IN THE SUPREME COURT OF FLORIDA

DAVID JAMES MARTIN,

Appellant,

v. CASE NO. SC10-539

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

PRELIMINARY STATEMENT

Appellant, DAVID JAMES MARTIN, 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 16 volumes, which will be referenced as "V," followed by the respective volume number designated in the Index to the Record on Appeal. The record also contains two supplemental volumes, which will be referenced as SV1 and SV2 respectively. "IB" will designate Appellant's Initial Brief. All citations are followed by any appropriate page number.

STATMENT OF THE CASE AND FACTS

At the time of her murder on March 11, 2008, Jacey McWilliams, was living at home with her parents in Jacksonville (V9 399). Jacey's mother Christine McWilliams knew Jacey had been hanging out with a man named David, whom Jacey had said was a friend (V10 405-06). Erin Urban lived in St. Petersburg and was dating Appellant at the time (V10 460-63). Two or three days before the murder, she spoke on the phone with Appellant, who was living in Jacksonville (V10 489-90). Both of them expressed a desire that Appellant go to St. Petersburg to visit Urban, but Appellant did not have a car. *Id.* Appellant told her, "I can just steal a car." When Urban asked how are you going to do that and he said, "well, that's easy. I'll just kill them." (V10 490). Urban, who believed Appellant was joking, replied that a cemetery was a good place to hide a body. Although she did not remember exactly what Appellant said, Appellant retorted that he knew a better place to hide a body (V10 491).

Rochelle Dotson worked with Jacey McWilliams (V10 418-19). Dotson had been to a pool hall a week or two before McWilliams' murder with her fiancee and Appellant (V10 420-21). On March 11, McWilliams told Dotson that Appellant was taking her to a special place that evening and left work approximately 4:30 p.m. (V10 423, 424). Christine McWilliams phoned Jacey that evening

because it was starting to rain, and Jacey informed her that she was in Middleburg with David, but heading home (V10 406-409).

Erin Urban lived in St. Petersburg and was dating Appellant at the time (V10 460-63). On that night, Appellant texted Urban and asking if she was working the next day. In another communication later that evening, Appellant told Urban that he could not tell her why he asked because it was a surprise, but that she would know soon (V10 471).[1] Appellant arrived at her house in St. Petersburg around 3:00 or 4:00 the next morning. Appellant told Urban that he had borrowed the car from Jacey McWilliams for $50. Urban described Appellant as very happy, giddy, smiling, glad to be there (V10 472-474). Appellant drove back to Jacksonville on March 13, but returned to St. Petersburg on March 14, still driving Jacey McWilliams' car (V10 475-478). Upon his return, Urban noticed McWilliams' cell phone in the car, but Appellant did not express any concern for McWilliams (V10 481-82). Appellant suggested that he and Urban move to Georgia, and Urban began to get worried that McWilliams would report her car stolen, but Appellant simply replied that he would leave the car somewhere for her to pick it up when they got there (V10 481-85).

[1]The record does not reflect whether this later communication was a text or a phone call.

On March 12, Urban's mother called Urban's brother Michael Christian, a St. Petersburg police officer, concerned that Appellant had showed up driving a car when she did not know him to have a car. Christian ran the tag on the car, which came back registered to Jacey McWilliams (V10 427-430).

In the meantime in Jacksonville, on March 13, two days after she last spoke with her daughter, Christine McWilliams went to the car dealership where Jacey worked to surprise her and take her to lunch. Jacey's boss informed Ms. McWilliams that Jacey had not been to work in two days. Ms. McWilliams was worried and notified the authorities of Jacey's disappearance (V10 411-12). When Detective McKinnon of the Jacksonville Sheriff's Office ran her car tag, he saw that Officer Christian had run it a few days earlier, and obtained Appellant's name from Christian (V10 436).

Appellant was arrested for shoplifting in the St. Petersburg area on March 17. Urban learned of the arrest, and also learned that Jacey McWilliams had been reported missing in Jacksonville (V10 485). When Urban spoke to Appellant about this, she thought it was odd that he did not express any concern for Jacey, thinking that it should have been the biggest worry on his mind (V10 488).

Kerry Burns of the Pinellas Park Police Department was the officer who arrested Appellant for shoplifting at Wal-Mart.

Appellant asked Officer Burns to put his keys in his car and to call his girlfriend Erin to tell her where the car was and that Appellant had been arrested (V10 520-525).

On that same day, detectives from Jacksonville contacted Detective Ken Blessing of the Pinellas Park Police Department about their missing-person investigation of Jacey McWilliams. Blessing was able to confirm for them that Appellant was in custody in Pinellas Park and that McWilliams' car was in the Wal-Mart parking lot. The car was towed by the Pinellas County Sheriff's Office (V10 532-35).

The police learned from Jacey McWilliams' cell phone records that her phone did not return to Duval County from Clay County on March 11 (V10 437). They learned from cell tower information that Appellant's phone was communicating with a tower near his residence in Jacksonville from 3:13 to 8:28 p.m. that day; with a tower in the area of Old Jennings State Forest, from 8:28 to 10:51; with a tower in Middleburg, in the area in which McWilliams' body was found, from 11:02 to 11:10; and with the same Middleburg tower transitioning to a tower in Lawtey from 11:17 to 11:50. After 11:50, Appellant's cell phone tower communications continued in a southerly direction, ending in the St. Petersburg area (V10 444-450).

Police also discovered that there were two attempts to use McWilliams's ATM card on March 12, at 1:22 and 1:23 a.m., at a

Circle K in Ocala, and obtained the surveillance tapes showing the person who used the ATM at that time (V10 544-546).

On March 20, Detective West of the Clay County Sheriff's Office and Detective Wolcott of the Jacksonville Sheriff's Office interviewed Appellant (V4 529-653). At that time they did not where Jacey McWilliams was or whether she was alive or dead (V11 575). The primary objective of the interview was to locate McWilliams, to find out what happened to her (V11 577). At first, Appellant claimed that he spent the evening in Middleburg with McWilliams, brought her home to Jacksonville, and then drove to St. Petersburg in McWilliams' car, which she had lent him, stopping back in Middleburg on the way (V4 529-576). When confronted with the cell tower information, Appellant changed his story, claiming that he had stolen McWilliams' car in Middleburg and threw her out of the car (V4 586-88). Appellant continued to deny knowledge of McWilliams' whereabouts until late in the interview, when he gave them directions to her location in a remote area off Johns Cemetery Road in Middleburg (V4 636-38). Appellant then described how he struck McWilliams in the back of the head multiple times with a hammer (V4 638-39).

Jacey McWilliams' body was found off Johns Cemetery Road in Middleburg, in an area overgrown with palmettos and small bushes (V13 811). Evidence showed that she had been dragged

approximately 100 feet to that location, from an area where a blood stain and a cigarette butt were found (V13 804-813).

Dr. Aurelian Nicolaescu performed the autopsy on Jacey McWilliams. Nicolaescu observed numerous fractures on her skull and opined that blunt force trauma to the head was the cause of death. Nicolaescu could not say whether McWilliams, would have been conscious during the attack, but given the totality of the injuries she would not have survived long (V13 822-832).

Dr. Heather Walsh-Haney examined and reconstructed the bones for osteological analysis. Much of the right side of McWilliams' skull was missing. After reconstructing the skull out of thirty-three fragments, Walsh-Haney concluded that McWilliams suffered a minimum of seven blunt force impact sites. The blows were delivered by an object with a curvilinear edge to it, and were delivered with great force to the cranium (V13 856-883).

On August 15, 2008, Appellant was indicted for the first-degree murder and armed robbery (V1 30-31).

Appellant filed a motion to suppress his March 20 statement to police on the grounds that it was involuntary (V3 520-522), which the court, after hearing, denied (SV1 175-176).

Appellant proceeded to trial. In addition to evidence supporting the facts noted above, Appellant testified in his own defense. Appellant denied killing Jacey McWilliams, but claimed

that he was there when a man named Mike Gregg killed her with a hammer. Appellant said he had lied to the police because Gregg threatened him and told him that he knew where his mother worked and where Erin Urban lived (V13 900 - V14 1007).

The jury found him guilty as charged on both counts (V4 664-65).

At the penalty phase, Christine McWilliams read a victim-impact statement about her daughter (V15 1155-61).

A joint stipulation was read to the jury, stating that Appellant was convicted of burglary to a structure or conveyance on August 14, 2007, and was on felony probation between March 11 and March 17, 2008 (V15 1162).

Eight witnesses testified for the defense: Tracy Ray, Appellant's mother; M.J. Martin, Appellant's grandfather; Kathleen Walsh, Appellant's ex-fiancee; friend Shantell Kanita; Gene Gottlieb, Appellant's conditional release counselor; Terry Kate, a former girlfriend; Heather Ray, Appellant's step-sister; and Matthew Whittington, Appellant's brother (V15 1163-1219).

The jury, by a vote of 9 to 3, recommended the death penalty (V4 708).

At the *Spencer* hearing, the State presented victim impact testimony by Christine McWilliams, Christopher McWilliams (Jacey's brother), and Janeen McWilliams (Jacey's sister-in-law) (SV2 186-195). The defense presented the testimony of Tracy Ray

(SV2 196-201). The defense also introduced Dr. Krop's telephonic deposition into evidence.

The court sentenced Appellant to death, finding three aggravating factors: committed during a robbery; committed while on felony probation; and cold, calculated, and premeditated. The court found the following mitigating factors: (1) drug abuse; (2) lack of positive role models; (3) lack of violent history; (4) crime was a situational, aberrant, isolated incident; (5) family members who love and support him; (6) has performed kind deeds for others; (7) has attempted to have a positive influence on family members, despite his incarceration; (8) artistic skills; (9) care about animals; (10) is amenable to rehabilitation and a productive life in prison.

Appellant filed a timely notice of appeal (R5 867), and this appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I:

Appellant's statement "I have nothing really to talk about" here could have been construed by officers as a continued assertion that he had no more information to offer regarding Jacey McWilliams' whereabouts. The statement was, at best, an ambiguous assertion of his right to terminate questioning, which did not obligate the detectives either to terminate questioning or to clarify the remark.

With regard to the claim of coercive police misconduct, Appellant's trial testimony shows that he did not confess because the detectives overbore his will and made it impossible to make a rational choice. Instead, Appellant retained his faculties enough to intentionally deceive the detectives by making a *false* confession, induced not by the detectives' prodding but by his fear, fear he successfully hid from the detectives, that the real killer would harm his mother or girlfriend if Appellant told the truth and implicated him. Appellant claims that the detectives' "coercive tactics found their mark" is belied by his own testimony.

Even if Appellant's trial testimony did not demonstrate that he was able to resist the detectives' pressure to confess, the detectives did not engage in misconduct that induced the confession. Appellant validly waived his right against self-incrimination after a proper advisement of those rights. While the detectives employed numerous tactics to elicit Appellant's confession, none were improper. Interpreting the evidence most favorably to sustaining the ruling below, no threats were issued, no promises of leniency were made, no deception was employed. The detectives' false-friend approach and their appeal to Appellant's emotions were permissible tactics. Appellant has not demonstrated that the court erred in denying suppression.

ISSUE II:

The "circumstantial evidence" rule, which prohibits the finding of an aggravating circumstance if the evidence supporting it is not inconsistent with the defendant's reasonable hypothesis negating the aggravator, does not apply here because the evidence supporting the cold, calculated, premeditated (CCP) aggravator was not "entirely circumstantial." Even if it did, Appellant's suggestion that an aggravator cannot be imposed if his theory is "consistent with the evidence" misapplies the standard. Because CCP was supported by competent substantial evidence, the court did not err in finding it.

ISSUE III:

The trial court rejected mitigating factors of emotional abuse, sexual abuse, and remorse as not proven. A trial court may find mitigation was not proven. Thus, the trial court properly considered and rejected this proposed mitigation. Any error in failing to find them was harmless.

ISSUE IV:

The trial court did not err in choosing not to specifically consider Dr. Krop's deposition as a basis for mitigation. First, Appellant waived the presentation of Dr. Krop's testimony. The Supreme Court has never hinted, much less held, that a trial court must constitutionally consider

mitigating evidence that the defendant waived. Nor has the Supreme Court ever hinted, much less held, that a trial court has a constitutional duty to independently locate mitigating evidence. The mitigating evidence at issue in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982) was proposed by defense counsel. Furthermore, the error, if any, in the trial court's failure to consider Dr. Krop's deposition was harmless. Dr. Krop's deposition testimony was that Appellant had an antisocial personality disorder. Dr. Krop's deposition, while it supported some mitigation, could be used to rebut that mitigation and all other mitigation as well.

ISSUE V:

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

ISSUE VI:

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

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS TO POLICE ON THE GROUND THAT HE INVOKED HIS RIGHT TO TERMINATE QUESTIONING, AND THAT THE STATEMENTS WERE INDUCED BY VARIOUS COERCIVE TACTICS? (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).

In applying this presumption of correctness regarding historical facts, "the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *Pagan v. State*, 830 So.2d 792, 806 (Fla. 2002).

MERITS:

Appellant raises two separate claims that his confession should have been suppressed. First, Appellant claims that he invoked his right to cut off questioning during his interrogation, and second, that the detectives coerced him to confess. The State will address each claim in turn.

A. Invocation of right to cut off questioning:

Protection of the right against self-incrimination requires that if the suspect "indicates in any manner" that he or she does not want to be interrogated, the interrogation must not

begin or, if it has already begun, must stop. *Miranda v. Arizona*, 384 U.S. 436, 473-74, 86 S.Ct. 1602 (1966); *Traylor v. State*, 596 So.2d 957, 961 (Fla. 1992).

In *Davis v. United States*, 512 U.S. 452, 458-59, 114 S.Ct. 2350 (1994), the Court held that officers are not required to terminate an interrogation upon a suspect's reference to an attorney unless the reference is an unequivocal assertion of the right to counsel. The Supreme Court recently held that the same standard applies to invocation of the right to remain silent. *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010). The Court noted that there is "good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." *Thompkins*, 130 S.Ct. at 2260. "A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoid[s] difficulties of proof and ... provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Id.*, citing *Davis*.

The Court explained that officers must be able to readily understand that a suspect wants to invoke his right to silence: "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'" *Id.*, citing *Davis*. "Suppression of a voluntary confession in these

circumstances would place a significant burden on society's interest in prosecuting criminal activity." *Id.*

The *Thompkins* Court concluded the defendant there "did not say that he wanted to remain silent or that he did not want to talk with the police," and that "with either of these simple, unambiguous statements, he would have invoked his 'right to cut off questioning.'" *Id.*, citing *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321 (1975).

