

IN THE SUPREME COURT OF FLORIDA

MICHAEL MULUGETTA YACOB,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC11-2505

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

ANSWER BRIEF OF APPELLEE

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### PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Yacob." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following are examples of other references:

XV 1377 Page 1377 of Volume XV of the record on appeal;

SE #22 State's Exhibit #22, the video of the murder.

Photocopies of several of the guilt-phase exhibits can be found at III 517-97.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

### OVERVIEW AND INTRODUCTION TO KEY FACTS

This is a very unusual robbery and premeditated murder in a convenience store. This was an execution-style murder "while ... engaged ... in the commission of, or an attempt to commit, or flight after committing or attempting to commit" a[]robbery... §921.141(5)(d), Fla. Stat.

Here, the facts of the merged felony-murder/pecuniary gain aggravator are "off the scale" in terms of their weight. The facts are depicted through much more than testimony. Through

State's Exhibit #22, key facts were shown to the jury, which recommended death by a 10-2 vote, and to the Judge, who imposed the death penalty. The Judge carefully analyzed the facts of the murder he saw in determining that the death penalty was appropriate.

State's Exhibit #22 shows the actual murder. No speculation is needed to know what happened in the key events surrounding the murder.

This Court can view those facts in State's Exhibit #22.

State's Exhibit #22 is a video that includes four camera angles documenting the crime scene and events there. Two of the cameras recorded the events exhibiting the heightened premeditation of the murder itself. They show Yacob, with a loaded 9mm gun, robbing the convenience store clerk, 19-year-old Moussa Maida, then, after Yacob demanded the surveillance "videotape," bagged the robbery loot, walked out of the cashier's room, and pocketed his gun, SE #22 shows Yacob --

- Pulling out his loaded 9mm gun and aiming it at Mr. Maida;
- Running towards Mr. Maida while tracking Mr. Maida with his gun, but with objects blocking his ability to shoot Mr. Maida, as Mr. Maida briskly walked to the cashier room door to lock it;

- When Yacob finally had what appeared to be a clear shot at Mr. Maida as he and Mr. Maida arrived at the cashier room door, face-to-face with Mr. Maida on each side of the cashier-room glass door, shooting at Mr. Maida;
- After the door frame blocked the first shot, putting the bag-of-loot down on the floor so he could more carefully aim at the victim; and then,
- While still face-to-face with Mr. Maida, shooting Mr. Maida in the heart, killing him.

During all of the above-listed events, including both gunshots, Yacob made no demands on Mr. Maida. There was no verbal warning. There was no verbal demand and a warning shot.

This murder was perpetrated during a robbery, but it was not an instantaneous "reflex" killing. Evidence of premeditation was unambiguous and overwhelming.

Under the very distinctive circumstances of this case and the weak mitigation, Judge Soud's imposition of the death penalty was proper.

#### **STATEMENT OF THE CASE AND FACTS**

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

The State begins with a Timeline of the basic events and proceedings, which provides a broad overview of the case as well

as an index of the locations in the record for those basic events and proceedings.

**A. Case Timeline.**

<b>DATE</b>	<b>EVENT</b>
5/4/2008	19-year-old Moussa Maida (XII 807), murdered at the Snappy Food Store ( <u>See</u> , <u>e.g.</u> , Camera #3 video in SE #22; X 533-39).
3/25/2010	Michael Jacob indicted for First degree Murder and Armed Robbery. (I 1-3)
2/2011	Defense recorded video of several potential mitigation witnesses. ( <u>See</u> DE #1, <u>Spencer</u> ; <u>see also</u> V 826; XIV 1287, 1290)
2011	Multiple continuances of the trial initiated by the defense and granted by the trial court. ( <u>See</u> I 31-33; III 481-83; 487-89; 495-97)
10/4/2011 to 10/6/2011	Guilt-phase jury trial. (X 447 to XIII 1055; copies of some of the trial exhibits are located at III 517 et seq.; videotape of the murder introduced as SE #22; clerk's list of exhibits at IV 609-613); colloquy of Defendant concerning his decision not to testify at guilt phase (XII 856-59, 910-11).
10/6/2011	Jury found Jacob guilty of First Degree Murder; jury found premeditation and committed during a robbery (XIII 1051-53; III 598-600); jury also found Jacob guilty of Armed Robbery with a firearm (IV 601-602; XIII 1053).
10/11/2011	Disclosure to Prosecution, listing several witnesses, and under Fla.R.Crim.P. 3.220(d)(1)(B) indicating "None know[n] to defense at this time." (IV 642-43)
10/13/2011	Court and parties discussed video of defense penalty-phase witnesses (VI 1059-1112); defense counsel characterized the video as "minor testimony" (VI 1061); prosecutor indicated that he had not yet been provided the video (VI 1066-67) and objected because the State would be deprived of the right of cross examination (VI 1066-67, 1089) and the trial court expressed a

DATE	EVENT
	similar concern (VI 1068-690; trial court conducted a colloquy of Yacob (VI 1071-76, 1090-97); defense's investigator, Mr. Douglas, also discussed (VI 1094-1104).
10/18/2011	Prior to jury penalty phase starting this date, trial court conducted colloquy of Defendant Yacob to confirm that he wished, against his attorneys' advice, to limit his counsel's presentation of mitigation evidence (XIV 1172-77, 1219); trial court conducted a colloquy of Yacob concerning his decision not to testify at the penalty phase (XIV 1221-24); detailed discussions, arguments, and rulings concerning the admissibility of proposed defense evidence (XIV 1177-1236).
10/18/2011	Jury penalty phase at which victim-impact witnesses testified (XIV 1260-81); defense investigator Douglas testified and referenced photographs of the Defendant, his family, and his mother's home (XIV 1284-93), and the jury recommended the death sentence by a 10 to 2 vote (XV 1377-79; IV 691).
10/18/2011	Trial Judge ordered PSI (XV 1383-85), which is included in the record in an unnumbered folder stamped "Confidential."
11/10/2011	Defense's Motion for New Penalty Phase (IV 761-62), which was subsequently denied (XV 1388-89; IV 788).
11/10/2011	Defense's sentencing memorandum. (IV 763-77)
11/14/2011	State's sentencing memorandum. (IV 778-86)
11/17/2011	Defense provided a copy of the video disc of its intended mitigation witnesses to the prosecutor. (See XV 1399)
11/18/2011	<u>Spencer</u> hearing (XV 1388-1438), at which trial court, upon the defense's request that the Court review it in chambers "prior to sentencing," admitted into evidence a video "disc of several witnesses" (XV 1389-90); Judge conducted a colloquy of the Defendant regarding the decision to call no witnesses, including himself, at the Spencer hearing (XV 1391-95); Judge discussed the PSI (XV 1395-99); defense's video disc of its

DATE	EVENT
	intended mitigation witnesses, discussed (XV 1399-1415); Judge admitted, without objection, into evidence Judgment and Sentence of Defendant's Washington-State assault (SE #1 at IV 791-801) and refused to admit the probable-cause facts of that assault (SE #A at V 802-805), as hearsay ( <u>See</u> XV 1409-1414); defense's investigator's deposition was also introduced (XV 1425).
11/23/2011	Defense's amended sentencing memorandum (V 865-887) in response to trial court's query regarding the evidence on which the defense asserts as showing that the Defendant believed the door's glass to be bullet-proof (XV 1421-22, 1437-38).
11/30/2011	State's supplemental sentencing memorandum, which discussed the defense's mitigation video and the defense assertion concerning the cashier-room's door. (V 888-90)
12/5/2011	Judge Soud sentenced Yacob to death. (XV 1439-55; V 902-934)

