IN THE SUPREME COURT OF FLORIDA

TERRY MARVIN ELLERBEE JR. ,	)	
	)	
Appellant,	)	
	)	
v.	)	**CASE NO. SC10-238**
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Nineteenth Judicial Circuit,
In and For Okeechobee County, Florida
[Criminal Division]

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and for Okeechobee County, Florida. In this brief, the parties will be referred to as they appear before the Court, although Appellee may also be referred to as the state.

The record appeal consists of 30 volumes. Volumes I through V contain the Record portion of the record on appeal and are numbered consecutively 1-665. This portion of the record will be referred to by the volume number followed by the symbol "R" followed by the page number.

Volumes VI-XXV contains the transcripts of hearings and the trial. Volume VI is numbered consecutively 1-123. Volumes VII-XXV is numbered consecutively 1-2731. The transcript portion of the record will be referred to by the volume number followed by the symbol "T" followed by the page number.

There are three volumes of supplemental record on appeal. These volumes are consecutively numbered from 1-254. The supplemental record will be referred to by "SR" followed by the volume and page number.

There are two volumes of evidence documents consecutively numbered 1-327. These will be referred to by the symbol "E" followed by the page number.

STATEMENT OF THE CASE

On November 16, 2006, Appellant Terry Marvin Ellerbee, Jr., was charged with first degree murder; burglary of a dwelling; two counts of grand theft; cruelty to animals; and possession of firearm or ammunition by a convicted felon I R62-65. A jury trial commenced on June 9, 2009.

After close of the State's case in chief, and at the close of all the evidence, Appellant moved for judgments of acquittal XIX-XX T1825-27, 1857. The motions were denied XIX-XX T1833, 1846-47, 1858. Appellant was found guilty of murder, burglary, two counts of grand theft, and cruelty to animals as charged R224-225, 559. The jury recommended death by an 11-1 vote.

On January 29, 2010, Appellant was sentenced to death for the murder conviction IV R561, 576-96, and to life in prison for the burglary and to 5 years in prison for each of the grand thefts and the cruelty to animals IV R562-566. The trial court entered a judgment for costs including $37, 492.53 for public defenders fees IV R614. Appellant filed his notice of appeal IV R602. This appeal follows.

STATEMENT OF THE FACTS

GUILT PHASE

Appellant's taped statement was played to the jury XIX T1750. Appellant is 21 years old XIX T1752. Appellant met Amber Reed and spent 41/2 months with her XIX T1755. Amber initially lived with Appellant at XIX T1758. Amber had a baby. Appellant wanted to take care of Amber and the baby which he considered his family XIX T1762. Appellant went to abandoned camps and residences to get away from everything XIX T1760, 62. Appellant talked to Amber about going to the prairie XIX T1760. Appellant wanted to be at the prairie with his family-Amber and the baby XIX T1762. On September 13, 2006, Appellant took Amber and the baby to the prairie in Emmadean Hutchinson's truck XIX T1763. They lived at an abandoned camp site XIX T1764. Life was extremely difficult. Appellant wanted to provide food and formula XIX T1763.

Appellant stated that the family was ordered to leave the camp site XIX T1764. The family moved to another site (i.e. red camp). XIX T1764. Appellant became desperate, hungry and in need for diapers and formula for the baby XIX T1785. Appellant went looking for food and supplies XIX T1785. Appellant came to the house of Thomas Dellarco. In Appellant's statement he initially denied he killed Dellarco or his dog XIX T1772. Appellant later admitted to killing Dellarco and his

dog XIX T1782. Appellant initially approached Dellarco's for berries and stuff because he was hungry XIX T1770.

Appellant walked up to Dellarco's property and had a conversation with Dellarco XIX T1778. After the two men conversed, Dellarco told Appellant he was going to town to do some business XIX T1778. Appellant walked into the woods XIX T1178. Dellarco left 15 minutes later XIX T1778. Appellant then walked toward Dellarco's house. Appellant had to shoot Dellarco's dog because it was aggressive toward him XIX T1779. Appellant went to the house for food and money XIX T1785. Appellant found cigarettes and tuna fish to eat XIX T1803. Appellant found a single shot .20 gauge XIX T1804. Dellarco arrived an hour later XIX T1803. Dellarco saw that his dog was dead and became upset XIX T1779. Dellarco said something about his dog and came in the house XIX T1796. Dellarco called the rest of the dogs XIX T1786. Dellarco went back outside and let the dogs out XIX T1786. Appellant was hiding in the master bedroom when Dellarco came in XIX T1783. Dellarco sat at the kitchen table XIX T1779.

Dellarco started dialing the phone XIX T1787. Appellant could hear the operator or voice recording saying "the number you have reached is no longer in service" XIX T1795. Appellant "spaz-zed out"XIX T1795. Appellant didn't know who Dellarco was calling and wanted to get out of the house T1783. Appellant walked out of the bedroom and fired a shot XIX T1798. Appellant merely wanted to fire a

warning shot XIX T1799. Appellant had closed his eyes when he shot XIX T1799. Appellant wanted to merely scare Dellarco to give Appellant a chance to get away XIX T1799. Because Appellant fired a single shot .22 he was asked "what if you had missed" and Appellant answered "That's what I intended" XIX T1798. Appellant didn't go in the house intending to shoot Dellarco XIX T1793. Appellant didn't decide to shoot Dellarco XIX T1794. Appellant had no intention to hurt anybody –he just wanted something to eat XIX T1794.

After the rifle was fired, Dellarco was sitting in the chair but his head was on the floor XIX T1784. Appellant threw towels down for the blood XIX T1784, 85. Appellant took Dellacro to the garage and threw blankets over him XIX T1784, 1789. Appellant scrubbed the floor XIX 1784. Appellant left and has been on the run ever since XIX T1784. Appellant was desperate, hungry and trying to get diapers and formula for the baby XIX T1785. Appellant was sorry for what happened and would change it if he could go back into time XIX T1791. Appellant took Dellacro's wallet and money XIX T1791. Appellant's statement indicated that he subsequently used Dellacro's debit card numerous times XIX T1768-69. Appellant had to have stuff for the baby XIX T1769.

Amber Striker (also known as Amber Reed) testified she was pregnant when she met Appellant XVIII T1701. Amber and Appellant decided to live together XVIII T1701. On September 13, 2006, Amber lived with Emmadeen Hutchinson XVIII

T1701. Appellant was living at a different location XVIII T1702. Amber borrowed a vehicle to go apply for food stamps XVIII T1702. Amber also picked Appellant up to take him to work XVIII T1702-03. Appellant drove with Amber and the baby in the back seat XVIII T1703. Instead of driving to work Appellant drove to a place called the "prairie" XVIII T1704. They drove around for an hour and ended up at a trailer XVIII T1705. Appellant broke into the trailer XVIII T1705. Amber took the baby inside and began to clean XVIII T1705. They started living in the trailer XVIII T1705. There was no water or electricity XVIII T1705. Appellant hooked up a battery from the vehicle to run a fan inside would bring back water, pots, pans, guns XVIII T1706. Appellant brought back a small .22, a shot gun, and a long .22 XVIII T1706-07.

Amber testified that a man and a woman knocked on the door and told her it was their camper and she needed to leave or they would call the police XVIII T1707. The people left and the Appellant returned in a matter of minutes XVIII T1707. Appellant, Amber and the baby left in Hutchinson's vehicle XVIII T1708. They drove for a while and found a red house (i.e. Red Camp) XVIII T1708. The red house was old, abandoned and run down XVIII T1709. They sat up residence in the red house XVIII T1708. Appellant was nervous and jittery XVIII T1708. Appellant said he deserved to live better than the red house XVIII T1709. A day or two or later Appellant left red camp for a couple of hours XVIII T1709, 1735. He returned at dusk with a blue SUV XVIII T1709. Appellant was happy, excited, bouncing all over the place XVIII

T17098. Appellant bought baby cereal, wipes, diapers, and two little outfits at Wal-mart in Sebring XVIII T1710-11. They then went to a motel and stayed one night XVIII T1711. They had pizza delivered XVIII T1712.

Amber testified the next day they went back and stayed at red camp XVIII T1713. The baby was fussing and Appellant was aggravated XVIII T1713. Appellant pulled Amber to him and told her he killed a man XVIII T1713. Appellant said he had to kill the man's dog because it was jumping at him XVIII T1713. Appellant said he had met the man before and the man loaned him a truck XVIII T1714. Appellant said he had to wait for the man to get home XVIII T1714.

Amber testified they traveled to several different locations and Appellant used the man's ATM cards XVIII T1715. Amber filled out a check and Appellant tried to cash it XVIII T1715-165. Appellant was unsuccessful in cashing the check XVIII T1716. They returned to red camp. At one point in time Appellant said they were going to move in the home XVIII T1717. Appellant said he would bury Dellarco XVIII T1717. Appellant said it would be a while before the power would be cut off for failure to pay the electric bill XVIII T1717. Appellant said Dellarco did not have any family to check up on him XVIII T1717. Appellant started getting nervous because there were police cars in the area and they might have found Dellarco XVIII T1724. Appellant, Amber and the baby left red camp XVIII T1724. They ended up staying in a tent XVIII T1725.

Appellant returned to red camp and said police were pulling Hutchinson's truck out XVIII T1725. Appellant would later return to red camp for diapers, wipes and other stuff for the baby XVIII T1725-26. Appellant picked up a generator and threw a long .22 in the bushes XVIII T1726. Appellant and Amber went to Eddie Carrol's house where they were arrested XVIII T1726.

Emmadean Hutchinson testified that Appellant and Amber Reed were in a relationship in 2006 and they moved in with her XIV T1232. Appellant moved out and Amber stayed XIV T1232. On September 13, 2006, Hutchinson loaned Amber her Ford Explorer but she did not return it XIV T1233. Hutchinson eventually got her truck back from the Okeechobee County Sheriff's Office XIV T1236.

Anna Jones testified that the Prairie is a rural area without many houses XIV T1238. Jones owns 3.75 acres with a travel trailer on it XIV T1239. On September 20, 2006, Jones noticed signs that someone was living in the trailer XIV T1241. Jones knocked on the door and told her she had no right to be on the property XIV T1214-42. The girl said her boyfriend indicated they could be there XIV T1242. Jones noticed a two week old baby XIV T1243. Jones noticed a Ford Explorer which was later identified as belonging to Emmadean Hutchinson XIV T1243-44. Jones told the girl she had until 3 o'clock to leave XIV T1243. Jones returned later with the police XIV T1246. The girl, baby, and the vehicle were gone XIV T1246. The girl looked jittery and thin as if she was on drugs XIV T1246-47.

Geraldine Baker testified that Thomas Dellarco is her brother XIV T1225. She last talked to him on September 19 XIV T1227. Baker contacted police to perform a welfare check XIV T1228.

Auxiliary deputy Phillip Hardin testified that on September 26, 2006, he was called to Thomas Dellarco's residence XVI T1413. Three dogs ran up to the gate XVI T1415. No one responded at the house XVI T1416. Hardin left a note in the mailbox for Dellarco to contact his sister. XVI T1416.

Ginger Brooks testified that on September 19 she called Dellarco and made arrangements to do something cleaning at his house XIV T1264. Brooks went to Dellarco's residence on September 21 at 5:45 XIV T1265-66. Brooks saw Appellant at the house XIV T1266. Brooks asked if Dellarco was home XIV T1267. Appellant said Dellarco went to town with friends XIV T1267. Brooks said she was there to clean the house XIV T1267. Appellant said it had already been cleaned XIV T1267. Brooks said she wished she had been told because it was a waste of time and gas XIV T1267. Appellant offered her gas money XIV T1267. Brooks said no and left XIV T1267.

Sean Bennis testified he lived with Thomas Dellarco for a year and had moved out 3 months prior XV T1290-91. Bennis found Dellarco's body on Sepetember 29, 2006 XV T1312. Where Bennis went to Dellarco's house he noticed Dellarco's vehicle was gone XV T1300. As Bennis walked up to the house he could smell that

something was dead XV T16301. Bennis went to the back and saw the dogs in the pool cage XV T1301. Five of the dogs were there, but Bennis did not see the sixth dog XV T1303. Bennis went in the house XV T1303. It was a mess XV T1304. Bennis went into the utility room and saw something dead under a blanket in the garage XV T1304. The kitchen and dining room were in disarray with all the drawers open and looked as if they had been gone through XV T1311. Bennis had previously left a .20 gauge that had been kept by the front door XV T1316-17. Bennis didn't see it there anymore XV T1317. Bennis called 911 XV T1304.