This Court had earlier reached the same conclusion, applying the *Davis* requirement of an unambiguous invocation of the right to terminate interrogation in *State v. Owen*, 696 So.2d 715, 717 (Fla. 1997). This Court cited with approval *Coleman v. Singletary*, 30 F.3d 1420 (11th Cir. 1994), which held as follows: "a suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent." *Owen* at 718. "If the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may proceed with the interrogation." *Id.*[2]

[2]This Court also noted that "requests for counsel have been accorded greater judicial deference than requests to terminate interrogation." *Id.* at 718, n.6. The State agrees with this observation, and suggests that a request to terminate questioning should be even more unambiguous than a request for counsel. When a suspect mentions a lawyer, officers should be

The defendant in *Owen* noted had initially waived his *Miranda* rights and during the ensuing interrogation made two equivocal statements. First, when an officer asked whether he had deliberately targeted the victim's house, Owen responded, "I'd rather not talk about it." Later, when the officer asked him where he had put a bicycle, Owen said, "I don't want to talk about it." As this Court stated in a later opinion,[3] "in both statements it was unclear whether Owen was referring to the immediate topic of discussion, i.e., the house and the bicycle, or to the underlying right to cut off questioning."

This Court noted the relevance of this distinction in *Almeida v. State*, 737 So.2d 520 (Fla. 1999). In *Almeida* the disputed invocation was "prefatory to-and possibly determinative of-the invoking of a right." *Almeida* at 523. The *Almeida* utterance was made under the following conditions: "(1) at the very beginning of the taped interrogation session; (2) in the midst of a general discussion concerning his rights; and (3) in direct response to a police question concerning the right to

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tuned to the possibility that the suspect is requesting counsel. As seen below, suggestions that a suspect does not wish to talk, especially during the course of the interrogation, are more likely to be part of the give-and-take of an interrogation and, as such, more difficult to discern as an invocation of the right to terminate the interrogation.

[3]*Almeida v. State*, 737 So.2d 520, 523-524 (Fla. 1999).

counsel." Based on these factors, the court determined that Almeida's invocation of his right to counsel was unambiguous.

The court in *Alvarez v. State*, 15 So.3d 738 (Fla. 4th DCA 2009), also wrote of the importance of timing to this issue, noting that alleged invocations are more likely to be found unambiguous when made prior substantive questioning than when made during the interrogation:

> [I]f a suspect has not answered any questions and fails to clearly waive his right to remain silent, or has waived his right but then answered only "mundane" questions before any substantive questioning, announcing he does not want to answer anymore, it is reasonable to conclude that he has decided not to speak. **However, where a suspect has heard, understood, and waived his Miranda rights, and has been answering substantive questions without incident and continues to do so, a statement which may have been unambiguous if uttered initially may be objectively ambiguous when considered in context**.

Alvarez at 745 (e.s.). See also *Cuervo v. State*, 967 So.2d 155, 163 (Fla. 2007)(noting that the defendant's invocation of the right to silence "came solely in response to the inquiry concerning his *Miranda* rights, before any questions specific to the crime were asked," and distinguishing *Owen* because the statements deemed equivocal there were made "during the course of an interrogation").

To summarize, when a suspect has waived his *Miranda* rights, officers are only required to end an interrogation where the defendant makes an unequivocal request to cut off questioning with sufficient clarity that a reasonable police officer in the

circumstances would understand the statement to be an assertion of the right to remain silent. If a reference to invoking these rights "is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect ***might*** be invoking the right to counsel," *Davis*, 512 U.S. at 459, 114 S.Ct. at 2352 (emphasis in original), officers are not required to stop questioning the suspect. Moreover, statements made during the course of interrogation are less likely to constitute an unambiguous invocation of the right to silence than statements made before substantive questioning begins.

Applying these principles here, the court below did not err in concluding that Appellant did not invoke his right to terminate questioning when he told the detectives, "I have nothing really to talk about." This utterance was at best an ambiguous request to terminate questioning, and the State contends that it was not a request to terminate questioning at all.

At the time of the disputed statement, Appellant had spent most of the first hour of the interview simply telling his first version of the events to the detectives, which involved him dropping Jacey McWilliams off at her home in Jacksonville and borrowing her car (V4 533-576). At that point, the detectives confront Appellant for the first time with evidence that

conflicts with his story, suggest to him that he has not given them the entire story, and began exhorting him to tell them the whole story. At that point, Appellant admitted that he ordered McWilliams out of the car in Middleburg and drove away, stealing her car (V4 586-88). The detectives told Appellant that McWilliams "didn't just get out of the car" (V4 591), and continued to exhort Appellant to tell them the rest of the story. At one point the following exchange occurred:

> WOLCOTT:[4] We got no beef. Okay the only beef I have is I have a job. I signed up for this job. It pays like crap, but I do it. Okay, it can be rewarding. I can help families. Okay, I can do that kind of stuff. But what prohibits me from doing that is when I got the evidence and I got the people talking and they are not going like this. Okay, then is when you start having problems. Do we need to have problems? Have I treated you bad?
>
> MARTIN: Nope.
>
> WOLCOTT: Have I disrespected you?
>
> MARTIN: Not at all.
>
> WOLCOTT: Do you feel like I am judging you wrong or anything?
>
> MARTIN: No.
>
> WOLCOTT: Then --
>
> MARTIN: As a matter of fact, you have something set in your head that you are trying to get to and I can't help you get there.
>
> WOLCOTT: But David, you can.
>
> MARTIN: No. I can't.
>
> WOLCOTT: I think you have it in your head, okay, that you can't help us. Okay. And maybe that is preventing you from wanting to help us, but at some point your time, son, you have to let someone trust in you. You got to show there is a reason to trust in you. Okay. You cannot put

[4]The transcript of the interview identifies the detectives as "Det." and "Other Det." who are in fact Detectives Wolcott and West, respectively. For clarity, they will be referred to by name.

> the weight of this world on your shoulders. None of us can. Okay. Communication is big, bro. Talking to people. Okay. Spiritually, mentally, I mean, it's a relief. Okay. It's a weight off, man. It's a weight off. Okay. It's relief for you to be able to lay down tonight in your bunk, okay, knowing that, you know what, that shit's behind me.
>
> MARTIN: You know what, I already feel that relief. You know why, because I told you what I already told you.
>
> WOLCOTT: David.
>
> MARTIN: I have nothing really to talk about.
>
> WOLCOTT: David, you are not, okay, you may be saying that you are having it okay, but your body is not saying it.
>
> MARTIN: Because y'all are putting me under a lot of pressure right now.
>
> WOLCOTT: Okay. Well, it's a pressure situation.
>
> MARTIN: I know it is.
>
> WOLCOTT: I don't know how many times you have sat across from a homicide detective being questioned.
>
> DEFENDANT: I have never.
>
> WOLCOTT: And that's why I said today is the biggest day of your life. Okay, today can be a turning point for you. It can't be a turning point by lying to us. Okay, I have been doing this job for 11 years. Okay, the two of us have been doing this job longer than you have been alive. Okay, we have seen other young people make this same mistake. They think that there isn't a way out. That there isn't a way out that there is no light at the end of tunnel and they can't help themselves and they can. I am telling you, they can, but you, David, cannot help yourself by not being truthful. You've got to. It's that simple because.

(V4 602-04). The detectives continued exhorting Appellant to tell them what really happened.

At the suppression hearing, Detective West testified that he did not consider anything in the preceding exchange to be a request by Appellant to terminate the interrogation (SV1 62). West agreed that Appellant did not ever give him "any indication

either verbally or by non-verbal queues [sic] that he no longer wished to speak to" the detectives. *Id.*[5]

The trial court did not err in holding that Appellant's statement "I have nothing really to talk about," under the circumstances presented, constituted an unambiguous request to terminate the interrogation.[6] The officers were telling Appellant that he would feel relief when he told the truth, to which he responded, "You know what, I already feel that relief. You know why, because I told you what I already told you. I have nothing really to talk about."

This case presents a classic example of an ambiguous (at best) request, suppression of which would punish officers for "guessing wrong." *Thompkins*. Rather than a request to terminate the interview, Appellant's statement under the circumstances is

[5]Appellant takes issue with Detective West's statements at the suppression hearing about what a suspect would have to do to invoke his right to cut off questioning (IB 57-58). Without debating the merits of West's speculations regarding an adequate invocation, it is ultimately irrelevant to whether Appellant unambiguously invoked his right to cut off questioning, which is governed by an objective standard, not what a particular officer may believe. See *United States v. Scurlock*, 52 F.3d 531, 536-37 (5th Cir. 1995)("The test is objective; that is, a suspect must articulate the desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent.").

[6]At the conclusion of the suppression hearing the court stated, "At no time did he invoke his right to remain silent which he had a right to do that after given his Constitutional Rights" (SV1 176).

more plausibly interpreted to mean the following: **"You are saying that I have not told you the whole story, but you are wrong, I have told you everything that happened."** The whole point of *Owen* and *Thompkins* is that officers should not be compelled to guess when a suspect "***might*** be invoking his rights," *Davis*, or might not be, especially when, as here, the more plausible interpretation is that he was not.

Accordingly, to the extent that Appellant in fact wished to end the interview, this statement did not "articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent."[7] *Owen*.

A similar situation was presented to the Supreme Court of New Hampshire in *State v. Jeleniewski*, 791 A.2d 188 (N.H. 2002). There, the officer told the defendant during questioning that he did not believe he was telling the truth, and asked him, "And you've got nothing else to say?" to which the suspect replied, "No, sir." The defendant continued to assert that he had left the victim safe, and the officer asked again, "is there anything else you want to tell me?" to which the defendant again replied

[7]For his part, Detective West testified that he believed Appellant was just "stalling" when he told them that he had "nothing really to talk about" (V11 773).

"No, sir." *Id.* at 192. The state high court agreed with the trial court's observation that **"[t]he defendant's response to the detective's question was nothing more than a continued assertion that he had no more information to offer regarding the murders.** It was not a statement that he no longer wished to answer questions." *Id.* The court continued:

> Under the totality of the circumstances, the defendant did not invoke his right to remain silent and terminate questioning at any time during the interview. **We construe the defendant's statements as affirmations of his version of what occurred on the day of the murder, rather than as assertions of the right to remain silent.** In the discussion leading up to the defendant's first statement, Detective Swift stated that he believed the defendant was not being truthful, which the defendant continually denied. **Under these circumstances, the defendant's response to the question as to whether he had anything else to say was a further affirmation that he was telling the truth about what happened, not an invocation of the right to remain silent.**
>
> Similarly, the defendant's second statement was not an invocation of the right to remain silent. At that point in the interview, Detective Swift was asking the defendant questions about his story that the girls were fine when he left the scene and that he had no idea what happened to them. Thus, the defendant's response of "No, sir" was simply a further affirmation of his innocence.

Jeleniewski, 791 A.2d at 193. The court further found that the defendant's continued answering of additional questions further supported its finding that he did not assert his right to remain silent. *Id.* Similarly, Appellant's statement here could have been construed by officers as a continued assertion that he had no more information to offer regarding the murders. As such, the statement was at best ambiguous, and not a clear assertion

of the right to terminate questioning. See also *Weaver v. State*, 705 S.E.2d 627, 632 (Ga. 2011)(defendant's statement during questioning "I don't want to say nothing" was "plainly not an attempt to cut off questioning;" it was "part of the 'give and take' of interrogation and may also be 'reasonably understood to express [Appellant's] internal conflict and pain in being asked to recount [all that] had happened'" (internal citations omitted)); *State v. Prosper,* 982 So. 2d 764, 765 (La. 2008)(defendant's statement during questioning "I don't have nothing else to say sir 'cause I'm telling the truth. I'm telling the truth. I don't have nothing else to say" "cannot plausibly be understood as an invocation to cut off questioning;" "Rather, defendant continued asserting he did not know where the guns were, which we find does not reasonably suggest a desire to end all questioning").

Of course, the Florida courts have affirmed denial of suppression for similar comments when the circumstances warranted it. See e.g., *Owen* ("I'd rather not talk about it" and "I don't want to talk about it" viewed as ambiguous under the circumstances); *Alvarez v. State*, 15 So.3d 738 (Fla. 4th DCA 2009)("I really don't have nothing to say" held to be ambiguous under the circumstances; instead, "he had nothing to say because he knew nothing about the crimes, not because he was refusing to talk"); *Bailey v. State*, 31 So.3d 809 (Fla. 1st DCA 2009)

(Defendant's words "Man, I don't really want to talk about that" did not "come across as a clear assertion of a right" under the circumstances). The same applies here. Under the circumstances, Appellant's statement was ambiguous at best. Because the statement could be understood as an assertion that he had already told the officers everything he knew, it was not a proper invocation even if it could also have been understood as an attempt to cut off questioning.

Appellant attempts to demonstrate that the officer believed that the request was an unambiguous attempt to end questioning because he told Appellant, "your body is not saying that." First, Appellant never made this argument below. Second, the officer's subjective belief is irrelevant, as noted above. And most importantly, the State contends that Appellant's so-called "body language" actually demonstrates that Appellant's statement was ambiguous, not unambiguous. Appellant claims that he "found no case law recognizing 'open' body language (whatever that is) as nullifying a defendant's previously or concurrently invoked right to silence" (IB 56-57). While the State has also not discovered cases using that exact phrasing, *Bailey* is certainly instructive. The *Bailey* court noted that the words the defendant used seemed a "rather emphatic" invocation of the right to terminate questioning, but found it ambiguous in light of the actual recording of the interview, which reflected that

the assertion was nowhere near as clear as the transcript made it appear. *Bailey*, 31 So.2d at 814. The context of the statement is obviously important to its meaning, and Appellant's suggestion that only the words on the transcript matter is unavailing.

Likewise, Appellant's resort to the dictionary to demonstrate the word "really" in Appellant's statement shows emphasis on his assertion of the right also fails (IB 55). As the *Bailey* court noted, "the word 'really' is not always used to express emphasis, but is sometimes used in a hedging manner." *Bailey*, 31 So.2d at 814. The same applies here. "I have nothing really to talk about" is better understood in this context as "I have nothing to talk about that is important or relevant or that I haven't already said," rather than "I insist that I have nothing further to say."

