IN THE SUPREME COURT OF FLORIDA

ROBERT EARL PETERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC10-274

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, ROBERT EARL PETERSON, was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal consists of 25 volumes, which will be referenced according to the respective Roman numeral designated in the Index to the Record on Appeal. "IB" will designate Appellant's Initial Brief. All citations are followed by any appropriate page number.

STATEMENT OF THE CASE

The State charged Appellant by indictment with one count of first-degree murder, one count of possession of a firearm by a convicted felon, and one count of destruction of evidence (IV 681). Appellant filed, among other pretrial motions, two motions to suppress statements made in recorded conversations (XIV 2664, 2668). After hearing (XVIII 3279-3367), both motions were denied (XVIII 3367). Appellant also filed a motion to declare Florida's capital sentencing procedure unconstitutional under *Ring v. Arizona* (XII 2327), which the trial court denied (XXIV 14). Appellant proceeded to trial on the murder and destruction of evidence charges, and the jury convicted him as charged (XV 2812-14). The jury also found that Appellant discharged a firearm during the commission of the murder (XV 2812-13). Appellant

proceeded to penalty phase, after which the jury recommended death by a vote of 7-5 (XVI 3003). The court conducted a *Spencer*[1] hearing, and then imposed a sentence of death. (XVII 3125-35). The court found the following aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification; and (3) the murder was committed for pecuniary gain. The court considered and weighed two nonstatutory mitigators: (1) defendant's history of drug abuse (slight weight); and (2) defendant's positive qualities, including (a) skills as a mechanic (minimal weight); (b) defendant was a good son (unproven); (c) serious negative impact of a death sentence on others (no weight); (d) defendant was a good friend (very slight weight); (e) defendant contributed to his community (slight weight); (f) defendant has been an exceptional inmate (very slight weight); (g) defendant exhibited good and mannerly behavior throughout the court proceedings (no weight); (h) defendant is amenable to rehabilitation and a productive life in prison (not established) (XVII 3130-34). This appeal follows.

STATEMENT OF THE FACTS

Appellant and Roy Andrews were stepfather and stepson (XXI 451). At the time of the murder, Appellant's regular source of income was his mother, Patricia Andrews (Roy's wife) (XXI 456).

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

Roy was angry at Appellant over the money Patricia was giving to Appellant (XXI 461-62). Patricia Andrews paid Appellant's child support of $350 a month, and had given him about $25,000 over the course of a year, in addition to $10,000 that Appellant claimed he spent on a drug deal (XXII 709-10). In early July, 2005, Appellant had been living with his mother, Roy kicked him out of the house out and told Patricia not to give Appellant more money (XXI 529). At the time, Appellant was 41 years old (XXII 658).

On July 3, 2005, Appellant went to the home of his aunt Laverne Rundall (Patricia's sister, who was married to Roy) (XXI 451, 454). Appellant told Rundall that Andrews "calls my mama names" and "calls her fat"and that this made Appellant want to "jump across the table and beat him to death" (XXI 455). Appellant also told his cousin, Becky Price, around the same time that he was going to kill Roy Andrews (XXI 530). Later in July Appellant went to Price's apartment, upset that his mother would not give him money because Roy had told her not to (XXI 531). Appellant again said that he was going to kill Roy.

About a year before the murder in this case, Appellant had dated Cheryl Greer (XXI 415-16, 423, 453). She had been killed after being struck by a car (XXI 416). Greer was buried in Greenlawn Cemetery (XXI 453).

Clara Keene had been dating for three weeks to a month on August 8, 2005 (XXI 415). At that time she was living with Appellant in a Master's Inn hotel room (XXI 418). Keene owned a green Chevrolet Cheyenne pickup truck with mud tires, larger

tires than stock (XXI 417). Keene had given Appellant the keys to the truck prior to August 8 (XXI 418). Appellant left the room early on the morning of August 8, before Keene awoke (XXI 419). Around 10:30 that morning Appellant called Keene to let him in, telling her that he had forgotten his key (XXI 420). Appellant looked worried and upset (XXI 421). Keene never saw her truck again (XXI 419). Police efforts to locate the truck were also unsuccessful (XXI 444-45).

Security video showed that Appellant left his motel room at 6:01 a.m. on August 8 (XXI 434, Exhibits 70-71). Appellant was wearing jeans, shoes, a jacket, and a hat. Id. Appellant left the building at 6:02 a.m. (XXI 436). At 10:11 a.m., Clara Keene is seen leaving her room, and at 10:13, she lets Appellant into a side entrance of the hotel (XXI 436-37). Appellant was wearing a different shirt, no jacket, no undershirt, no shoes, and no hat (XXI 437).

At the time of the murder Roy Andrews worked at the Jax Metro Clinic (XX 279). On August 8, 2005, Andrews came to work at about 4:45 a.m. in his green pickup truck (XX 279-280). Andrews left work at about 9:30 a.m. (XX 281).

Sometime between 9:00 and 10:00 a.m., Darrell Harvey and Billy Stevenson heard two gunshots coming from Greenlawn Cemetery (XX 292, 302). After that, the two men heard a loud engine roar and saw a green pickup truck with tires bigger in the back than the front backing up fast and left the back of the cemetery (XX 292-94, 303-04). The truck was a green GMC (XX 371). One white

male was in the truck (XX 296, 304). When police came to speak with Harvey, he noticed a different green pickup truck at the cemetery with its doors open (XX 295).

A cemetery maintenance worker saw a truck sitting on the side of a road in the cemetery with a person laying on the ground and told his supervisor (XX 321). The supervisor investigated and believed the person was dead, and told his manager to call the police (XX 313-14). The supervisor estimated that this occurred at about 9:45 a.m. (XX 313). The responding officer found that the man did not seem to be alive (XX 328). The officer see a baseball cap on the ground near the driver's side of the truck (XX 329). The man in the truck was Roy Andrews (XX 337).

Andrews had multiple blunt force injuries to his head sustained around the time of death that were consistent with brass knuckles, as well as injuries on his hands that were consistent with defensive wounds (XXI 476-80). Andrews also had two gunshot wounds, both contact wounds, both sustained when he was still alive, both fatal (XXI 480-85). Andrews had $1100 in cash on him (XX 372)

After Andrews' family was notified of the murder, Appellant told his aunt Laverne Rundall that "they're going to find my fingerprints in Roy's blood in the truck" (XXI 457). Appellant explained that Andrews had a "nose gush" of blood and that Appellant had helped him clean it up. *Id.*

As of August 10, the Sheriff's Office had not released any information regarding the time of the murder, the number of gunshots involved, the fact that Andrews had been severely beaten (XXI 441-42).

On August 10, police arrested Jimmie Jackson for driving with a suspended license (XXI 587-89). Jackson agreed to allow police to record phone calls with Appellant (XXI 590). During the calls, Jackson and Appellant agreed to meet at 10:45 that morning (XXII 605-613). Police placed recording devices in Jackson's truck and on his person in preparation for the meeting between Jackson and Appellant (XXI 590-91). Jackson and his truck was searched prior to placing the recording devices in the truck (XXI 590). Police surveilled the location of the meeting (XXI 591. Appellant arrived at the location and got into Jackson's truck (XXI 592-93). Police listened to the conversation as it occurred 620).

During the recorded conversation, Appellant described in detail how he killed Roy Andrews.[2] Appellant flagged down Andrews on Emerson Street, walking along it like his truck had broken down (XVI 3088). Andrews drove Appellant to the cemetery and beat him with brass knuckles (XVI 3088). Appellant was trying to knock Andrews out to take him somewhere, but Andrews would not pass out, so Appellant shot him twice with a

[2]This account is taken from the transcript that was given to the jury rather than the actual trial transcript, because the trial transcript contains several gaps where the recording was inaudible to the court reporter.

pistol in the face (XVI 3088-89). Appellant said that this occurred at 9:45 a.m. (XVI 3080). Appellant said that Andrews landed on the grave of Cheryl Greer, that he "stacked them double" (XVI 3090).

Appellant went out to Baldwin and had the truck burned and crushed (XVI 3088).[3] Appellant also set all his clothes on fire and got rid of the gun (XVI 3090). Appellant scrubbed himself down with a brush, and went back to the Master's Inn (XVI 3088-89).

Appellant bragged about having "everything covered" as far as an alibi and the security cameras at the Master's Inn (XVI 3085). All police had was "a couple of fingerprints," but he had that covered as well (XVI 3080). Appellant also lost his hat (XVI 3093). Appellant owed $3,000 to the man who got rid of the truck, and needed to get him out of town (XVI 3094). Appellant claimed that he killed Andrews because he had called his mother a "fat bitch" (XVI 3081). Appellant was arrested from Jackson's truck (XXI 593).

Appellant testified at trial. Appellant claimed that he collected hats and had more than one "Bike Week" hat like the one he wore on August 8, 2005 (XXII 662-63). Appellant claimed that, on August 7, 2005, he had seen Andrews at home in his truck and had wiped a trickle of blood from his nose, and then wiped it off

[3]It seems that Appellant was referring to Clara Keene's truck, which he had earlier taken to the cemetery. Andrews' truck remained at the scene when he was discovered dead.

(XXII 667). Appellant explained that he bumped his head on Andrews' truck and his hat fell off into the truck (XXII 669). The next morning, Appellant said he went to his mother's house, tried to find Jimmie Jackson, and then went across the street from his mother's house where he was working (XXII 676). Eventually Appellant returned to the motel room (XXII 679-80). Appellant left his shoes in the truck because they were "nasty" (XXII 680).