**B. The Murder and Events Surrounding the Murder.**

On Sunday morning, May 4, 2008, 19-year-old Moussa Maida, known as "Mike," was murdered in Duval County, Florida, while working at the Snappy Food Store owned by his father. Mike, Mike's father, and other family members worked at the store. (See, e.g., SE #22; X 483-96) Yacob murdered Mike shortly after Mike opened up the store and while Mike was staffing the store alone. (See Cameras 1, 2, 3 in SE #22)

The cause of Mr. Maida's death was a hollow-point bullet (Compare XII 811, 797 with XI 791, 796) shot into his heart and lungs (XII 806, 809-810). A hollow point bullet is designed to inflict more damage to whatever it hits. (XI 796)

**Video of the Murder as It Occurred.**

The State introduced into evidence a video (SE #22) recorded from four camera locations and angles at the Snappy Food Store immediately prior to, during, and immediately after Yacob shot Mr. Maida in the heart on May 4, 2008. (See X 561-63; SE #22)

SE #22 includes video and audio. (See X 564 et seq.; see [and hear] SE #22)

The following three tables summarize what was, and is, depicted in the four camera angles. The third row of the three tables indicates the viewpoint of the camera. The fourth, last, row of each table contains a narrative of significant events depicted by that camera's viewpoint. The second table includes two cameras' views of the interior of the store: Camera 2 on the public-accessible side of the cashier room wall and Camera 3 on the non-public side of the cashier room wall.

<b>State's Exhibit #22</b>
<b>Camera 1 (12 minutes 56 seconds, duration<sup>1</sup>)</b>
Shows the front exterior of the Snappy Food Store, parking spaces in front of the store, the road, and part of a parking lot across the street; the camera is located on the left side of the store as one faces away from the store; it is angled away from the store.
Shows Yacob's getaway car parking across the street; victim Mr. Maida arriving at the store to open it up; Yacob, in hooded clothing, exiting the car and approaching the store on a non-direct route; customer Anthony Hardy arriving; gunshots;

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<sup>1</sup> After the 12 minutes and 56 seconds, there are a few minutes of blank video.

<b>State's Exhibit #22</b>
<b>Camera 1 (12 minutes 56 seconds, duration<sup>1</sup>)</b>
victim screaming; multiple gunshots; voice demanding door be opened; extensive banging; Yacob, still hooded, running across the street and, in a direct route, rendezvousing with the getaway car, and driving off; Mr. Hardy asking the victim if he is "all right"; Mr. Hardy exiting the store and yelling to someone who had just driven up, "Which way did he go?"; Mr. Hardy on his cell phone and re-entering the store and yelling "Mike."

<b>State's Exhibit #22, continued</b>	
<b>Camera 2 {4:35 duration}</b>	<b>Camera 3 {3:06 duration}</b>
Shows part of the interior store, including an area immediately outside of the store's enclosed cash register room; the camera is located immediately outside of the cash register room on or near the right wall of the store as one faces towards the front door of the store.	Shows part of the interior store, pointed to an area immediately inside the store's enclosed cash register room; the camera is located inside the cash register room on or near the right wall of the store as one faces towards the front door of the store.
Shows victim Mr. Maida, alone, performing some tasks in the enclosed cash register room; Mr. Maida exiting the cash register room; Yacob, in hooded clothing, accosting the Mr. Maida and directing him back into the cash register room; views the robbery in progress in the cash register room through the glass wall, including Yacob's commands "safe," "videotape" multiple times; "quick"; "CD" <sup>2</sup> ; Yacob	Shows victim Mr. Maida performing some tasks in the enclosed cash register room; Mr. Maida exiting the cash register room; Yacob, in hooded clothing, accosting Mr. Maida and directing him back into the cash register room; clear view of robbery in progress in the cash register room, including Yacob's commands "safe," "videotape" multiple times; "quick," "CD" as he is pointing the gun at the victim; Yacob

<sup>2</sup> As noted infra, the court reporter indicated "TV," but it sounds like Yacob actually said, "CD." The initial Brief (IB 6) also indicates "CD."

<p>exiting the cash register room; Yacob putting his gun in his pocket; as Yacob reaches the area opposite the cash register window, pulling out the gun and pointing it at the victim; Yacob running back to the door of the cash register room; immediate gunshot; Yacob bending over; Yacob standing and facing Mr. Maida at the cash register room door; another gunshot; Yacob running away then returning to the cash-register-room door to pick up the bag of robbery loot as the victim screams, then Yacob running away again; victim falling to floor inside cash register room and moaning as he is dying; multiple gunshots; Yacob demanding door be opened as Yacob returns to area in front of cash register room then leaves that area again; extensive banging; quiet; Mr. Hardy asking the victim if he is "all right"; Mr. Hardy looking into cash register room and seeing victim on the floor; Mr. Hardy yelling "Which way did he go?"</p>	<p>exiting the cash register room with the robbery loot in a bag as the victim stands up in the cash register room; the victim reaching towards under the counter as Yacob walks in front of the victim's location; Yacob and the victim racing to the cash register door; the victim locking that door; a gunshot; Yacob bending over and standing upright and facing the victim at the door; another gunshot while victim is still at the door; the victim backing away from the door holding his chest; Yacob running away then returning to the cash-register-room door to pick up the bag of robbery loot as the victim screams, then Yacob running away again; victim reaching for under the counter and falling to floor inside cash register room and moaning as he is dying; multiple gunshots; voice demanding door be opened as Yacob returns to area in front of cash register room then leaves that area again; extensive banging; quiet and victim motionless.</p>
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<p><b>State's Exhibit #22, continued</b></p>
<p><b>Camera 6 (4:11, duration)</b></p>
<p>Shows part of the interior store, looking from inside the store towards its front exterior door. Cash register room not visible.</p>
<p>Shows Yacob, in hooded clothing, entering the store going to his right then turning around and walking towards the cash register room; sounds of the robbery in progress (See cameras</p>

#2 and #3 above), including Yacob's commands, "put it in the bag," plastic-bag-sounding noise, "safe"; compliant-sounding "right here" responses from victim; Yacob's commands "videotape," "quick," "video"; Mr. Hardy<sup>3</sup> entering the store and going to the area of the store away from the cash register room; Yacob's commands, "videotape" and "CD"; Mr. Hardy walking towards the cash register room, stops, leans forward, and intently looks towards cash register room, then backs away out of sight as the first gunshot rings out; another gunshot; victim screaming; Yacob trying to open store's front exterior door and shooting door multiple times; Yacob, still inside, leaving front exterior door area; Yacob demanding door be opened; victim moaning as Yacob returns to the front exterior door and attempts to exit; Yacob banging on door with gun; Yacob putting bag of robbery loot on a stand,<sup>4</sup> attempting to yank door open, and the bag of robbery loot falls to the floor; Yacob gathering some of the spilled robbery loot from the floor; Yacob yanking on the exterior door some more, then pulls on part of the bottom of the door, crouches over and exits through the bottom part of the door; victim moaning; Mr. Hardy appears again and asks the victim if he is "all right"; Mr. Hardy yelling "Which way did he go?"; Mr. Hardy exiting the store through the bottom part of the exterior door; moaning stopped.