None of the case Appellant cites require a different conclusion. Appellant's lead case is a trial court order, *United States v. Reid*, 211 F.Supp.2d 366, 368 (D.Mass. 2002), where the trial court ordered the suppression of the defendant's confession on the ground that the defendant unambiguously invoked his right to silence by saying, "I have nothing else to say." *Reid* was distinguished by the Fourth District in *Alvarez* because the defendant's statement in *Reid* was made "before substantive questioning" ("courts have been more apt to find a

revocation of a waiver of the right to remain silent unambiguous and unequivocal if made ***before*** substantive questioning" (emphasis in original). *Alvarez*, 15 So.3d at 744.[8] The same is true here. *Reid* does not apply because the disputed statement here was made long after substantive questioning began.

Moreover, the court in *Reid* emphasized that the defendant used the word "else," which means "additional" or "more." *Reid* at 372. Use of such a word is more likely to alert officers that the defendant is finished speaking and is invoking his right to terminate questioning.[9] Appellant here used no such words.

In *Martin v. State*, 987 So.2d 1240 (Fla. 2d DCA 2008), the defendant invoked his right to silence at the outset of the interview, like the defendant in *Reid*. The defendant repeatedly told the detective that he nothing to say, but questioning continued. No such thing occurred here. Finally, *Dubon v.*

[8]*Smith v. State*, 915 So.2d 692 (Fla. 3d DCA 2005), is distinguishable on the same basis. In response to the detective's offer to give "his side of the story," the defendant replied that he "had nothing to say." This is far different than a similar statement used in the middle of an interrogation.

[9]The defendant in *Christopher v. Florida*, 824 F.2d 836 (11th Cir. 1987), used the same words ("I got nothing else to say"). In fact, the defendant in *Christopher* repeated that he had nothing else to say, but the interrogation continued. The same is true of the word "further," which distinguishes *People v. Douglas*, 8 A.D.3d 980, 778 N.Y.S.2d 622 (App. Div. 2004)("I have nothing further to say").

State, 982 So.2d 746 (Fla. 1st DCA 2008), has little precedential value because the court wrote nothing about "context to the defendant's three custodial statements that he has 'nothing to say.'" *Alvarez*, 15 So.3d at 744, n.8.

Appellant has failed to demonstrate that the court below erred in determining that he did not unambiguously invoke his right to terminate questioning.

B. Coercive Police Misconduct:

1. Introduction - Appellant's motive to confess:

Appellant details numerous instances of alleged misconduct by Detectives Wolcott and West that induced him to confess, rendering the confession involuntary and inadmissible. The State will respond to each allegation of misconduct, but asserts first that all of it is irrelevant, because none of it induced a confession.

At trial, Appellant denied killing Jacey McWilliams, claiming that a man named Mike Gregg killed her in front of him. Appellant testified that after the murder Gregg told him, "I'll get you if you tell anybody about this" (V13 948). Gregg told Appellant that he knew where Appellant's mother worked, and that Erin Urban lived in St. Petersburg (V13 948-49). Appellant was "freaked out" because he knew, having just witnessed Gregg killing Jacey McWilliams with a hammer, that Gregg was capable of violence (V13 949-950).

At the time of the interrogation, Appellant testified that he felt that the lives of his mother and Urban were still in jeopardy because the "menace" of Mike Gregg was "still there" (V13 957). He told the detectives that what happened to Jacey McWilliams was "not simple," but never elaborated (V13 958). Appellant was suggesting that he did not want to reveal to the detectives what happened to McWilliams due to his fear for the safety of his mother and girlfriend.

Appellant eventually confessed to killing Jacey McWilliams himself. He admitted at trial that his tearful confession was all an act, nothing more than an attempt to deceive the detectives (V13 971-72).

If Appellant's confession was nothing more than a lie, made with the intent to deceive the detectives, it could not have been coerced by them. Appellant cannot claim that his confession resulted from the detectives "overbearing his free will" to make a rational choice when in fact that confession was an intentional deception. And the motive for that deception is clear. Appellant was not coerced into a false confession by threats, promises of lenient treatment, or any deception by the detectives; he made an intentionally false confession because he feared for the safety of his mother and girlfriend, a "fact" wholly unknown to the detectives. Because Appellant's false confession was induced by matters unrelated to any alleged

police misconduct, suppression is not warranted. See e.g. *Blake v. State*, 972 So.2d 839, 844 (Fla. 2007)(a confession is not involuntary unless there is a "causal connection between the police conduct and the confession"); *Colorado v. Connelly*, 479 U.S. 157 at 164, 107 S.Ct. 515 at 522 (1986) (prohibiting suppression "absent police conduct causally related to the confession").[10]

This fact alone is sufficient to support the order denying suppression. Again, Appellant admitted that he made an intentional choice to deceive the detectives, so he cannot claim that he had lost his ability to make a "free and unconstrained choice" or that his "capacity for self-determination" had been "critically impaired." *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879 (1961). The primary motive for this

[10]Of course, Appellant never testified that his will was overborne by the detectives' threats, promises or deception. The Maryland Court of Appeals recently addressed this point in *Lee v. State*, 12 A.3d 1238, 1253 (Md. 2011):

> To be sure, the State has the burden to prove voluntariness. We cannot help but note, nonetheless, that Petitioner did not testify at the suppression hearing. Therefore, we do not have even his word that Detective's Schrott improper comment overbore his will and produced his confession. Nor does the fact that Petitioner's confession followed the detective's comment, by itself, establish that Petitioner's will was overborne. As we have said, a mere promise, whether it be of leniency or, as here, confidentiality, without more, will not render a confession involuntary, for federal (or state) constitutional purposes.

deception was fear for the safety of his mother and girlfriend, but even to the extent that the detectives' threats or promises added to that motive, they did not deprive him of the ability to make a free choice, because he obviously did.

Nonetheless, even if Appellant himself had not testified that he had retained the ability to make a free and unconstrained choice to make his false confession, the State contends that no police misconduct sufficient to suppress the confession occurred.

2. Confession obtained by coercion in general:

In his motion to suppress, Appellant notes that his statements were made when officers interviewed him "confined at the police station, restrained from leaving" (V3 521). From this fact, Appellant concludes, "certainly, under these circumstances, the voluntariness of any such statements are, to say the least, suspect. Thus, any confession elicited under these circumstances violated [his] rights." *Id.* In other words, Appellant asserts that the voluntariness of **any** statement given during custodial interrogation, even after *Miranda* warning have been given, is presumptively questionable, based on the mere fact that it was given during custodial interrogation. Contrary to Appellant's assertions, statements derived from custodial interrogation are not presumptively inadmissible. As this Court once said, "we adhere to the principle that the state's

authority to obtain freely given confessions is not an evil, but an unqualified good." *Traylor v. State*, 596 So.2d 957, 965 (Fla. 1992). See also *McNeil v. Wisconsin*, 501 U.S. 171, 181, 111 S.Ct. 2204, 2210 (1991)(noting that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good" and that "admissions of guilt resulting from valid *Miranda* waivers 'are more than merely "desirable;" they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'").

As such, attempting to elicit a confession is not coercion. Nor does the fact that police apply some pressure to the defendant to obtain such a confession constitute coercion. "Obviously, interrogation of a suspect will involve some pressure because its purpose is to elicit a confession." *Jenner v. Smith*, 982 F.2d 329, 334 (8th Cir. 1993). "In order to obtain the desired result, interrogators use a laundry list of tactics," including "a raised voice, deception, or a sympathetic attitude on the part of the interrogator." However, such tactics "will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne." *Id.*

Similarly, the mere fact an interrogation does in fact induce a confession does not render the confession involuntary. As the Supreme Court put it, "of course, these confessions were

not voluntary in the sense that petitioners wanted to make them or that they were completely spontaneous, like a confession to a priest, a lawyer, or a psychiatrist. But in this sense no criminal confession is voluntary." *Stein v. New York,* 346 U.S. 156, 182, 73 S.Ct. 1077, 1091 (1953). "Few criminals feel impelled to confess to the police purely of their own accord, without any questioning at all," so the test is not "whether the confession would have been made in the absence of the interrogation." *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir. 1986). Police tactics during questioning do not render a confession involuntary unless their statements to Appellant "were so manipulative or coercive that they deprived [him] of his ability to make an unconstrained, autonomous decision to confess." *Id.* at 605. While the detectives here certainly intended to persuade Appellant to made a full accounting of his involvement in the disappearance of Jacey McWilliams, Appellant plainly retained the ability to make an unconstrained, autonomous decision to confess.

In order for a confession to be voluntary, it must be the "product of an essentially free and unconstrained choice by its maker" as opposed to the product of an interrogation where the suspect's "will has been overborne and his capacity for self-determination critically impaired." *Culombe v. Connecticut*, 367 U.S. at 602, 81 S.Ct. at 1879. See also *Blake*, 972 So.2d at 844

(holding that "the salient consideration in an analysis of the voluntariness of a confession is whether a defendant's free will has been overcome"). Moreover, "to establish that a statement is involuntary, there must be a finding of coercive police conduct." *Schoenwetter v. State*, 931 So.2d 857, 867 (Fla. 2006); see also *Connelly*, 479 U.S. 157 at 167, 107 S.Ct. at 522 ("[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"). Judge Posner provided a relatively clear articulation of the proper standard in *United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990), stating that a confession is involuntary when "the government has made it impossible for the defendant to make a rational choice as to whether to confess-has made it in other words impossible for him to weigh the pros and cons of confessing and go with the balance as it appears at the time."

Applying these standards, the totality of circumstances supports the ruling below that the interrogation was not coercive. The detectives appealed to Appellant's conscience in a variety of ways, letting him know that telling them the truth had benefits that he could not derive by failing to give a full, accurate accounting of his encounter with Jacey McWilliams. As this Court has observed, "except in those narrow areas already established in law, police are not forbidden to appeal to the

consciences of individuals." *Johnson v. State*, 660 So.2d 637, 643 (Fla. 1995). "Any other conclusion would come perilously close to saying that the very act of trying to obtain a confession violates the rights of those who otherwise have waived their rights." *Id.* See also *State v. Rupe*, 683 P.2d 571, 582 (Wash. 1984)(holding that "psychological appeals to defendant's conscience" do not render a confession induced by them involuntary).

This observation applies here. The police did no more than appeal to Appellant's conscience in an attempt to induce him to tell them what really happened to Jacey McWilliams. Moreover, to the extent that police may have implied to Appellant that it was possible that he would, or would not, go to death row for his acts, these statements were made when the officers had no idea what Appellant had actually done to McWilliams. As such, the officers did not deceive Appellant.

3. Specific claims of police misconduct:

Appellant claims to define his argument by identifying six categories of allegedly improper tactics that rendered his confession involuntary (IB 60). To make this claim, Appellant often employs the most unfavorable interpretations of the detectives' statements possible, sometimes taken out of context. None of the detective's statements were improper, when viewed in the totality of circumstances and under the correct standard

requiring the evidence to be viewed in a light most favorable to sustaining the ruling. *Pagan*. This Court should reject Appellant's apparent attempt to demonstrate error based upon sheer volume of allegedly improper comments rather than merit. Moreover, many of these claims were not raised in the suppression proceeding. The State's task in responding to these accusations is made even more difficult by the fact that Appellant filed a brief, cursory motion to suppress (V3 520-22) and presented only a very short argument in favor of his motion at the hearing (SV1 157-160). The State will attempt to address all of Appellant's various accusations, but the State contends that any that are not specifically addressed do not demonstrate error. The State will address each of Appellant's six identified techniques in turn.

a. Threats that if Appellant refused to cooperate he would get sent to death row, would not get a fair trial, and the detectives would testify adversely to him:

Appellant begins his discussion with *Brewer v. State*, 386 So.2d 232 (Fla. 1980), where this Court found that the defendant's confession was involuntary "where police threatened defendant with electric chair, suggested that they had power to reduce charge against him and that confession would lead to lesser charge and told defendant he might not be sentenced to life if he confessed but assured him that he would be convicted and probably would not receive a fair trial" (IB 61). Appellant

claims that the detectives here "employed virtually identical tactics." The State disagrees that *Brewer* resembles this case and asserts that Appellant's characterizations of the detective's statements here are grossly exaggerated or unreasonable interpretations.[11]

Review of the objectionable interrogation in *Brewer* demonstrates why it does not apply:

> THIRD VOICE: What time did you leave? Now someone took you to Bellair in a pickup truck. I know that for sure. I don't know where you went to in Bellair and Allen and I have followed you every footstep from the time you were supposed to be at the Jiffy Store that night and the time you left your trailer until you went to the Jiffy Store, 'til you went to Lous and back to your trailer, and from your trailer to Bellair, and to the people you talked to in Bellair, and all about it. And, its looking dim for you, boy. I'm not kidding you.
>
> FIRST VOICE: **If you get convicted of first degree murder, now it's the damn electric chair or life. Now that's the way that's what it amounts to. But, if you you know, if you committed second degree murder, its what? Five? What? Twenty? Twenty years to life and you're eligible for parole at five or seven, see? That's second degree. That's what you did. I know that's what you did. That's what you did. Second degree murder.** But, if we put all this evidence we got before a jury, you are liable to get convicted of first degree murder. Look, we know you were you were in the area. We know you went to the restaurant. Your knife was found

[11]It must also be noted that *Brewer* cites *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183 (1897), for the proposition that confessions are involuntary if obtained by "any direct or implied promises, however slight," *Brewer* at 235, and applies that standard in determining that the confession was involuntary. As discussed below at pp. 51-53, the *Bram* standard was long ago been discarded by the Supreme Court and no longer represents the proper standard for determining voluntariness of confessions. For this reason alone, the precedential authority of *Brewer* is questionable.

under that woman. Your knife, that's been identified as your knife, it's even got your name on it. How is a jury

SECOND VOICE: Engraved on it.

FIRST VOICE: Engraved on it. **How is a jury how is a jury going now, you think of 12 people that don't know a damn thing about the law sitting back there listening to this, see?** They don't know as much about the law as me or Alred or maybe not as much as you; but, they are sitting there listening. All right. Here here he was. His knife was under the woman. We've got your boots that's got blood all over them. All over them. Even where they were polished. We are going to present that to the jury. We are going to let them look at it. We've got casts, photographs of where your heel impression went into the dirt. We know they're your boots; they've been identified as your boots, right?

SECOND VOICE: Yes, sir.

FIRST VOICE: Not the ones you were wearing when you were in here, when you were brought in here this afternoon. We are talking about some other boots. You know what I'm talking about, don't you?