Dr, Charles Diggs testified he was the medical examiner and performed an autopsy on Thomas Dellarco on October 2, 2006 XV T1327. The cause of death was a gunshot wound to the head XV T1334. The wound would cause immediate death XV T1342. There was no other trauma to Dellarco XV T1342. The bullet entered the top of the skull, almost in the middle, and went through the brain tissue then placed behind the left eye XV T1331, 1328. Diggs also performed a necropsy on a dog XV T1335. The dog had been shot three times – once in the head area, once in the back area, and once in the leg XV T1336. Diggs could not determine the order of the gunshots XV T1343.

Crime scene technician Kathleen Watson testified she went to Dellarco's residence on September 29, 2006 XVI T1423. There were cigarettes butts throughout the house XVI T1430-33. The air conditioning was not working XVI T1435. There

was a receipt on the table dated September 21, 2006, at 16:48 XVI T1439. There was a blood stain pattern on a chair XVI T1441. It was a contact smear XVI T1442. There were other droplets of blood XVI T1442. There was a wiping or cleaning up pattern XVI T1443. There was blood in the Northeast and Southeast bedrooms XVI T1449. The blood was consistent with someone moving within the room and leaving blood behind XVI T1451. There was blood by the sink with a wiping pattern XVI T1452. There was blood near the garage area XVI T1444. In Watson's opinion the incident occurred around the kitchen area, the body was dragged to the garage area, and there was an attempt to clean up XVI T1462, 1463. No useable prints were found in the residence XVI T1463. Watson testified it was too speculative to say where Dellarco was when he was shot XVI T1476.

Earl Ritzline testified as a criminalist in the Indian River Crime Laboratory XVIII T1638. Ritzline testified that Appellant's DNA matched that of some cigarettes butts in the residence XVIII 1678-80. There were other cigarettes butts that did not match Appellant's DNA XVIII T1684. None of the DNA could be linked to Thomas Dellarco XVIII T1689. Some DNA could be from another person XVIII T1690.

Mark Chapman of the Indian River Crime Laboratory testified as a firearm examiner XVII T1545-46. Chapman examined the bullets taken from Dellarco and the dog XVII T1553, 1557. Chapman excluded the bullets taken from Dellarco as coming

from Exhibit 128- a .22 revolver XVII T1558. Chapman excluded the bullets from the dog as coming from Exhibit 128 XVII T1559.

Carol Chapman worked as a teller for bank of America in Sebring in 2006 XV T1371. Chapman testified that on September 25, 2006, she was presented a check made out to Terry Ellerbee written on the account of Thomas Dellarco XV T1374. The man presented a drivers license for Terry Ellerbee XV T1377. The check was for $1000 XV T1376. The signature for Dellarco did not match the signature on file for Dellarco XV T1377. There were insufficient funds in the account to cover the check XV T1379. Chapman required a thumbprint of the person presenting the check XV T1376. Chapman did not cash the check XV T1379. Chapman kept the check XV T1379. The thumbprint on the check was later determined to match Appellant's thumbprint XVI T1410.

Mahatou Patel owns a small motel in Sebring XV T1350. Patel testified that his card shows that Terry Ellerbee rented a room on September 21 and September 25 of 2006 XV T1352-54.

Thomas Dellarco's bank statements showed a number of transactions on September 23, 24, 25 and 26 XV T1360-68.

Detective Richard Durfee testified that he went to the crime scene XVII T1485. Durfee followed some tire tracks in the area to a vehicle and a shack XVII T1487-88. The area was known as red camp XVII T1489. The vehicle belonged to Emmadean

Hutchinson XVII T1489. Wires ran from the vehicle's battery to a fan in the house XVII T1490. Durfee went inside the shack for his safety XVII T1491. No one was inside XVII T1492. Durfee called for a tow truck and waited at the road XVII T1493.

When Durfee returned to the camp he noticed that someone had been there XVII T1493. Durfee called for other officers and went inside the shack again XVII T1495. Items inside had been moved XVII T1496. Durfee later searched red camp XVII T1497. Red camp was two rooms a kitchen and a bathroom XVII T1503. It had electricity running to it XVII T1504. Inside red camp were baby bottles XVII T1505. There was also a check from Thomas Dellarco to Amber Reed for $1,000 XVII T1513. A shirt was found that had Dellarco's Bank of America visa card XVII T1515-16. Inside a pair of pants was a wallet with Dellarco's driver's license XVII T1518-19. A box of shotgun shells and .22 ammunition was found XVII T1506-09. Appellant's fingerprint matched the print on the box XVII T1534.

Detective Durfee testified he searched Appellant's room at the residence where Appellant was arrested. Durfee collected receipts from a baby bag XVII T1574. A pin number to a Bank of America card was found in Appellant's wallet XVII T1578. A 20 gauge shotgun was found in the closet area XVII T1583. A gun also found XVII T1579.

PENALTY PHASE

Dr. Michael Riordan is a neural and forensic psychologist XXII T2124 -- 25. Dr. Riordan examined Appellant and reviewed various records including hospital and jail records etc. XXII T2127-28. Riordan examined Appellant on November 17, 2006 for two to three hours, on March 23, 2007 for nine hours, and on May 22, 2009 for two hours. XXII T2129. Riordan performed mental status examinations and clinical interviews. XXII T2130. The tests are not usable without neurological training. XXII T2132. Appellant is memory and learning impaired XXII T2134. Appellant had neuropsychological deficits that were related to his mother's pregnancy XXII T2136. At the age of five Appellant fell from a bunk bed and busted his head to open which required five stitches at the hospital XXII T2136. Appellant also suffered head trauma when assaulted and rendered unconscious XXII T2136. Appellant had four occasions of head trauma XXII T2210. The head trauma could account for poor memory function and other areas of dysfunction XXII T2137. Appellant became more vulnerable because of the added head trauma XXII T2137. There is a strong likelihood that Appellant's mother's consumption of alcohol during pregnancy contributed to neuropsychological deficits XXII T2138.

Dr. Riordan found cognitive disorder XXII T2138. Both the mother and father used alcohol and illicit drugs prior to Appellant's birth XXII T2139. Appellant had a lack of stable household during his development years XXII T2139. Appellant was a

victim of domestic violence between the parents XXII T2139. There were instances where the children were sent to bed hungry XXII T2140. There was physical and mental abuse XXII T2140. Nurturing was lacking XXII T2140. Appellant was told that he was not wanted by his mother XXII T2140. Appellant's mother reinforced that by not being in Appellant's life for different periods of time XXII T2140. Appellant was choked by his mother XXII T2140. These things make person vulnerable to a mental disorder XXII T2140.

Appellant had problems with depression and felt worthless XXII T2140. The father took Appellant to crack houses and exposed Appellant illegal substances XXII T2142. Appellant would ask others why his mother hated him XXII T2142. The grandmother said one of the kids was bloodied because they took food when hungry XXII T2143. The father used crystal meth XXII T2143. It is suspected that Appellant suffered from fetal alcohol syndrome XXII T2143 -- 44. Appellant began using alcohol at the age of seven XXII T2144. Appellant's mother indicated that Appellant and his father cooked and used crystal meth together XXII T2145. It is possible Appellant may have alcohol fetal syndrome which likely impacted his ability to learn XXII T2145. Appellant was administratively promoted several times in school XXII T2146. He was advanced four times and then stopped attending in the ninth-grade T2147. Appellant had problems with organizational skills XXII T2148. He had a cognitive disorder XXII T2148. Dr. Riordan expects more problems due to the

disorder including the ability to adjust and other undiagnosed problems XXII T2149. FCAT placed Appellant in the lowest category of achievement XXII T2150. Appellant withdrew from school in the ninth-grade XXII T2150. Appellant tried to reenter school but was not allowed to by school officials XXII T2150. Appellant has the potential for rehabilitation XXII T2151. Appellant complained of headaches is young child XXII T2153.

Dr. Riordan administered the WAIS –III XXII T2154. Appellant had a verbal IQ of 86 which falls within the low average range or borderline range XXII T2155. Performance IQ was 81 XXII T2156. A full scale IQ was 83 XXII T2157. The Woodcock Johnson III tests showed the ability to speak at 81 and a reading score of 80 XXII T2158. Appellant scored impaired on tests that are sensitive for brain damage XXII T2159 -- 60. The test showed impairment in auditory modality XXII T2162. Dr. Riordan gave a total of 21 different types of tests XXII T2162. The results showed that Appellant was in the brain-damaged range XXII T2162. Appellant's dental health was in very poor shape and he had his teeth extracted at the jail XXII T2163.

Medication was prescribed for Appellant but was not followed up on XXII T2166. Appellant's father did not follow up because he was not convinced Appellant had a mental disorder XXII T2166. At the age 17 Appellant was being treated for anger but he dropped out XXII T2168. Appellant has been suicidal multiple times including at jail XXII T2168. Appellant had been Baker acted XXII T2169. On

October 5 and November 2, 2006; on April 9, 21, 24, and May 20-22 and 31, and June 11, 17, 25 and July 5-9 22-23, 26-31, of 2008, Appellant was placed on suicide watches. XXII T2169. On October 12, 2006 he was admitted to New Horizon XXII T2170. Appellant attempted suicide by cutting his throat and hanging himself XXII T2170. Suicide attempts are associated with deep depression XXII T2170. Suicide attempts are not uncommon for someone with bipolar disorder XXII T2170. Appellant's mother was a model for suicidal behavior and drilled worthlessness into Appellant. XXII T2170. Crystal meth would make Appellant feel like he was functioning better XXII T2172 -- 73. Appellant was diagnosed as a drug dependent and was treated for it XXII T2173. However, the treatment failed XXII T2173.

Taking care of the girl and child gave Appellant an important sense of helping and self-esteem XXII T2174. Structure in prison is what Appellant needs XXII T2175. Appellant had no structure as a child growing up or while he was on his own XXII T2175. Dr. Riordan diagnosed Appellant with a bipolar disorder and a cognitive disorder XXII T2175. Appellant has deficits in memory and attention XXII T2189. Park Place Behavior Health Care indicated Appellant had an injury to the top of his head XXII T2203. Raulerson Hospital records indicate Appellant suffered a closed head injury XXII T2204. On four different occasions Appellant had head injuries XXII T2210. Dr. Riordan testified if nothing was wrong with Appellant’s brain he would not gotten the test results that resulted XXII T2214. Appellant should have been

identified as a student in need of special services XXII T2221. Appellant had special mechanical ability akin to an idiot savant XXII T2227. Appellant has rehabilitation potential in part because of the special ability XXII T2228. Okeechobee jail records indicate that Appellant is bipolar XXII T2239. New Horizon's records indicate Appellant's diagnosed bipolar at the age of 15 or 16 XXII T2240. Park Place indicated that Appellant had been Baker acted due to suicidal thinking XXII T2244. Being homeless and not knowing where one's next meal is coming from is an extremely stressful condition XXII T2253. Appellant's general functioning on the day of the killing was at an impaired level XXII T2256. There are no signs of malingering in Appellant's testing XXII T2278.

Shannon Smith testified she is in prison XXIII T2309. Appellant is her brother XXIII T2309. HRS took Smith away from her mother because of beatings from her mother and father when she was 10 or 11 XXIII T2312. Smith was smacked around and told she was worthless XXIII T2113. Smith suffered beatings with a belt XXIII T2314. The worst beating was with the cattle prod which had electricity XXIII T2314. This was also used on Appellant XXIII T2315. The mother was creative and would invent things to beat the kids with such as water hoses and switches XXIII T2316. Beatings occurred every day XXIII T2316. Smith was in a mental hospital XXIII T2319. Mother would make the kids drink castor oil and give them nothing to eat XXIII T2319. There was no nutrition XXIII T2320. Smith would run away from home

XXIII T2320. Smith was put on medication for posttraumatic stress XXIII T2321. The things that happened to Smith in the home also happened to Appellant XXIII T2323. Smith has seen the effects of crystal meth on Appellant XXIII T2322.