In the discussion of ISSUE 2, in sub-section "C3," "Illustrating Yacob's Execution of Mr. Maida," the above events are displayed in a diagram with a narrative that combines the camera viewpoints.

When the video was played, it was "stopped to avoid the unnecessary or gratuitous ... sounds the victim was making after being shot . . . ." (XV 1417)

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<sup>3</sup> Mr. Hardy turns right and walks away from the cash register room as Yacob is demanding the "videotape" twice (at ~1:27, SE #22).

<sup>4</sup> SE #20 (at III 536) and SE #67 (at III 582) show it as a "Florida Lottery" stand. (See XI 628, 685)

The video recorder from which SE #22 was produced was located in the cashier's room. (X 559-60; SE #51 at III 566)

In each of the videos, the perpetrator's face was not sufficiently visible for identification. In addition to the hooded jacket, the perpetrator's face was covered with a mask. (See SE #22; X 572-73, 590)

Detective Leavens, who had viewed the unredacted version of the cameras' video (X 590), testified to some of the details recorded on Camera 3, which showed the "inside of the cashier's booth." (See X 564-70) He pointed out that the perpetrator wore camouflage and had a black pistol in his hand. (X 567) The perpetrator had a colored glove on his left hand, and his right hand was bare. (X 567) While robbing the victim, the perpetrator took the store's phone. (X 567) The video showed Mr. Maida activating the magnetic lock on the store's front entrance, then "locking himself inside the cashier's booth." (X 568) The perpetrator saw Mr. Maida and "ran back toward the cashier's door." (X 569)

At this point, the sound of a discharging firearm was heard. (X 569) The detective's testimony continued:

The first discharge, I observed the person in the camo [camouflage jacket]. You could see him squat down. He stands back up and a second time, he reengages and points the weapon through the glass part -- at the glass, which is actually pointing in the victim's direction, and discharging it a second time.

(X 570)

The detective also described what was viewed on the Camera 2 video, as part of it was played in court. (See X 570-71) Camera 2 showed the area "just outside" of the "cashier's booth, where the customer would come up to perform the transaction." (X 570) The Court reporter transcribed the audio as the excerpt of the video was played:

"UNIDENTIFIED SPEAKER: (Inaudible) [Yacob:] videotape (inaudible) video. Videotape. Videotape. (Inaudible) TV [CD], (Victim:] I swear to God (inaudible).

"[Victim:] (Scream). (Scream). (Gunshots). [Yacob:] Open the fucking door. Open the fucking door.

"[Hardy:] (Inaudible) Mike. Mike, are you all right? Mike. Mike. Oh, shit. Oh, shit. Oh, shit. Which way did he go? Which way did he go?"

(X 571)

When the video from Camera 6 was played, it showed "the inside view of the [store's] entrance door." (X 571) Its audio included Yacob's demands for the videotape, the victim's screams, and gunshots, and Mr. Hardy's asking "Mike" if he is "all right" and asking "Which way did he go?" (See X 573; SE #22)

The last video excerpt that the detective narrated as it was played for the jury was from Camera 1 (See X 574-81), which showed a view "from inside the store, facing outside of the store" (X 574). It showed the "suspect vehicle" driving back in forth across the street from the store (X 576), and the victim drive up, park, and unlock the store (X 577). When the victim

entered, there was a "chirping sound" indicating that someone entered the store. (X 578) The suspect got out of the car [across the street from the store, See SE #22] and walked down what appeared to be hedges. The video shows the suspect approaching the door. Subsequently, it shows Mr. Hardy. (X 579) It shows the suspect exiting the store and running towards the parked vehicle and getting in it. (X 579-80) Audio was played that comported with the audio from the other cameras. (See X 579-81)

**Additional Testimony, Scientific, and Other Evidence.**

In addition to the video of the murder transpiring (SE #22), several photographs of the murder scene were discussed and introduced into evidence. (X 497-505, 523-25, 537, 551-61, 600; XI 605 et seq.) Autopsy photographs were also introduced. (XII 812 et seq.)

Anthony Hardy testified that, on May 4, 2008, he was employed as a painter. (X 482-83) Mr. Hardy frequented the Snappy Food Store and knew the victim, Moussa Maida, as "Mike." (X 483-84) Hardy went in the store around 7:45 or 8am on May 4<sup>th</sup>. He continued:

Q. ...While you were there, did something occur?

A. Yes, it did.

Q. ... tell us what you heard and what you observed at that time.

A. When I came into the store to get the water, I got back to the water cabinet, where the water was, and I turned around, coming back to pay for the water. And as I got to the end of the counter, coming down the aisle, I heard a gunshot. And when I heard the gunshot, immediately I []turned around, and I ran back to the ba[c]k of the store for my own safety. And what I did was I tucked down behind that first aisle, right there where the water cooler is.

Q. And then what happened?

A. And then after I ducked down, I looked around and trying to peep and hide all at the same time. And I heard a gunshot and I looked around. And all I could see was a young man running to the door, and he couldn't get out the door.

...

... I scooted down behind the -- behind the -- behind the -- the aisle there. It has a soda aisle. It's soda a thing there and that was where I was hiding.

(X 486, 488)

Mr. Hardy heard some more gunshots. (X 488-89) He could not see the man's face but saw that he had on a camouflage jacket with a hood over his head. (X 490-91, 494) He saw that the man had a white plastic bag and what appeared to be a 9mm pistol. (X 492-93) Mr. Hardy heard the man yell, "Open the fucking door." (X 491) Hardy observed the man make additional attempts to get out of the store's exterior door and kick the door. The "glass [on the door] finally gave way." (X 491-95)

Mr. Hardy continued:

So what he was able to do was the bottom of the bars, at the bottom of the bars, able to pry them up, so then that way he could scoot up underneath the bars and get out.

Q. Okay. And how did he get out? Did he just walk through or did he have to --

A. No. It was almost like he had to almost crawl up under there. I mean, you know, it wasn't like he just walked out the door.

Q. And then what happened after that, sir?

A. I -- I -- I waited -- waited a while until I thought that the coast was clear, and I came out the same way that he went out.

Q. And what did you do, sir?

A. I -- I -- I was so nervous. I was trying to call 911 but I wouldn't. So I was -- there was other people outside, and I was hollering at them to call 911. And then I went back in the store to see if I could help Mike.

Q. And what -- what happened when you went back in the store to see if you could help Mike? What did you see?

A. When I went back in the store to help Mike, I couldn't because the door was locked.

Q. And you're talking about --

A. The door that leads back behind the counter with the cash register.

...

Q Okay. And did you end up talking to the police?

A. Yes, I did.

Q. Was there any money outside in the parking lot area?

A. Money was everywhere.

Q. Okay. And did you recover some and turn into it the police?

A. Yes, I did.

(X 495-96, 497)

Witnesses located at various locations outside of the Snappy Food Store testified to hearing gunshots (X 513, 521, 521) and banging noises (X 514) and the sound of breaking glass (X 514; see also X 522). William Bowling and Russell Snell saw someone,

wearing what appeared to be a hood, crawl out of the front door of the Snappy Food Store. The person rendezvoused with a car and got into it. (X 515-17, 522) Mr. Bowling indicated that the person was carrying a gun, and the car drove away. (X 516-17)

Officer Cayenne described the crime scene when he arrived the morning of May 4, 2008: "there was some shattered glass where the front door is located as well as some loose U.S. currency that was laying on the floor." The officer entered through the "small opening that had been pried open" in the store's front door. (X 534, 540-41) Mr. Maida was inside the interior room "behind the counter," [b]ut the door was secured," so the officer was unable to attempt to assist the victim. (X 535) After unsuccessfully attempting to gain access to the interior room with a sledgehammer, fire and rescue were able to get access through the ceiling. (X 536-39) The victim was "pronounced deceased upon arrival by fire-rescue." (X 539)

Additional evidence indicated that the door to the cashier's room was still locked when the police arrived (X 553), and the deceased victim was laying on the floor inside the locked area (X 557).