SECOND VOICE: Yes, sir.

FIRST VOICE: Those are your boots, aren't they?

SECOND VOICE: Yes, sir.

FIRST VOICE: You were wearing them that night, weren't you?

SECOND VOICE: Yes, sir.

FIRST VOICE: And why did you lie to us and tell us that you had them others on? It ain't going to do you any good to lie, Pat. If you done it, tell us, and tell us right now, and we'll help you out on this thing. They are going to come to us and they are going to say, "Did you cooperate?" We are going to say, "yes, he did. He's sorry for what he done. We believe he can be rehabilitated." That's what we will tell the parole people when the (sic) come to us. If you hang back and try to lie to us, we are going to say, "yes, he lied to us. **He hasn't admitted it. We had to go to a jury trial. The jury found him guilty. They sent him away for life." And that's the way it will be. You will be there the rest of your damn life.** Hell, tell us about it. We put a guy in jail, just like you, just about the same age, for the same thing not one month ago. Now, he was on drugs too. Hell, you're sorry for what you've done. I know you are. Tell us about it. Get it off your conscience. We'll help you out. I'm serious. Won't we, Alred? I tell you, a damn jury is going to convict you, Pat. We got all kinds of evidence on you. Even if what you told us is true, a jury will still convict you of first

degree murder. **You've got 12 people sitting back there and they've read about all this stuff in the papers and, man, these people will just string you by the nape of your neck right now if they get their hands on you. Hell, we know you done it. You know you done it. We can prove it in court. Admit it. Say you're sorry. Try and get off light. That's your only recourse.**

SECOND VOICE: Yeah, but that ain't the only thing you can do is say you're sorry.

FIRST VOICE: Why ain't it?

SECOND VOICE: 'Cause that don't bring back someone's life.

FIRST VOICE: You are sorry you done it, though, ain't you?

SECOND VOICE: I ain't saying I done it.

FIRST VOICE: **Well, I know you ain't saying you done it; but, see, I know you did it. Alred knows you did it. Jennings Murrhee knows you did it.** Isn't that right? Hell, it ain't the worst thing in the world. We do this stuff all the time; this is our business. This is our business. **And I guarantee you when we go to court, if we go to a trial on this thing, buddy, they are going to find you guilty. I'll swear they are. They will find you guilty and they will send you away for the rest of your life if they don't put you in the electric chair.** Where you go ahead and cooperate and tell us you've done this thing and tell us how you done it, tell us where that billfold is, tell us where the billfold is, we'll help you out on this thing. We'll get you'll get out of this thing on second degree murder. But we got you. We got you locked up in this thing. And that's the truth. You ain't but 19 years old.

SECOND VOICE: 18.

FIRST VOICE: Eighteen years old. You'll be out on the streets when you're 30, or less than that, but you won't if we go to a trial and you're convicted of first degree murder. You can count on that.

THIRD VOICE: Why don't you just go ahead and straighten up and tell us?

FIRST VOICE: Do you want to tell us about it? Tell us about it. Cooperate with us. We'll help you out. You've known me all your life. You know I ain't no liar and I don't put stuff on people they don't deserve. I'll tell the parole and probation people you cooperated with us. Alred will, too. And I'll get Jennings Murrhee to tell them that you cooperated. We know you done it. Hell, tell us about it and cry about it and pray a little bit about it and you'll be all right.

Brewer at 233-35 (e.s.).

Even a cursory reading of the interrogation in this case shows that it bears little resemblance to the aggressive, threatening manner of the officers in *Brewer*. The officer in *Brewer* repeatedly told the defendant that they knew he had killed the victim, and that if he did not confess the jury would "just string you by the nape of your neck" and that his "only recourse" was to "say you're sorry" and "try and get off light." The officer even "guaranteed" to Brewer that he would be found guilty and the jury would "send you away for the rest of your life if they don't put you in the electric chair."

The only "threat of the death penalty" that Appellant identifies in the three and one-half hour interrogation is a single statement from Detective Wolcott as follows:

> Wolcott: The best thing that David can do for David is to help us find her. Okay?
> Defendant: Uh-huh.
> Wolcott: Because you look like a monster if you don't. You really do. And you know where monsters go. Monsters go to prison, monsters go to death row. Monsters never see the light of day again. You are no monster right?
> Defendant: Right.

(V4 580-81; p. 52-53).[12] Appellant characterizes this an "an explicit threat meant to incite fear" (IB 62). In fact, this

[12]For unknown reasons Appellant cites the page number of the interrogation transcript rather than the record volume page number in his brief on this sub-issue. For clarity, the State

statement bears little resemblance to the threats made in *Brewer*, especially considering the friendly, trusting atmosphere that the detectives here tried to impart to Appellant.[13] No reasonable reading of Wolcott's statement shows that he was threatening Appellant with a death sentence. The mention of death row was more similar to the tactic used in *Walker v. State*, 707 So.2d 300, 311 (Fla. 1997), where the detective "reminded Walker that he could face the death penalty for the murders of the victims in this case," but "Walker was never threatened with the 'electric chair.'" See also *United States v. Astello*, 241 F.3d 965, 967 (8th Cir. 2001):

> Here, the agents used a train analogy, telling Astello that the train was leaving the station and those who told the truth would be on the train while those left behind at the station would be charged with the crime. They said that the train was getting crowded, and that those who were on the train would testify against him. Certainly, these statements may have influenced Astello's decision to tell the truth. Having carefully read and listened to the June 19 interrogation in its entirety, however, we conclude that the statements were "not so coercive as to deprive [Astello] of [his] ability to make an unconstrained decision to confess." *United States v. Mendoza*, 85 F.3d 1347, 1351 (8th Cir.1996).

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will cite both the page number of the interrogation transcript and the page number in the record on appeal.

[13]Detective West testified at trial that his purpose during an interrogation is to "gain rapport and gain trust with this person and be able to talk freely back and forth" by "trying to make him comfortable so he'll want to speak to us." (V11 577). Threatening Appellant with death row would be inconsistent with this attempt.

Appellant also claims that the detectives implied to him that he "would not get a fair trial unless he confessed" (IB 63). The statements Appellant cites on pp. 64-65 of the initial brief do not support this proposition. The detectives told Appellant that a jury would not believe his implausible story (V4 597-98; pp. 69-70). No reasonable interpretation of that statement could characterize it as a threat that he would not receive a fair trial. Wolcott also mentioned that a jury would have far more sympathy for Appellant if he (Wolcott) were able to testify that Appellant cooperated (V4 599, 615; pp. 71, 87).[14] See *Fitzpatrick v. State*, 900 So.2d 495, 512 (Fla. 2005)(holding that advice from a parole officer that "it was in his best interest to cooperate with the authorities does not rise to the level of coercion to render Fitzpatrick's statement involuntary"). Again, that was hardly a threat of an unfair trial. "An official who encourages cooperation with the government and who informs the defendant of realistically expected penalties for cooperation and/or non-cooperation does not offer an illegal inducement." *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1475 (11th Cir. 1992), abrogated on

[14]This comment bears no resemblance to the comments in *Tuttle v. State*, 650 N.W.2d 20 (S.D. 2002), *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1991), or *People v. Brommel*, 364 P.2d 845 (1961), where the detectives made specific threats to report the defendant's refusal to cooperate to authorities.

other grounds, *Coleman v. Singletary,* 30 F.3d 1420 (11th Cir. 1994).

Finally, the detectives told him that the jury would more likely believe Erin Urban, "a pretty little blonde haired girl that ain't never been in no trouble" as well as the officers and "everyone we have talked to," over Appellant and his implausible story (V4 581; p. 52). This comment was at the very least a valid opinion, and likewise did not constitute the threat of an unfair trial.

In contrast, the officers in *Brewer* did not tell the defendant there that the jury would not believe him; instead, they explicitly told him that "12 people that don't know a damn thing about the law" would be judging him. In other words, the jury would not base its verdict on the law, because they did not know the law. That statement is a threat that the defendant will not get a fair trial, not the statements in this case. Calling the detectives' statements here a threat that Appellant would not receive a fair trial is just another example of the gross exaggeration and unreasonable interpretations of the detectives' statements that characterize Appellant's argument.

It may be helpful at this point to emphasize exactly what the detectives were trying to elicit from Appellant. At the time of the interview, the detectives knew only that Jacey McWilliams was missing, that Appellant had been arrested in

possession of McWilliams' car, and that he had attempted to use her ATM card. Detective West testified that at the time he interviewed Appellant, they did not where McWilliams was or whether she was alive or dead (V11 575). Their primary objective of the interview was to locate McWilliams, to find out what happened to her (V11 577). As such, statements about what level of homicide Appellant may have committed, and whether it would appear to anyone, including the jury, that Appellant committed a premeditated murder rather than an accidental homicide, stemmed from the fact that the detectives *had no idea what had actually happened to Jacey McWilliams.*

Thus, when Detective Wolcott suggests to the Appellant that the jury might believe him to be a "monster," he is not suggesting that his failure to confess will be used against him at trial. Wolcott is telling Appellant that the jury may not learn that the killing was an accident unless he told them that it was an accident, because otherwise the evidence may support a first-degree murder conviction. Again, Appellant's interpretations employ the most unfavorable inferences possible, rather than using favorable inferences required by law. *Pagan*.

This point is clearly demonstrated where Appellant claims that the detectives told Appellant that if he did not confess, they "would testify that Martin 'meant this to happen' and that this is 'how he wanted it to be'" (IB 67). Wolcott said nothing

of the sort. Again, when Wolcott asked Appellant "Do you want these folks back here to hear out of us that David is cold-blooded and he meant this to happen?" (V4 620; p. 92) he is telling him that without evidence that the killing was an accident the evidence may show that the killing was premeditated. This was a fair statement. Again, Appellant's exaggerated negative interpretations of the detectives' comments do not establish error. And of course, Appellant himself testified that he confessed (falsely) not because his will had been overborne by the detectives' threats, but because he feared that the truth, that someone else had killed Jacey McWilliams, would endanger his mother and girlfriend.

b. Delusion of Appellant as to his true position by telling him that he was not a premeditated murderer and could expect a "future" with his girlfriend and forgiveness from a jury if he confessed:

Appellant claims that detectives engaged in misconduct when they "repeatedly assured Martin that he did not commit premeditated murder and was not facing death row, or even life imprisonment, that his situation was 'not that bad'" and other similar statements (IB 68).

Again, the central response to this claim is the context of the interrogation. Appellant views the interrogation in hindsight, after it has been revealed that he indeed committed a first-degree murder, serious enough to merit a death sentence.

In hindsight, suggestions to Appellant during the interrogation that he may have committed a lesser offense than first-degree murder and that he had a "future" seem deceptive. But at the time of the interrogation, all the detectives knew is that McWilliams was missing and they had no idea what had happened to her, although they had reason to believe that was dead and that Appellant was responsible. Under these circumstances, trying to induce Appellant to tell them what happened, and suggesting to him that it could have been a "accident," and that he was not a cold-blooded killer, were perfectly reasonable.

One point in the interrogation demonstrates the detectives' intent. Appellant cites a passage where Detective Wolcott tells Appellant, "David is not a premeditated murderer," and "you are not at the top of the tree" (based upon the tree diagram with the most severe homicide charge at the top and the least severe at the bottom) (IB 70-71). Appellant selectively quotes from this passage to make it appear that Wolcott was telling him explicitly that he did not commit a premeditated murder. The entire passage suggests otherwise:

> Wolcott: There's a huge difference from David facing premeditated, planned first degree monster cold-blooded murder, okay. To the other end of, it wasn't planned. It wasn't supposed to go like that. That's not my intent. How it was going on. I'm busting loose at the seams. I know in my heart I need to get to this area. I'm sorry. Please. There's different levels. People care. She

> cared, okay?[15] She didn't ask me what's going to happen to David because I want to see that he goes to prison. She was like I want my daughter. I need my daughter. Please, I don't know how much more I can beg you. Just give her the [inaudible], okay? That's all I ask you, okay. My partner and I have not lied to you. Everything I've told you is the truth. **David is not a pre-meditated murderer. Okay, those people deserve to go to the electric chair. Okay, but there's several things below it. Okay, you may be way down here brother. I don't know, you may be up in here. I don't know unless you tell me. I need to, you got to tell me.** Okay, there is a reason why everything happens. Was it a moment of rage, what is it? I mean there is a reason. **Are you this guy? Are you the guy up here? Are you the guy at the top of the tree?** Martin: No.
>
> Wolcott: Are you the guy that wrote notes and planned for this to happen?
>
> Martin: No.
>
> Wolcott: Okay.
>
> Martin: **And I am not the guy down at the bottom either. I am no where in here.** I don't know what else to say. I really don't. I mean I know what you are asking me but I don't know. It's something I can't answer. I just can't. It's not that I can't because I am not willing, I just can't. I'm sure you find that hard to believe.

(V4 611-12; pp. 86-87).

First, the State notes that the trial transcript does not reflect that Wolcott said "David is not a pre-meditated murderer." The trial transcript indicates that Wolcott said, "maybe it's not premeditated murder, okay?" (V11 697). But even if Wolcott said "David is not a pre-meditated murderer," the full context of the comment reveals Wolcott's intent. Wolcott was *suggesting* that Appellant was not "at the top of the tree," but specifically said that he did not know unless Appellant told

[15]Wolcott is referring to the victim's mother here.

him. It is unreasonable to take from this passage that Wolcott was promising Appellant that he would not be charged with premeditated murder if he confessed. Moreover, if the tree diagram was meant to suggest to Appellant that he committed a lesser degree of homicide or even a noncriminal act, it failed. Appellant simply replied that he was not "on the tree" at all, because he knew nothing of Jacey McWilliams' fate.

The fact that Appellant's argument is based on hindsight is most clearly demonstrated by his accusation that Detective Wolcott "minimized the crime and its consequences" (IB 70). Wolcott could not have "minimized the crime" because he had no idea what the crime was. Wolcott evidently believed that it was unlikely that Appellant committed a premeditated murder, and believed that Appellant might have a "future" if he had committed a lesser degree of homicide. All of the detectives' statements "minimizing" the charge, suggesting that Appellant could possibly avoid a premeditated murder charge, are based on this idea. At no time did the detectives promise that Appellant would not be charged with premeditated murder.[16] See e.g.,

[16]The same is true of Appellant's contention that the detectives "were misrepresenting to Martin the degree of the crime he would be charged with" (IB 72). The detectives did not know what degree murder Appellant would be charged with, because they did not know what happened, as they repeatedly told him. Suggesting that the detectives assured him that he would under no circumstances be charged with premeditated murder misrepresents the record.