Diane Harmon testified that she has known Appellant since grade school and saw him almost every day XXIII T2342. Appellant was polite and did not hurt anybody XXIII T2344. Appellant was good to animals XXIII T2345.

Brenda Jacobs is Appellant's mother XXIII T2375. Jacobs broke down and went to the hospital for three months XXIII T2375. She was diagnosed with posttraumatic stress disorder XXIII T2376. When Appellant was born his father was extremely abusive toward Jacobs XXIII T2380. Appellant witnessed the abuse XXIII T2380. Jacobs was also abused when she was pregnant XXIII T2380. One night the father's actions hospitalized Jacobs for three days XXIII T2381. The abuse was common XXIII T2381. The father taught Appellant to drink XXIII T2382. Appellant started drinking at age seven XXIII T2382. Jacobs was aware Appellant used illegal drugs XXIII T2382. The father would beat Jacobs everyday XXIII T2383. Jacobs eventually divorced the father and when she moved Appellant stayed with the father XXIII T2384. Appellant was 11 or 12 years old at the time XXIII T2384. Jacobs returned when Appellant was 17 XXIII T2385. At that time Appellant was taking drugs, drinking, and making meth in the bathtub XXIII T2385. Appellant learned to do these things from this father XXIII T2385. Appellant's father told Appellant that

Jacobs was a bad person XXIII T2387. In 2000 Jacobs went to New Horizons and was diagnosed with posttraumatic stress disorder XXIII T2387. On February 2005 Appellant and his father came to a funeral for Jacobs' mother messed upon drugs XXIII T2389. Jacobs testified Appellant knows right from wrong but does not know how to separate them XXIIIT2392. Appellant starts off with good intentions and ends up doing something bad XXIII T2392. When Appellant was away from his father he was a good son XXIII T2392. When Appellant is with his father for a long time he becomes like his father XXIII T2392.

A tape of Terry Ellerbee Sr.'s testimony was played before the jury XXIII T2397. Ellerbee Sr. is Appellant's father XXIII T2400. Appellant's brother Shane is in prison half the time XXIII T2404. Appellant was born in 1985 XXIII T2405. Appellant's mother did not want to be responsible for children and divorced because she was going to bars XXIII T245. Life was rough for Appellant because his mother wanted nothing to do with him XXIII T2406. From the age of one year old until Appellant went to school he would ride the truck with Ellerbee Sr., including diapers and bottles XXIII T2407. When Appellant was five years old he fell from a bunk bed and had to be taken to the hospital XXIII T2408. Appellant was held back in the sixth and seventh grade XXIII T2416. There was no mother figure around XXIII T2416. Appellant's mother said Appellant was bipolar XXIII T2421. A girl got appellant on drugs when he was 18 or 19 XXIII T2423. They smoked crack cocaine and she got

him started on heroin XXIII T2424. Ellerbee Sr. saw Appellant smoke meth XXIII T2424. Appellant would steal to get more XXIII T2424. Ellerbee Sr. could not reason with him -- he was just crazy with it XXIII T2424. Ellerbee Sr., had Appellant Baker acted XXIII T2425. One time Appellant came to Ellerbee's house and his eyes were in the back of his head XXIII T2425. Appellant meet a crazy girl XXIII T2428. It was Amber Reed XXIII T2428. They came into the house with a baby XXIII T2428. Appellant said he was going to adopt the baby had raise it XXIIII T2428. Ellerbee Sr. would not allow them to live in his house XXIII T2428 -- 29. Appellant was mean and hyper when on crystal meth XXIII T2430. Ellerbee Sr. visit Appellant in jail where he was more easy-going instead of crazy XXIII T2430. If sentenced to life, Ellerbee Sr. would visit Appellant every chance he gets XXIII T2431. Ellerbee Sr. should have disciplined Appellant when he first saw him with drugs XXIII T2432. A death sentence would be very hard on the father XXIII T2433. Brenda Jacobs had Appellant tested for bipolar disorder XXIV T2452. Jacobs showed classic signs of bipolar disorder XXIV T2452 -- 53. When Appellant was in jail for 72 days Ellerbee Sr. did not visit him because Appellant had to be punished XXIV T2455. Even after his release time would go by without Ellerbee Sr. seeing Appellant even though they lived in the same house XXIV T2457. Ellerbee Sr. testified that when Appellant

Rita Ellerbee is Appellant's grandmother XXIV T2465. Appellant's grandfather was an alcoholic and abusive husband and was abusive to the children XXIV T2466.

Rita took care of Appellant when he was in kindergarten XXIV T2469. Appellant's mother was a coldhearted person XXIV T2471. Rita called HRS over the way she treated her children XXIV T2471. Appellant's father hit Appellant's stepmother so that Appellant lived with Rita for awhile XXIV T2472. Appellant's father had a hard time trying to raise Appellant by himself XXIV T2473. The father was drinking too much and using drugs also XXIV T2473. Appellant had a hard time growing up because his mother would have nothing to do with him XXIV T2473. When the mother was supposed to pick up Appellant, she instead drove up and threw all his clothes in the yard and left XXIV T2474. Appellant felt like the world was against XXIV T2476.

Dr. Gregory Landrum is a clinical and forensic psychologist XXIV T2479. Dr. Landrum conceded that Dr. Riordan has additional training in the area involving brain injury XXIV T2483. Landrum interviewed Appellant two hours on June 6 and June 8 XXIV T2487. Appellant has a low average IQ of 85 XXIV T2488. Appellant has not been diagnosed with bipolar disorder and only his mother made such diagnosis XXIV T2491. People walk around with bipolar disorder who are not diagnosed XXIV T2492. In Landrum's opinion, Appellant is not bipolar XXIV T2493. Appellant has a history of a major episode of depression XXIV T2496. The episode was not followed by a manic episode needed for bipolar XXIV T2496. Landrum testified that Dr. Riordan had an axis one diagnosis of cognitive disorder XXIV T2505. Landrum opined that Appellant did, and did not, meet the criteria for cognitive disorder XXIV

T2505. A diagnosis in 1995 showed a Weichler IQ test of 80 XXIV T2505. Appellant suffered from attention deficit hyperactivity disorder XXIV T2515. Appellant does not meet the full criteria of antisocial personality disorder XXIV T2517. Appellant told Dr. Landrum on June 8 he was basically surviving with Amber Reed and the child by breaking into houses and getting provisions XXIV T2521. Appellant observed the victim's home for awhile and talked to the owner XXIV T2522. Appellant shot the dog as it was growling XXIV T2523.

Appellant felt trapped in the house when the owner arrived there was no way out and shot the gun with the intent to scare not shoot the owner XXIV T2525. Dr. Landrum did not believe there is enough information to support brain damage XXIV T2529. Landrum did not disagree there was mild brain impairment XXIV T2538.

Appellant has some memory problems and some ADHD XXIV T2542. The parent's drinking during pregnancy could have an impact on metal ability even though not full-blown fetal alcohol syndrome XXIV T2555. Landrum could rule out a cognitive disorder but could not rule in either XXIV T2537. In Landrum's opinion Appellant was not under extreme mental or emotional distress, nor was his capacity to conform conduct substantially impaired XXIV T2532-33. Landrum found mitigation in this case including Appellant's family life, rejection by his mother, physical abuse, substance abuse in the family, and the fact he was rejected and unloved XXIV T2530.

John Ellerbee is Appellant's uncle XXI T2061. Appellant came to live with John several times XXI T2064. When appellant was 10 years old his father began drinking heavily and was intoxicated a lot XXI T2065 -- 66. Appellant's father start using drugs when Appellant was in his early teens XXI T2066. Appellant's father smoked methamphetamines and crack cocaine XXI T2066. John used crystal meth on and off for two or three years XXI T2067. He was introduced to it by Ellerbee Sr. XXI T2067. When on crystal meth one has wild mood swings XXI T2067. When appellant was 12 years old John received a call to pick him up outside a crack house XXI T2069. Appellant's mother wanted nothing to do with Appellant XXI T2070. Appellant was very angry and hurt over his mother's rejection T XXI 2070. Appellant was not raised in a community with friends XXI T2070. He was off by himself all the time XXI T2070. At times Appellant was good with machinery, it depended on his personality XXI T2071. John fell like Appellant has two personalities XXI T2071. Appellant can be happy and outgoing or moody with a chip on his shoulder XXI T2072. John started seeing this when Appellant was 12 or 13 years old XXI T2072. Appellant's mother was very strange XXI T2077. She would padlock the refrigerator XXI T2077. Appellant's mother hated Appellant very much XXI T2077. Appellant suffered verbal and mental abuse XXI T2077. Appellant did not have many friends growing up XXI T2078.

Elizabeth Mowery testified that she had known Appellant since he was 12 or 13 XXI T2088. Appellant had mood swings XXI T2092. There were signs of drug use

when Appellant was 18 years old XXI T2092. Eugene Harvey testified that when Appellant was 10 years old his father would take him to a bar XXI T2100. James Brothers, a church deacon, has known Appellant for 20 years XXI T2106. Appellant showed indications of taking meth XXI T2113.

A certified copy of a conviction from Osceola County was introduced through witness Jackie Moore T XXI 2018. The document shows that adjudication was withheld XXI T2019.

Theresa Martin worked as a probation officer for DOC in the Okeechobee office XXI T2021. Martin supervised Appellant while he was on probation XXI T2023. Appellant was sentenced to probation on June 24, 2005 XXI T2024. He was given 30 months of probation XXI T2027.

TJ Brock testified that on January 20, 2006 family members of Appellant presented letters discovered in Appellant's vehicle XXI T2035. Appellant admitted to writing the letters XXI T2035. The letters were introduced as exhibits 153 through 161 XXI T2035. Brock did not know if Appellant ever committed any of the crimes related in the letters XXI T2043. Brock testified that there was nothing in the letters about Mr. Dellarco XXI T2043. Brock testified the notes could or written years prior to the incident XXI T2044.

SUMMARY OF THE ARGUMENT

1. Defense counsel offered invalid defenses to felony murder. Even if the jury believed the defense's version of the facts, they could not acquit the Appellant. Appellant was denied due process, his right to a jury trial, and effective assistance of counsel where defense counsel presented an invalid defense to felony murder.

2. The trial court erred in instructing the jury on and in finding that the killing was cold, calculated and premeditated.

3. The death penalty is not proportionally warranted in this case.

4. The trial court erred in instructing the jury on the aggravating circumstance that the victim was particularly vulnerable due to advanced age or disability.

5. The trial court erred in overruling appellant's objection to the prosecutor asking Dr. Riordan whether he called the jail and told them appellant needed psychotropic medications.

6 The trial court erred in failing to consider and evaluate statutory mitigating circumstances that were proposed by appellant.

7. The trial court erred in denying appellant's motion to suppress the evidence from red camp.

8. The trial court erred in denying appellant's motions for special verdict forms.

9. Florida Statute 921.141(d), the felony murder aggravator is unconstitutional on its face and as applied in this case.

10. The sentence of death must be vacated and the sentence reduced to life where the trial court failed to make the findings required for the death penalty.

11. It was error to use the aggravating circumstance that appellant committed the murder while on probation.

12. Florida's death penalty which does not require: the findings under Ring v. Arizona, 122 S. Ct. 2428 (2002); the jury to be properly advised of their responsibility; a unanimous jury finding for death; a unanimous jury finding of aggravating circumstances; a finding beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution**.**

ARGUMENT

POINT I

APPELLANT WAS DENIED DUE PROCESS, HIS RIGHT TO JURY TRIAL, AND EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL PRESENTED AN INVALID DEFENSE TO FELONY MURDER.

The prosecution's theory as to felony murder was that during a burglary Appellant shot Thomas Dellarco. Defense counsel argued the shooting was an accident and thus Appellant was not guilty of first degree murder under premeditation or felony murder. Specifically defense counsel argued Appellant was not guilty of felony murder because this was "an accidental shooting":

> Mr. Glenn….. 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.**
>
> ****
>
> If he intended a miss shot and pulled the trigger and there is somebody that could have been hit that's culpable negligence that is not first degree murder. **It is not felony murder.**

XX, T1924-25, 1930 (emphasis added).