Appellant explained that his story to Jimmie Jackson about killing Roy Andrews was untrue, told to Jackson in an effort to intimidate him because Jackson owed him money (XXII 689).

During the penalty phase, the State presented four victim impact witnesses, Alison Andrews, James R. Ross, Wayne Jackson Andrews, and Gina Vought (XXIV 47-64). Appellant presented the testimony of Chuck Fisette (records custodian at Jacksonville Sheriff's Office), Jack Haslett (employer), Roy Turner Edmunds (employer), Lawrence Michael Ross (employer), David Bradshaw (friend), Bryan Mette (friend), William E. Barnett (friend and colleague), Casty Hobbs (friend), Laverne T. Rundall (aunt), and Patricia Andrews (mother) (XXIV 69-154).

During the Spencer hearing, Dr. William Morton testified regarding the effect of Appellant's cocaine use on his decision to murder Roy Andrews (XVII 3196-3263).

SUMMARY OF ARGUMENT

ISSUE I.

Appellant's counsel had redacted all of Appellant's statements in his recorded conversation with Jimmie Jackson that implied that he killed Cheryl Greer. The only information about Greer's death in the conversation the jury heard was that Appellant knew Cheryl Greer, knew where she was buried, and dumped Roy Andrews' body "on top of" Greer's grave. These statements did not constitute inadmissible evidence, much less fundamental error.

ISSUE II.

Appellant's contention that Roy Andrews' community suffered no loss because Andrews had retired already retired as a law enforcement officer is absurd. This evidence showed Andrews' uniqueness as an individual human being. Nor did the prosecutor improperly compare Appellant's "choices" to Andrews'. To the extent that the comment of Andrews' son that the crime deserves a "just punishment" was improper, the court did not err in determining that it did not vitiate the entire penalty proceeding.

ISSUE III.

Applying the four factors this Court set out in *Ramirez v. State*, 739 So.2d 568 (Fla. 1999), Appellant has failed to show that the court erred in finding that he was not "in custody" when he told Jimmie Jackson that he killed Roy Andrews. The fact that

Jackson called Appellant does not demonstrate that he was "summoned" by police. Appellant and Jackson simply agreed to meet. Nor does Jackson's question to Appellant "But how did you do it?" demonstrate that Appellant was in custody. Appellant ignores the final two factors. Appellant was in no way confronted with evidence of his guilt, and obviously felt free to leave, as he did at one point. The court properly denied the motion to suppress.

ISSUE IV.

Appellant claims that the "cold" element of the CCP aggravator was refuted by Dr. Morton's testimony that Appellant was addicted to cocaine, which rendered him incapable of cool and calm reflection. First, the court rejected, or at least expressed strong doubt about, much of Dr. Morton's testimony. Second, Dr. Morton's testimony does not appear to relate to the "cold" element of the CCP aggravator. The "cold" element generally has been found wanting only for "heated" murders of passion, in which the loss of emotional control is evident from the facts." Appellant does not claim a murder of passion, only that cocaine made him enraged and panicky. Such evidence does not rebut the "cold" element of CCP. Third, this court has repeatedly rejected claims that cocaine addiction negated the CCP aggravator. Even a chronic drug abuser can still act in accordance with a deliberate plan where the evidence indicates that he was fully cognizant of his actions during the murder.

ISSUE V.

Neither of the two disputed portions of testimony constituted inadmissible hearsay. The “pecuniary gain” aggravator was supported by competent substantial evidence.

ISSUE VI.

The relative weight given each mitigating factor is within the discretion of the sentencing court. Appellant has not offered any compelling reason to alter this general rule of law. The court did not abuse its discretion in assigning slight weight to the non-statutory “drug use” mitigator.

ISSUE VII.

Comparing this case to similar capital cases, it is clear that the death sentence was proportional to the murder.

ISSUE VIII.

This Court has repeated rejected the *Ring* claims Appellant asserts here, and should do so again in this case.

ARGUMENT

ISSUE I

DID THE STATE'S INTRODUCTION OF TESTIMONY AND ARGUMENT RELATING TO APPELLANT'S STATEMENT THAT HE "STACKED THEM DOUBLE" WHEN ROY ANDREWS LANDED ON THE GRAVE OF CHERYL GREER CONSTITUTE FUNDAMENTAL ERROR? (Restated)

Standard of review

Appellant acknowledges that he did not object to the disputed evidence or otherwise preserve an argument for review, and that only he is entitled to relief only if he demonstrates fundamental error. Because an unpreserved claim does not involve a trial court ruling that can be accorded any particular deference, claims of fundamental error are review *de novo*. See *Croom v. State*, 36 So.3d 707, 709 (Fla. 1st DCA 2010)(holding that an appellate court "reviews a defendant's unpreserved claim that a trial court committed fundamental error *de novo*").

The disputed statements

Appellant's brief suggests that the State simply introduced evidence implying that he committed another murder while his counsel and the court stood idly by. The record tells a different story.

At officers' direction, Jimmie Jackson secretly recorded a conversation with Appellant (XXII 619-621). In the conversation, Appellant described in detail how he lured Roy Andrews to him, killed Andrews, and then covered his tracks. Appellant told Jackson that he killed Andrews in a cemetery, and that Andrews' body landed on the grave of "Cheryl," an acquaintance who had

been struck by a car and killed a year earlier. In Appellant's words, he "stacked them double" (XXII 642).

Prior to trial, Appellant sought to suppress the recording on various grounds (XIV 2641-49, 2664-2671). At the outset of the hearing on these motions, the prosecutor informed the court that he and defense counsel had redacted the transcript of the recording to exclude certain matters such as "defendant's record and another homicide that he attempted to claim credit for" (XVIII 3279-3280).[4]

Before trial, the parties announced that they had stipulated that the recording of the conversation between Appellant and Jackson had been redacted (XIX 5-6, 8). The court read the following stipulation to the jury:

> Ladies and gentlemen, you're about to hear a statement recorded by the Jacksonville Sheriff's Office. The Court has held and the State and defense hereby stipulated and agreed that certain portions of this statement should be redacted. That means removed.
> You should not concern yourself with and should draw no conclusions about those portions of the statement which have not been placed before you.

(XXI 596). The jury was given transcripts of the (redacted) recording (XXII 622), and the redacted recording was played (XXII 622-651).[5]

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[4]References to the victim as a retired law enforcement officer were also redacted.

[5]The record on appeal contains a disc of the unredacted recording. The redacted recording was State's Exhibit 73. The State also attached the transcript of the redacted recording (the

At the suppression hearing, the unredacted recording of the conversation was played (XVIII 3328-3351). As the prosecutor had alluded to, some of the portions eventually redacted implied that Appellant himself had been responsible for the death of Cheryl Greer, the woman on whose grave Appellant said Andrews landed after Appellant killed him. Those comments were as follows:

1. Referring to Roy Andrews, Appellant stated "That's the second mother-fucker I got laying in the cemetery, O.K.?" (XVIII 3334).

2. The underlined portions of the following excerpt from the transcript:

> **PETERSON**: All right. Hey, the girl that got killed on Philips Highway?
> **JACKSON**: Yeah.
> **PETERSON**: I got accused for that. I went through all that fucking involuntary manslaughter charges and all that BS.
> **JACKSON**: Damn.
> **PETERSON**: They said I threw her out in front of a car. So what, you know. Hey, maybe it happened like that, maybe it didn't. Shit's got to happen sometimes the way shit's got to happen, you know. The kids are a fucking lot better off now than if that hadn't -- if she still was alive --
> **JACKSON**: I thought she might was just drinking, just wandered out there. Goddamn.
> **PETERSON**: Yeah, go ahead and think that.
> **JACKSON**: Well, then all -- then all that's -- that's what I thought, (inaudible) -- saying woman, an old lady hit her, some shit like that there.
> **PETERSON**: Yeah, well an old lady did hit her, but she tripped and fell in the fucking highway, didn't she? And you know what?

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one given to the jury) to its sentencing memorandum (XVI 3079-3096).

> This man landed on her grave. Okay. I stacked them double.
> **JACKSON**: Damn. That the --
> **PETERSON**: They went through my truck, they got --
> **JACKSON**: That's the -- that's one Randy used to go with.
> **PETERSON**: Yeah, she did. I put one of top of her.
> **JACKSON**: Uh, that crazy ass name.
> **PETERSON**: Cheryl.
> **JACKSON**: Yeah. Yeah. Yeah. That's the one Randy -- that's the one that fighting, that wanted to come fight Diane about Randy.
> **PETERSON**: Yeah. Yeah.
> **JACKSON**: God no, I thought -- no, I ain't -- I ain't paid that no mind there because -- because I just thought -- because I know it were raining that -- that day.
> **PETERSON**: Look. Look listen. She put so much stuff in my fucking face and she pissed me off so bad, and she -- she went somewhere where she wasn't supposed to go. She went there. So when she went there, boom, that was the end of that. I had enough.
> **JACKSON**: Hey, I'm busy. I'll call you back.
> **PETERSON**: When she went there, I had enough. You know what I'm saying? I had enough.
> **JACKSON**: Uh-huh.
> MR. PETERSON: Like I said, I ain't got no problems doing it. I'm just as coldhearted as the next motherfucker, man.

(XVIII 3348-3350).

After the underlined comments above were redacted, all that remained of the exchange about Cheryl Greer that the jury heard was the following:

> **PETERSON**: Alright. The girl that got killed on Phillips Highway?
> **JACKSON**: Yeah.
> **JACKSON**: I thought she might was just drinking, just wandered out there, god-damn. Well, then all, then all, then all, that's, that's what I thought, but by they saying woman, an old lady hit her, some shit like that there.