Under the cashier's counter inside the cashier's room, there was a "remote switch that would secure the door at the very entrance of the business, that would lock it automatically." (X 554-55, 560-61; SE #52/ZZ at III 567; see also SE #51 at III

566) It was in the "On" position. (X 561; SE 52/ZZ at III 567; see also XI 656)

There was a bullet hole in the doorframe of the cashier room's door just above the door handle. (X 552, 557; SE #46/UU at III 561<sup>5</sup>; SE #49 at III 564; SE #55/DDD at III 570; XI 649, 657; see also SE #44/SS at III 559; SE #45/TT at III 560; XI 645-46)

There was another bullet hole, which was in the glass portion of that same door (X 553); it was located above and to the right of the first bullet hole (X 558; SE #46/TT at III 561; SE #56/EEE at III 571; XI 649; SE #57/FFF at III 572; XI 650, 653, 658). (See XI 646-47; SE #54/CCC; XI 648-49, 654, 657) Distances of the bullets holes from the floor were determined. (XI 659-60)

The bullet in the frame of the cashier room's door did not penetrate all the way through the door, whereas the one in the glass did penetrate all the way through the door. (XI 657-58)

The evidence technician said she had been advised that the glass encasing the cashier's room was "supposed to be bulletproof." She said, "I'm not sure what you call this particular glass but it was very thick." (XI 671-72; see also XI 710)

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<sup>5</sup> As mentioned supra, photocopies of several of the exhibits introduced in the guilt-phase can be found at III 517-97.

The store's front, exterior door was damaged (See SE #4 at III 520; XI 621; SE #10 at III 526; SE #12 at III 528; SE #13 at III 622), including the burglar bar part of it (XI 618). There was a bullet hole in part of the front door. (See SE #10 at III 526; XI 621)

The crime scene was processed by evidence-technician detectives. (X 593 et seq.) There was no indication that anyone entered or exited the store other than through the store's front door. (X 597)

Nine millimeter shell casings were photographed and recovered from the store. (XI 637-45, 655-56, 661-63, 721-31) All six recovered shell casings were fired from the same gun. (XI 796-97)

Bullet fragments and projectiles were also recovered. (XI 663 et seq.) A bullet was also recovered from the victim's chest and identified as FDLE #17. (XI 791, 797) FDLE #17 was fired from the same firearm as a bullet fragment from the murder scene. (XI 793-94; see also FDLE #15 included JJJJ and KKKK discussed at XI 789 and XI 663-64)

FDLE #17, the fatal bullet from the victim's chest, was a "jacketed hollow-point bullet of 9mm class" (XI 796) The FDLE expert described the significance of a hollow-point bullet:

The theory behind the hollow-point is that because it has that hole in it, when it impacts upon an object, it's more likely to expand and increase its surface size, which

theoretically would impart more damage upon the object that it hits.

(XI 796)

The police recovered what appeared to them to be, and was tested as, blood from the handles of the store's front door. (XI 608, 679, 683, 686; SE #59, 60, 61, 62; see also XI 619-20; SE #8, 9 at III 524-25) The **bloody door handles** were seized as evidence. (XI 620, 691-93; see also XI 688) Blood was sampled from the handles. (See XI 696, 697)

A **white plastic bag** (SE #78/BBBB; XI 665-68) with blood on it (See, e.g., XII 884) was found inside and near the front door of the store and near the lottery stand there (XI 614; SE #20/T at III 536; SE #21/U at III 537; XI 624; SE #17 at III 533; XI 626, 627-28; SE #23 at III 538; SE #23/W at III 538; XI 628; SE #26 at III 541).

A **five dollar bill** with blood on it was recovered from the floor. (XI 613, 681, 698-701 SE # 79/CCCC)

**Blood droplets** were observed on the floor in the area of the plastic bag and the money. (See XI 615, 626-27, 680, 688-90; SE #21 at III 537; SE #64) Part of the flooring was collected as evidence. (XI 684-85) Blood samples were also taken from the floor. (XI 695-96, 701-702)

**Yacob's DNA** (SE #104/BBBBB; XII 829) matched crime scene blood. The expert testified:

The DNA profile that I obtained from the interior handle [from the store's front door, see XI 696], the swabs from the floor and the major DNA profile from the plastic bag and the \$5 bill matched the DNA profile from Michael Yacob.

(XII 884) The probability that the DNA from these murder scene samples was anyone other than Yacob was 1 in 59 quadrillion among African-Americans. (XII 893-94)

Yacob's finger and palm prints (SE #105/CCCCC; SE #106/DDDDD; XII 831-32) matched latent prints lifted from the plastic bag (XII 846-51) that the robber-murder handled, placed on the floor to kill Mr. Maida, retrieved after shooting Mr. Maida, and placed on the lottery stand.

#### **C. Yacob's Refusal to Testify & the Guilty Verdicts.**

The trial judge conducted colloquies of Yacob (XII 856-59, 910-11), who decided not to testify (XII 911).

On October 6, 2011, the jury found Yacob guilty of First Degree Murder as charged, finding premeditation and committed-during-a-robbery. (XIII 1051-53; III 598-600) The jury also found Yacob guilty of Armed Robbery with a firearm. (IV 601-602; XIII 1053)

#### **D. Discussions of Penalty Phase Scheduled for October 18, 2011, and Mitigation Video Mentioned.**

Prior to the jury guilt-phase, the trial court had indicated that any jury penalty phase would occur on October 18, 2011, if necessary. (V 969, 990; VI 1020, 1054)

During the guilt-phase trial, defense counsel mentioned that, for the penalty phase, the defense was considering using "video snippets" of, "for example, school teachers of Mr. Yacob" "in lieu of having witnesses flown in live." (XI 761). The prosecutor asserted the State's right to cross examine those witnesses and requested a copy of the video "as soon as possible." (XI 763-64) The trial court stated that the "confrontation clause applies to the penalty phase," to which defense counsel, responded "Yes, sir" (XI 764), and directed that any "available materials" be provided to the State "imminently" "at the first available opportunity" (XI 764-65).

The trial court attempted to re-set the penalty phase earlier "[i]f you're not bringing in any other witnesses from out of town." (XI 762) Defense counsel responded:

I don't believe we could get it together in time. Your Honor, we would suffer a prejudice.

(XI 763) The trial court re-confirmed the October 18, 2011, penalty-phase date. (XI 763)

On October 6, 2011, immediately after the jury's guilty verdicts, the trial court confirmed the October 18 penalty-phase. (XIII 1060) The prosecutor asserted that he wanted to cross-examine any defense mitigation witnesses (XIII 1061-62) and confirmed that he wanted a list of the witnesses that the defense intended to offer via videotape (XIII 1062-63). The prosecutor repeated:

I'm not agreeing to the videotape unless I have an opportunity to cross examine.