Killing one during the course of a felony, whether accidental or not, constitutes felony murder. Thus, defense counsel was asking the jury to acquit based on an invalid theory of defense. Defense counsel was not intending to concede guilt. Rather, counsel mistakenly believed the jury could acquit Appellant of first degree murder if the jury believed the shooting was accidental. However, the jury could have only returned a not guilty verdict as to felony murder based on an accidental shooting if they did not follow the instructions and the law.

Defense counsel used a second invalid theory that Appellant was not guilty of felony murder. Florida law, and the jury instruction given in this case, is unequivocally clear that an act is in the course of a felony for the purpose of felony murder if it committed during the course of the felony or **in flight after** the attempt or commission XX, T1972 lines 1-4; Florida Standard Jury Instructions 7.32(2c); e.g., Hornbeck v. State, 77 So. 2d 876 (Fla. 1955). Despite well-settled law that a killing during an escape from the scene of the felony constitutes felony murder- defense counsel argued the invalid defense that Appellant was not guilty because he shot Dellarco while escaping the scene of the burglary:

> Mr. Glenn….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.**

XXV, T1925-1926 (emphasis added). In response the prosecutor correctly told the jury that the defense theory was not valid under the law:

> MR. BAKKEDAHL**… The judge will tell you what the law is.** Now, Mr. Glenn went to great lengths to discuss with you the consequences of a burglary in the course of and as a consequence of, and I'm not quite exactly sure, but I think his theory is that he had finished the burglary maybe and that the murder happened after the burglary. **But that's not what the law will tell you.** The law will tell you it is in the course of. And he was – as long as he's in that house, he is committing that burglary.

XX T1931-32 (emphasis added). The bottom line is that even if the jury believed defense counsel's version of what factually occurred they could not acquit on an invalid theory that Appellant merely shot Dellarco while escaping from his house.

The denial of due process and ineffectiveness of counsel on the face of the record may be raised on direct appeal. See Gore v. State, 784 So. 2d 418. 438 (Fla. 2001); McMullen v. State, 876 So. 2d 589, 596 (Fla. 5th DCA 2004).

Defense counsel entirely failed to subject felony murder to **adversarial testing and thus the law will presume prejudice** and deem counsel ineffective per se. Dillbeck v. State, 882 So. 2d 969, 974 (Fla. 2004) (quoting Cronic, 466 U.S. at 659,

104 S.Ct. 2039). Counsel was deficient and deprived Appellant due process, and the right to a jury trial, due to the mistaken belief he was providing a valid defense to felony murder. Appellant was deprived of a meaningful adversarial testing of his guilt and counsel was per se ineffective in the guilt phase and penalty phase.

Alternatively, under Strickland v. Washington, 466 U.S. 668 (1984), to prevail on a claim of ineffectiveness assistance of counsel, a defendant must show counsel's representation "fell below an objective standard of reasonableness." Porter v. McCollum, 130 S.Ct. 477, 452 (2009). Further, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. This standard does not require a showing that the deficient conduct "more likely than not" altered the outcome; a defendant need only establish a probability **sufficient to undermine confidence in the outcome**:

> We do not require a defendant to show "that Counsel's deficient conduct more likely than not altered the outcome" of his penalty proceeding, but rather that he establish "A probability sufficient to undermine confidence in [that] outcome." *Stricklkand*, 466 U.S., at 693-694, 104 s. ct. 2052.

Porter, 130 S.Ct. at 455-56.

The failure to present a defense may constitute ineffective assistance of counsel and a deprivation of due process. In Jackson v. State, 970 So. 2d 346 (Fla. 2d DCA 2007) on direct appeal the appellate court held there was ineffective assistance of

counsel on the face of the record when defense counsel failed to present any defense to a revocation of probation. Then-Judge Canady wrote for the court at page 347:

> "There is no plausible strategic reason for the course of action chosen by counsel. The deficiency of counsel's performance and the resulting prejudice to Jackson are manifest".

Likewise, the presentation of an invalid defense to felony murder constitutes prejudicial ineffectiveness of counsel. Because there was no verdict form specifying whether the jury's vote was based on premeditation or felony murder--the jury may have accepted the defense theory of an accident. It is known that due to counsel's mistaken belief--the jury had no choice but to convict Appellant of first degree felony murder even though they may have believed the shooting to be accidental.

The case most similar to the instant case is Chandler v. Illnois, 543 N.E. 2d 1290 (Ill. 1989). Chandler was a direct appeal of a death penalty case where the defendant defended against felony murder. In Chandler the defendant and his accomplice broke in a residence. The accomplice killed an occupant while the defendant was ransacking the residence. Defense counsel conceded the defendant entered the residence--but argued it was the accomplice, and not the defendant, who killed the victim and thus the defendant, was not guilty of felony murder. After closing argument the jury was instructed on felony murder and returned a general verdict finding the defendant guilty of 1st degree murder and burglary.

In Chandler, the Illinois Supreme Court held that defense counsel's asking the jury to acquit based on a mistaken belief that the jury could find the defendant not guilty of murder because he did not personally kill the victim was prejudicial deficient performance because the jury had no choice but to vote guilty based on the law:

> Counsel's apparent strategy was to convince the jury, in closing argument, to believe defendant's denial, in his statements to the police, of killing the victim. This strategy was the basis of counsel's deficiency.
>
> ****
>
> Defense counsel apparently **mistakenly believed** that the jury could find defendant not guilty of murder if they believed that he had not inflicted the fatal wounds to the victim. Indeed, Defense counsel concluded his closing argument by telling the jury, "I don't think if you take a realistic view of this that you can find Mark Chandler guilty of murder." The jury, however, having been instructed on both felony murder and accountability, **had no choice but to find defendant guilty** of murder, residential burglary and arson.

543 N.E. 2d at 1295-96 (emphasis added). The court noted that the ultimate error of counsel was that even if counsel had persuaded the jury as to the facts his client would still be guilty:

> The jury could have returned a not-guilty verdict on the charged offenses only if it had chosen to disregard the jury instructions. Counsel had admitted that defendant was telling the truth in his statements to the police, and that he had broken into the victim's house. The ultimate error of counsel's strategy, however, is revealed by the fact that **even if counsel had succeeded in persuading the jury that defendant did not stab the victim, the jury was still**

> **instructed to find defendant guilty of murder under the law of accountability or felony murder**.

543 N.E. 2d at 1296 (emphasis added) [1.] The court concluded that defense counsel's failure to understand the law left the case without adversarial testing and deprived the defendant of a fair trial:

> By failing to comprehend the law of accountability and felony murder, counsel's strategy and actions amounted to no real defense at all. The prosecution's case, therefore, was not subject to meaningful adversarial testing, and defendant was deprived of a fair trial.

543 N.E. 2d at 1296. In Chandler, the court reversed and remanded for a new trial. Likewise, in this case trial counsel's failure to properly comprehend felony murder resulted in Appellant having no defense at all. This cause must be reversed and remanded for a new trial.

Instead of trying to defend felony murder by using an invalid defense, counsel should have focused on valid defenses. If a defense was presented to the felony (i.e. burglary in this case), then there would be no felony murder. For example, the necessity defense is recognized in Florida. See McCoy v. State, 928 So. 2d 505 (Fla. 4th DCA 2006). Such a defense boils down to whether one is trying to prevent a harm

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[1] The court also noted that for felony murder "... it is immaterial whether the killing in such a case is intentional or accidental, or is committed by a confederate..." Id.

greater than the crime one is committing. For example, necessity might be a defense to trespass where a tornado or hurricane is present.

In the present case there was evidence that Appellant was in a "desperate" situation, starving, and in desperate need of food and supplies for a baby that was just a few weeks old XVIII T1785. The primary proceeds of the burglary were food and money, credit cards which were then first used for baby food and baby supplies. Such evidence would support a defense that it was necessary to break into Dellarco's house for the well-being of the baby, Amber Reed and Appellant. Such a defense could negate burglary which in turn would negate felony murder. See Fowler v. State, 492 So. 2d 1344, 1352 (Fla. 1st DCA 1986) (felony murder cannot stand where evidence does not support the underlying felony). Then the claim of accidental shooting would become important to the jury. However, by trying to defend felony murder with the invalid claim that an accidental shooting negates felony murder, defense counsel mistakenly deprived Appellant of a defense and adversarial testing of his case. Appellant was deprived of due process, a fair trial, a jury trial, and effective assistance of counsel contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Articles 9, 16, 17, and 22 of the Florida Constitution. The case must be reserved and remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED.

The trial court found the aggravating circumstance that the crime was committed in a "cold, calculated and premeditated" manner, hereinafter "CCP" IV R577-582. The jury was also instructed on CCP. This was error.

This aggravator "ordinarily applies in those murders which are characterized as executions or contract murders." McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). While such examples are not deemed to be all inclusive, they do represent the type of heightened premeditation and coldness required for the CCP aggravator. The instant case meets neither the spirit nor the literal requirements for this aggravator.

It was error for the trial to find CCP and to instruct and to present CCP to the jury over Appellant's objections XXIV T2570, 2572, 2600.

This court reviews the finding of an aggravator to see if the trial court "applied the right rule of law … and, if so, whether competent substantial evidence supports its finding." Diaz v. State, 860 So. 2d 960, 965 (Fla. 2003). In doing so, it examines the trial judge's specific factual findings. Id. at 967.

In order for this aggravating circumstance to apply, "heightened premeditation" is required. Jackson v. State, 599 So. 2d 103, 109 (Fla. 1992). That is, the defendant

must have had "a careful plan or prearranged design" to kill. Id. A suspicion of heightened premeditation will not be sufficient. Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988). This aggravator must be proven beyond a reasonable doubt. Lloyd, supra, at 403 (although evidence might create "suspicion" of a contract killing, the fact was established beyond a reasonable doubt). The trial court's finding CCP was legally flawed.

The conclusion of CCP in this case was based on speculation. The trial court found that Appellant was homeless and penniless with Amber Reed and a baby to care for IV R578. The trial court concluded that Appellant waited for Dellarco, approached the house, shot the dog, and entered the house and shot Dellarco because he thought Dellarco was calling 911 because he saw his dog had been shot. The trial court concluded that Appellant covered up the shooting and then made "his getaway" IV R 581. The trial court concluded this was a carefully planned lay- in- wait murder for the express purpose of living in Dellarco's house.

The trial court's conclusions are speculative, rely on impermissible stacking of inferences, and are internally inconsistent. The trial court stated that Dellarco left the residence and Appellant waited for him to return. The trial court then concluded- "Eventually Mr. Dellarco did return and the armed defendant approached his home. As he entered Mr. Dellarco's yard, the defendant shot and killed Mr. Dellarco's large dog. The defendant then entered Mr**.** Dellarco's home" IV R580 (emphasis added).

However, this portrays a different hypothesis of what occurred compared with the trial court"s later statement that Appellant "waited, hidden in a bedroom in Mr. Dellarco's home" IV R581 (emphasis added). The trial court is guessing and speculating as to what occurred -- and ends up speculating in an inconsistent way-- that Appellant followed Dellarco into the house after his return versus hiding in a bedroom upon his return. The bottom line is the trial court cannot say what happened and thus CCP is not based on substantial competent evidence. See McWatters v. State , 36 So. 3d 613, 642 (Fla. 2010) ("there simply is not enough evidence of what transpired between McWatters and Bradley to conclude that the murder was CCP"). The inconsistent guesses as to what happened cannot be used to support CCP . See Hoskins v. State , 702 So. 2d 202, 210 (Fla. 1997) ("many of the facts used by the state to support a finding of CCP are based on speculation"); Brooks v. State , 918 So. 2d 186, 206 (Fla. 2005) (aggravating factors require proof beyond a reasonable doubt, "not mere speculation derived from equivocal evidence").