Sheriff v. Bessey, 914 P.2d 618, 621-22 (Nev. 1996)(noting that interrogation techniques such as offering false sympathy and "minimizing the seriousness of the charges" are permissible as long as they do not produce "inherently unreliable statements or revolt our sense of justice").

The detectives never told Appellant what he would be charged with. The detectives never promised that he would not be charged with first-degree murder if he told them where Jacey McWilliams was. The following exchange occurred almost immediately before Appellant told the detectives where McWilliams was located:

> WEST: Step one, you recognize that [that is, that Martin needs mental health help]. You recognize that you weren't thinking straight. You understand that that is a problem for David. And I give you my word that I will personally go to the State Attorney's Office and that's what I will convey to them. **I can't make a deal. I am not allowed to do that. You know that. You've been around long enough.**
> MARTIN: But when you have a lot of influence
> WEST: I give you my word -- you're right. I do have a lot of influence and so does he.
> WOLCOTT: And that's why we are not lying.
> WEST: And so do my partners.
> WOLCOTT: We are not lying about, **we are not promising you anything**. You can see what I'm saying. **Saying we are going to do this or that because that would be lying to you, but what the man is saying his word carries a lot of weight.**

(V4 636, p. 108). The detectives could hardly have been clearer about the limits of their authority and the fact that they were not making any promises to him other than to convey Appellant's cooperation and need for mental-health assistance to the State

Attorney. While they did impart the weight of their influence to Appellant, that influence remained limited to the State Attorney.

More importantly, this exchange occurred almost *immediately* prior to Appellant's admission that he knew where Jacey McWilliams was located. This was not an offhand statement by detectives buried in the middle of the interrogation. To the extent that Appellant could somehow have believed that the officers were promising that he would not be charged with first-degree murder earlier in the interrogation, this exchange immediately prior to the confession dispelled any such belief.

As such, even if Appellant had not admitted at trial that his ability to make a free choice was unimpaired, this claim did not provide a basis for suppression.

c. Deception by making Appellant believe that he only had that afternoon to confess or the benefits of cooperation would be lost:

Appellant claims that the confession was involuntary because the officers falsely suggested that he could only "reap the benefits of cooperation" if he confessed during that interrogation. In fact, it is clear that the detectives were pressing for a confession that afternoon because they wanted to be able to retrieve Jacey McWilliams' body before dark, as they repeatedly indicated (V4 605, 608, 615; pp. 77, 80, 87). Appellant has not demonstrated that Wolcott's statement that his

"agency is not going to allow me to come back" was false. Appellant has failed to demonstrate that these statements constituted misconduct.

d. Promises to give favorable testimony and use their influence to arrange for psychiatric treatment:

Appellant claims that the detectives engaged in misconduct by telling him that they would tell the prosecutor and the jury "nice things about him" and by promising psychiatric help. None of the detectives' statements were improper.

Appellant suggests that the detectives' assertion that they would tell authorities and testify about his cooperation constituted an offer to "help him obtain leniency" in exchange for his cooperation, which Appellant contends was improper.

First, as Appellant correctly notes, "the fact that a police officer agrees to make one's cooperation known to prosecuting authorities and to the court does not render a confession involuntary." *Maqueira v. State*, 588 So.2d 221, 223 (Fla. 1991). This Court applied this principle recently in *Caraballo v. State*, 39 So.3d 1234 (Fla. 2010). The defendant there contended that his confession should be suppressed because the officers "improperly prodded him to 'tell the truth' and promised to help him in court if he provided useful information." *Id.* at 1247. This Court rejected the defendant's claim, citing *Maqueira*. The same applies here. Officers

telling a suspect that they would tell the prosecution or "help him in court" if he cooperated is not improper. The fact that they stated it several times does not transform a legitimate practice into police misconduct.

Appellant relies on *Day v. State*, 29 So.3d 1178 (Fla. 4th DCA 2010) and *Ramirez v. State*, 15 So.3d 852 (Fla. 1st DCA 2009). These cases rely upon outdated and rejected standards for voluntariness of confessions.

The *Day* court reversed an order denying suppression due to the investigator's "constant offers of help, followed by requests for information," and noted that "the lack of clarity on the real limits of the investigator's authority certainly added to appellant's 'unrealistic hope' that the investigator would truly help him.'" *Day*, 29 So.3d at 1182. The *Day* court, however, expressly relied on *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183 (1897), which stated that confessions must not be obtained "by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Day*, 29 So.3d at 1180. This reliance on *Bram* ignores that the Supreme Court jettisoned the *Bram* standard in *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (1991). The *Fulminante* Court replaced the *Bram* standard that had condemned any confession obtained by "any direct or implied promises, however slight" with a "totality of the circumstances" test. *Fulminante*, 499 U.S. at 285, 111 S.Ct.

at 1251 (noting that "it is clear that this passage from *Bram* ... under current precedent does not state the standard for determining the voluntariness of a confession."). See also *United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir. 1995) (Posner, J.)(explaining that the *Bram* standard, which described any confession induced by "promises or threats" as involuntary, "had ceased to be the actual test of involuntariness long before the formal interment of *Bram*" in *Fulminante*); *United States v. Lall*, 607 F.3d 1277, 1285 (11th Cir. 2010)(noting *"Bram's* suggestion of a *per se* rule that would render a confession involuntary if it was preceded by "any direct or implied promises, however slight, has been rejected by the Supreme Court;" instead, "voluntariness must be determined by examining the totality of the circumstances"); *United States v. Montgomery*, 555 F.3d 623, 630 (7th Cir. 2009)(noting that *Bram*'s *per se* rule requiring suppression whenever a promise or inducement is made to a suspect "was decisively rejected by the Supreme Court" in *Fulminante*); *State v. Unga*, 196 P.3d 645, 654 (Wash. 2008)(noting that "*Bram* was jettisoned in *Fulminante*" and explaining that "a promise does not *per se* render a confession involuntary" and after *Fulminante*, the key is whether the promise made it impossible for the defendant to make a rational choice as to whether to confess). *Bram* is no longer the proper standard for voluntariness of a confession. Threats and

promises, even promises of leniency, do not render confessions involuntary unless they make it impossible for the defendant to make a rational choice as to whether to confess.

The Fourth District's entire analysis of promises inducing confessions in *Day* is based on the invalid standards of *Bram*. Moreover, the *Day* Court does not take into account this Court's decisions in *Caraballo* and *Blake,* which state the proper standard for analyzing voluntariness. As such, *Day* is fundamentally flawed and cannot be relied upon.

Ramirez relies on the same invalid *Bram*-based voluntariness standard as *Day*: "A confession or inculpatory statement is not freely and voluntarily given if it has been elicited by direct or implied promises, however slight." *Ramirez*, 15 So.3d at 855 (citing *Walker v. State*, 771 So.2d 573, 575 (Fla. 1st DCA 2000)). However, even if the First District in *Ramirez* had employed the correct standard, *Ramirez* is readily distinguishable. In *Ramirez* the officer told the defendant that the officer could not "help" him unless he confessed, but refused to specify what help he would offer, in spite of the defendant's regular requests for the officer to identify the help. The Court noted that the officer suggested to the defendant that he could help his family with their immigration issues if he confessed. *Ramirez* bears no resemblance to this case.

The same analysis applies to Appellant's contention that the officers' suggestion that Appellant could get psychiatric help was improper. First, it should be noted that almost until the point of Appellant's confession, the detectives thought that Appellant was talking about help with a drug problem (e.g., "he definitely needs some help. He definitely needs some rehab" (V4 620; p. 92)). Later in the interrogation, almost to the point where Appellant confessed, Appellant clarified that he did not need "drug help," because all he did was smoke pot, and "didn't really have a drug problem" (V4 632; p. 104). The detectives agreed that if all he did was smoke marijuana then he did not need "drug rehab" as they had previously believed (V4 633 p. 105). Instead, Wolcott clarified that Appellant, when he said he "needed help," meant that he needed to be able to "sit down with a mental health counselor, okay, which they have." *Id.*

The State asserts that telling a suspect who has told officers that he needs help with his mental health issues that he can get help in prison is hardly coercive. To the extent that the detectives' assurances constituted a "promise" of mental-health aid, such an assurance is only improper if one applies the rejected *Bram* "any direct or implied promise, however slight" standard. See e.g., *Green v. Scully*, 850 F.2d 894 (2d Cir. 1988). In *Green* the detectives suggested Green must have been mentally ill when he killed the victims. A

detective "expressed sympathy and offered to help saying that he would talk to the District Attorney's office about getting psychiatric help for petitioner," an offer "repeated a number of times." The detective "told petitioner that he would tell the prosecutor that 'the brother needs help.... [F]or him to spend the rest of his life in an institution isn't going to give him any help,'" and "'you tell me what happen I call the D.A. I get him down here man we get you some help,'" but did not suggest that he would not go to jail. *Green*, 850 F.2d at 896. The Second Circuit held that the offers of psychiatric help did not render the subsequent confession involuntary:

> **Although Detective Hazel did offer psychiatric help, nothing he said could be construed as holding out the hope of leniency in the courts or a shorter sentence**. Even were this offer of help somehow to be interpreted as inducing Green to have such a hope, that belief would be dissipated by Hazel's advice that Green should not think he was going to escape responsibility for what he did and telling Green that he would have "to go to jail."

Id. at 903 (e.s.).[17] See also *Miller v. Fenton*. In *Miller* the detective made "outright promises" of psychiatric help, promises that even implied that the defendant might not be prosecuted at all. *Miller*, 796 F.2d at 610. The court held that the promise did not render the subsequent confession involuntary:

[17]The detectives in *Green* also misled the suspect about existing evidence against him. While the opinion notes that some of the police conduct was "troubling," the opinion makes it clear that it was this "chicanery" that made it a "close case," and not the promises of psychiatric treatment.

> Boyce made no direct promise of such leniency; the only outright promise he made was to get Miller help with his psychological problem. As we have stated above, indirect promises do not have the potency of direct promises.

Id. The officers in *Green* and *Miller* offered far more benefit to the defendant than the detectives here: in those cases the officer implied that the defendant may not even be prosecuted, that they would go to a mental-health facility to get help for their "problem" rather than prison. The detectives here made no such promise, even implied.

e. Promise to arrange a visit from his girlfriend:

In addition to the so-called "promises" noted above, Appellant claims that the detectives "made an explicit promise in exchange for Appellant's cooperation, in other words, a 'quid pro quo' bargain" (IB 79). Because Appellant contends that "an express 'quid pro quo' bargain for a confession will render the confession involuntary as a matter of law," (IB 73) this "bargain" automatically renders Appellant's confession invalid. This claim is erroneous for several reasons.

Occasionally, Florida courts assert that an "express quid pro quo" bargain for a confession will render the confession involuntary as a matter of law. See *Walker*; *Ramirez*; *Day*. The "express quid pro quo" language was first used in *State v. Moore*, 530 So.2d 349 (Fla. 2d DCA 1988). *Moore* cited for this proposition *Fillinger v. State*, 349 So.2d 714 (Fla. 2d DCA

1977), a case holding a confession involuntary because of officer promised to advise state attorney of defendant's cooperation if he confessed.

This short review shows the curious history of the "quid pro quo" rule. Its genesis was a case holding a confession involuntary specifically because the officer said that he "would advise the State Attorney of her cooperation, or not of her cooperation in the case." *Fillinger* at 715. This "promise" involves an interrogation practice that is now clearly recognized as permissible. *Maqueira*; *Blake*. And of course, *Fillinger* explicitly applied the discarded *Bram* rule for its conclusion. Moreover, *Moore*, the case where the "express quid pro quo" rule was first announced, held that "statements suggesting leniency are only objectionable if they establish express quid pro quo bargain for confession." Somehow, a rule that related to "statements suggesting leniency" was transformed into a rule that any "quid pro quo bargain," such as a promise to allow a suspect to call his girlfriend, renders a confession involuntary. The State asserts that even the most cursory analysis of such a rule demonstrates that it is absurd.

The "express quid pro quo" rule directly contradicts the proper voluntariness rule, which looks at the totality of the circumstances to determine whether police misconduct overbore the defendant's free will and made it impossible for the

defendant to make a rational choice as to whether to confess. The "express quid pro quo" rule also contradicts the rule of *Colorado v. Connelly*, which requires police misconduct before a confession can be suppressed as involuntary. The idea that any promise that induces a confession, no matter how inconsequential and no matter whether it deprived the defendant of his ability to make a rational choice, renders a confession involuntary "as a matter of law," should be finally and explicitly rejected by this Court.

Moreover, any such "express quid pro quo" rule would not apply here. Appellant himself asked whether the detectives could arrange for him to call Erin Urban and allow her to visit (V4 636, p. 108). Detective West stated that they can "make arrangements for visits," but "we got this issue right now David that we have to cover first." Detective Wolcott added, "just tell me where I can go to get [Jacey McWilliams]." *Id.* Obviously, the detectives were informing Appellant that Urban could not visit him until they were finished with the interview. No reasonable interpretation of this exchange could consider it police misconduct, overreaching by the police that overbore the defendant's free will to make a rational choice.

Appellant dramatically claims that the detectives made "40-50 false promises and threats" throughout the interrogation (IB 81). The State contends that the officer did not make a single

false promise, as explained above. The only explicit promise that the detectives made was that they would inform the State Attorney of his cooperation and need for mental-health services, a promise conditioned by the explicit caveat that they could "not make a deal" and that they "weren't promising you anything" (V4 635, p. 107). Moreover, as Appellant himself admitted that he intentionally lied to the officers in an effort to deceive them when he confessed, he cannot claim that their alleged misconduct made it impossible for him to make a rational choice as to whether to confess.

f. Exploitation of Appellant's "religious beliefs" with a "version" of the "Christian burial technique":

Finally, Appellant claims that the detectives engaged in misconduct in telling him that they wanted to find Jacey McWilliams so that they could "take her home to her mama," and other similar statements. Appellant claims that these statements were "improper and coercive under *Nix v. Williams*[, 467 U.S. 431, 104 S.Ct. 2501 (1984)] (IB 83).