(XIII 1063) Defense counsel then indicated, "I'll be more than willing to provide that." (XIII 1063)

The video of the "mitigation" witnesses was made through February 2011 interviews conducted by a defense investigator and defense attorney in Washington state. (See DE #1)

The trial court scheduled a "hearing on all pending matters prior to the penalty phase" for October 13, 2011. (XIII 1063)

#### **E. Interim Pleading and Proceedings.**

##### **October 11, 2011.**

The defense filed a Disclosure to Prosecution, listing several witnesses, and under Fla.R.Crim.P. 3.220(d)(1)(B) ("statement of any person...") indicating "None know[n] to defense at this time." (IV 642-43)

##### **October 13, 2011.**

At this hearing, the trial court reiterated that the jury penalty phase remains scheduled for October 18, 2011. (VI 1059) The trial Court and parties discussed video of defense penalty-phase witnesses. (VI 1059-1112) Defense counsel characterized the video as "minor testimony." (VI 1061) The prosecutor indicated that he had not yet been provided the video (VI 1065-66) and objected because the State would be deprived of the right of cross examination (VI 1066-67, 1089), and the trial court expressed a similar concern (VI 1068-69).

The trial court conducted a colloquy of Yacob that confirmed his informed desire not to call his mother as a witness in the penalty phase. (See VI 1071-76) Defense counsel informed the trial court that Yacob was limiting defense penalty-phase witnesses to the defense investigator, Mr. Douglas, in spite of counsel's lengthy attempts to "sway" Yacob from that decision. (VI 1073) Yacob confirmed this limitation on his counsel as "accurate." (VI 1074; see VI 1074-76) The trial court indicated that Yacob is "obviously not waiving the penalty phase jury." (VI 1073; see also VI 1083-85) The trial court conducted another round of colloquy with Yacob. (VI 1090-97)

The defense's investigator, Mr. Douglas, was also discussed further. (VI 1094-1104)

#### **F. The Jury Penalty Phase.**

On October 18, 2011, the date that the penalty phase was scheduled to begin, but prior to penalty opening statements, the trial court conducted another colloquy of the Defendant to confirm that, against his attorneys' advice, he wished to limit his counsel's presentation of mitigation evidence. (XIV 1172-77, 1219) The admissibility of aspects of defense investigator Douglas' proposed testimony was also discussed, including the prosecutor tendering cross-examination areas that could be explored if the witnesses actually testified, (XIV 1177-1198) resulting in a detailed ruling (XIV 1198-1212).

The trial court offered to allow the defense witnesses to testify by telephone. (XIV 1202) It also noted that "[t]here are witnesses available in this courtroom who could offer" testimony concerning matters that the defense sought to introduce through hearsay. (XIV 1207)

The trial court denied the prosecution access to the defense investigator's notes, and other evidentiary matters were discussed. (XIV 1213-20)

The trial court also conducted a colloquy of the Yacob concerning his decision not to testify at the penalty phase. (XIV 1221-24)

Photographs that the State (XIV 1224-25) and the defense (XIV 1225-26) intended to introduce were discussed. An additional discussion of the defense photographs, as well as the defense investigator, Mr. Douglas, ensued. (XIV 1227-36) Defense counsel indicated that Mr. Douglas would not comment on the photographs other than identifying the family members in them. (XIX 1234-35)

In the jury penalty phase, victim impact witnesses (the victim's younger brother, the victim's mother, and the victim's younger sister) testified. (XIV 1260-81) The State rested. (XIV 1281-82)

The defense's investigator then testified. (XIV 1284-93) He testified about Yacob's birthday. (XIV 1285) He testified about the Defendant's move from Eritrea to Ethiopia to New Jersey to

Seattle, Washington. (XIV 1285-86) His mother's name is Sosna Beyenne. (XIV 1286) Yacob lived in Seattle until he graduated from high school. (XIV 1286-87) After graduation, Yacob moved to Jacksonville, Florida, to reside with his father. (XIV 1287) Douglas testified about the photographs he took on February 17, 2011, (XIV 1287-91), including ones depicting Yacob hugging "a young lady by the name of Rachel, who was a high school classmate, close friend," (XIV 1287); his mother, including Yacob hugging his mother (Id. at 1288); Yacob's younger siblings (Id.); Yacob's family (Id.); Yacob's family again (Id. at 1288-89); several of Yacob's graduation, including his cousins and aunt and uncle (Id. at 1289-90); a seal showing Yacob's 2003 graduation (Id.); Yacob's aunt and grandmother (Id. at 1289); his grandmother and mother with his younger sisters (Id. at 1289-90); Yacob with his grandmother, mother, and uncle (Id. at 1290); "family photo of Michael [Yacob] and his grandmother, Miss Besherre" (Id. at 1290); "[f]amily photo of him with a doll" (Id. at 1290); "his Aunt Helen's wedding," including his grandmother, mother, uncle, and himself (Id.); Yacob's 2003 high school diploma obtained from Yacob's father (Id.); Yacob's mother, Sosna Beyenne, and his younger brother, which the investigator took on February 17, 2011 (Id.); and, religious icons inside of Yacob's mother's home near Seattle (Id. at 1290-91). The investigator discussed religious icons in the house

and, based on conversations with Yacob and his family, Yacob "appeared to love his family, yes, sir, and they him." (Id. at 1291)

The jury recommended the death sentence by a 10 to 2 vote. (XV 1377-79; IV 691)

Trial Judge ordered PSI (XV 1383-85), which is included in the record in an unnumbered folder stamped "Confidential."

The parties submitted sentencing memoranda (IV 763-77, 778-86), which they subsequently supplemented (V 865-887, 888-90).

#### **G. Spencer Hearing.**

On November 18, 2011, the trial court conducted a Spencer Hearing. (XV 1388 et seq.)

The defense tendered a "mitigation disc of several witnesses" for the judge's review. The defense did not request that the video be played "at this time," and the prosecutor did not object because "almost anything can come in," but he also indicated that he would respond to, and address, it later. (XV 1390) The trial court admitted the video as Defense Exhibit #1. (Id.) Defense counsel confirmed that the video included the same people discussed prior to the jury penalty phase. (XV 1391) Defense counsel indicated that the defense did not wish to call any witnesses of any kind. (XV 1391)

The trial court conducted another colloquy of Yacob concerning his request not to call any witnesses and not to

testify at the Spencer hearing. (XV 1391-95) Yacob indicated that he was prohibiting defense counsel from calling witnesses because "[i]t's just too much pain for them." (Id. at 1394)

The trial court said it "will watch [the video] in great detail." (XV 1395)

The defense had no objections to the PSI, and the trial court said it would continue to study it and would not consider lack of remorse in any way and would not negatively consider Yacob maintaining his innocence. (XV 1396-98)

The prosecutor indicated that he was provided the video of the Seattle "witnesses" "yesterday," (XV 1399) which was November 17, 2011.