The trial court also speculated that the motive for the killing was because Appellant thought Dellarco was calling the police:

> The defendant saw Mr. Dellarco come into his home and sit at the dining room table. He saw Mr. Dellarco dialing the phone. It is a reasonable inference from the evidence that the defendant thought Mr. Dellarco was calling for law enforcement via 911 because he saw his dog had been killed.

IV R581. However, there was no evidence Appellant believed Dellarco was calling the police. In fact, the state relied on Appellant's tape statement that he saw Dellarco on the phone -- but the statement refutes that Appellant believed the call was to the police -- the statement showed that Appellant knew the call was made to a disconnected number and not to the police XIX T1795. Thus, the trial court's speculation is not supported by substantial competent evidence. See Williams v. State, 37 So. 3d 187, 196-97 (Fla. 2010) (while "hasp and lock *could have* been purchased with the intent to secure the scene of the murder that had yet to occur, that conclusion is speculative" and not necessarily inconsistent with a hypothesis negating CCP).

In addition, if the speculation was true, shooting in **reaction** to a call to police is hardly a cool, calm, and calculated plan required for CCP. Moreover, standing by and watching Dellarco pick up and dial a phone-- whether the call be to police or someone else -- is inconsistent with the carefully planned lay-in-wait murder. The timing of a carefully planned murder would avoid allowing the victim in opportunity to contact anyone. For that matter, if the murder had been carefully preplanned Dellarco would have been killed earlier when it was clear that no one else was around. A preplanned murder would not have permitted Dellarco to drive off with the possibility of later returning with a potential witness.

The trial court's conclusion as to CCP is also based on the stacking of a number of inferences. The trial court speculates that Appellant's only plan was to murder

Dellarco rather than the killing occurring during the interruption of a theft -- because Appellant could have enough time to go inside the house and steal everything before Dellarco returned IV R580. However, there is not a set time limit for burglary. In this case Appellant was in Dellarco's house for approximately an hour to an hour and a half. Appellant was looking for food, money, and other items. There was evidence that food was eaten and drawers in other areas were searched. The passage of an hour or so does not convert an interrupted burglary into a preplanned murder. Assuming **arguendo** that an hour is an extraordinary amount of time to eat and then search through the house -- Appellant (with an IQ of 83) may have simply lost track of time while searching. At best, the event is susceptible to more than one interpretation. Thus, the evidence is insufficient for CCP. See Geralds v. State, 601 So. 2d 1157 (Fla. 1992) (CCP stricken—hypothesis of scouting home and victim's schedule was consistent with two theories—that defendant planned crime for when victims would be present **or** defendant planned (unsuccessfully) to avoid contact with the victims).

The trial court also inferred that this could not have been a lay- in- wait robbery - because Appellant could have easily robbed Dellarco outside his residence instead of hiding in a bedroom IV R580-81. This inference is based on another inference -- that Appellant hid in the bedroom so he could kill Dellarco. The only evidence presented as to why Appellant hid in a bedroom was that the burglary was interrupted by Dellarco's return -- not that he was in the bedroom to kill Dellarco XIX T1785, 1794. If the plan

was to kill Dellarco so that one could live in the house the killing would occur outside rather than the inside so as to mess up the house. Again, if the plan all along was to kill -- the killing would likely have occurred in the beginning and not after Dellarco had left and returned and started to call others.

The trial court also inferred a preplanned murder by inferring that Appellant "**could have"** left Dellarco alive by simply running of the house, or by tieing Dellarco, or by were striking him unconscious IV R581. However, the fact that the victim was not left alive does not prove CCP -- otherwise based on such logic every first degree murder would be CCP. The test for CCP is not whether the killing was unnecessary. The test is whether there was a careful plan, under cool and calm reflection, to kill. Moreover, it is pure speculation that bypassing the scenarios of running, tying up, or striking unconscious, demonstrated the careful plan and heightened premeditation required for CCP. Even if one does not believe the shooting was accidental and was a premeditated conscious decision to kill upon discovering that Dellarco had returned in the midst of Appellant looking for things to steal -- the scenarios of running, tying up, or striking unconscious **would also be absent**. In other words, under the facts of this case, the absence of the scenarios no more indicates CCP than it does a premeditated decision to kill upon to being discovered in the midst of a burglary. The bottom line is that the trial court impermissibly relied on, or stacked, a number of inferences for CCP. This is not substantial competent evidence of CCP.

Even if the killing was calculated, to be CCP a crime must have been cold rather than emanating from emotion. See Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) (although the killing was clearly calculated, it was not the result of "calm and cool reflection" and thus not cold). Here the evidence did not show the killing was cold. As noted by the trial court Appellant was homeless and penniless. Appellant had a baby and Amber Reed to care for. Appellant had been under the emotional stress of caring for Reed and the baby for a period of time without having the necessities to do so. Although the stress he was under may not have equated to mental mitigation, it does show that the capital offense was not done by a person with calm and cool emotions. Even the most calculated cases of preplanned murder are not cold where the defendant is in a state of emotional stress. See Cannaday v. State, 620 So. 2d 165, 174 (Fla. 1993) (where distress of the defendant had built up "over a two month period" the killing was not the result of cool deliberation and thus not CCP).

In addition an element of CCP is a lack of a legal or moral justification. "A pretense of legal or moral justification is 'any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense". Nelson v. State, 748 So. 2d 237, 244 (Fla. 1999). Appellant was seeking food and supplies for himself, Amber Reed and the baby when they were in the desperate condition which would at

the very least constituted a pretense of the legal or moral justification for the burglary in which the shooting occurred.

The trial court also referred to letters or journals, that Appellant wrote, to prove CCP -- states exhibits 155 -- 160 E 266 -- 280. The letters were found some six months prior to the shooting XXI T2035. Police testified they did not know when the letters were written XXI T2044. The letters contained absolutely no reference to Thomas Dellarco. Prior writings or statements at some undetermined time about different people are insufficient to prove CCP. See Hardy v. State, 716 So. 2d 761, 766 (Fla. 1998) (defendant sentenced for murder of deputy; "general statement made several weeks before the murder in reference to what Hardy would do if he were involved in a situation similar to Rodney King (cannot be construed) as sufficient evidence of a cold, calculated and premeditated plan"); Perry v. State , 801 So. 2d 78, 91-92 (Fla. 2001) ("Perry's statement about being able to kill someone with a knife by cutting the jugular vein **was not relevant** to proving the cold, calculated and premeditated (CCP) aggravating circumstance"); Williams v. State, 967 So. 2d 735 (Fla. 2007) (fact that Williams had previously committed extremely similar murder was not substantial competent evidence that he preplanned the instant murder); Power v. State, 605 So. 2d 856, 864 (Fla. 1992) (prearranged plan to commit similar rape of another victim could not be used to conclude CCP for capital offense of rape/murder)

The letters included: things needed for hiking and breaking into places E 268; knockovers E 280; and backup plane (sic) E 276. The things needed to break into places included guns, food, cigarettes, **black clothes, gloves, and a black mask** E 268. These clothing items show a plan not to be recognized by victims of the break-in -- a plan inconsistent with a preplanned killing because one does not need a black mask if the victim is not going to be left alive.

Knockovers is a list of 15 stores and homes that were targets E 280. Thomas Dellarco's home was not listed. Thus, the list does not support plans to commit robbery or burglary of Dellarco. The list does not support any plan to kill let alone establish CCP by showing a careful plan to kill Dellarco.

The backup plane (sic) was to have someone named **Henry,** not the victim in this case, sign a check in an amount of $150,000-$500,000 and to use Henry's credit cards E 276. This does not involve killing Dellarco. It is not analogous to the instant case. There was no attempt to have, or force, Dellarco to sign any check -- which could have been done if that was the plan. There are the words "dispose of him" (i.e.Henry), but this does not necessarily mean to kill Henry. Moreover, if it does mean to dispose of Henry's body -- it again is not relevant to CCP in this case where the body of Dellarco was never disposed of - but instead was left at the residence. In summation, the letters are so different in so many ways that they do not constitute substantial competent evidence of a careful plan to kill Thomas Dellarco.

Appellant's actions on the day the killing are also inconsistent with the alleged careful plan Dellarco and to take over his house. Appellant would not have permitted Dellarco to leave nor would he have allowed him to return and use the phone.

Appellant's actions after killing did not prove a careful plan to kill to Dellarco so Appellant could use his house. There was evidence Appellant cleaned his prints and blood. In other words, Appellant cleaned potential evidence. Appellant did not clean up the house to live in it. Dellarco's house was left in disarray with objects and cigarette butts all over the house. Also, Amber Reed's testimony that **after the killing** Appellant told her that they could live in the house does not prove a prearranged plan to kill. At best, this shows that **after** the death of Dellarco Appellant came to realize the possible opportunity to live in the house. See Power v. State, 605 So. 2d 856, 864 (Fla. 1992) (Power's after killing actions cannot be used as evidence of what occurred before the murder—"an event that occurred **after** the commission of the murder, cannot sustain the necessary findings of heightened premeditation **before** the murder). If living in the house was preplanned, Appellant, Reed and the baby could have moved in the house immediately after the shooting. Instead of bringing Reed and the baby to the house to live there – they stayed in a motel before going again to Red Camp. In fact, Appellant never attempted to live at the Dellarco house.

The error was not harmless beyond a reasonable doubt. When an error occurs in penalty proceedings, the burden is on the State to prove beyond a reasonable doubt that

the error did not contribute to the sentence. See Perry, 801 So. 2d at 91. Under the federal and state constitutions, this rule applies to errors in the finding of, and instructing on, aggravating circumstances. See Parker v. Dugger, 498 US 308, 321 (1991). See also Elledge v. State, 346 So. 2d 998, 1003 (Fla.1977) ("Would the results of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing at which the factor of the Gaffney murder shall not be considered.").

At bar the State emphasized CCP in the jury sentencing proceedings. Further, CCP has historically received significant weight. See Morton v. State, 789 So. 2d 324, 331 (Fla. 2001) ("CCP and HAC 'are two of the most serious aggravators set out in the statutory sentencing scheme.'"). Further, Appellant presented many mitigators and the jury could have reasonably voted for a life sentence without the CCP circumstance. See pages 50-55.

All of this mitigation was almost totally accepted by the trial court. More importantly, it cannot be said the jury would not have given this mitigation even more consideration and greater weight. The bottom line is that the consideration of the CCP aggravator cannot be said to have been no import to either the jury or judge in this case. Thus, the error was not harmless. The error denied Appellant due process and a

fair and reliable sentencing. Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. This cause must be reversed and remanded for a new penalty phase.

POINT III

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

"Any review of the proportionally of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). This court summarized proportionally review as a consideration of the "totality of circumstances in a case," and due to the finality and uniqueness of death as a punishment "its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So. 2d 954, 956 (Fla. 1996).

In State v. Dixon, 283 So. 2d 1 (Fla. 1973), it was made clear that similar results would be reached for similar circumstances and results would not vary based on discretion:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die this court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, Supra, can be controlled and channeled until the sentencing process becomes a **matter of reasoned judgement rather than an exercise in discretion at all.**

283 So. 2d at 10 (Emphasis added). See also Proffitt v. Florida, 428 U.S. 242, 250 and 252-53 (1976). In other words, proportionality is not left to the individual tastes of the judges but this Court reviews each case to ensure that similar individuals are treated similarly.

Under this Court's proportionality analysis, the death penalty is reserved for the "most aggravated" and "least mitigated" of murders. Cooper v. State , 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State 748 So. 2d 922, 933 (Fla. 1999):

> [O]ur 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, at 933 (emphasis added) (footnote omitted); Cooper v. State, 739 So. 2d at 85; see also, e.g., Besaraba v. State, 656 So. 2d 441, 446 (Fla. 1995) ("Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders.") (quoting Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)).

In the present case there was a burglary/killing. However, except for Appellant's statement, how it occurred is totally unknown. Appellant described it as an accidental shooting. No one described how it happened. There were no eyewitnesses. There was no forensic or expert testimony to explain what had happened. It is only known the victim was shot once in the head. Other than Appellant's statement, it is not known what occurred at the time of the shot. See

Thompson v. State, 647 So. 2d 824 (Fla. 1994) (witness elimination aggravator stricken and death ruled disproportionate where it was not known what happened during shooting); Terry v. State, 668 So. 2d 954 (Fla. 1996) (death disproportionate where although clear murder took place during robbery - the circumstances of the actual shooting were unclear).