> **PETERSON**: Yeah, well an old lady did hit her, but she tripped and fell in the fucking highway, didn't she? And you know what? This man, landed on her grave! O.K. I stacked em double.
> **JACKSON**: Damn. That the--
> **PETERSON**: They went through my truck, they got--
> **JACKSON**: That the, that's one, uh, uh, Randy used to go with.
> **PETERSON**: Yeah, she did.
> **JACKSON**: Uh, uh,
> **PETERSON**: And I put one on top of her.
> **JACKSON**: Uh, uh, that crazy ass name, uh, uh,
> **PETERSON**: Cheryl. Yeah, yeah. Like I said, I ain't got a problem with doing it. I'm just as cold-hearted as the next motherfucker man.

(XVI 3090-91, XXII 641-42).[6]

In short, Appellant's counsel successfully removed all statements suggesting that Appellant had been responsible for Cheryl Greer's death. All that remained was the fact that she was struck by a car, and that Appellant put Roy Andrews' body "on top of" Greer's grave.

Appellant utterly ignores trial counsel's effort to remove the implications that Appellant killed Cheryl Greer from the recording. Instead, Appellant wrongly identifies a relevant part of the unredacted recording as a separate "telephone conversation" between Jackson and him that the State "did not play" at trial (IB 17). This assertion is false. This was not a separate recording that the State simply chose not to introduce

[6]This account is taken from the transcript that was given to the jury rather than the actual trial transcript, because the trial transcript contains several gaps where the recording was inaudible to the court reporter.

at trial. It was the same recording at issue here, prior to the redactions Appellant's counsel had successfully secured before it was played for the jury.

At trial, the prosecutor mentioned the "stacked them double" comment in opening statement (XX 271). The recording was played for the jury where Appellant made that statement (XXII 642). The prosecutor confronted Appellant with this statement in cross-examination (XXII 697-98). During closing, the section of the recording where Appellant made the comment was played four times (XXII 766, 795; XXIII 822, 890). The recording was also played for the jury during deliberations (XXIV 1098).

Merits

Under this proper backdrop, it becomes clear that Appellant's comments included in the recording do not constitute fundamental error entitling Appellant to a new trial. Errors that have not been preserved by contemporaneous objection can be considered on direct appeal only if the error is fundamental. See, e.g., *Goodwin v. State*, 751 So. 2d 537, 544 (Fla. 1999)("If the error is not properly preserved or is unpreserved, the conviction can be reversed only if the error is 'fundamental'"). Statements improperly suggesting that the defendant committed a collateral crime constitute fundamental error only it they "reach[] down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged

error." *England v. State*, 940 So.2d 389, 398 (Fla. 2006), quoting *Doorbal v. State*, 837 So.2d 940, 954-55 (Fla. 2003).

Unless one incorporates the knowledge that Appellant had seemed to claim that he was responsible for Cheryl Greer's death, nothing about Appellant's statements that the jury actually heard reasonably suggests that Appellant may have killed Greer. Heard in isolation, after the redactions were made, all Appellant's statements suggest is that he was aware of Greer's death and the location of her grave, and he had dumped Roy Andrews' body on top on her grave. No reasonable reading of Appellant's statements that he "stacked them double" or that he "put one on top of her" suggests that he was responsible for Greer's death. Even if an active imagination could conclude from Appellant's statements that he might have been responsible for Greer's death, in no way did such strained speculation "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained" without it.

In fact, as the jury heard it, Appellant made the cause of Ms. Greer's death clear in his statement to Mr. Jackson: "Yeah, well an old lady did hit her, but she tripped and fell in the fucking highway, didn't she?" (XXII 642). Appellant's own words reflect that Greer died because she tripped and fell in the highway. It is simply not even a rational conclusion that Appellant admitted that he killed Greer, much less fundamental error.

The same is true of Appellant's statements that he "stacked them double" or that he "put one on top of her." These phrases connote only that Appellant put one dead body on top of another, not that he killed both of them. And even if these phrases support an implication that Appellant killed both of them, they are far from the high standard of fundamental error.

Of course, when the redacted material is read along with the unredacted material, a different picture emerges. The listener hears that Appellant was accused of throwing Ms. Greer in front of a car and that "maybe it happened like that, maybe it didn't." Appellant also expresses his antipathy toward Ms. Greer, saying that she "pissed me off so bad," that he had "had enough" of her, and that her children were a lot better off with her dead. If these statements had been included in the recording played for the jury, Appellant may have had a point that prejudicial evidence that he committed a collateral crime was introduced at trial. But of course, no such evidence was admitted, thanks to the actions of defense counsel and the prosecutor. While the knowledge that Appellant made these redacted statements might prejudice one about <u>any</u> reference to Ms. Greer's death in the recording, the jury could not have been prejudiced in that manner because it never learned that Appellant made those statements. The statements they heard in no reasonably way imply that Appellant killed Ms. Greer.[7]

[7]What Appellant's argument boils down to is that he feels that counsel did not redact enough from the recording. Whether counsel sought to redact the "stacked them double" and "put one

As such, the disputed statements did not reasonably imply that Appellant killed Ms. Greer. Rather, the statements were highly relevant to establish the veracity of Appellant's statements to Jimmie Jackson that he (Appellant) had killed Roy Andrews. In his testimony, Appellant claimed that he had nothing to do with Andrews' death. Appellant contended that his detailed description of his murder of Roy Andrews made to Jimmie Jackson was just "tough-talk intimidation" because Jackson owed him money (XXII 689). The fact that Appellant knew specific details of the killing that would be known only to the killer belies his denial. In particular, Appellant knew that Andrews' body was located near the grave of Cheryl Greer.[8] Moreover, the fact that his former girlfriend was buried in Greenlawn Cemetery gave Appellant a personal connection to the cemetery that again supports the contention that he killed Andrews.

Because the statements were relevant to Appellant's guilt and did not reasonably suggest that Appellant killed Cheryl Greer, they would have been admissible even if Appellant had objected. Even if the statements were improperly introduced, they were far from "reaching down into the validity of the trial

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on top of her" comments is unknown. The State submits that this Court should be cautious to find fundamental error when the record shows that counsel was aware of the matter and may have had reasons not to object.

[8]Appellant agreed that the body was as close to Greer's grave as possible without driving over gravestones (XXII 697-98). Janis Diamond testified regarding the locations of Greer's grave and Andrews' body (XXI 463-68).

itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error."

Keen v. State, 775 So.2d 263, 279 (Fla. 2000), presented this Court with similar circumstance. Keen claimed that a statement contained in a taped conversation between him and Shapiro, where Shapiro stated, "And in, in light of your past history, even she [Keen's girlfriend] believes that you're guilty" constituted improper collateral offense evidence and fundamental error. This Court disagreed, "because Shapiro's testimony was the centerpiece of the State's case against Keen," an "exhaustive, first-person account of the planning and execution of a murder, compelling in both detail and volume," which was "more than enough to support a guilty verdict and precludes a fundamental error finding on this claim." *Id.* The same is true here. See also *England*, 940 So.2d at 397-98; *Doorbal*, 837 So.2d at 955-56. Appellant has failed to demonstrate fundamental error.

ISSUE II

DID THE COURT ABUSE ITS DISCRETION IN REFUSING TO EXCLUDE ALLEGEDLY IMPROPER VICTIM IMPACT TESTIMONY? (Restated)

Standard of review

The admission of victim impact testimony is reviewed for abuse of discretion. *Deparvine v. State*, 995 So.2d 351, 378 (Fla. 2008). If no specific objection to the victim impact evidence is made, the determination of whether the evidence constitutes fundamental error is reviewed *de novo*. *Croom v. State*. A decision on a motion for a mistrial is within the discretion of the trial judge and such a motion should be granted only in the case of absolute necessity. *Snipes v. State*, 733 So.2d 1000, 1005 (Fla. 1999).

Trial court's ruling

Nearly a year and a half prior to trial Appellant filed a "Motion to Exclude Evidence or Argument Designed To Create Sympathy for the Deceased (Victim Impact Evidence)" (XII 2290-2301). The motion claimed that section 921.141(7), Florida Statutes, was unconstitutional on various grounds, and that evidence admitted pursuant to it would render the capital sentencing scheme unconstitutional. The motion simply attacked the notion of victim impact evidence in capital sentencing and did not address in any way any specific objections to the victim impact evidence introduced in this case. Prior to the penalty phase, Appellant offered no argument in support of this motion, and the court denied it without comment (XXIV 35-36).

One of the victim impact witnesses was James Ross, who served with Roy Andrews with the Jacksonville Sheriff's Office (XXIV 51-52). Chief Ross read the following statement:

> I first met Roy Andrews in October of 1974 when I came to the Jacksonville Sheriff's Office from the Jacksonville Beach Police Department. We met at the police academy when he was assigned as my field training officer and we immediately became close friends.
>
> We rode together for over 13 months in the downtown area, which was called Zone 3 at the time. During this period, several select areas were assigned a police unit that had two officers permanently assigned. These were usually the highest crime areas or areas with high volumes of violent crime. Roy and I were assigned during this 13-month period to the Springfield area, around 8th and Main streets and then the area of Ashley and Davis.
>
> Since we were assigned together, we shared a car which meant we also shared the ride to and from work, plus many hours at work to share personal stories, experiences and learn about each other's families. Roy and I developed a very close personal relationship from this time spent together and continued this relationship over the next 20-plus years.
>
> During this time, we always had a friendly rivalry, as Roy had served as a U.S. Army paratrooper and I had served in the United States Marine Corps. This resulted in many hours of discussion on which service and its members were the best and so on. The experience of being a U.S. Army paratrooper remained evident in Roy's bearing in always wanting to be one of the best.
>
> Roy remained in the downtown area his entire career, making many friendships and serving the community he loved so much.
>
> You must understand that urban core policing is a special experience with many old-time issues and longtime problems. We don't work in an area like that without wanting to be there and helping people that know they cannot do well without the police. Roy knew this and could have easily moved to an upper-class area which was not as violent, but he felt he was needed more in Zone 3.