First, *Williams* does not support this argument. In an earlier decision in that case, the Supreme Court ruled that officers engaged in interrogation in violation of Williams' right to counsel when they conversed with him about providing a "Christian burial" for the victim. *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232 (1977). Neither *Williams* decision suggested

that the use of such a technique rendered a confession involuntary, so Appellant's statement that the detectives' statements here were "improper and coercive under *Nix v. Williams* is simply incorrect. See *United States v. Whitmore*, 386 Fed.Appx. 464, 471 (5th Cir. 2010)(holding that "an interrogating officer's mere reference to religious beliefs does not alone invalidate a confession" and that the defendant's reliance on *Williams* to claim otherwise is "misplaced", since *Williams* "concerned the use of religious beliefs to disregard a defendant's invocation of his right to counsel").

Appellant correctly notes that this Court once called the so-called "Christian burial technique" a "blatantly coercive and deceptive ploy" in *Roman v. State*, 475 So.2d 1228 (Fla. 1985).[18] However, the State has failed to discover a case where this Court suppressed a confession based on its use in interrogation (including *Roman*). To the contrary, this Court has ruled that the precise tactic used by detectives here is permissible. In *Hudson v. State*, 538 So.2d 829, 830 (Fla. 1989), the officer "appealed to Mr. Hudson's emotions and asked him if he had ever been to a funeral without a body, and that "for the family to

[18]The State fails to comprehend how this "technique" could ever be considered "deceptive." As for coercive, that determination is of course made on a case-by-case basis, so any suggestion that the use of this tactic is somehow inherently improper is erroneous.

put this situation to rest" they should be permitted to "observe and see the body." This Court held that the officer's plea did not render the confession involuntary. In *Nelson v. State*, 850 So.2d 514, 522-23 (Fla. 2003), police asked Nelson if he would be worried if his sister was missing and to put himself in the victim's family's shoes and imagine how they felt. The police told Nelson they wanted to "put their minds at ease" because they were worried about her, and "if she's dead help us find her so we can give her a proper burial just like you would expect for [your sister] if she was killed." "This statement apparently had some effect on Nelson because he began to cry and soon thereafter agreed to take the police to the victim's body. *Id.* This Court found that this tactic did not render the confession involuntary. *Id.* at 524. The detectives' statements here are similar to those in *Nelson*. Notably, the fact that the defendant in *Nelson* became emotional and cried after the burial suggestion did not alter this Court's conclusion. See also *Alston v. State*, 723 So.2d 148 (Fla. 1998)(finding a confession voluntary where a detective urged the defendant to take police to the victim's body so his mother could get "closure"). Moreover, the detectives did not exploit Appellant's "sincerely held religious beliefs." First, the detectives never mentioned religion when urging Appellant to let the victim's mother "take her home," and second, there is no evidence in the record that

the detectives were aware that Appellant had "sincerely held religious beliefs," if in fact he had any.

Appellant validly waived his right against self-incrimination after a proper advisement of those rights. While the detectives employed numerous tactics to elicit Appellant's confession, none were improper. Interpreting the evidence most favorably to sustaining the ruling below, no threats were issued, no promises of leniency were made, no deception was employed. To the extent that the detectives played on Appellant's emotions, "there is nothing inherently wrong with an officer attempting to create a favorable climate for confession by attempting to strike an emotional chord with a defendant." *United States v. Barlow*, 41 F.3d 935, 945 (5th Cir. 1994).

Just as importantly, even to the extent that any of the detectives' statements were improper, they did not deprive Appellant of his free will to make a rational choice. First, the detectives clearly assured Appellant before he confessed that he was promised nothing but their good word to the prosecutor and the court; any other promise implied during the interrogation was no promise. More importantly, Appellant's trial testimony shows that he did not confess because the detectives overbore his will and made it impossible to make a rational choice. Instead, Appellant retained his faculties enough to deceive the detectives by making a *false* confession,

induced not by the detectives' prodding but by his fear, fear he successfully hid from the detectives, that the real killer would harm his mother or girlfriend if Appellant told the truth and implicated him. Appellant claims that the detectives' "coercive tactics found their mark" (IB 83), but Appellant's own testimony states otherwise. Under these circumstances, Appellant has failed to demonstrate that the court below erred in denying his motion to suppress his confession.

ISSUE II

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

Standards 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)). Furthermore, when the evidence supporting guilt is "entirely circumstantial," "the circumstantial evidence [supporting the CCP aggravator] must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." *Geralds v. State*, 601 So.2d 1157 (Fla. 1992). See also *Smith v. State*, 28 So.3d 838, 866 (Fla. 2009)("Where the

evidence in the case is entirely circumstantial, the State can satisfy the burden of proof only if the evidence is 'inconsistent with any reasonable hypothesis which might negate the aggravating factor'"); *Brooks v. State*, 918 So.2d 181, 206 (Fla. 2005)("An aggravating factor may be supported entirely by circumstantial evidence, but 'the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor'").

Trial court's ruling:

The trial court, in its sentencing order found the CCP aggravator (V5 827). The trial court made the following findings:

> Evidence presented at trial showed that in the days leading up to the murder, the Defendant had a phone conversation with Erin Urban, where she asked him how could he come visit her in St. Petersburg since he did not own a car. The Defendant responded by saying he could just steal a car and kill the person he stole it from. Days later, the Defendant spent the evening with Jayce McWilliams, telling her it would be a "special night." While together, he drove her to an isolated location in Middleburg where the murder could not be observed. The Defendant then retrieved a hammer from the vehicle, while Jayce McWilliams looked away and smoked a cigarette, the Defendant struck her with the hammer, using great force. The evidence established the Defendant himself brought the hammer that evening, and that the Defendant later told police the first blow was from behind. Erin Urban received a phone call from the Defendant moments after the murder in which she described his demeanor as giddy, and that he showed no signs of emotional distress or panic. These facts establish the Defendant committed the murder in a cold, calculated and premeditated manner, and without any moral or legal justification. This aggravating circumstance has been

given great weight in determining the appropriate sentence to be imposed in this case.

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 v. State*, 926 So.2d 1203, 1214 (Fla. 2006) (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 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's entire argument is based upon the following premise: "the evidence is consistent with a reasonable hypothesis that negates these elements [of the CCP aggravator]" (IB 85-86, repeated at IB 87). Appellant claims that his "version," that his killing was a "spur-of-the-moment murder committed in an emotional frenzy when Jacey refused to loan Martin her car," is "reasonable and entirely consistent with the evidence in the case" (IB 87-88). As such, Appellant claims that the court was prohibited from finding the CCP aggravator. This entire premise suffers from two critical flaws. First, it fails to take into account that the "circumstantial evidence" standard applies only when an aggravator is supported only by circumstantial evidence, which was not the case here. Second, even if the CCP aggravator were supported only by circumstantial evidence, Appellant's formulation wholly misstates the circumstantial-evidence standard, improperly transforming it into a standard that could scarcely ever be met.

Again, the rule requiring that the evidence of an aggravator be inconsistent with any reasonable hypothesis negating the aggravator applies only when the evidence proving the aggravator is "entirely circumstantial." *Geralds*; *Smith*; *Brooks*. As CCP is primary a state-of-mind aggravator, evidence supporting it is typically circumstantial. This case, however, presents a situation where some of the evidence supporting the CCP aggravator, indeed, arguably the strongest evidence, was Appellant's own admission. As such, the circumstantial-evidence rule does not apply in this case, and the CCP aggravator should be affirmed if supported by competent substantial evidence without any analysis of its relation to Appellant's hypothesis negating the aggravator.

Erin Urban testified that, two or three days before the murder, she spoke on the phone with Appellant (V10 489-90). Both of them expressed a desire that Appellant go to St. Petersburg to visit Urban, but Appellant did not have a car. *Id.* Appellant told her, "I can just steal a car." When Urban asked how are you going to do that and he said, "well, that's easy. I'll just kill them." (V10 490). Urban, who believed Appellant was joking, replied that a cemetery was a good place to hide a body, and Appellant replied that he knew a better one (V10 491).

The State contends that this direct evidence in the form of Appellant's own statements was evidence supporting each of the

elements of the CCP aggravator, and was relied upon heavily by the trial court in finding CCP. As such, because proof of this aggravator was not "entirely circumstantial," the circumstantial-evidence rule did not apply, and any circumstantial evidence supporting the aggravator need not be shown to be inconsistent with Appellant's hypothesis of innocence. As long as there was competent substantial evidence in the record to support the aggravator, it should be upheld. Appellant's statement and the other evidence indicated in the order supported the aggravator, which is all that is required to uphold it.

Even if the evidence supporting the CCP aggravator were entirely circumstantial, Appellant has misapplied the proper standard. Appellant claims that the CCP aggravator must be reversed if "the evidence is consistent with a reasonable hypothesis that negates" the CCP aggravator (IB 85-86, 87). Appellant claims that as long as his hypothesis of an unplanned killing prompted by emotional panic "is consistent with the evidence, then the CCP aggravator has not been proven beyond a reasonable doubt" (IB 91).

If this were the correct standard, then the existence of a competing theory alone would defeat the imposition of an aggravator. Appellant has the standard backward. A defense theory that is consistent with the evidence does not demonstrate

that an aggravator is invalid; instead, evidence that is inconsistent with the defense theory demonstrates that the aggravator is valid.[19]

As such, the fact that Appellant can present an innocent interpretation of each of the pieces of evidence used to support CCP does not defeat the aggravator. It is only when no evidence is inconsistent with Appellant's hypothesis that the aggravator cannot stand.

Here, each of the pieces of evidence used to support CCP are inconsistent with Appellant's theory that he committed a spur-of-the-moment murder in an "emotional frenzy." The fact that Appellant can provide alternative interpretations for this evidence makes it a question for the finder of fact; it does not make the aggravator invalid.

The four pieces of evidence the trial court used to support CCP are all supported by the record: the phone conversation where Appellant tells Erin Urban that he can steal a car and kill the owner so he can see her and that he knows a good place to hide the body; taking Jacey McWilliams to an isolated

[19]This rule is taken from the circumstantial-evidence rule applicable to sufficiency of evidence to support guilt when the evidence of guilt is purely circumstantial. Under that standard, the state is required "only to introduce competent evidence which is inconsistent with the Defendant's theory of events." *State v. Law*, 559 So. 2d 187 (Fla. 1989). In applying this rule, the court must view the evidence in the light most favorable to the State. *Id.*

location where he can kill her without detection; bringing the murder weapon with him; and Appellant's demeanor when he contacted Urban after killing McWilliams. All of this evidence, when viewed in the light most favorable to the State, is inconsistent with Appellant's hypothesis. As such, Appellant has failed to demonstrate that the court erred in finding the CCP aggravator.

While the State is not required to rebut Appellant's theory, two points deserve mention. First, Appellant takes issue with the court's finding that Appellant was "giddy and that he showed no signs of emotional distress or panic" when he spoke to Urban on the phone after the murder. Appellant claims that this finding was based on a "misapprehension of the facts" because Urban's testimony about Appellant's demeanor related to his arrival in St. Petersburg five hours after the murder, and that Appellant's demeanor five hours after the murder is irrelevant to his state of mind at the time of the murder (IB 93). In fact, Appellant had called Urban earlier and told her that he had a "surprise" for her, that he could not tell her and she would find out soon (V10 470-71). While Urban did not specifically testify about Appellant's demeanor during this conversation, certainly his characterization of his visit as a "surprise" for Urban is inconsistent with his theory that he had just killed a friend in an emotional panic and fled the scene in

her car. Appellant's demeanor when he actually arrived in St. Petersburg only supports this inference.

Second, Appellant claims that *Hardy v. State*, 716 So.2d 761 (Fla. 1998), supports his argument that his statements to Urban about stealing a car and killing the owner cannot support CCP. In *Hardy*, the court's finding of CCP was based primarily on a prior statement made by Hardy several weeks before the murder about what Hardy would do if he were involved in a situation similar to that of Rodney King, who was beaten by police officers. This Court found that "this was a very general statement" and not sufficient evidence of CCP. *Hardy* at 766. In contrast, Appellant here did not make a general statement about what he would do if involved in a confrontation with police; Appellant actually suggested that he could steal a car and kill the owner and take the body to a good place, so that he could see Erin Urban. Two or three days later, Appellant stole a car and killed the owner, all in a very remote area, exactly as he had suggested. This case bears little resemblance to *Hardy*.

Finally, the State is compelled to note that Appellant's "reasonable hypothesis" negating CCP is utterly at odds with Appellant's own trial testimony. Appellant sets out two accounts made during his interrogation, and two accounts related to his psychiatrist Dr. Krop, which he claims were "detailed, reasonable, each internally consistent and consistent with each

other" (IB 90). This claim conveniently ignores Appellant's trial testimony. While these accounts may have been consistent with each other, they were specifically disclaimed by Appellant in his sworn testimony at trial, where he denied killing Jacey McWilliams at all. One wonders how Appellant can claim that the CCP aggravator must fail based upon a hypothesis that he specifically denied at trial.

Accordingly, the court did not err in finding the CCP aggravator.

ISSUE III

DID THE TRIAL COURT PROPERLY FIND THAT THREE MITIGATING CIRCUMSTANCES, EMOTIONAL ABUSE, SEXUAL ABUSE AND REMORSE, WERE NOT PROVEN? (Restated)

Appellant asserts that the trial court abused its discretion in rejecting emotional abuse, sexual abuse, and remorse as non-statutory mitigation. The trial court rejected these mitigating factors as not proven. A trial court may find mitigation was not proven. Thus, the trial court properly considered and rejected this proposed mitigation.

The trial court's ruling:

The trial court rejected emotional abuse mitigation as not proven, finding that the defendant presented only "anecdotal evidence" to support this mitigator. The trial court stated that the defendant "did not provide evidence showing how the alleged incidents impacted his ability to know right from wrong

or kept him from being a law abiding member of society." The trial court rejected sexual abuse mitigation as not proven, finding that the defendant's mother testimony that she "suspected" he had been sexually abused but could not confirm the abuse was insufficient. The trial court rejected remorse mitigation as not proven, finding the defendant's remorse was "insincere and an act." The trial court relied on the defendant's own trial testimony in support.

Preservation:

This issue is not preserved. Appellant did not file a motion for rehearing of the sentencing order. Appellant should have pointed out to the trial court the errors regarding these three mitigating circumstances. Appellant did not object in the trial court on the same basis he now asserts is error on appeal.