The trial court found three aggravators. However, as discussed in Point II, the CCP aggravator does not apply in this case. Even if CCP did apply, death would be disproportionate in this case. Appellant was young (21 years old) and in a desperate situation with a baby to care for – but without the background to properly cope. Thus, this aggravator would not be as substantial as in other cases. See Johnson v. State, 720 So. 2d 232 (Fla. 1998) (while it was proper to find prior violent felony aggravator it was not as strong as in other cases when its facts were considered).

This case had significant mitigation found, or not rejected, by the trial court some of which include; childhood abuse and trauma; rejected by mother; mental health issues; low IQ (83); alcohol and drug abuse; adjustment to prison life; age (21 years old); poor self esteem; mother suffered from a mental illness; father abused mother in front of Appellant; mother was cruel and unpredictable; father abused alcohol and drugs; Appellant has a history of suicide attempts.

Although Appellant was young at the time of the capital offense, much of the mitigation related to his childhood and is particularly significant. In Eddings v.

Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982), the court made it clear that a defendant's difficult background did not have to remove criminal responsibility in order to be "a relevant mitigation factor of great weight". 102 S.Ct. at 877. "There can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant". Id.

One's background does not inevitably seal one's future--but it does create a significant risk of future criminal behavior. Some people overcome their history through their mental and emotional resiliency and/or family /therapy support while others without such resiliency and support are even more at risk. The mitigation in this case illustrates how Appellant's life was tumultuous without parental support.

(1) Childhood abuse and trauma

This mitigation was never disputed in the court below. Appellant and his siblings were beaten with an electrical cattle prod XXIII T2314, 2323. The mother was creative and would invent things such as hoses and switches to beat the children XXIII T2316. The beatings occurred every day XXIII T2316. The abuse included forcing the kids to drink castor oil and giving them nothing to eat XXIII T2319. She kept the refrigerator padlocked XXI T2077. Having a difficult, tumultuous childhood is significant mitigation. See Hegwood v. State, 575 So. 2d 170, 173 (Fla. 1991) (Hegwood's "ill-fated life appears to be attributable to his mother"). Children develop different ways of coping with hurtful experiences. Childhood abuse disrupts a child's

emotional and cognitive development. See Dorothy Otnow Lewis et. al., toward a theory of the Genesis of Violence: A follow-up study of delinquents, 28 J. Am Acad. Child &Adolescent Psychiatry 431, 436 (1989) (childhood abuse increases "risk and severity of adult violent criminality").

(2) Rejection by mother

This was undisputed. Appellant's mother wanted nothing to do with him XXIII-IV T2406, 2473. In fact, when Appellant's mother was supposed to pick him up – she instead drove up and threw all his clothes in the yard and left XXIV T2474. The lack of nurturing and protection as a child may impair psychological development so as to impair the ability throughout life to make proper judgments.

(3) Mental health issues

It was not disputed that Appellant had been Baker acted XXII T2169, 2244. Dr. Riordan administered 21 tests to Appellant. XXII T2162. Dr. Riordan's testing showed evidence of brain damage and cognitive disorder XXII T2162, 2138. Dr. Landrum acknowledged that Riordan had additional training in the area involving brain injury XXIV T2483. Dr. Landrum could not, and did not, disagree that at the very least there was mild brain impairment XXIV T2538. There was a history of head trauma that could relate to mental disorders. In addition, it has been recognized that physical abuse during childhood may damage the central nervous system. See Bruce D. Perry, Incubated in Terror: Neurodevelopment Factors in the "Cycle of violence,"

in Children in a Violent Society 124, 131 (Joy D. Osofsky ed., 1997). Appellant's mother was even able to recognize the impact of Appellant childhood and his mental status when she testified that Appellant knows right from wrong-but does not know how to separate them XXIII T2392.

(4) Low IQ

It is undisputed Appellant had a low IQ of 83. Low IQ impacts one's ability to make sound judgments. An IQ between 70 and 84 is considered as borderline intellectual functioning. See American Psychiatric Association, Diagnostic and Statistical Manual) (text rev. 4th ed. 2000) at 48 ("Borderline Intellectual Functioning (see p. 740) describes an IQ range that is higher than that for Mental retardation (generally 71-84."), at 740 ("This category [Borderline Intellectual Functioning] can be used when the focus of clinical attention is associated with borderline intellectual functioning, that is an IQ in the 71-84 range.").

Indeed, this Court, after summarizing an expert's testimony in this area, said '[b]orderline intellectual functioning is defined as a score between 70 and 84…" Johnston v. State, 960 So. 2d 757, 759 (Fla. 2006): see also Burger v. Kemp, 483 U.S. 776, 779 (1987) (noting that petitioner "had an IQ of 82"). See also Wiggins v. Smith 539 U.S. 510, 535 (2003) (noting that where the defendant had an IQ of 79, "his diminished mental capacities… augment his mitigation case").

(5) History of alcohol and drug abuse

The evidence presented showed a history of alcohol and drug abuse. In fact, it was shown Appellant had first began drinking at the age of 7 XXIII T2382. His drug abuse also began at an early age XXI, XXIII T2069, 2382. This substance abuse is an attempt to self-medicate from one's emotional, mental and physical problems. Moreover, this abuse has been recognized as impairing one's development. See Mann v. Lynaugh, 690 F. Supp. 562, 567 (N.D. Tex. 1988) (psychologist noted that drug abuse beginning at age 10 may have adversity affected development).

(6) Adjustment to prison Life

It was not disputed factually that Appellant can successfully adjust to prison. This has been noted as extremely important mitigation. Skipper v. South Carolina, 106 S. Ct. 1669, 1671 (1986) ("a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison" may be a basis for life in prison); Cooper v. Duger, 526 So. 2d. 900 (Fla. 1988).

(7) Age

Appellant was 21 years old at the time of the offense. At such a young age, and with a low IQ, Appellant did not have the time or support to mature and overcome the emotional and psychological problems emanating from his abusive and traumatic childhood. While it is true chronological age (other under 18) is not mitigating in itself, young age combined with evidence of immaturity or mental or emotional

problems will render age a mitigating circumstance. See Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998) (error to reject age of 19 where there was evidence of mental problems); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (age 21 mitigating combined with emotional immaturity); Campbell v. State, 679 So. 2d 720 (Fla. 1996)(Age 21 combined with emotional immaturity would be mitigating). The closer the age to the constitutional bar of 18, the stronger the age mitigator becomes. See Urbin v. State, 714 So. 2d 411 (Fla. 1998).

In this case, there was significant evidence supporting immaturity and mental; and emotional problems. Appellant had an IQ of 83 XXII T2157. Testing showed signs of brain damage XXII T2159-60. Appellant had been Baker acted XXII T2169, 2244. This evidence was undisputed.

As mentioned earlier there was other mitigation found by the trail court that included: history of suicide attempts; poor self-esteem; mother suffered from a mental illness; father abused mother in front of Appellant; mother was cruel and unpredictable; father abused alcohol and drugs. This was not one of the most aggravated and least mitigated cases for which the death penalty is reserved.

Proportionality review is not merely counting the quality of circumstance but involves a qualitative analysis of comparable situations. In other comparable cases, with even less mitigation, the death sentence has been held to be disproportionate.

In Johnson v. State, 720 So. 2d 232, 238 (Fla. 1998) death was disproportionate where Calvin Johnson was convicted of first degree murder, attempted first degree murder, robbery, attempted robbery and burglary Two aggravating circumstances were present - 4 prior violent felonies and during the course of a felony. These are more weighty than the aggravators *in this case*-- on probation and during the course of a felony. The evidence showed that Calvin Johnson shot the victim 3 times in the house then moved the victim to the porch and, without provocation, stood over him and shot him 5-6 more times. 720 So. 2d at 236. The accumulative effect of the wounds would cause death. Id. The circumstances in this case were less egregious that in Johnson.

Furthermore, although Johnson had similar mitigation it was less substantial than in this case. Johnson's mitigation was "he was 22 years old [Appellant was 21], troubled childhood; had young daughter, was respectful to parents and neighbors; obtained a GED, was previously employed, voluntarily surrendered to police." In Johnson death was deemed disproportionate. Likewise, death is disproportionate here. To hold otherwise would violate this Court's proportionality analysis.

In Terry v. State, 668 So. 2d 954 (Fla. 1996). Terry and Floyd were looking for a place to rob. They came to a gas station where the Francos worked. Floyd held Mr. Franco at gunpoint while Terry dealt with Mrs. Franco in a different room. Terry shot and killed Mrs. Franco. Aggravating circumstances were more weighty than in this case and included **prior violent felony**, during the course of a felony, and pecuniary

gain (merged). The mitigation was minimal compared to the instant case - good family man, poverty, emotional and developmental deprivation in childhood. This Court held that death was disproportionate. This Court emphasized that to find death proportionate there must be a "discrete analysis of the facts" 668 So. 2d at 965. This is consistent with this Court's view that the death penalty must be based on known facts and not speculation as to what occurred - otherwise Florida's utilization of the death penalty would risk being unreliable and arbitrary. Even though there was some eyewitness testimony and Floyd's confession it could not be determined what transpired immediately prior to Mrs. Franco being shot by Terry. Id.

"It is clear that the murder took place during the course of a robbery. However, the circumstances surrounding the actual shooting are unclear." Id. In this case the facts of the shooting are even less illuminated as there were no eyewitness or co-defendant confessions. In this case there was substantially more mitigation than in Terry. As in Terry, death is disproportionate in this case.

In Thompson v. State, 647 So. 2d 824 (Fla. 1994) the defendant was convicted of killing a subway sandwich shop owner, by a single shot to the head, during a robbery. The trial court found three aggravators-during the courses of a robbery; witness elimination; and CCP. Again, the aggravators were more weighty than in this case. The avoid arrest aggravator was reversed because it was not known what occurred during the shooting.

Death was found disproportionate with mitigation showing Thompson was a good parent, was honorably discharged from the Navy, was a good prisoner, had artistic skills, and had been employed. The instant case has much more mitigation.[2] Death is disproportionate. Appellant's death sentence should be vacated and remanded for imposition of a life sentence.

[2] The mitigation in this case is similar, although more extensive, than in Williams v. State, 707 So. 2d 683 (Fla. 1998) - good behavior awaiting trial, GED while in jail, capacity for rehabilitation, found religion in jail and involved in ministry capacity to work hard, 18 years old. Williams was another case where a shooting occurring during a robbery and death was deemed disproportionate

POINT IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE VICTIM WAS PARTICULARLY VULNERABLE DUE TO ADVANCED AGE OR DISABILITY.

Appellant objected to the trial court instructing the jury on the aggravating circumstance that the victim was particularly vulnerable due to advanced age or disability XXIV T2593-600. The trial court overruled the objection and instructed the jury on the vulnerable victim aggravator XXIV T2600. This was reversible error.

The evidence showed that t Thomas Dellarco was 72 years old and had arthritis, gout and some vision problems. There was other evidence that Dellarco had lived with a roommate until 3 months before the shooting XV T1290-91. Dellarco lived alone. His home was immaculate. He took care of 6 dogs. He was able to drive himself.

For the vulnerable victim aggravator to apply the person must not merely be advanced age or merely vulnerable-the victim must be particularly vulnerable due to advanced age or disability, See Francis v. State, 808 So. 2d 110, 139 (Fla. 2001). In the present caser Mr. Dellarco was not particularly vulnerable and this the aggravator does not apply.

Only two cases of this Court have specifically dealt with whether the vulnerable victim aggravator has been met. In Francis v. State, 808 So. 2d 110 (Fla. 2001) 66 year old women who lived active lives and took care of themselves were not

particularly vulnerable. The other case was Woodel v. State, 985 So. 2d 524 (Fla. 2008). In Woodel the victim was a 74 year old woman who had broke her left arm in a serious accident which resulted in limited motion and strength. 985 So. 2d at 531. The victim suffered 56 cuts or stab wounds many of which were to her right arm. Id. at 526. These were defensive wounds. Thus, there was classical evidence of particular vulnerability – she could not defend with her left arm and was only able to defend with her right arm.