> It is quite ironic that a man that lived honorable life in a violent place died in such a manner as he did. His death had a very personal effect on me, as just the week before his death, we had spoken on the phone and attempted to schedule a lunch together to catch up with each other's lives. We never got to have that time together, and Roy's death deprived us of any future lunches.
> Six years ago, I became the commanding officer of the same area that Roy and I had patrolled so many years ago. Never a day goes by since Roy's death that I do not think of him as I drive the same streets that we rode together day in and day out. I see the same buildings we answered calls to and remember the many stories and experiences we shared.
> A person is judged by not only his intentions but by his actions. And I must say that Roy Andrews was an honest, honorable, dedicated and caring man who served his country and community proudly. And his violent death impacted me profoundly and cut short his continued positive impact to this city and those of a the great friend.

(XXIV 52-55). Appellant registered no objection to Chief Ross' testimony, nor does the record show that Appellant asked for redactions of Ross' statement prior to the penalty phase.

During closing argument, the prosecutor closed with the following:

> Roy Bryan Andrews, after serving this country and everyone, he went to work for the Sheriff's Office. His chosen profession -- responding, rushing, racing, running into places that everybody else was running away from, helping this community and everyone for almost 30 years.
> And then he retired. And he took up a different path as a mental health counselor for as long as he could, serving this community again, but this time, one person at a time. And this time more often than not before it was too late. And isn't that exactly and fittingly, exactly the way he died? What was Roy Andrews' last act on this earth? He put aside his personal time. He put aside his

> personal life. And he pulled over in his truck to help someone in need, get in Robbie, and the very last thing he did on this earth.
>
> And don't misunderstand me, please. This proceeding, as I said before, is not about Roy Andrews. It's about Robert Peterson. And death is not the correct or appropriate recommendation because Roy Andrews was who he was. It's the appropriate recommendation because Robert Earl Peterson is who he is.
>
> It is not something that you will go home and brag about. It is not something you will forget. Inarguably it's not the easy thing to do. But under our law, the law that binds all of us and the law that binds each of us, based on these facts, a recommendation for death in this case I submit to you is the right thing to do.
>
> Thank you for your time.

(XXIV 187-88). Again, Appellant registered no objection to this argument.

The court gave the following jury instruction:

> You have heard evidence today by Alison Andrews, J. R. Ross, Jack Andrews and Nina Simpson, relating the impact of the victim's death in this case. This evidence should not be considered by you as evidence of an aggravating circumstance or rebuttal of mitigating circumstance ... circumstances. This evidence may be considered to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.

(XXV 217-18).

Preservation

In *Wheeler v. State*, 4 So.3d 599 (Fla. 2009), the defense presented a general objection to victim impact testimony, but made no specific objections to the presentation of that testimony. This Court found that Wheeler's specific objections to the victim impact testimony raised on appeal "was not preserved by Wheeler's general pretrial objections addressed to

all victim impact evidence, where he made no specific objections to any of the evidence presented and failed to object below on the grounds argued here." *Wheeler* at 606. However, this Court noted that "evidence that places undue focus on victim impact, even if not objected to, can in some cases constitute a due process violation." *Id.* As such, victim impact evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair" constitutes fundamental error and can be remedied on appeal even without an objection. *Id.* at 606-07. Applying this standard, this Court found that the disputed victim impact evidence did not constitute fundamental error. *Id.* at 607-09.

The same applies here. Appellant filed a general objection to victim impact testimony prior to trial, but did not specifically complain of the matters addressed on appeal. Accordingly, Appellant is not entitled to relief unless he demonstrates that his specific complaints were "so unduly prejudicial that it renders the trial fundamentally unfair." See also *Silvia v. State*, --- So.3d ----, 2011 WL 1304930 (Fla. April 7, 2011).[9]

Merits

The victim impact evidence statute, section 921.141(7), Florida Statutes, provides as follows:

> Once the prosecution has provided evidence of the existence of one or more aggravating

[9]Appellant did preserve his objection to Wayne Andrews' "just punishment" comment, discussed below, but only to the extent that Appellant argues that the court abused its discretion in denying his motion for mistrial on that basis.

> circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

This Court has held that this statute does not "impermissibly affect ... the weighing of the aggravators and mitigators" or "otherwise interfere ... with the constitutional rights of the defendant" and does not constitute an impermissible nonstatutory aggravator. *Windom v. State*, 656 So.2d 432, 438 (Fla. 1995). The statute itself prohibits evidence relating to "characterizations and opinions about the crime, the defendant, and the appropriate sentence." See also *Franklin v. State*, 965 So.2d 79, 97 (Fla. 2007). As the United States Supreme Court observed in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991), in rejecting a claim that the Eighth Amendment prohibits victim impact testimony, "victim impact evidence serves entirely legitimate purposes."[10]

a. Testimony of Andrews' law enforcement and military career

[10]Additionally, the Florida Constitution contains a victims' rights provision that entitles the victims of crimes, including the next of kin of homicide victims, "to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused." *Franklin v. State*, 965 So.2d 79, 97 (Fla. 2007)(citing Art. I, § 16, Fla. Const.).

Appellant claims that, because Roy Andrews had already retired as a law enforcement officer by the time Appellant killed him, "***there was no loss***" to the community as a result of Andrews' murder (IB 26). Any suggestion that this stunning position could be a misinterpretation of Appellant's intent is dispelled in the same paragraph of the brief, where Appellant notes that Andrews was "no longer an officer, so there was nothing for any community to have lost as there would have been had he been an active duty officer at the time of his death." *Id*.

Similarly, Appellant complains that references to Roy Andrews' service in the armed forces were likewise inappropriate because, in his words, "what loss could the country have suffered because at some unknown time in the past he had once been a soldier?" (IB 27).

It should go without saying that Appellant is wrong that the community suffered "no loss" as a result of Roy Andrews' death because he was no longer a law enforcement officer or servicemember. This evidence was admissible victim impact evidence not necessarily because it established a loss to the community but because it showed "the victim's uniqueness as an individual human being." In *Franklin v. State*, 965 So.2d 79, 97 (Fla. 2007), this Court approved evidence that the victim "took over the role of 'father' at age eighteen when his father died and he helped support the family;" that "he was a member of the Army for twenty-five years and served in Vietnam;" that "he was a loving and generous person who helped family, friends, and

neighbors;" that he "was a 'good guy' who would help others;" among other evidence. Appellant's suggestion that evidence related to Andrews' service as a police officer and soldier are improper because he had retired from those positions is meritless, to say the least.

Appellant also complains that the prosecutor "unfairly compared Peterson's life with that of Andrews" (IB 28). The disputed comment is the following:

> And isn't that exactly and fittingly, exactly the way he died? What was Roy Andrews' last act on this earth? He put aside his personal time. He put aside his personal life. And he pulled over in his truck to help someone in need, get in Robbie, and the very last thing he did on this earth.
> And don't misunderstand me, please. This proceeding, as I said before, is not about Roy Andrews. It's about Robert Peterson. And death is not the correct or appropriate recommendation because Roy Andrews was who he was. It's the appropriate recommendation because Robert Earl Peterson is who he is.

(XXIV 187-88).

The State fails to comprehend how this comment constitutes an improper "comparison" between Appellant's life and Andrews' life. The comment bears no similarity with those made in *Wheeler* (prosecutor compared the "choices" the defendant made with those of the victim and specifically "intended to use the victim impact as a contrast to the defendant's mitigation of his life and his character") and *Hayward v. State*, 24 So.3d 17, 42 (Fla. 2009) (prosecutor compared the victim's choices in life to the

defendant's choices). In fact, Appellant cannot demonstrate that the comments were erroneous, much less fundamentally erroneous.[11]

b. Statement that Appellant's crime deserves "just punishment"

Finally, Appellant complains about the victim impact statement of Roy Andrews' son, Wayne Andrews, which finished with: "This was a senseless horrific murder. The crime deserves just punishment." (XXIV 58). At the conclusion of victim impact witnesses, Appellant objected to this testimony, claiming that "the jury can infer from that that he's asking the jury to render a verdict of death in this particular case," and moved for mistrial (XXIV 65-66). The State noted that the witness only asked for a "just punishment" and did not urge the jury to recommend the death penalty, but did not object to a curative instruction (XXIV 66). Appellant suggested that the jury be "instructed that they're not to consider any aspect of any of these witnesses's testimony as indicative of recommending any type of sentence" (XXIV 67). The court told the jury the following:

> Ladies and gentlemen of the jury, the witnesses you've heard up to this point are what we call

[11]Appellant also argues that this Court should reverse his sentence because two prosecutors in different parts of the State in the *Wheeler* and *Hayward* cases improperly compared the victim's choices to the defendant's (IB 29). Appellant urges this Court to say "enough is enough" because "one, two, three strikes and you're out." While the State contends that the prosecutor's comments were in no way improper, the State disagrees that this Court should find fundamental error and reverse a sentence of death because two unrelated prosecutors made similar mistakes in other cases.

