's recommendation, or specific findings of aggravating factors are without merit. These issues are not addressed in Ring, and in the absence of any Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 822 So.2d 1269 (Fla. 2002); Cox v. State, 819 So.2d 705, 724 n.17 (Fla. 2002) (noting prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)). Moreover, this Court has already rejected these arguments post-Ring. Porter, 840 So.2d at 986 (rejecting

argument that aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Doorbal v. State, 837 So.2d 940 (Fla. 2003)(same). Additionally, as detailed above, Apprendi does not apply to Florida's capital sentencing procedures.

Courts are not required to have juries specify in their penalty recommendations which aggravating or mitigating factors exist. This Court stated, "[this] presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984).

This Court has previously rejected the argument that a unanimous jury sentence recommendation is required. Frances v. State, 970 So.2d 806, 822 (Fla.2007) (rejecting argument that Florida's capital sentencing scheme is unconstitutional because it does not require a unanimous jury recommendation); Evans v. State, 800 So.2d 182 (Fla. 2001); Sexton v. State, 775 So. 2d 923 (Fla. 2000); Alvord v. State, 322 So. 2d 533 (Fla. 1975). This Court has also held that "a capital jury may recommend a death sentence by a bare majority vote." Card v.

State, 803 So.2d 613, 628 n. 13 (Fla. 2001) citing Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). Both the Apprendi and Ring decisions are inapplicable and there is no basis for relief.

4. The jury does not have to determine that the aggravators outweigh the mitigators beyond a reasonable doubt.

Once again, this Court has already ruled that the jury does not have to make its findings in a penalty phase trial beyond a reasonable doubt. Williams v. State, 967 So.2d 735, 761 (Fla.2007) (rejecting argument that trial court erred in failing to instruct jury that it was required to determine beyond reasonable doubt that aggravating factors outweighed mitigating factors); Sweet v. Moore, 822 So.2d 1269, 1275 (Fla.2002). Finally, Ellerbee's reliance on out-or-state cases and federal cases is misplaced as those courts were interpreting foreign statutes dissimilar to Florida's. Relief must be denied and Ellerbee's sentence affirmed.

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Jeffrey L. Anderson, Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on February 9, 2011.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately on April 14, 2008.

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LISA-MARIE LERNER