Mr. Dellarco was able to take care of 6 dogs and himself. He was not particularly vulnerable as was the victim in Woodel. It was error to instruct on the vulnerable victim aggravating circumstance. The error cannot be deemed harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) -- especially where the jury is not guided by instruction as to what makes a victim vulnerable. The jury could improperly overly rely on age to make its determination. Furthermore, the error cannot be deemed harmless where the jury could find significant mitigation. See Points II and III. The error may have impacted the balancing of the aggravators against mitigators with a thumb placed on the aggravator side. The error denied Appellant due process and a fair and reliable sentencing. Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. This cause must be reversed and remanded for a new penalty phase.

POINT V

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR ASKING DR. RIORDAN WHETHER HE CALLED THE JAIL AND TOLD THEM APPELLANT NEEDED PSYCHOTROPIC MEDICATIONS.

Dr. Riordan is a psychologist who testified to Appellant's mental health status before and at the time of the killing. The prosecutor asked Dr. Riordan if it was mitigating that Appellant has bipolar disorder and was deprived medical treatment at the jail XXII T2261. Then over Appellant's objections, the prosecutor was permitted to ask Riordan whether he called the jail and informed them that Appellant needed psychotropic medications XXII T2261-65. Defense counsel argued that it was irrelevant and that the prosecutor was accusing Riordan of unethical behavior XXII T2263. The prosecutor argued that the question went to bias because if Riordan thought Appellant had a bipolar disorder he would call the jail and tell them the medications to give XXII T2263-64. The trial overruled the objection and Riordan testified he did not contact the jail about medications needed by Appellant XXII T2264-65. This was reversible error.

It is irrelevant that Riordan did not contact the jail about placing Appellant on medications. Riordan is a psychologist and **not** a medical doctor and thus cannot legally prescribe medications. Moreover, Riordan is not even a treating psychologist

let alone a treating physician. Recommending medications is **not** in Riordan's field. Riordan's field is to observe and report – it is not to treat. As a non-treating psychologist, Riordan would face potential legal and financial liability problems for even recommending medications – a type of liability that is not insured for. Riordan's involvement in the treatment of Appellant is not relevant or proper.

The error cannot be deemed harmless. Dr. Riordan opined that Appellant suffered mental disorders. Although Dr. Landrum did not fully share these opinions, Landrum acknowledged that Dr. Riordan was better suited to make these conclusions XXIV T2483. However, the prosecutor attacked Dr. Riordan based on the improper question about contacting the jail about medications:

> Mr. Bakkedahl…. What did Riordan find as mitigating. **This is important**. These are mitigators that fall within this fifth one. **And this goes directly to his credibility.** The defendant was deprived the medication at the jail for his previously diagnosed bipolar disorder. Number one, he never was previously diagnosed, and Number two **and more importantly, if he thought the defendant suffered from bipolar, why he didn't tell the jail; give him something for his bipolar disorder, which he didn't.** Doesn't that strike anybody as a little odd? If he truly believed he suffered from bipolar, **he would have said to the jail staff, you need to treat this guy,** he's got bipolar disorder. **He doesn't do it.**

XXV T2649 (emphasis added). The error denied Appellant due process and a fair and reliable sentencing. Fifth, Sixth, Eighth and Fourteenth Amendments to the United

States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. This cause must be reversed and remanded for a new penalty phase.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND EVALUATE STATUTORY MITIGATING CIRCUMSTANCES THAT WERE PROPOSED BY APPELLANT.

In sentencing order the trial court did not consider or evaluate any statutory mitigating circumstances but merely stated-"The Defense presented no statutory mitigating factors" IV R585.

In this case, the defense had had specifically requested that the jury be instructed on the statutory mitigators of: age, extreme mental or emotional disturbance, no significant criminal history XXIV T2582-2585. The trial court granted the defense requests and instructed the jury on the statutory mental mitigators XXIV T2583-2585: XXV T2709-10. It was reversible error for the trial court to fail to consider the statutory mitigating circumstances.

At one point in time, that trial courts were required to consider any mitigating evidence in the record. However, this no longer is true. In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this court indicated that the trial court must consider and evaluate any mitigating circumstances proposed by the defense. In other words, it was not reasonable to require the trial court to dig into the record to ascertain possible mitigation that was never even mentioned by the defense. That is not the situation here where defense counsel specifically identified the mitigation he wanted by requesting

the jury be instructed on the mitigation. It was error for the trial court not to consider and evaluate this mitigation.

The error was not harmless. The ignored statutory mitigation was important and supported by evidence. For example, the age mitigator was important and supported by evidence. Appellant was 21 years at the time of the offense, While it is true chronological age (other than under 18) is not mitigating in itself, young age combined with evidence of immaturity or mental or emotional problems will render age a mitigating circumstance. See Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998) (error to reject age of 19 where there was evidence of mental problems); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (age 21 mitigating combined emotional immaturity); Campbell v. State, 679 So. 2d 720 (Fla. 1996)(age 21 combined with emotional immaturity would be mitigating). The closer the age to the constitutional bar of 18, the stronger the age mitigator becomes. See Urbin v. State 714 So. 2d 411 (Fla. 1998). In this case, there was significant evidence supporting immaturity and mental and emotional problems. Appellant had an IQ of 83 XXII T2157. Testing showed signs of brain damage XXII T2159-60. Appellant had been Baker acted XXII T2169. This evidence was undisputed. There was other evidence supporting immaturity and mental and emotional problems. Even if it were in dispute-it would not make the error of failing to consider and evaluate the statutory mitigating circumstance of age harmless.

It was also harmful error not to address the other statutory mitigating circumstances that were not addressed by the trail court. The failure to address the statutory mitigating circumstances denied Appellant due process and a fair reliable sentencing in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I Sections 2, 9, 16 and 17 of the Florida Constitution.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE FROM RED CAMP.

Appellant moved to suppress evidence from the search by police of the structure name Red Camp, where Appellant resided SRIII T201-202. The trial court denied the motion V R636-637. This was error.

The trial court has discretion in making factual findings. The search of Red Camp by police was done without a warrant. A key issue was whether Appellant had an expectation of privacy in Red Camp.

Evidence showed that Appellant resided at Red Camp Helen Brown indicated that she owned land upon which the structure was located SRIII, T199-200. However, Brown did not know the structure that was searched even existed SRIII, T200.

There was no evidence presented that anybody had a superior interest in the structure to Appellant. Despite being explicitly told by the prosecutor that Mrs. Jones had nothing to do with Red Camp[3] – the trial court ruled that Jones had not given permission for Appellant to be at Red Camp and thus Appellant had no right to be at Red Camp:

[3] Mr. Albright: As to Number two, the red camp, just to clarify for the Court, because I know it's been **a while, the camp that Ms. Jones just testified to that RV, is not the red camp at issue.**

> First there is no evidence that either the Ford Explorer or "Red Camp" belonged to the defendant. In fact, the evidence is to the contrary. Ms. Reed took the Explorer with Ms. Hutchinson's consent, but did not return it timely. It was reported as stolen and later found abandoned. Ms. Hutchinson, who had kicked the defendant out of her residence prior to Ms. Reed using the car never, gave this defendant permission to use or have her car.
>
> Likewise, **this defendant had no permission either express or implied from Ms. Jones to be in or on her property at the "Red Camp".** Even Ms. Reed had no permission to be in or on this property. At a minimum, both were trespassers on this property.

V R636 (Emphasis added). The trial court's order was flawed where Ms. Jones was the owner of a trailer – but was not the owner of the structure known as Red Camp that was the subject of the search. Thus, the trial court erred in denying the motion to suppress.

The error cannot be deemed harmless. As a result of the search police found Dellarco's Bank of America visa card XVII T1515-16, 1518-19, and other incriminating evidence which was emphasized to the jury as evidence of guilt. This cause must be reversed and remanded for a new trial.

VI T25 (emphasis added).

POINT VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR SPECIAL VERDICT FORMS.

Appellant requested special verdict forms for the guilt phase of the trial XX T1911. Appellant's motions were denied XX T1911. This was error. In this case the jury returned a general verdict of guilt. Because of the denial of a special verdict it was not known how many, if any, jurors voted for a theory of premeditation or felony murder.

This is a death penalty case. Accordingly, heighten standards of due process apply. See Elledge v. State, 346 So. 2d 998 (Fla. 1977) ("heightened" standard of review), Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), Proffitt v. Wainwright, 685 F. 2d 1227, 1253 (11th Cir. 1982) ("reliability in the fact-finding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 65L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187, 96 S. Ct. 2909 (1976) (plurarity opinion) (citing cases).

While the jury was instructed its finding of guilt must unanimous, it was never required to unanimously agree on precisely what Mr. Ellerbee was guilty of: premeditated murder or felony murder based on burglary.

The Court has "declared that there do exist size and unanimity limits that cannot be transgressed if the essence of the jury trial right is to be maintained." Brown v. Lousiana, 447 U.S. 323, 331 (1980). A requirement of jury unanimity on the "verdict" misses the constitutional mark where the jury is instructed on two theories and its verdict is a general one. In such cases, as here, the jury was not required to find the defendant guilty of a single, cognizable incident or "conceptual grouping." See United States v. Acosta, 7148 F. 2d 577, 582 (11th Cir 1984); United States v., Gipson, 533 F. 2d 453, 458 (5th Cir. 1977). As the Court explained in Scarborough v. United States, 522 A. 2d 869 (D.C. Ct. App. 1987) (en banc):

> [T]he unanimity issue under a single count of an information or indictment does not turn only on whether separate criminal acts occurred at separate times (although in some cases it may); it turns, more fundamentally, on whether each act alleged under a single count was a separately cognizable incident—by reference to separate allegations and/or to separate defenses—whenever it occurred.

In Schad v. Arizona, 111 S. Ct. 2491 (1991) specific jury verdicts were not required. However, with the advent of Ring v. Arizona, it is now clear there must be specificity in jury determinations to determine if a defendant is death eligible. General

verdicts are no longer sufficient when the state proceeds on multiple theories of first degree murder. A general verdict does not give sufficient information about the jury's findings to prove a proper premise for the decision of whether or not to impose the death penalty. The error denied Appellant due process and a fair trial. Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I Sections 9 and17 of the Florida Constitution. This cause must be reversed and remanded for a new trial.

POINT IX

FLORIDA STATUTE 921.141 (d), THE FELONY MURDER AGGRAVATOR IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Florida Statute 921.141(5) violates both the Florida and United States Constitutions. The use of this aggravator renders Appellant's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 12, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant filed a motion to declare this aggravator unconstitutional. The trial court denied the motion. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator.

Aggravating circumstance (5) (d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual batter, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree statute. Fla. Stat. 784.04(1)(a)2.

The decisions of the United States Supreme Court have made clear that under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutionals. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2743, 77 L. Ed.2d 235, 249 (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra, at 2742, 77 L.Ed.2d at 249-250.

It is clear that the felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation". See Fla. Stat. 921.141(5)(I). Rogers v. State, 511 So. 2d 526 (Fla. 1987). It is completely irrational to make a person who does not kill and/or intent to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. It is clear that this aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant, supra.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992); Tennessee v. Middlebrooks, 113 S. Ct. 1840 (1993) (granting certiorari); Tennessee v. Middlebrooks, 114 S. Ct. 651 (1993) (dismissing writ of certiorari as improvidently granted).

In State of North Carolina v. Cherry, 257 S.E.2d 551, the Supreme Court of North Carolina held that when a defendant is convicted of First Degree Murder under the felony rule, the trial judge is not to submit to the jury at the penalty phase of the trial, the aggravating circumstance concerning the underlying felony. The Court in Cherry held that:

> We are of the opinion, that nothing else, appearing the possibility that the defendant convicted of felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to an "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the Statute we hold that when a defendant is convicted of First Degree Murder under the felony murder rule, the trial judge shall not submit to the jury, at the sentencing phase of the trial, the aggravating circumstances concerning the underlying felony.

The North Carolina Supreme Court state in Cherry that once the underlying felony has been used to obtain a conviction of First Degree Murder, it has become an element of that crime and may not thereafter be the basis for additional prosecution of Cherry. 257 S.E.2d at 567.