> victim impact witnesses. And their testimony is allowed to show the uniqueness of the victim's place in society and impact of his loss on society. You're not to consider this testimony in any way as testimony recommending or requesting either type of sentence, okay, or any type of recommendation from you in your advisory sentence.

(XXIV 67).

The prosecutor correctly observed that Wayne Andrews' remark, to the extent that it was an opinion regarding the "appropriate sentence," was no more than a mild miscue because it did not suggest a particular sentence, only a "just" one. As such, it did not vitiate the entire proceeding and the court did not err in denying the mistrial. Moreover, the curative instruction explicitly informing the jury that victim impact testimony could not be considered as a sentence recommendation "was sufficient in this case to dissipate any prejudicial effect of the objectionable comment," *Buenoano v. State*, 527 So.2d 194, 198 (Fla. 1988), especially when coupled with the general victim-impact instruction read during jury instruction.

Appellant has failed to demonstrate reversible error.

ISSUE III

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS A RECORDING OF APPELLANT'S STATEMENTS MADE IN JAIL? (Restated)

Standard of review

"Generally, in reviewing a trial court's ruling on a motion to suppress, this Court accords a presumption of correctness to the trial court's findings of historical fact, reversing only if the findings are not supported by competent, substantial evidence, but reviews de novo 'whether the application of the law to the historical facts establishes an adequate basis for the trial court's ruling.'" *Parker v. State*, 873 So.2d 270, 279 (Fla. 2004), citing *Connor v. State*, 803 So.2d 598, 608 (Fla. 2001).

Trial court's ruling

On August 10, 2005, Jimmie Jackson was arrested for driving on a suspended license (XXVIII 3308, 3320). Jackson knew Appellant because Jackson sold dope (XXVIII 3310). Detective Kazimir testified that he searched Jackson's truck before he placed the recording devices in it, and did not find any weapons or other contraband in the truck (XVIII 3290-93, 3309, 3312).

In a controlled telephone call, Jimmie Jackson called Appellant and arranged to meet him in a Winn-Dixie parking lot (XXVIII 3300-02, 3308-3310). Under police surveillance, Jackson went to the parking lot in his truck (XXVIII 3311). Appellant arrived at the lot, and got into Jackson's truck (XXVIII 3303, 3314-15). While in Jackson's truck, Appellant described in detail how he killed Roy Andrews (XXVIII 3328-3351).

Both Jackson and Appellant were under surveillance during the entire encounter (XXVIII 3312, 3317). Sergeant Baker testified that it was "impossible" that Jackson could have been reaching for a firearm during the time that Appellant was recorded (XXVIII 3315). Baker noted that Appellant's contention that Jackson was trying to intimidate him by reaching for a firearm was Appellant's "third version of what happened:" earlier Appellant had claimed that he was intoxicated when he spoke to Jackson and that he was reading a script when he spoke to Jackson (XXVIII 3315).

Appellant filed motions to suppress claiming that he was "intimidated" by Jackson "because it appeared to Mr. Peterson that [Jackson] was constantly reaching for a firearm" (XIV 2642). As a result, Appellant alleged that he decided to intimidate Jackson by telling him that he (Appellant) had killed Roy Andrews "in an attempt to keep himself from getting shot" by Jackson (XIV 2642). Accordingly, Appellant claimed that "the intimidating atmosphere that existed inside the confidential informant's vehicle was tantamount to both threats and violence" and that his statements should be suppressed (XIV 2643-44). In a second motion, Appellant further claimed that the encounter with Jackson constituted custodial interrogation and that his statements should be suppressed because he was not read *Miranda* warnings prior to the encounter (XIV 2647-48). Appellant presented no evidence to support his claims at the suppression hearing.

The court found that Appellant's allegations that he was intimidated by Jackson's purported reaching for a firearm was "totally contradicted" by the evidence at the hearing, particularly the recording of the encounter (XVIII 3361). The court continued:

> There is absolutely nothing to indicate any intimidation by this Jimmie Johnson [sic] against Mr. Peterson. And if Jimmie Johnson [sic] was reaching for a firearm in between the driver's door and the driver's seat area for the length of time that the defendant was talking on this tape, he could have clawed a hole in the upholstery much less have time to get a firearm out if that is what his intent was. It is just ludicrous to imagine that somebody is intimidated and goes on talking that long by such a motion. It would have had to have been a comic repetition of the action, going back and back and back like that to have lasted through that conversation. It just defies credibility and how that would have been intimidating in the absence of any actual evidence of or even testimony of the existence of a firearm, I don't know.

(XVIII 3361-62).

The court also found, applying *Lee vs. State*, 988 So.2d 52 (Fla. 1st DCA 2008), that it appeared "unquestionable" that the encounter was not a custodial interrogation (XVIII 3362). First, the court noted that there was no evidence that Appellant thought he had been summoned by police when he met with Jackson. Second, the place and manner of the meeting was determined by Jackson and Appellant, not by the police. Third, Appellant was not "confronted with evidence of his guilt;" instead, it was Appellant gave evidence of his guilt with little or no urging from Jackson. Fourth, Appellant was obviously aware that he was

free to leave, because he left the truck to get a cigarette (XVIII 3362-64).

Merits

Appellant argued two separate but related issues below: first, that he was coerced to confess, and second, that he was subjected to custodial interrogation without *Miranda* warnings. While Appellant mentions the coercion aspect of his claim in his issue statement on appeal (IB 31), he does not make any further argument on this ground. As such, the State simply relies on the trial court's explicit factual ruling that Jackson did not intimidate Appellant.[12]

Appellant instead focuses his issue on the claim that he was subjected to custodial interrogation without *Miranda* warnings.[13] This Court set out a four-part test for a determination of whether a suspect is in "custody" for *Miranda* purposes in *Ramirez v. State*, 739 So.2d 568, 574 (Fla. 1999): (1) the manner in which

[12]The State adds that a coerced confession is one where the defendant's "free will has been overcome" by police misconduct. *Blake v. State*, 972 So.2d 839, 844 (Fla. 2007). Appellant did not claim that he confessed because his will to resist confessing had been overborne. The State submits that alleged coercion that causes a defendant to attempt to intimidate another by falsely claiming that he had murdered someone does not constitute an involuntary confession.

[13]"Under *Miranda* and its progeny, suspects must be told prior to any custodial interrogation 'that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them.'" *Schoenwetter v. State*, 46 So.3d 535 (Fla. 2010), citing *Traylor v. State*, 596 So.2d 957, 966 (Fla. 1992).

police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning. As set forth above, the trial court explicitly applied this test and found that none of the factors supported a finding that Appellant was in custody (XVIII 3362-64). Appellant has failed to demonstrate that any of the court's conclusions were erroneous.[14]

As the court below found, the mere fact that Jackson called Appellant does not demonstrate that he was "summoned" by police. Appellant and Jackson simply agreed to meet. Nor does Jackson's question to Appellant "But how did you do it?" demonstrate that Appellant was in custody. Appellant ignores the final two factors. Appellant was in no way confronted with evidence of his guilt, and obviously felt free to leave, as he did at one point.

In *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, (1966), the Supreme Court held that placing an undercover agent near a suspect in order to gather incriminating information was permissible under the Fifth Amendment. While Hoffa was on trial, he met often with Edward Partin, who, unbeknownst to Hoffa, was

[14]Appellant complains that the court made findings related to his state of mind rather than a proper "objective test" (IB 33). The State cannot identify any part of the court's order which shows that it applied a subjective test rather than an objective one. Even if it had, any findings related to Appellant's state of mind would be equally applicable using an objective test.

cooperating with law enforcement officials. Partin reported to officials that Hoffa was trying to bribe jurors. The Court approved the use of Hoffa's statements at his subsequent trial for jury tampering, finding that Hoffa could not show that his incriminating statements "were the product of any sort of coercion, legal or factual." *Id.*, at 304, 87 S.Ct., at 414. "The fact that Partin had fooled Hoffa into thinking that Partin was a sympathetic colleague did not affect the voluntariness of the statements." *Illinois v. Perkins*, 496 U.S. 292, 298, 110 S.Ct. 2394, 2398 (1990) (discussing *Hoffa*).

The same applies here. See also *Illinois v. Perkins* (holding that admission of defendant's statements to an undercover agent in response to the agent's inquiries, while the defendant was jailed on unrelated charges, did not violate the Fifth Amendment). The fact that Jackson fooled Appellant into thinking that Jackson was a sympathetic colleague did not affect the voluntariness of the statements. Appellant is not entitled to relief.

ISSUE IV

IS THERE COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE? (Restated)

Standard of review

This Court's review of claims that the trial court improperly found an aggravating circumstance is limited to determining whether the trial judge applied the correct rule of law and, if so, whether competent, substantial evidence supports the finding. *England v. State*, 940 So.2d 389, 402 (Fla. 2006)(citing *Hutchinson v. State*, 882 So.2d 943, 958 (Fla. 2004)).