The prosecutor discussed the video in detail, including specific aspects of the video that would have been improperly presented to the jury (XV 1399-1409), including the prejudice of Yacob's mother holding and feeding a baby (XV 1400), refocusing for a close-up of the mother's face crying (XV 1400), and the denial of his right to cross-examine concerning specific topics the prosecutor discussed (XV 1400-1403). For example, the prosecutor discusses being deprived of the ability to cross-examine concerning Yacob's "over 50 suspensions he [Yacob] attributed to minor behavioral issues." (XV 1403) The prosecutor also discussed "a prior [2001] incident in school that involved

him [Yacob] beating an individual with a metal bar," resulting in Yacob being adjudicated delinquent. (XV 1403-1405)

The State tendered a "complete record of what occurred" in the 2001 incident, but the defense objected on the ground of hearsay, complaining that it would be deprived of cross-examination. (XV 1405-1406) The prosecutor responded that "the whole DVD is hearsay" and that "once it has come in," the State is allowed to rebut it with probable-cause facts, as well as the judgment and sentence. The prosecutor also argued that in Yacob's "own interview by police on March 25, 2012," Yacob said he got into a fight using his hands and a metal bar; Yacob said it was wrong to use the metal bar. (XV 1407-1409) Defense counsel repeated his hearsay objection. (XV 1409) The trial court then accepted aspects of the State's argument, but rejected the admissibility of the police probable-cause certification on the ground of hearsay. (XV 1410-11)

The State was then allowed to introduce, without objection, the Judgment and Sentence that showed that Yacob pleaded guilty to two counts of Assault in the Third Degree because he believed that there was a "substantial likelihood" that he would be "found guilty at trial." (XV 1411-13; IV 791-801) The excluded probable-cause certification was placed in the record as marked for identification. (XV 1411-13; V 802-805)

The prosecutor pointed out that the defense's mitigation DVD includes discussion of a fight, a boy being bullied, and a metal pipe (XV 1414) and that Yacob admitted that he used a metal bar to hit someone (XV 1415). The prosecutor argued that he was merely highlighting "what has already come in." (XV 1414)

The trial court then invited and heard argument concerning whether evidence proved that Yacob was aware that the doors were being locked when the victim "flipped the switch." (XV 1417-21) The trial court also invited the defense and the State to write a supplemental sentencing memorandum on the status of the evidence concerning whether "everyone believed" that the glass was actually bullet proof. (XV 1421-23)

The defense then introduced the video deposition of its investigator, Mr. Douglas. (XV 1424) The prosecutor observed that the investigator discusses "a lot of hearsay stuff" of the mitigation witness video. (Id. at 1424-25) The trial court invited the parties to address "any such matter" in their supplemental memoranda. (XV 1425) A transcript of the investigator's deposition was also introduced. (Id. at 1425-26)

The prosecutor argued in detail concerning why this is not a "typical" or "ordinary felony murder case" and the defense responded. (XV 1428-34, 1436)

The trial court pointed out that it would not consider CCP as a separate aggravator in this case, but it "will consider" the

detailed facts in evidence, including the video of the murder transpiring. (XV 1435)

The parties subsequently submitted additional sentencing memoranda. (V 865-887, 888-90)

#### **H. Sentencing and Attendant Trial Court Findings.**

On December 5, 2011, Judge Soud sentenced Yacob to death. (XV 1439-55; V 902-934)

The trial court relied on the PSI in its evaluation of "this matter." (XV 1439-40)

The Court indicated that it heavily relied upon the video of the murder as it transpired. (XV 1442) It characterized this case as "remarkably different" from those in which the trial court has only witness testimony about what happened, resulting in only a "sterile transcript" for the Florida Supreme Court's review. (XV 1442)

The trial court detailed aspects of the video of the murder (XV 1442-47), including, the Defendant lying in wait to enter the store (XV 1442); the detection-avoiding route Yacob took from the getaway car to the store to maximize surprise (Id. at 1443); Yacob hooding and masking his identity (Id. at 1444); a glove on Yacob's left hand but no glove on Yacob's right hand and trigger finger (XV 1444); Yacob's gun loaded with "hollow-point ammunition designed to maximize damage and injury" (XV 1444); the victim submitting to every one of Yacob's demands (XV

1444); Yacob's demands for the videotape (Id. at 1445); Yacob watching the victim as Yacob pocketed his gun, then the victim flipping the door-lock switch. (XV 1446) The trial court found that the evidence did not prove that Yacob knew what the victim was specifically doing at the time (XV 1445-46), but it also rejected the theory that Yacob returned to the cashier room door to effect an exit from the store because Yacob shooting the victim would prevent the victim from complying with Yacob's demands. (XV 1447)<sup>6</sup> The trial court continued:

The defendant went back. All that was left was to exit. This is not a case of a robbery gone bad. This is not a case where things got out of control. This is a case of a conscious decision of a man perfectly willing to end the life of a 19-year-old boy.

(XV 1447)

The trial court rejected the argument that sentencing Yacob is simply a matter of determining an equation that felony murder with pecuniary gain "equals a sentence of life." (XV 1448) Instead, the analysis is "fact-intensive." (Id.)

The trial court discussed the aggravation some more and then focused on the mitigation. (XV 1448-51)

The trial court discussed Yacob's decision to prohibit his attorneys from calling a number of mitigation witnesses and the

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<sup>6</sup> Also, when Yacob returned to the cashier's door, he demanded nothing. Instead, he opened fire, placed the loot on the floor then fired the fatal shot.

trial court's multiple inquiries of Yacob concerning his decision. (XV 1451) Even after the trial court announced its ruling on the inadmissibility of the video and the partial admissibility of the defense investigator's testimony, Yacob was "steadfast in refusing to allow defense counsel to call witnesses who were at every stage present in the courtroom, except for the teachers." "His family was here. An interpreter was on standby, should the defendant change his mind." (XV 1451-52)

The trial court pointed to the State's right to cross-examine witnesses. (XV 1452)

Therefore, the trial court found, as discussed in the sentencing order, that some mitigation was not established. (XV 1452-53)

The trial court discussed this case's "critically important distinctions" with the case law. Here, there are no "substantial mitigating circumstances," and here there is no uncertainty "as to the events surrounding the murder." Here, a video makes "abundantly clear" what happened that justifies the death penalty." (XV 1453-54)

The trial court rendered an extensive sentencing order (V 902-934, attached as the appendix to this Answer brief) that discussed its fact-intensive method of analysis (V 909-910), the aggravating circumstances (V 910-12); the defense's proposed

mitigating circumstances (V 912-25); Yacob's limiting his defense counsel's presentation of mitigation when "[m]any of the mitigation witnesses were present in the courtroom" (V 925-26); and the trial court's "careful[]" study of the PSI (V 926-27).

The trial judge agreed with the 10-to-to jury recommendation of death based on his assessment of the aggravating and mitigating circumstances. (V 932-33)

#### **SUMMARY OF ARGUMENT**

**ISSUE 1:** The trial court properly rejected as mitigation certain matters that were not supported by competent evidence. Indeed, Yacob personally created the situation in which the prosecution was deprived of cross examination, producing the incompetent nature of the purported mitigation evidence; he should not be heard to complain on appeal about what he created in the trial court.

**ISSUE 2:** This death sentence is proportionate. This is a very distinctive robbery-murder. It is not a frenzied, reflex killing during a robbery gone bad. It is not a killing during a struggle over the gun or robbery loot. A fact-intensive analysis of this murder committed during Yacob's robbery demonstrates near-CCP level premeditation and near-avoid arrest motive.