Standard of review:

A trial court's decision as to whether that circumstance is established is reviewed for abuse of discretion. *Ault v. State*, 53 So.3d 175, 187 (Fla. 2010). This does not seem to be the correct standard of review. Normally, a trial court's finding that a matter was not proven is a factual, evidentiary matter that is normally reviewed under the clearly erroneous standard. Under either standard of review, however, Appellant cannot prevail.

Merits:

A trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection. *Ault v. State*, 53 So.3d 175, 186 (Fla. 2010)(citing *Coday v. State*, 946 So.2d 988, 1003 (Fla. 2006)). Even expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case. *Ault*, 53 So.3d at 186. The rejection of the mitigation must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons. *Coday v. State*, 946 So.2d 988, 1005 (Fla. 2006).

The trial court rejected the proposed mitigation of sexual abuse as not proven. Appellant's mother only "suspected" that he had been sexually abused, she could not confirm the sexual abuse (V15 1164-65, 1177). A rejection of a proposed mitigator on the basis that it is pure speculation is certainly rational.

The trial court rejected the proposed mitigation of remorse as not proven. The trial court relied on the defendant's own trial testimony that his remorse was insincere and an act as a basis for a finding that this mitigator was not proven. A trial court is certainly free to rely on a defendant's own sworn testimony as support for rejecting a mitigator. While it is true that Appellant's version of events changed numerous times, that is actually the point. Appellant's remorse and acceptance

of responsibility, if any, was inconsistent. Thus, the trial court properly considered and rejected this proposed mitigation.

Harmless error:

A trial court's findings on mitigation are also subject to harmless error analysis. *Ault v. State*, 53 So.3d 175, 187 (Fla. 2010). If there is no likelihood of a different sentence, then the error must be deemed harmless. *Ault v. State*, 53 So.3d 175, 195 (Fla. 2010). In *Ault v. State*, 53 So.3d 175, 195-196 (Fla. 2010), this Court found that the trial court erred in rejecting brain damage; adjustment to life in prison; low IQ; acceptance of responsibility; remorse; and pedophilia but found the error to be harmless. This Court explained that reversal is permitted only if the excluded mitigating factors reasonably could have resulted in a lesser sentence. The *Ault* Court noted that in several prior cases, this Court had found that a trial court's error in failing to consider mitigating evidence was harmless in light of the aggravating circumstances. *Ault*, 53 So.3d at 195-196 (discussing cases). In *Ault*, the trial court had found five aggravators, each of which was assigned either great weight, significant weight, or, as to HAC, maximum weight. The trial court determined that the aggravating circumstances far outweighed the mitigating circumstances. This Court noted that even if each of the rejected mitigating factors had been found by the trial court (and it is not certain that the court would

have found some of those factors even if it had conducted the proper analysis), this Court found "no reasonable possibility that Ault would have received a different sentence." *Ault*, 53 So.3d at 196.

Here, the trial court's rejection of the proposed mitigation was harmless. The trial court found three aggravating circumstances and gave each of them great weight. In contrast, the trial court here found eleven non-statutory mitigators but each was given only slight weight. Even if the trial court had found emotional abuse as a twelfth mitigator, there is no reasonable possibility that Appellant would have received a different sentence. The error was harmless.

ISSUE IV

WHETHER THE TRIAL COURT HAS AN INDEPENDENT DUTY TO CONSIDER MITIGATING EVIDENCE THAT THE DEFENDANT WAIVES? (Restated)

Appellant asserts that the trial court erred in not considering Dr. Krop's deposition testimony as a basis for mitigation. Appellant asserts that the trial court's failure to consider this evidence was a violation of *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982). Appellant waived the presentation of Dr. Krop's testimony. The Supreme Court has never hinted, much less held, that a trial court must constitutionally consider mitigating evidence that the defendant waived. Nor has the Supreme Court ever hinted, much less held,

that a trial court has a constitutional duty to independently locate mitigating evidence. The mitigating evidence at issue in *Eddings* was proposed by defense counsel. Furthermore, the error, if any, in the trial court's failure to consider Dr. Krop's deposition was harmless. Dr. Krop's deposition testimony was that Appellant had an antisocial personality disorder. Dr. Krop's deposition, while it supported some mitigation, could be used to rebut that mitigation and all other mitigation as well.

The trial court's ruling:

Dr. Krop did not testify at the penalty phase. While Dr. Krop's report and deposition was introduced at the *Spencer* hearing, Dr. Krop did not testify at the *Spencer* hearing either. At the *Spencer* hearing, defense counsel introduced both the report and deposition of Dr. Krop as a package and stated that Dr. Krop "essentially diagnosed Mr. Martin with an antisocial personalty disorder" (SV2 201; V5 737 - deposition of Dr. Krop).

Dr. Krop testified at the deposition that he examined Appellant on May 14, 2008 for over five hours (V5 741). Dr. Krop examined Appellant again on May 28, 2008 (V5 744). Dr. Krop administered both a neuropsychological evaluation and personality tests to Appellant (V5 744). Dr. Krop administered the Beck Anxiety Inventory; the Beck Depression Inventory; the MMPI-2; the Mooney problem Checklist; a drug survey; the Michigan Alcohol Screening test; and the Wechsler Abbreviated

Scale of Intelligence test (V5 745), and wrote a report on October 1, 2009 (V5 743).

Dr. Krop noted that on the MMPI-2 test, the scale that was "most significantly elevated was the psychopathic deviance scale." (V5 747-748). Appellant's profile was "pretty much a pathological profile" (V5 748). Dr. Krop noted that Appellant had "been in trouble since he was a young kid" (V5 748). Appellant's highest scores were on the psychopathic deviance scales (V5 748-749). Appellant's antisocial behavior was "reflected in his testing as well as his past history" (V5 749). While Dr. Krop did not administer the Hare Psychopathy checklist, he opined that if he had used the Hare Psychopathy measure, he projected that Appellant "probably would have come out relatively high on the psychopathic traits" (V5 749-750, 751-752). Dr. Krop believed that he did not need to do that measure because it was clear from Appellant's self-reported history that he would probably meet both the criteria on the Hare scale and on the DSM-IV manual (V5 750). Appellant would score high on both Hare and MMPI (V5 752). Dr. Krop diagnosed Appellant as having "antisocial personalty disorder." (V5 753).

Dr. Krop also diagnosed Appellant as having substance abuse (V5 755). Appellant's I.Q. was in the normal range (V5 756). Dr. Krop testified that Appellant did not suffer from any major

mental illness (V5 757). Dr. Krop noted Appellant's "compulsion" for stealing "throughout his life." (V5 758).

Appellant reported to Dr. Krop that he did not tell his mother of father about the sexual abuse "because he didn't want to be in more trouble" and was concerned that his mother would not believe him (V5 742).

Appellant also recounted the facts of the murder to Dr. Krop (V5 759). Appellant and the victim went to Black Creek in Middleburg (V5 759). Appellant had known her for about two weeks and she had done favors for Appellant including taking him places and buying him lunch (V5 759). Appellant wanted to see his girlfriend, Erin, who lived in St. Petersburg (V5 760). Appellant then demonstrated to Dr. Krop how he struck the victim with the hammer (V5 761,765). Appellant expressed remorse (V5 762-763).

Appellant while never having seizures or head trauma claimed to have a history of blackouts (V5 764). Dr. Krop described the blackouts as disassociative episodes (V5 765). Dr. Krop testified that Appellant has a full scale I.Q. of 109 (V5 767). Dr. Krop found "no deficits at all" in his neuropsychological evaluation (V5 767). Appellant did "exceeding well" on the neuropsychological tests (V5 767).

At the later interview, Appellant told Dr. Krop that he had lied to him and the cops about murdering the victim (V5 775).

Appellant now claimed that someone else committed the murder (V5 775). Appellant claimed that he falsely confessed to the murder because he was being threatened by the murderer (V5 775). Dr. Krop expressed his disbelief to Appellant (V5 776). Appellant admitted to Dr. Krop that if he took a polygraph that he was not sure that he could pass it (V5 776). Appellant received three DRs in jail during this time (V5 776).

Dr. Krop had seen Appellant again about one week before the deposition (V5 778). Appellant then admitted to being the murderer during his interview (V5 779). Appellant told Dr. Krop that he had not been drinking on the day of the murder (V5 780). Dr. Krop did not find either statutory mental mitigators to be present (V5 785). Dr. Krop did state that Appellant "derives from a very dysfunctional family." (V5 785). Dr. Krop listed his mother's alcohol abuse; his conflicts with his step-mother; his father's abandonment of him including not attending the trial; his history of being sexually abused by an adolescent neighbor; his use of drugs and his dissociation to cope with stress which is common in sexual abuse victim as likely areas that he would testify regarding if he was called to testify in the penalty phase (V5 785-787).

Appellant was put on medication when he was younger but his mother took him off the medication (V5 788). His mother had him admitted to Charter by the Sea because she thought he was being

emotionally, and possibly sexually, abused by his step-mother (V5 788). Appellant stayed in Charter by the Sea until the insurance money ran out (V5 788). His mother believed that Charter by the Sea made him a bad person (V5 788). Appellant's mother told Dr. Krop that he was a perfect kid before going to Charter by the Sea but became a bad kid in that institution. (V5 788). Dr. Krop stated that the mother's perception is that the reason Appellant turned out was everyone else's fault and that she had nothing to do with him turning out this way (V5 788). Appellant's mother blames everyone on the father's side of the family for Appellant's problems (V5 789-790). Appellant's mother was a "pretty severe alcoholic" which had a "significant impact" on Appellant (V5 788-789).

Appellant's step-mother locked him in a closet (V5 789). His mother did not provide any discipline or rules but the father and step-mother provided structure, rules and discipline (V5 790). Appellant "did not like that" (V5 790). Dr. Krop has spoken with the mother, father, step-father, and grandfather (V5 790). The family used Appellant as a pawn against each other (V5 791). Dr. Krop also spoke with Mr. Gottlieb who was a counselor at Clay Behavioral (V5 796). Appellant had been sent to Clay Behavioral after he got out of a juvenile program (V5 796). Dr. Krop admitted that he had no independent evidence that Appellant was sexually abused by the neighbor (V5 792).

Appellant filed a sentencing memorandum of law (V5 800-815). The sentencing memo refers to Dr. Krop not in the mitigation section, but instead in the section addressing the State's aggravating circumstance of being on felony probation. The memo refers to Dr. Krop's findings that Appellant's dysfunctional family contributed to his diagnosis of antisocial personality disorder (V5 804). The memo refers to Dr. Krop's report noting Appellant's substance abuse and that Appellant never received the individualized treatment required by statute, but the memo then acknowledges that Appellant left the treatment facility after a week. The memo refers to the report, not the deposition (V5 804). The memo does not refer to Dr. Krop at any point in the proposed mitigation section (V5 809-815).

The trial court's sentencing order did not include any reference to Dr. Krop's deposition testimony. While the trial court did not consider Dr. Krop's deposition as a basis for finding sexual abuse as a mitigator, the trial court also did not consider Dr. Krop's diagnosis of antisocial personality disorder in rejecting any mitigation.

Preservation:

This issue is not preserved. Contrary to Appellant's assertion, the trial court has no duty to independently comb the record for mitigation. Rather, it is the duty of defense counsel to present mitigation the trial court. While this Court

in *Spann v. State*, 857 So.2d 845, 857-858 (Fla. 2003), stated that mitigating evidence must be considered and weighed when it is contained anywhere in the record including when the defendant asks the court not to consider mitigating evidence, this Court also stated that, "because nonstatutory mitigation is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigation it is attempting to establish." Imposing an independent duty on the trial court to identity non-statutory mitigation is simply unworkable and just invites sandbagging on appeal. A trial court simply cannot be expected to guess what could possibly be viewed as mitigating by appellate counsel or this Court. It certainly is not evident to a reasonable person that an expert finding that Appellant was antisocial and did not suffer from any major mental illness should be considered as mitigating. Moreover, imposing such an independent duty undermines both the adversarial system and the trial court's role as a neutral and detached magistrate. A trial court should not be put in a position of being second chair defense counsel. This claim of mitigation based on Dr. Krop's deposition was never made in the trial court and as such, this issue is not preserved.

Standard of review:

This claim essentially asserts fundamental error because the proposed mitigation on appeal was never proposed in the

trial court. Claims of fundamental error are necessarily reviewed *de novo*. *Elliot v. State*, 49 So.3d 269, 270 (Fla. 1st DCA 2010).

Merits:

Opposing counsel asserts that "[i]t is well-settled that the sentencer in a capital case must consider, evaluate and weigh any relevant mitigating evidence in the record" citing *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). A sentencer may not "refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114, 102 S.Ct. at 877. The sentencer "may determine the weight to be given relevant mitigating evidence," but "may not give it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 115, 102 S.Ct. at 877. As the Eleventh Circuit recently observed, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978), and its progeny establish that a capital defendant has a constitutional right, under the Eighth and Fourteenth Amendments, (1) to present any relevant mitigating evidence as to his unique, individual background, character, and record and the circumstances of his crime and (2) to have the sentencing jury or judge give meaningful consideration and effect to his mitigation evidence without such restrictions by state statute, judicial interpretation, or jury instructions. *Puiatti v. McNeil*, 626 F.3d 1283, 1314 (11th Cir. 2010).

First of all, as this Court has recognized, a particular circumstance may not be mitigating in nature. *Spann v. State*, 857 So.2d 845, 858 (Fla. 2003)(explaining that whether a particular circumstance is truly mitigating in nature is a question of law). As the United States Supreme Court recognized, the mitigation must be mitigating. *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562 (2004). The *Tennard* Court, while rejecting any requirement that there be a nexus between the mitigation and the crime, explained that there was a "low threshold" for relevance that mitigating evidence must meet. *Tennard*, 542 U.S. at 285, 124 S.Ct. at 2570. Mitigating evidence to be considered mitigating must be evidence that a "sentencer could reasonably find that it warrants a sentence less than death." *Tennard*, 542 U.S. at 285, 124 S.Ct. at 2570. The *Tennard* Court observed that "a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability." *Tennard*, 542 U.S. at 286, 124 S.Ct. at 2571. The *Tennard* Court gave an example from their prior decision in *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669 (1986), that "how often the defendant will take a shower is irrelevant to the sentencing determination." *Tennard*, 542 U.S. at 285, 124 S.Ct. at 2571.