Trial court's ruling

The trial court, in its sentencing order found the cold, calculated, and premeditated (CCP) aggravator. The trial court made the following findings:

> The defendant threatened on numerous occasions to kill the victim. He even specifically stated to one person that he wanted to beat the victim to death. Statements were made to Becky Price, Laverne Rundall, Joel Sockwell, and Jimmy Jackson at various times. He borrowed a truck from his girlfriend to avoid having his truck seen during the murder. He scouted out a location in a cemetery which was largely deserted at that time of day, and which, not coincidentally, was near the victim's route home from work. He had to have made arrangements in advance in order to be able to burn, crush, and destroy the truck, gun, and bloody clothing used and worn in committing the murder. He bragged to Jimmy Jackson about completely disposing of these items immediately after the murder. It would not seem possible for a person covered with blood, brain matter, and gore to drive up to

> a commercial vehicle crushing business and ask to have his truck disposed of, without causing people to ask questions or at least recall the incident clearly afterward. Further, he told Jimmy Jackson he owed a man $3,000.00 for helping him dispose of the truck, and that he had to get that man out of town quickly. He prepared the plan to fake engine trouble to get the defendant to come to the cemetery and turn his back on the perpetrator.
>
> He prepared for this deadly encounter by obtaining brass knuckles, a change of clothing, and a firearm in advance. In short, the defendant procured the means of killing, devised a plan for the killing, and carried it out as a matter of course without any pretense of legal or moral justification, and without any provocation whatsoever from the victim. The defendant also had ample opportunity to change his mind, cancel the plan, or release the victim, but instead, after substantial reflection, he acted out his conceived plan to murder his victim. The defendant's statement to Jimmy Jackson that he killed Mr. Andrews because he called the defendant's mother fat does not constitute even a pretense of legal or moral justification for murder.

(XVII 3127-28).

Preservation

In arguing against the CCP aggravator in his sentencing memorandum, Appellant asserted only that the some of the evidence was inconsistent with his description of the murder to Jimmie Jackson, and that there was "no indicia of heightened premeditation such as marking on a calendar or phone calls to the victim by the defendant to set a trap as alleged by the state" (XVII 3101-02). On appeal, Appellant makes a new argument, claiming that the "cold" element of the CCP aggravator was unproven due to Dr. Morton's testimony that Appellant's

"cocaine addiction" demonstrated that he "acted in a panic or an emotional rage" (IB 38). As such, this issue is not preserved for appellate review. See *Buzia v. State*, 926 So.2d 1203 (Fla. 2006)(challenge to aggravator that is different for the challenge asserted below is not preserved for review). However, even if this issue were preserved it is meritless.

Merits

To support the CCP aggravator, a jury must find (1) that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) that the defendant exhibited heightened premeditation (premeditated); and (4) that the defendant had no pretense of moral or legal justification. *Buzia*, 926 So.2d at 1214 (citing *Jackson v. State*, 648 So.2d 85, 89 (Fla. 1994)).

"The 'cold' element generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts." *Walls v. State*, 641 So.2d 381, 387-88 (Fla. 1994). The inability of the victim is unable to offer any resistance or provocation also supports the "cold" element. See *Looney v. State*, 803 So.2d 656, 678 (Fla. 2001).

"The calculated element applies in cases where the defendant arms himself in advance, kills execution-style, plans his actions, and has time to coldly and calmly decide to kill." *Wright v. State*,

19 So.3d 277, 299 (Fla. 2009).

"Furthermore, to prove the element of heightened premeditation, the evidence must show that the defendant had a careful plan or prearranged design to kill, not to just simply commit another felony." *Wright*, 19 So.3d at 300. "However, this element exists where a defendant has the opportunity to leave the crime scene with the victims alive but, instead, commits the murders." *Id.*

Appellant concedes that "calculated" and "premeditated" elements of the CCP aggravator, but claims that the "cold" element was refuted by Dr. Morton's testimony, asserting that Appellant was addicted to cocaine, which rendered him incapable of cool and calm reflection. This argument is flawed for several reasons.

First, this argument ignores that the trial court rejected much of Dr. Morton's testimony in the sentencing order. The court expressed doubt at Morton's conclusion that Appellant was addicted to cocaine, noting that only one witness, Appellant's girlfriend of three weeks, had ever seen Appellant using cocaine (XVII 3130). The court noted that several of the witnesses "claim that they suspected he did so, but none testified to seeing it," and that none of them "felt moved to attempt to get the defendant to seek treatment for drug abuse." *Id.* Further, the court found that the weight he could accord Dr. Morton's testimony was "greatly diminished" by the fact that "all of the testimony about the defendant's drug abuse is based upon self-

reporting" from Appellant to Dr. Morton and others (XVII 3131). Based on these factors, the court gave only slight weight to the mitigating circumstance of history of drug abuse. *Id.* Appellant has given no reason why the court might have given any more weight to this same evidence had he asked the court to consider it in determining the CCP aggravator.[15]

Second, even if the court did not express such doubt about Dr. Morton's testimony, it does not appear to relate as directly to the "cold" element of the CCP aggravator as Appellant presumes. Again, "the 'cold' element generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts." *Walls*. Appellant does not claim a murder of passion, only that cocaine made him enraged and panicky. The State asserts that such evidence does not rebut the "cold" element of CCP.

Third and most importantly, this Court has repeatedly rejected claims that cocaine addiction negated the CCP aggravator. See *Turner v. State*, 37 So.3d 212 (Fla. 2010). "Even if the trial court had found that Turner was addicted to crack cocaine, such a finding would not necessarily preclude the CCP aggravator from being found." *Turner*, 37 So.3d at 224. "This Court has explained that a chronic drug abuser can still act in accordance with a deliberate plan where the evidence indicates that the person 'was fully cognizant of his actions on the night

[15]Appellant only cited Dr. Morton's testimony in support of his drug-abuse mitigator.

of the murder.'" *Id.* See also *Guardado v. State*, 965 So.2d 108, 117 (Fla. 2007); *Robinson v. State*, 761 So.2d 269, 278 (Fla. 1999). The same is true here. The evidence here clearly demonstrates that Appellant acted in accordance with a deliberate plan and that he was fully cognizant of his actions on the day of the murder, as his detailed description of the murder two days later amply demonstrated.

Accordingly, Appellant has failed to demonstrate that the court erred in finding the CCP aggravator. Even if the CCP aggravator were not supported by sufficient evidence, such error would be harmless beyond a reasonable doubt. Two valid aggravating circumstances would remain: 1) heinous, atrocious and cruel; 2) murder was motivated by pecuniary gain. Heinous, atrocious, or cruel is one of the "most weighty in Florida's sentencing calculus." *Sireci v. Moore*, 825 So.2d 882 (Fla. 2002). As such, the presence of this aggravating factor is more likely to render an erroneous aggravating factor harmless.

ISSUE V

IS THERE COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT MURDER WAS MOTIVATED BY PECUNIARY GAIN? (Restated)

Standard of review

This Court's review of claims that the trial court improperly found an aggravating circumstance is limited to determining whether the trial judge applied the correct rule of law and, if so, whether competent, substantial evidence supports the finding. *England*, 940 at 402.

Trial court's ruling

The trial court, in its sentencing order found that the murder was motivated by pecuniary gain (IV 564-65). The trial court made the following findings:

> The defendant had no steady employment, and had had no steady employment for over a decade at the time of the murder. For that time period he lived with his mother and the victim. They paid his child support of $350.00 per month, they paid for his truck, and gave him over $25,000.00 in cash during the year preceding the murder. Patricia Andrews also gave the defendant $10,000.00 in cash approximately one month before the murder, as prepayment for doing repairs to Laverne Rundall's home. Laverne Rundall testified that the defendant never ordered any materials or did any actual work on her home. Laverne Rundall and Becky Price both testified that Roy Andrews had told the defendant that this lifestyle was not going to go on, that he had to move out of the house, and that he and his wife (Andrews) were going to terminate the flow of money to the defendant. Penalty phase witnesses proved that the defendant spent large sums of money on hotel rooms, entertaining females, and cocaine during this period of his life. It has been proven beyond a reasonable doubt

> that this murder was motivated almost entirely by a desire to obtain money and financial gain.

(XVII 3129-30).

Merits

Appellant claims that the court improperly relied upon two pieces of hearsay to support the pecuniary-gain aggravator. In fact, neither instance constituted inadmissible hearsay.

The first instance of alleged hearsay was the following colloquy between the prosecutor and Laverne Rundall on redirect examination:

> Q Miss Rundall, what sorts of things was Roy angry at Robbie about?
> A About --
> MR. FLETCHER: Objection, Your Honor. Hearsay.
> THE COURT: Well, I don't think it would if it's not offered to prove the truth of the matter asserted, rather, being angry. So I'll overrule the objection.
> You can answer, Miss Rundall.
> THE WITNESS: Over the money Pat was giving Robbie.

(XXI 461-62).

Appellant, without any analysis, declares Rundall's testimony inadmissible hearsay. The State disagrees. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. The disputed testimony does not involve a "statement" at all. It is completely unknown how Ms. Rundall knew that Andrews was mad at Appellant, and there is no reason to presume that it was a

statement from Andrews. Appellant has failed to demonstrate that the disputed testimony constituted hearsay.

Moreover, the prosecutor's question was in direct response to Appellant's questioning of Ms. Rundall on cross-examination, when defense counsel asked Rundall whether Andrews was "mad at Robbie" (XXI 461). The prosecutor's question, simply asking the basis for this anger, was fair response to this testimony.

The second instance of alleged hearsay came from Becky Price, who testified that Appellant called her in early July, very upset because Roy Andrews "had thrown him out of the house and had told [Appellant's mother] not to give him any more money," and called a second time later in July, very upset again, because "his mother wouldn't give him any money again because [Andrews] had told her not to" (XXI 529, 531). Defense counsel did not object to this testimony, which Appellant now surmises was "clearly an oversight" (IB 44). The State disagrees. The State suggests that defense counsel did not object because the testimony was not inadmissible hearsay. It is elementary that statements of a criminal defendant are admissible when offered against him at trial. § 90.803(18)(a), Fla. Stat.; *Hoefert v. State*, 617 So.2d 1046, 1050 (Fla. 1993).[16] Price's testimony was properly introduced.