This Court should follow these courts and declare this aggravator unconstitutional pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

POINT X

THE SENTENCE OF DEATH MUST BE VACATED AND THE SENTENCE REDUCED TO LIFE WHERE THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY.

The legislature has made it clear under § 921.141(3) of the Florida Statues that if the trial court is to sentence a defendant to death it "shall set forth in writing its findings" that (1) sufficient aggravating circumstances exist to justify the death penalty and (2) there are insufficient mitigating circumstances to outweigh the aggravating circumstances. The legislature directed in § 941.141(3) that if the trial court "does not make the findings requiring the death sentence" within 30 days -- a life sentence must be imposed. In this case, the trial court did file the sentencing order within 30 days, however, the order does not contain "the findings requiring death." Thus, Appellant's death sentence must be vacated.

As noted above, there are two specific findings "requiring the death sentence." One is a finding that "sufficient aggravating circumstances exist" to justify the death sentence. The trial court never made this required finding -- instead it skipped this step and merely weighed the aggravating circumstances against the mitigating circumstances IV R594. The failure to make the required finding that sufficient aggravating circumstances exist requires vacating the death sentence and imposition of a life sentence.

POINT XI

IT WAS ERROR TO USE THE AGGRAVATING CIRCUMSTANCE THAT APPELLANT COMMITTED THE MURDER WHILE ON PROBATION.

In sentencing Appellant to death, the court found, as an aggravating factor, that he committed the murder while "under a sentence of imprisonment or placed or community control or on felony probation." §921.141(5)(a), Fla. Stat. (2008) The defendant was on felony probation for the offense of burglary on Adjudication was withheld. This aggravating factor was given great weight. It was error to use this aggravating factor because there was no link or nexus between his status of being on probation and the murder. The error denied Appellant due process and a fair and reliable sentencing. Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. This Court should review this issue under a de novo standard of review.

The "under sentence aggravator," as originally adopted from the Model Penal Codes death penalty sentencing scheme provided only that persons under a sentence of actual imprisonment were eligible for a death sentence if they committed a capital murder while in prison. American Law Institute Model Penal Code §210.6 (1962). Obviously, its purpose was to deter persons in prison from killing under the reasoning that an inmate who faced no possible death sentence if he or she killed someone would have no reason not to do so. That is, for example, without this aggravator a person

already serving a life sentence would have no reason not to kill another inmate or guard because they could get only a life sentence. Such punishment for committing a first-degree murder would prove no deterrent to someone already facing life in prison. Hence, death has to be available to deter inmates from committing prison murders.

In 1996, the Florida legislature amended §921.141(5)(a) by adding to the under sentence aggravator, whether the defendant was on community control or probation. Trotter v. State, 690 So. 2d 1234, 1237 (Fla. 1996). The reason for doing so, however, is far less compelling than the original statute. That is, persons on probation have other reasons for not committing a first-degree murder than facing a death sentence. Namely, their probation can be revoked, and sentencing a person to prison, even for life, can be a powerful deterrent. Moreover, if most first-degree murders are not death worthy, Proffitt v. State, 428 U.S. 253 (1976), that punishment, harsh as it is, is more realistic and hence of more deterrent value than the remote possibility of a death sentence. Hence, if, as in this case, the State wanted to use, and the court found that the defendant committed a capital murder while on probation, there should be especially strong evidence that the defendant committed the murder because he or she were on probation. Without such compelling proof, there is no reason to believe a defendant committed the murder because he was under some sentence of imprisonment. As such, if this Court approves this aggravator in this case, then it is justifying a death sentence simply because of Appellant's status, without that status doing anything to

substantially justify that punishment. Zant v. Stephens, 456 U.S. 410 (1982) (aggravators must genuinely narrow the class of persons eligible for a death sentence.)

This approach has some precedence in the way this Court has considered the "avoid lawful arrest" aggravator. §921.141(5), Fla. Stat. (2008). As originally intended this aggravator sought to deter persons who killed police officers. Riley v. State, 366 So. 2d 19, 22 (Fla. 1978). It had a broader application, however, if it was shown that the "dominant purpose" of the murder was to avoid lawful arrest. To establish this aggravator "the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness." Connor v. State, 803 So. 2d 598, 610 (Fla. 2001). This Court has frequently rejected a lower court's finding this aggravator because the State had failed to carry this heavy burden of proof. Zack v. State, 753 So. 2d 9 (Fla. 2000); Consalvo v. State, 697 So. 2d 805 (Fla. 1996). In this case, there is no evidence Appellant killed because he was on probation.

In Tafero v. State, 403 So. 2d 355 (Fla. 1985), Jessie Tafero was on parole when he killed two police officers who had stopped him. In explaining why he murdered them, the defendant said he did so because he would never go back to prison. As a parolee that was strong evidence that he had committed the murder because of his status. Thus, the "under sentence of imprisonment" aggravator would have been proven. Because similar type evidence was missing in this case, this Court should find that the lower court improperly instructed the jury on and found that aggravating

factor. It should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

POINT XII

FLORIDA'S DEATH PENALTY WHICH DOES NOT REQUIRE: THE FINDINGS UNDER RING V. ARIZONA, 122 S. CT. 2428 (2002); THE JURY TO BE PROPERLY ADVISED OF THEIR RESPONSIBILITY; A UNANIMOUS JURY FINDING FOR DEATH; A UNANIMOUS JURY FINDING OF AGGRAVATING CIRCUMSTANCES; A FINDING BEYOND A REASONABLE DOUBT THAT AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This court has indicated it has not ruled on whether Ring v. Arizona, 122 S. Ct. 2428 (2002) applies in Florida. State v. Steele, 921 So. 2d 538, 540 (Fla. 2005) ("...this court has not yet forged a majority view about whether Ring applies in Florida'); but see Coday v. State, 946 So. 2d 988, 1005 (Fla. 2006) (stating in Steele this court determined Ring did not apply in Florida). In Steele this court made it clear that in order "to obtain a death sentence, the state must prove beyond a reasonable doubt at least one aggravating circumstance." 921 So. 2d at 543. In other words, the fact finder must find at least one aggravating circumstance - otherwise the maximum sentence that can be imposed is life in prison. In Cunningham v. California, 127 S. Ct. 856 (2007) the court emphasized the Federal Constitution right to a jury trial requires juries to find facts noting "the relevant 'statutory maximum' ... is not the maximum sentence a judge may impose after finding of additional facts, but the maximum he

may impose without any additional facts". Thus, aggravating circumstances must be found by the jury otherwise the maximum punishment is life in prison. Ring clearly applies to Florida's death penalty scheme.

Also, the Eighth Amendment requires "heightened reliability... in the determination whether the death penalty is appropriate..." Sumner v. Shuman, 483 U.S. 66, 72, 107 S. Ct. 2716, 97 L.Ed. 2d 56 (1987).

1. Due process was violated where the jury was not properly advised of their responsibility.

In this case the jury was constantly told its decision was "advisory" and the trial court would be making the sentencing decision. It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. See Caldwell v. Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) (wherein the Court stated that the jury must be fully advised in the importance of its role and neither comments not instructions may minimize the jury's sense of responsibility for determining the appropriateness of death).

The comments and instructions which would leave the jury to believe that their decision is advisory violates Appellant's right to receive due process of law and a fair proceeding under the Fifth, Sixth, and Fourteenth Amendments to the united States Constitution and Article I Sections 8, 16 and 17 of the Florida Constitution.

2. Due process and the right to a jury trial were violated without the jury finding "sufficient aggravating circumstances" exist.

The Florida Legislature has not proclaimed the finding of one aggravating circumstance is sufficient to exceed a life sentence. Rather, the Legislature requires that "sufficient aggravating circumstances" exist. §921.141. A finding of one aggravating circumstance is not enough. There must be a finding of sufficient aggravating circumstances. Thus, the fact Appellant was found guilty of felony murder does not waive his rights to have the jury determine whether "sufficient" aggravators exist. The felony murder aggravator may not be "sufficient "to justify the death sentence. In fact, the death penalty has not been upheld in Florida when felony-murder is the only aggravator. See Jones v. State, 705 So. 2d 1364 (Fla. 1998); Williams v. State, 707 So. 2d 683 (Fla. 1998).

3. Due process and the right to a jury trial is violated where Florida allows a jury to decide aggravators exist and to recommend a death sentence by a mere majority vote.

As this court noted in Steele, Florida is the only state that allows a jury to decide aggravators exist and to recommend a sentence if death by a mere majority vote. 921 So. 2d at 548. This violates both Ring and the right to heightened reliability of the Eighth Amendment that other states require. In deciding cruel and unusual punishment

claims, the practice of other states will be reviewed. See e.g., Solem v. Helm, 103 S. Ct. 3001 (1983); Thompson v. Oklahoma, 108 S.Ct. 2687 (1988).

This court explicitly recognized that the jury is free to mix and match aggravating circumstances without deciding unanimously, or even by a majority, the particular facts upon which it is choosing death:

> Under the law, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statue, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, see § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, see §921.141(5)(f), because seven jurors believe that at least one aggravator applies.

921 So. 2d at 545. Again, this violates both Ring and the Eighth Amendment right to heightened reliability.

> **4. Due process is violated where the jury does not have to find aggravators outweigh mitigators beyond a reasonable doubt.**

In State v. Wood, 648 P.2d 71 (Utah 1981), cert. denied, 459 U.S. 980 (1982), the Utah Supreme Court held that the certitude required for deciding whether the aggravating factors outweighed the mitigating factors was beyond a reasonable doubt:

> The sentencing body, in making the judgment that aggravating factors "outweigh,: or are compelling than, the

> mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances.

648 P. 2d at 83-84.

In State v. Rizo, 833 A. 2d 363 (Conn. 2003), the Connecticut Supreme Court recognized that the reasonable doubt standard was appropriate for the weighing process:

> Imposing the reasonable doubt standard on the weighing process, moreover, fulfills all of the functions of burdens of persuasion. By instructing the jury that its level of certitude must meet the demanding standard of beyond a reasonable doubt, we minimize the risk of error, and we communicate both to the jury and to society at large the importance that we place on the awesome decision of whether a convicted capital felony shall live or die.

833 A. 2d at 407 (emphasis added). The court recognized that the greater certitude lessened the risk of error that is practically unreviewable on appeal:

> ....in making the determination that the aggravating factors outweigh the mitigating factors and that the defendant shall therefore die, the jury may weigh the factors improperly, and may arrive at a decision of death that is simply wrong. Indeed, the reality that, once the jury has arrived at such a decision pursuant to proper instruction, that decision would be, for all practical purposes, unreviewable on appeal save for evidentiary insufficiency of the aggravating factor, argues for some constitutional floor based on the need for reliability and certainty in the ultimate decision-making process.

833. A.2d at 403 (emphasis added). Finally, the court reversed the death sentence for failure to instruct that the aggravators must outweigh the mitigators beyond a reasonable doubt:

> Consequently, the jury must be instructed that it must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that, therefore, it is persuaded beyond a reasonable doubt that death is the appropriate punishment in this case. In this regard, the meaning of the "beyond a reasonable doubt" standard, as describing a level of certitude, is no different from that usually given in connection with the questions of guilt or innocence and proof of the aggravating factor.
>
> The trial court's instructions in the present case did not conform to this demanding standard. We are constrained, therefore, to reverse the judgment of death and remand the case for a new penalty phase hearing.

833 A. 2d at 410-11. Likewise, the fact finder in this case must have been persuaded beyond a reasonable doubt that the aggravators outweighed the mitigators. Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution; Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant's sentences must be vacated.

CONCLUSION

Based on the foregoing facts authorities and argument and authorities cited therein, Appellant respectfully submits this Court should vacate the convictions and sentences, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellant's Initial Brief has been furnished to Lisa Marie Lerner, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by U.S. Mail this _____ day of November, 2010.

_____
Jeffrey Anderson
Attorney for Appellant

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that Appellant's Initial Brief has been prepared with 14 point Times New Roman type, in compliance with a *Fla. R. App. P*. 9.210(a)(2), this _____ day of November, 2010.

_____
Counsel for Appellant