This Court has defined evidence as mitigating "if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed." *Spann v. State*, 857 So.2d 845, 858 (Fla. 2003)(citing *Evans v. State*, 808 So.2d 92 (Fla. 2001)). In *Spann*, this Court found much of the proposed mitigation, such as sinus and hayfever problems, was not mitigating because it did not reduce the degree of moral culpability for the crimes committed. *Spann*, 857 So.2d at 859.

Here, the proposed mitigating evidence does not met the *Tennard* threshold. Dr. Krop's diagnosis was that Appellant was antisocial. Antisocial is not mitigation. Both this Court and the Eleventh Circuit have recognized that antisocial personality disorder harms rather than helps a defendant in his quest for a life sentence. *Freeman v. State*, 858 So.2d 319, 327 (Fla. 2003) (concluding that antisocial personality disorder is a trait that most jurors tend to view unfavorably); *Heath v. State*, 3 So.3d 1017, 1030 (Fla. 2009)(observing that presentation of an antisocial personality disorder diagnosis would harm rather than help the defendant's penalty phase presentation); *Suggs v. McNeil*, 609 F.3d 1218, 1231 (11th Cir. 2010)(explaining that antisocial personality disorder "is not mitigating but damaging."); *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1368 (11th Cir. 2009)(same). Unlike the taking a shower

example in *Tennard* which was just irrelevant, antisocial has the exact opposite effect from mitigating evidence. Far from being evidence a "sentencer could reasonably find that it warrants a sentence less than death," it is evidence that a sentencer could reasonably finds warrants a sentence of death. The evidence must be actually mitigating. And Dr. Krop's deposition testimony was not.

Opposing counsel overreads *Eddings*. The Supreme Court has never hinted, much less held, that a trial court must constitutionally consider mitigating evidence that the defendant waived. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933 (2007)(finding no prejudice where the defendant waived presentation of mitigation). Appellant waived the presentation of Dr. Krop's testimony. Nor has the Supreme Court ever hinted, much less held, that a trial court has a constitutional duty to independently locate mitigating evidence. The mitigating evidence at issue in *Eddings* was proposed by defense counsel.

Harmless error:

The error, if any, in the trial court's failure to consider Dr. Krop's deposition is harmless. If the trial court had used Dr. Krop's deposition testimony to find mitigation, the trial court was then also welcome to use Dr. Krop's final diagnosis that Appellant did not suffer from any major mental illness but rather had an antisocial personalty disorder to rebut any other

mitigation. Dr. Krop's deposition is a double edged sword. Appellate counsel ignores this dual aspect of Dr. Krop's deposition in her argument. The Supreme Court recently addressed mitigation that had an associated price of aggravation in *Wong v. Belmontes*, 558 U.S. -, 130 S.Ct. 383 (2009), concluding that counsel was not ineffective at penalty phase for failing to investigate and present expert mitigating evidence because any expert's testimony would have opened the door to damaging additional aggravation evidence. Here, as in *Belmontes*, Dr. Krop's deposition, while it supported some mitigation, could be used to rebut that mitigation and all other mitigation as well. The error, if any, was harmless.

ISSUE V

IS THE DEATH SENTENCE PROPORTIONATE? (Restated)

Standard of review:

The standard of review whether a death sentence is proportionate is *de novo*.

The trial court's ruling:

The trial court found three aggravators: (1) under-sentence-of-probation (great weight); (2) during commission of a robbery (great weight); and (3) CCP (great weight). The trial court considered and weighted several non-statutory mitigators: (1) defendant's substance abuse (slight weight); (2) defendant was a product of a broken home and raised by an alcoholic mother

(slight weight); (3) defendant's lack of a violent history (slight weight); (4) the murder was an isolated, aberrant incident (slight weight); (5) defendant has family members, who love him (slight weight); (6) defendant performed kind deeds for others (slight weight); (7) defendant loves his family (slight weight); (8) defendant attempted to have a positive influence on his family (slight weight); (9) defendant's artistic skills at tattoos (slight weight); (10) defendant cares about animals (slight weight); and (11) defendant is amenable to rehabilitation (slight weight). The trial court concluded that "the aggravating circumstances in this case far outweigh the mitigating circumstances." The trial court then sentenced Appellant to death (V5 825-835).

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 v. State*, 965 So.2d 108, 119 (Fla. 2007). Instead, this Court looks at the nature of and the weight given to the aggravating and mitigating circumstances. 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.

This case involves the CCP aggravator, which, as this Court has observed many times, "is one of the most serious aggravators provided by the statutory sentencing scheme." *Wright v. State*, 19 So.3d 277, 304 (Fla. 2009)(citing *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)).

In *Guardado v. State*, 965 So.2d 108, 119 (Fla. 2007), this Court found the death penalty proportionate where the defendant beat and stabbed the victim to obtain money to continue his crack cocaine binge. Guardado went to the victim's house, whom he knew and who lived in a remote, rural area. Guardado knocked on her door, and when she answered the door, he beat the victim with a "breaker bar" several times and then fatally stabbed her.

Guardado, 965 So.2d at 110-111. Guardado then searched the house for money and valuables. He took the victim's jewelry box, briefcase, purse, and cell phone. The trial court found five aggravators, including prior violent felony, engaged in the commission of a robbery with a weapon, and HAC, no statutory mitigators, and nineteen nonstatutory mitigators including that the defendant accepted responsibility, had a lengthy history of substance abuse and addiction to crack cocaine, and was sexually molested as a child. *Guardado*, 965 So.2d at 112 & n.2 (listing aggravation and non-statutory mitigation).

This Court found the death sentence proportional in *Guardado*. *Guardado*, 965 So.2d at 118-199. This Court noted that both the HAC and CCP aggravators were present and they are "two of the most serious aggravators set out in the statutory sentencing scheme." *Guardado*, 965 So.2d at 119. This Court concluded that a death sentence was "proportional to other murder cases involving similar factual circumstances and similar aggravating and mitigating circumstances." See also *Hernandez v. State*, 4 So.3d 642, 672-673 (Fla. 2009)(finding a death sentence as proportionate where victim's neck was broken and she was stabbed where the motive for the murder was to obtain money for crack cocaine from the victim's purse and ATM card).

Appellant's reliance on *Larkins v. State*, 739 So.2d 90 (Fla. 1999) and *Johnson v. State*, 720 So.2d 232 (Fla. 1998), is

misplaced. In *Larkins*, as this Court specifically noted, "neither the heinous, atrocious, or cruel nor the cold, calculated, and premeditated aggravators" were present. *Larkins* at 95. Here, unlike *Larkins*, the CCP aggravator is present. Moreover, *Larkins* involved two aggravators, not three aggravators as in this case. Most significantly, *Larkins* had a "history of mental illness." *Larkins* at 95. Appellant does not.

Opposing counsel misreads *Larkins*. *Larkins* involved both statutory mental mitigators. *Larkins* at 92 (explaining that originally the trial court found no statutory or nonstatutory mitigating factors but that this Court remanded for the trial court to reweigh the mitigation, and, on remand, the trial court found both statutory mental mitigators). Both of the statutory mental mitigators were present in *Larkins* based on "uncontroverted" expert testimony that Larkins suffered "from organic brain damage possibly in both the left and right hemispheres" and Larkin's "cerebral damage" made it "difficult for him to control his behavior." *Larkins* at 94.

This Court views *Larkins* as a mental mitigation case. *Green v. State*, 975 So.2d 1081, 1089 (Fla. 2008)(finding a death sentence disproportionate because it involved "extensive mental health mitigation" relying on *Larkins* and describing *Larkins* as a case were "significant mental health mitigation outweighed the prior violent felony and pecuniary gain aggravators."); *Crook v.*

State, 908 So.2d 350, 358 (Fla. 2005)(finding a death sentence disproportionate because it involved "overwhelming mitigation, especially the mental mitigation" relying on *Larkins*). Neither statutory mental mitigator is present here. There was no expert testimony that Appellant suffered from brain damage or any other significant mental disorder. Dr. Krop diagnosed Appellant as having "antisocial personalty disorder," not a major mental illness (V5 753). Dr. Krop testified in his deposition that Appellant did not suffer from any major mental illness (V5 757). Dr. Krop testified in his deposition that neither statutory mental mitigators was present (V5 785). *Larkins* is not applicable.

Johnson is equally inapplicable. The CCP aggravator was not present in *Johnson* but is present here. See *Mosley v. State*, 46 So.3d 510, 528 (Fla. 2009)(distinguishing *Johnson* because the CCP aggravator was present in *Mosley* unlike *Johnson*). Moreover, the trial court in *Johnson* accorded one mitigator substantial weight and found one statutory mitigator. Here, the trial court afforded the various mitigators only slight weight. No mitigator was afforded substantial weight unlike *Johnson*. And the trial court here rejected the statutory mitigator of age unlike the trial court in *Johnson*. Additionally, *Johnson* involved only two aggravators, not the three aggravators present

in this case. *Johnson* does not apply. The death sentence is proportionate.

ISSUE VI

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION PURSUANT TO RING V. ARIZONA WHEN THE JURY RECOMMENDED DEATH AND THE UNDER SENTENCE OF PROBATION AGGRAVATOR IS PRESENT? (Restated)

Appellant asserts that Florida's death penalty statute violates the Sixth Amendment right to a jury trial as announced in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). This Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute. Furthermore, Appellant was on probation. One of the aggravating circumstances found by the trial court was the under-sentence-of-imprisonment-or-probation aggravator. This Court has repeatedly held that *Ring* does not apply to cases where this aggravating factor is present. Moreover, contrary to Appellant's assertion, the jury necessarily found an aggravating circumstance when recommending a death sentence. Appellant's jury recommended a death sentence. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Accordingly, Florida's death penalty does not violate the Sixth Amendment right to a jury trial.

The trial court's ruling:

Appellant filed a "motion to declare Florida's capital sentencing procedure unconstitutional under *Ring v. Arizona*" in

the trial court, arguing that *Ring* required the jury rather than the judge find the aggravating circumstances, and that under Florida's statute it was the judge rather than jury that made the required statutory findings (V2 297-307). Appellant also asserted the jury's advisory recommendation was not sufficient because the recommendation did not specify exactly what aggravating circumstances were found by the jury (V2 301-303). The trial court reserved ruling on the *Ring* motion until after the motion hearing (V5 736).

On October 16, 2009, the trial court held a motion hearing on the numerous pre-trial motions that had been filed (V7 1047-1101). While confusing because Assistant Public Defender Till used an index that did not correspond to the docketing, defense counsel argued that the statute was unconstitutional (V7 1050-1052, 1053). The trial court ruled that all the motions were denied (V7 1069).

Standard of review:

Constitutional challenges to statutes are reviewed *de novo*. *Miller v. State*, 42 So.3d 204, 215 (Fla. 2010)(stating "[w]e review a trial court's ruling on the constitutionality of a Florida statute de novo" regarding a Sixth Amendment challenge to Florida's death penalty scheme pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348 (2000)and *Ring*).

Merits:

The Sixth Amendment states:

> 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.

The United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) held that the Sixth Amendment requires that aggravating factors, necessary under Arizona law for imposition of the death penalty, be found by a jury.

Ring does not apply. Appellant was on probation for burglary at the time of the murder. This Court has repeatedly held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is present. *Hodges v. State*, - So.3d -, -, 2010 WL 4878858, 24 (Fla. December 2, 2010); *Victorino v. State*, 23 So.3d 87, 107-108 (Fla. 2009)(observing that *Ring* does not apply to cases that include the prior violent felony aggravator, the prior capital felony aggravator, or the under-sentence-of-imprisonment aggravator); *Smith v. State*, 998 So.2d 516, 529 (Fla. 2008)(rejecting a *Ring* claim and explaining that the under-sentence-of-imprisonment aggravator "may be found by the judge alone."); *Floyd v. State*, 913 So.2d 564, 577-578

(Fla. 2005)(rejecting a *Ring* claim and explaining the under-sentence-of-imprisonment aggravator "may be found by the judge alone" citing *Allen v. State*, 854 So.2d 1255, 1262 (Fla. 2003)). Because the under-sentence-of-imprisonment aggravator is a recidivist aggravator, the judge alone may find such an aggravator. *Ring* does not apply.

Even if *Ring* applied to this case, the jury found an aggravator during the guilt phase. The jury convicted Appellant of robbery with a deadly weapon in the guilt phase, thereby necessarily finding the "during the course of a felony" aggravator in the guilt phase. When one of the aggravating circumstances is the murder was committed in the course of a felony and the jury unanimously found the defendant guilty of that felony in the guilt phase, that finding satisfies *Ring*. *Cave v. State*, 899 So.2d 1042, 1052 (Fla. 2005)(citing *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003); *Kormondy v. State*, 845 So.2d 41, 54 n.3 (Fla. 2003) and *Doorbal v. State*, 837 So.2d 940, 963 (Fla. 2003)).

Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial. Appellant claims that Florida's death penalty statute, section 921.141, is unconstitutional because the judge rather than the jury makes the written finding of aggravators. The statute "does not provide for such jury determinations." Appellant is mistaken.

As this Court explained in *State v. Steele*, 921 So.2d 538, 546 (Fla. 2005), a jury recommendation of death is a jury finding of at least one aggravator. The *Steele* Court explained that if *Ring* applies to Florida, all *Ring* requires is a finding that at least one aggravator exists. Given the requirements of section 921.141 and the language of the standard jury instructions, such a finding already is implicit in a jury's recommendation of a sentence of death. This Court in *Steele* noted that its interpretation of *Ring* is consistent with the United States Supreme Court's assessment of Florida's capital sentencing statute. In *Jones v. United States*, 526 U.S. 227, 250-51, 119 S.Ct. 1215 (1999), the United States Supreme Court noted that in its decision in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055 (1989), in which it concluded that the Sixth Amendment does not require explicit jury findings on aggravating circumstances, a jury that recommends death, "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." Both this Court and the United States Supreme Court view a jury's recommendation of death as satisfying the requirements of *Ring*.

Appellant's argument overlooks that Florida's death penalty scheme is "jury plus judge" sentencing. Arizona's scheme was "judge only" sentencing. Adding a judge on top of a jury does

not violate the Sixth Amendment right to a jury trial. Suppose that a state required that a judge agree with a jury to convict a defendant. Surely, there could be no argument that such a system of jury plus judge trials violated the right to a jury trial. Such a defendant has had his jury plus the added benefit of a second opportunity to convince a second fact finder not to convict him. Florida's death penalty does not violate the Sixth Amendment right to a jury trial. The trial court properly denied the *Ring* motion.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Nada Carey, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on April 14, 2011.

_____
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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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