[16]To the extent that Appellant is claiming that Andrews' statement to Appellant's mother not to give Appellant any more money (repeated to Price by Appellant) constituted hearsay, this testimony was introduced for the effect the statement had on Appellant, not for the truth of the matter asserted.

Even if this testimony were improperly introduced, it was not the only evidence that the murder was motivated by pecuniary gain. During penalty phase, Rundall testified in greater detail about the financial support Roy and Patricia Andrews had been giving Appellant, and that friction was arising between them because Roy Andrews did not want things to continue as the were any longer and Appellant did (XXIV 131-32). Patricia Andrews herself testified, on cross-examination, that Roy had changed their financial arrangement so that she would not be able to get money without Roy knowing about it, and that Roy had urged Appellant to find a job (XXIV 145-46).

"The pecuniary gain aggravator is applicable in cases where 'the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain.'" *Durousseau v. State*, 55 So.3d 543, 558 (Fla. 2010), *citing Finney v. State*, 660 So.2d 674, 680 (Fla. 1995). Without or without the alleged hearsay testimony, competent, substantial evidence supported this aggravator.

Even if the pecuniary gain aggravator were not supported by sufficient evidence, such error would be harmless beyond a reasonable doubt. Two valid aggravating circumstances remain: 1) heinous, atrocious and cruel; 2) cold, calculated, and premeditated. This Court has called HAC and CCP "two of the most serious aggravators set out in the statutory sentencing scheme." *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1999). As such, the presence of these aggravating factors is more likely to render an

erroneous aggravating factor harmless. Appellant has failed to demonstrate reversible error.

ISSUE VI

DID THE TRIAL COURT ABUSE ITS DISCRETION IN ASSIGNING ONLY SLIGHT WEIGHT TO APPELLANT'S NONSTATUTORY "HISTORY OF DRUG ABUSE" MITIGATOR (Restated)

Standard of review

Whether a mitigating circumstance exists is reviewed for abuse of discretion. *Caballero v. State*, 851 So.2d 655, 661 (Fla. 2003) (explaining that a trial court is free to reject age as a mitigating circumstance and noting that under the abuse of discretion standard, "we will uphold the trial court's determination unless it is "arbitrary, fanciful, or unreasonable"). Discretion is abused "only where no reasonable man would take the view adopted by the trial court." *Buzia v. State*, 926 So.2d 1203, 1216 (Fla. 2006).

Trial court's ruling

The trial court gave "slight weight" to Appellant's proposed nonstatutory mitigating circumstance of "long and well documented history of drug abuse:"

> While an expert witness, Dr. William Morton, Jr., testified that the defendant had a genetic predisposition of being at risk of being drug dependent, none of the defendant's witnesses except for Clara Keene, his girlfriend of three weeks, testified that they had ever actually seen him use cocaine. Several of them claim that they suspected he did so, but none testified to seeing it. No witness ever testified that they felt moved to attempt to get the defendant to seek treatment for drug abuse. The defendant at no time made a meaningful effort to seek drug treatment on his own. He attended a single counseling session and never returned. Dr. Morton further testified that the defendant

> did not only use cocaine, he frequently sold it to other people.
>
> Further, all of the testimony about the defendant's drug abuse is based upon self-reporting. The defendant's self-reports to Dr. Morton, friends, and family, otherwise unsupported by the record herein, greatly diminished the weight which this Court can give to the testimony of Dr. Morton. *See, Nelson v. State*, 850 So.2d 514 (Fla. 2003). Additionally, the record herein, showing the manner in which the defendant planned, prepared, and executed this complex scheme to kill and evade responsibility for the killing, make it glaringly evident that the defendant was clear headed and rational during the period leading up to the murder. There is no evidence in the record that the defendant's substance abuse mitigated the heightened premeditation necessary to support the imposition of the death penalty. The Court assigns slight weight to the mitigator of drug abuse.

(XVII 3130-31).

Merits

Appellant readily concedes that the "weight a trial court gives to the mitigation present in a capital case is within the exclusive jurisdiction of the trial court," citing *Trease v. State*, 768 So.2d 1050, 1055 (Fla. 2000)(holding "the relative weight given each mitigating factor is within the discretion of the sentencing court") (IB 46). The State agrees. The court did not reject this mitigator, nor even assign it no weight. Instead, citing weaknesses in the evidence of Appellant's drug abuse, as well as evidence that Appellant was "clear headed and rational" when planning the murder, the court determined that only slight weight should be assigned to this factor. Appellant has failed to cite a single case holding that a court committed

reversible error in assigning a particular level of weight to a nonstatutory mitigator, especially when the court has given specific reasons supported by the record for its weight determination. The State suggests that no such case exists, because it would be wholly inconsistent with the well-established rule that weight assigned to aggravators and mitigators are within the court's discretion. See *Hoskins v. State*, 965 So.2d 1, 19 (Fla. 2007)(noting that "it is not our function to reweigh" aggravating and mitigating factors).

Appellant asserts that this Court can find that the trial court erred assigning slight weight to the mitigator pursuant to *Bell v. State*, 841 So.2d 329 (Fla. 2002). In *Bell* this Court found that the trial court's unexplained assignment of "little weight" to the age mitigator when the defendant was a minor was error. First, the State notes that this holding in *Bell* was a plurality opinion, and has never been cited for the proposition that there are other circumstances where the court's weight-assignment to a mitigating factor can be overturned by this Court. More importantly, contrary to Appellant's suggestion, the holding in *Bell* is absolutely limited to the age mitigator; in fact, it is limited to the age mitigator only in cases where the defendant is a juvenile.[17] "[W]hen the statutory mitigator is age and the defendant is a minor that discretion is limited."

[17]Of course, this matter is no longer an issue after the United States Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005), which prohibits the execution of any person committing a murder when under the age of 18.

Bell, 841 So.2d at 335. See also *Ramirez v. State*, 739 So.2d 568 (Fla. 1999)("when the murder is committed by a minor, the mitigating factor of age must be found and given 'full weight'"). When the defendant is not a minor, the rule cited in *Bell* does not apply and the court may assign whatever weight to the age mitigator it deems appropriate. *Hunter v. State*, 8 So.3d 1052, 1071-72 (Fla. 2008).

This rule of law cited in *Bell* (which no longer exists after *Simmons*) cannot be extended to other aggravating and mitigating circumstances without destroying the principle that weighing of these circumstances is the trial court's function. This is especially true when the court has provided specific reasons for giving only slight consideration to a mitigating factor, such as here. The court simply did not credit the evidence used to support this mitigating factor, which gave it ample reason to reduce its weight in determining an appropriate sentence. Appellant has failed to demonstrate the court erred.

ISSUE VII

IS THE DEATH SENTENCE PROPORTIONATE? (Restated)

Trial court's ruling

In its sentencing order, the trial court described Appellant's murder of Roy Andrews as follows:

> The defendant, Robert Earl Peterson, brutally murdered 64 year old Roy Andrews, a retired police officer and current substance abuse and addiction counselor on August 8, 2005. Mr. Andrews was the defendant's stepfather, having raised him as his own son since the approximate age of fifteen. The defendant lured Mr. Andrews into a cemetery on the pretext of having car trouble. The defendant ambushed his victim by attacking him from behind while Mr. Andrews was examining the defendant's car engine. The vicious and brutal attack, by the defendant's own statement, was accomplished by hitting him in the face and head nine or ten times with brass knuckles. The defendant admitted to a confidential informant that he tried to beat the victim to death so that he could take the body somewhere else for disposal. He claimed to have broken the victim's jaw, knocked all his teeth out, and left his eyeball hanging out of his head, but was unable to render the victim unconscious. When it was evident that the defendant was helpless but still conscious, he shot him twice in the head with a pistol. The medical examiner testified that one of the wounds to the head would not have been immediately fatal. One bullet was recovered from the glove box of the victim's truck and the other remained in the victim's skull.
>
> The sole motive for the killing appeared to be the fact that Mr. Andrews was succeeding in convincing his wife (the defendant's mother) to stop giving the defendant money. The constant flow of money from his mother was financing the defendant's drug habit. The defendant received $25,000.00 in cash during the preceding year from his mother, together with her payment of his $350.00 per month child support, and a lump sum of $10,000.00 shortly before the time of

> the murder. Mr. Andrews had succeed[ed] in getting Mrs. Andrews to evict her son from her home and to agree to cut off the flow of money. The defendant had no steady source of income, doing occasional odd jobs in home maintenance and renovation.

(XVII 3125-26).

The trial court found three aggravators: (1) cold, calculated and premeditated; (2) heinous, atrocious and cruel; and (3) pecuniary gain (XVII 3127-3130). The trial court considered and weighed nonstatutory mitigators: (1) defendant's history of drug abuse (slight weight); and (2) defendant's positive qualities, including (a) skills as a mechanic (minimal weight); (b) defendant was a good son (unproven); (c) serious negative impact of a death sentence on others (no weight); (d) defendant was a good friend (very slight weight); (e) defendant contributed to his community (slight weight); (f) defendant has been an exceptional inmate (very slight weight); (g) defendant exhibited good and mannerly behavior throughout the court proceedings (no weight); (h) defendant is amenable to rehabilitation and a productive life in prison (not established) (XVII 3130-34). The trial court concluded that "the three weighty aggravators, when weighed against the two non-statutory mitigators, which were assigned only at best slight weight, support a death sentence" (XVII 3134).[18] The trial court then sentenced Appellant to death (XVII 3134-35).