The trial judge, the jury, and this Court, through SE #22, were, and are, able to see the murder transpire. The video shows

Yacob's preoccupation with the "videotape" and his heightened premeditation as he pulls out his gun again and decides to kill the victim. Yacob trains the hollow-point-loaded gun on the victim and maintains its readiness as he intercepts the victim at the cashier's room door. As soon as Yacob reaches the door, he demands nothing other than the victim's life by shooting at him twice. He immediately shoots once but the door frame stopped the bullet. He places the bag of robbery loot on the floor to take better aim. He stands up, faces the victim on the other side of the door, aims at the victim, and fires a hollow-point bullet into the victim's heart, killing the victim. The jury expressly found premeditation, and much more than simple premeditation was proved with compelling evidence.

In contrast, the mitigation is weak. There is no mental, or any other substantial, mitigation.

**ISSUE III:** There is no viable Ring issue.

None of the appellate issues merit any relief.

## ARGUMENT

### **OVERARCHING STANDARD OF APPELLATE REVIEW.**

Rulings of the trial court<sup>7</sup> are purportedly the subject of an appeal. Accordingly, this Court recently re-affirmed the "Topsy Coachmen" principle that a "trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011). See also Robertson v. State, 829 So.2d 901 (Fla. 2002) (collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010) ("key to this ["Topsy Coachman"] doctrine is whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988) ("... affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001) ("we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"); Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001) ("We conclude that summary judgment for the defendant was appropriate, but for a different reason").

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<sup>7</sup> Even in cases of fundamental error, the focus is on a trial court ruling, that is, one that should have been rendered.

**ISSUE 1: DID THE TRIAL COURT REVERSIBLY ERR BY NOT ACCREDITING PURPORTED MITIGATION IN UNSWORN, EX PARTE'D HEARSAY THAT HAD NOT BEEN SUBJECT TO ANY CROSS EXAMINATION? (IB 28-37, RESTATED)**

Yacob's ISSUE I complains that the trial court erred by not accrediting statements by family and educators that were in a video recording made by Yacob's investigator and attorney in Washington state. The State respectfully submits that ISSUE 1 should be rejected.

Yacob personally created the situation about which he complains on appeal in ISSUE 1. He should not be heard to complain about it. Yacob waived ISSUE 1.

Further, the trial court reasonably did not accredit alleged facts that were solely based upon hearsay in the video and in related defense investigator testimony. When the video was made about eight months prior to the penalty phase, the State was not present. The recorded interviews were entirely ex parte, with Yacob's defense investigator and defense attorney asking each "witness" the questions. The video included a number of leading questions, and when Yacob's mother started tearing-up, the camera zoomed-in on her face.

There was no defense motion to perpetuate testimony.

No "witness" was sworn.

There was no cross examination.

Indeed, the defense did not even serve its mitigation witness list until October 11, 2011, and did not even provided the State

the video until November 17, 2011, the day before the Spencer hearing was scheduled to begin.

The trial court properly did not accredit the hearsay content of the video and the related hearsay from the defense-team investigator.

**A. Introduction: Yacob's Enforceable Partial Limitation of Mitigation Evidence.**

As a threshold matter, Yacob personally limited the scope of the presentation of mitigating evidence. Contrary to the Initial Brief's arguments (IB 28-33, 36-37), Yacob did not waive the penalty jury (See XIV et seq.; VI 1073, 1083-85), thereby not invoking Muhammad v. State, 782 So.2d 343 (Fla. 2001). See Boyd v. State, 910 So.2d 167, 189 (Fla. 2005) ("Boyd did not waive all mitigation but only limited the matters presented on mitigation. Thus, we hold that *Muhammad* is inapplicable to this case").

Yacob also did not waive all mitigation evidence (See XV 1284-93, 1349-53), thereby not requiring inquiries pursuant to Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993) ("defendant's waiver of his right to present any mitigating evidence"). See Boyd, 910 at 188-89 (Fla. 2005) ("distinguishable from *Koon* because Boyd did not ultimately waive his right to present mitigation"; "requirements of *Koon* are not applicable in this case because Boyd presented mitigating evidence"). Even though not required, as discussed in the Facts section supra and in this issue infra and as the Initial Brief admits (IB 33 n.10),

the trial court conducted extensive colloquies of Yacob to ensure that he was knowingly and voluntarily limiting his counsel's ability to represent him.<sup>8</sup> See also, e.g., Spann v. State, 857 So.2d 845, 854 (Fla. 2003) (colloquy sufficient; discussing Overton v. State, 801 So.2d 877 (Fla.2001)).

Here, especially where the defendant partially limited mitigation evidence, the trial court was not required to appoint any special counsel or otherwise force the presentation of evidence against Yacob's wishes. In Grim v. State, 841 So.2d 455, 461-62 (Fla. 2003), where "the defendant waived mitigation," this Court rejected the argument that "the court should have ordered mitigation presented through a 'special counsel' as suggested in *Muhammad*." Grim, citing to Hamblen v. State, 527 So.2d 800 (Fla. 1988), reasoned that "a defendant cannot be forced to present mitigating evidence during the

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<sup>8</sup> If this Court affirms Yacob's death sentence, these trial court inquiries may be significant in evaluating related ineffective-assistance-of-counsel claims on postconviction. See, e.g., Schriro v. Landrigan, 550 U.S. 465, 475, 127 S.Ct. 1933, 1941 (2007) ("If Landrigan issued such an instruction [to "his counsel not to offer any mitigating evidence"], counsel's failure to investigate further could not have been prejudicial under *Strickland*" [v. Washington, 466 U.S. 668 (1984)]). See, e.g., Lawrence v. State, 691 So.2d 1068, 1074 (Fla. 1997) (direct appeal; failure to present mitigation evidence as a postconviction-type issue).

See also Spann v. State, 857 So.2d 845, 854 (Fla. 2003) (reviewing court's Koon colloquy under abuse its discretion standard).

penalty phase of the trial." Here, Yacob was not even prohibiting all mitigation evidence, but rather he was cherry-picking only part of it for presentation. See also Ocha v. State, 826 So.2d 956, 964-65 (Fla. 2002) ("Hamblen and its progeny operate under the premise that a competent defendant may direct his own defense at trial"; citing Farr v. State, 656 So.2d 448, 449 (Fla. 1995)).

Thus, Boyd, 910 So.2d at 189, applying the abuse of discretion standard, rejected a claim that "the defendant's waiver of mitigation was invalid because it is the attorney's obligation to decide what evidence is to be presented in the penalty phase of trial." Boyd explained that --

we have long recognized that a competent defendant may waive the right to present all mitigating evidence. *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). This right is not altered when the defendant has counsel.

As in Boyd, 910 So.2d at 189-90 (citing Grim v. State, 841 So.2d 455, 461 (Fla. 2003)), here, Yacob "has the right to choose what evidence, if any, the defense will present during the penalty phase."

#### **B. Waiver of ISSUE 1.**

This issue, which complains about the trial court not accrediting hearsay evidence in the February 2011 video of Yacob's family and of educators, was waived because Yacob personally created the situation about which he complains on appeal in ISSUE 1.

As the trial court indicated, "the defendant has made an election that brings consequences with it." (XIV 1210) Yacob had the option of limiting the evidence, but his choice must have consequences.

Immediately prior to the penalty phase and in spite of the prosecutor even explicitly forewarning the defense of the State's insistence on its right of cross examination, Yacob limited the defense mitigation evidence to the defense investigator's testimony and the attempted use of the video by prohibiting his attorneys from calling to the stand the "witnesses" in the video, even as a number of family members in the video were in the courtroom during much of the trial. The State elaborates. See also detailed discussion of the record in sub-sections "Discussions of Penalty Phase Scheduled for October 18, 2011, and Video Mentioned"; "Interim Pleading and Proceedings," "The Jury Penalty Phase," "Spencer Hearing," and "Sentencing and Attendant Trial Court Findings," in "STATEMENT OF THE CASE AND FACTS," supra.