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[18] The court considered Appellant's "positive qualities" as a single mitigator, although it divided it into eight subparts.

Merits

The purpose of this Court's proportionality review is to foster uniformity in death-penalty law. *Hernandez v. State*, 4 So.3d 642, 672 (Fla. 2009). Proportionality review is a consideration of the totality of the circumstances in a case in comparison with other capital cases. *Hernandez* at 672. Proportionality "is not a comparison between the number of aggravating and mitigating circumstances." *Guardado*, 965 So.2d at 119. Instead, this Court looks at the nature of and the weight given to the aggravating and mitigating circumstances. Instead, this Court considers the totality of circumstances compared to other capital cases. *Tillman v. State*, 591 So.2d 167, 169 (Fla. 1991). "For purposes of proportionality review, this Court accepts the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence." *Guardado* at 119.

Although the court found three aggravating circumstances in this case, Appellant dismisses two of them based on his previously-argued claims that they were not supported by the evidence. Thus, Appellant argues that this is a one-aggravator case (HAC), and as such, that the death sentence is disproportionate. As argued above, all of the aggravating circumstances were amply supported by the evidence and should be considered in determining whether the death sentence was proportionate.

This case involves the CCP and HAC aggravators, which, this Court has observed, are "two of the most serious aggravators set

out in the statutory sentencing scheme." *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1999). Furthermore, this case does not involve any statutory mitigation or any mental mitigation. *See Wright v. State*, 19 So.3d 277, 304 (Fla. 2009)(observing that when "mental health mitigation reveals a mentally disturbed defendant, we have vacated the death penalty under appropriate circumstances even when the heinous, atrocious, and cruel aggravating circumstance was found" citing *Offord v. State*, 959 So.2d 187, 192 (Fla. 2007)). Moreover, these aggravators were offset only by two nonstatutory mitigators. One was given only slight weight based on the lack of evidence supporting it, the other was given no more than slight weight.

In cases with comparable facts and aggravating and mitigating circumstances, this Court has approved the death sentence. In *Bruno v. State*, 574 So.2d 76 (Fla. 1991), evidence showed that the defendant made plans to the kill the victim prior to the murder. The defendant and his son visited the victim's apartment. At some point, the defendant excused himself and went to the bathroom. Upon returning, the defendant removed a crowbar from his pants and began striking the victim. The victim fell to the floor but still appeared alive. The defendant ordered his son to retrieve a gun that was under the bathroom sink, and then shot the victim twice in the head. The defendant returned to the apartment later to steal the victim's property. The defendant disposed of the crowbar and gun used to kill the victim, as well as his bloody shoes. This Court found that the only applicable

aggravators were pecuniary gain (merged with robbery), HAC, and CCP. The trial court found no mitigation, in spite of the "undisputed" evidence of the defendant's "long history of drug abuse." *Bruno*, 574 So.2d at 82-83. This Court approved the death sentence. *Id.* at 83.

In *Muehleman v. State*, 3 So.3d 1149 (Fla. 2009), the defendant decided to rob and murder a 97-year old man who had hired him as a helper. The defendant set the kitchen table in an attempt to create the illusion that the two had eaten breakfast and then gone out for a ride, then wiped down the residence to eliminate his fingerprints. The defendant repeatedly struck the victim with a cast iron frying pan. These blows did not kill the victim, so the defendant attempted to strangle the victim, and then finally shoved two plastic wrappers down his throat. The court found HAC, CCP, financial gain, and avoid arrest aggravators, and the age mitigator. This Court approved the death sentence. *Id.* at 1166.

In *Davis v. State*, 859 So.2d 465 (Fla. 2003), the defendant, his girlfriend, and a friend decided to kill the girlfriend's mother. They tried to inject her with bleach, but when that did not kill her Davis stabbed her to death. They cleaned the kitchen where they killed the victim, and later returned to obtain the victim's credit cards, cash, and ATM card. The aggravating factors were: (1) the crime was committed while Davis was on felony probation; (2) HAC; and (3) CCP. This Court approved the death sentence. *Id.* at 480.

The cases contain comparable facts and similar aggravators and support the conclusion that Appellant's death sentence is proportionate. The cases Appellant cites are not comparable and do not demonstrate that his death sentence is disproportionate. In *Farinas v. State*, 569 So.2d 425 (Fla. 1990), the victim killed his estranged girlfriend in a "heated domestic confrontation," but this Court rejected the CCP aggravator, which the State argued was shown by the defendant's unjamming the gun three times before delivering the fatal shots. No careful advanced plans like Appellant made were present in *Farinas*. Moreover, this Court found that the trial court improperly rejected the "extreme mental or emotional disturbance" mitigator. No such mitigation is present here.

Nor is *Blakely v. State*, 561 So.2d 560 (Fla. 1990) comparable. Blakely killed his wife when he reached a "breaking point" of his troubled marriage. The record does not reflect what evidence supported the CCP aggravator, but the evidence in the opinion does not show that Blakely carefully planned the murder and the destruction of evidence. Nor did Blakely kill his wife for financial gain. Moreover, *Blakely* has been rejected to the extent that it suggests a "heated domestic confrontation." See *Evans v. State*, 838 So.2d 1090 (Fla. 2002). While the State denies any suggestion that Appellant's murder of Roy Andrews constituted a "heated domestic confrontation," the basis for the decision in *Blakely* has been overruled. Appellant has failed to demonstrate that the death sentence was disproportionate.

ISSUE VIII

DID THE TRIAL COURT PROPERLY DENY THE MOTION TO DECLARE FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL BASED ON *RING V. ARIZONA*, 536 U.S. 584, 122 S.Ct. 2428(2002)? (Restated)

Appellant asserts that his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). He urges this Court to recede from its prior precedent in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) and *King v. Moore*, 831 So.2d 143 (Fla. 2002). This Court has repeatedly rejected *Ring* claims. Moreover, Appellant's jury recommended the death penalty. Even if *Ring* applied in Florida, a jury's recommendation of death necessarily means that the jury found at least one aggravator, as both this Court and the United States Supreme Court have explained. Thus, the trial court properly the motion.

Standard of review

Whether a statute complies with the Sixth Amendment right to a jury trial is a question of law reviewed *de novo*. Cf. *United States v. Seymour*, 519 F.3d 700 (7th Cir. 2008)(concluding that an "*Apprendi* issue is subject to *de novo* review."); *United States v. Salazar-Lopez,* 506 F.3d 748, 750-751 (9th Cir. 2007)(noting that preserved *Apprendi* challenges are reviewed *de novo*.).

Trial court's ruling

Prior to trial, defense counsel filed a written "motion to declare Florida's capital sentencing procedure unconstitutional under *Ring v. Arizona*" (XII 2327), which the trial court denied (XXIV 14).

Merits

The Sixth Amendment to the federal constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In *Ring v. Arizona*, 536 U.S. 584, 589, 122 S.Ct. 2428, 2432 (2002), the United States Supreme Court held "capital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." This Court has repeatedly held that Florida's death penalty scheme does not violate *Ring*. *See e.g. Miller v. State*,42 So.3d 204 (Fla. 2010) (rejecting a due process challenge based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), and *Ring* to Florida capital sentencing scheme and explaining "the indictment is not required to express this specific statutory language because the statute affords sufficient notice to satisfy due process;"); *Zommer v. State*, 31 So.3d 733, 752-753 (Fla. 2010)(noting "on numerous occasions," this Court has rejected the assertion that *Apprendi* and *Ring* require that aggravating and mitigating circumstances be found individually by a unanimous jury and also rejecting a claim that *Apprendi* requires sufficient aggravating circumstances and insufficient mitigating

circumstances must be charged in the indictment and noting "we have previously rejected constitutional challenges to an indictment for failure to list the aggravating circumstances that the State intends to prove"); *Poole v. State* 997 So.2d 382, 396 (Fla. 2008)(noting that "since the *Ring* decision, we have rejected similar arguments that Florida's death penalty statute is unconstitutional based on *Ring*" citing *Marshall v. Crosby*, 911 So.2d 1129 (Fla. 2005); *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) and *King v. Moore*, 831 So.2d 143 (Fla. 2002)).

Appellant's argument completely ignores the reasoning of this Court's decision in *State v. Steele*, 921 So.2d 538, 547 (Fla. 2005). In *Steele*, this Court explained that, even if *Ring* applied in Florida, it would require only that the jury make a finding that at least one aggravator existed. Given the requirements of section 921.141 and the language of the standard jury instructions, such a finding is implicit in a jury's recommendation of a sentence of death. *Steele*, 921 So.2d at 546. The *Steele* Court relied on *Jones v. United States*, 526 U.S. 227, 250-251, 119 S.Ct. 1215 (1999), in which the United States Supreme Court explained that, in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055 (1989), "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." So, under the reasoning of *Steele*, a jury's recommendation of death means that the jury found an aggravator,

which is all *Ring* requires. *See also Poole*, 997 So.2d at 396 (rejecting a request that this Court reconsider the holding in *Steele* that the finding of at least one aggravator is implicit in the jury's recommendation of death). Both this Court and the United States Supreme Court have explained that a jury's recommendation of death means the jury necessarily found one aggravator. Here, the jury recommended death. Therefore, his jury necessarily found an aggravator which is all that *Ring* requires.

Accordingly, Florida's death penalty statute does not violate of *Ring*, and the trial court properly denied Appellant's motion.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence entered in this case.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to David A. Davis, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on May 23, 2011.

Respectfully submitted and served,

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_____

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
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