As early as June 15, 2011, in Yacob's presence in open court, the trial court announced that any jury penalty phase was "reserve[ed]" for October 18, 2011. (V 969; see also V 990; VI 1020, 1054) Therefore, the defense team, including Yacob himself, had plenty of notice and plenty of time to provide the prosecutor an opportunity to cross-examine the witnesses in the

video at issue here, but they did not tender the witnesses for cross-examination.

Indeed, at the end of the day on October 4, 2011, during the guilt phase, rather than starting the penalty phase earlier, the defense insisted on adhering to the October 18<sup>th</sup> jury penalty phase date so they would have enough time to marshal their mitigation. (See XI 762-63)

In that October 4<sup>th</sup> discussion in the guilt-phase, the defense indicated that it was considering using "video snippets" of, "for example, school teachers of Mr. Yacob" "in lieu of having witnesses flown in live." (XI 761) Defense counsel said, "**we haven't made a determination ... at this time.**" (XI 761) During the discussion, the prosecutor asserted the State's **right to cross-examine** the defense's mitigation witnesses and **requested a copy of the video "as soon as possible."** (XI 763-64) The trial court ordered that any "available materials" be provided to the State **"imminently" "at the first available opportunity"** (XI 764-65), and the trial court also indicated the **State's right to confront the defense witnesses,** which defense counsel acknowledged (XI 764).

On October 6, 2011, immediately after the guilty verdicts, the prosecutor brought up the topic of "potential [defense mitigation] witnesses" and repeatedly asserted the **State's right of cross-examination.** (XIII 1061-62, 1063) The prosecutor also

confirmed that he wanted a list of the witnesses that the defense intended to offer via videotape (XIII 1062-63). Defense counsel responded, "I'll be more than willing to provide that." (XIII 1063) The defense still had not provided the prosecutor a copy of the video. (See VI 1066-67)

The trial court offered to allow the defense witnesses to testify by telephone. (XIV 1202)

On October 11, 2011, the defense filed a Disclosure to Prosecution, listing several witnesses, but under Fla.R.Crim.P. 3.220(d)(1)(B)'s "statement" requirement, the Disclosure stated, "None know[n] to defense at this time." (IV 642-43)

At a pre-penalty-phase hearing, on October 13, 2011, five days prior to the jury penalty phase that had been scheduled for months, the defense finally indicated that it did intend to play a video for the penalty phase. (VI 1061) The prosecutor indicated that he has not been provided the video. (VI 1065-66)

At the October 13<sup>th</sup> hearing, the trial Court and parties discussed video of defense penalty-phase witnesses. (VI 1059-1112) Defense counsel characterized the video as "relatively minor testimony," not justifying as "cost-effective" paying for flying witnesses to Jacksonville. (VI 1061) The prosecutor indicated that he had not yet been provided the video (VI 1066-67) and, again, asserted that the State would be deprived of the right of cross examination (VI 1066-67, 1089), and the trial

court expressed a similar concern (VI 1068-69). The trial court conducted colloquies of Yacob. (See VI 1071-76, 1090-97)

On October 13<sup>th</sup>, defense counsel acknowledged that Sosna Beyenne was present in the courtroom. (VI 1063) Yacob said she was his biological mother. (VI 1071)

On October 18, 2011, in Yacob's presence, the attorneys and the trial court discussed details of the hearsay and details of the State's deprived cross-examination, and the trial court conducted another colloquy of Yacob. (See XIV 1172-1236)

On November 17, 2011, the day prior to the Spencer hearing, the defense finally provided the prosecutor the video. (See XV 1399)

At the Spencer hearing, the defense finally tendered the video of mitigation "witnesses" to the trial court and argued that it should be considered for mitigation. (See XV 1389-90, 1399) At that time, although the prosecutor did not contest its admissibility, he indicated he will "address" it (XV 1390) and shortly thereafter provided detailed arguments why the contents of the video should not be accredited (See XV 1399 et seq.), specifically tendering areas in which he would have cross examined the witnesses (XV 1400-1405; see also XV 1414-15).

At the Spencer hearing, the prosecutor also requested that a probable-cause record of some facts regarding Yacob's prior assault delinquency-adjudication be admitted, but the defense

succeeded in objecting on hearsay/cross-examination-deprivation grounds. (XV 1405-1411) As a result, the prosecution was allowed to introduce only the judgment and sentence (XV 1411-13; see IV 791-801), and the probable-cause fact-narrative portion, as well as the information charging document, were only marked for identification for the record (XV 1412-13; see V 802-805).

While, at the Spencer hearing, the trial court admitted the video of the defense mitigation "witnesses" (XV 1389-90, 1426), it ultimately refused to accredit its content because it was hearsay and because it deprived the State of cross-examination (XV 1451-52).

In open court at the sentencing hearing, the trial court found:

[T]he defendant chose to prohibit his lawyers from calling a number of mitigation witnesses in this case. That includes his father, his mother, his grandmother, his stepmother, and three educators.

And this Court at every stage took the opportunity to inquire of the defendant, as required by the *Kuhn* case, to ensure that the defendant understood the consequences of his decision, that his decision was knowingly made, a free exercise of his will, without the effect of duress or coercion and even after this court issued his detailed rulings as to what evidence would be admissible, what the investigator would be allowed to testify to in the course of trial.

And after that ruling, the defendant was steadfast in refusing to allow counsel to call witnesses who were at every stage present in the courtroom, except for the teachers and educators in Seattle, I believe it is. His family was here. An interpreter was on standby, should the defendant change his mind. And everything was done. And yet the defendant consciously chose to not allow his lawyers to

call his family members as witnesses, in order to preserve them from further, presumably, emotional suffering.

Because of that, as I discussed in the sentencing order, there are a number of the mitigating circumstances argued by the defendant that **cannot be established by a preponderance of the evidence** because this Court is deprived of a full understanding of the **circumstances surrounding those alleged mitigating circumstances**. And the State of Florida is denied due process and **denied the right of confrontation and cross examining those witnesses**.

(XV 1451-52)

Accordingly, the trial court's written sentencing order discussed its inquiries of the Defendant concerning his decision to waive a portion of his mitigation evidence from witnesses "[m]any" of whom "were present in the courtroom." (VI 925-26) The trial court reasoned that the defendant "did not waive the penalty phase jury" and actually did present "some mitigation evidence." (VI 926 n.18) The trial court also indicated that it "carefully studied the PSI Report," which was "unremarkable." (VI 927)

As the trial court described in its ruling, it had, in fact, conducted multiple inquiries of the defendant leading up to its determination that Yacob had freely and knowingly waived the portion of his mitigating evidence that was on the video:

- On October 13, 2011, when the defense finally announced Yacob's decision that it would not call to the witness stand the family and educators who provided statements to the defense team months earlier in the video, the trial court announced that it would not allow the video of the

mitigation "witnesses" to be played to the jury (VI 1067-70) and conducted a colloquy of Yacob that confirmed his informed desire not to call his mother (See VI 1071-72) and others in the video (See VI 1074-76) as witnesses in the penalty phase, even though defense counsel acknowledged that Yacob's mother was in the courtroom at the time (Compare VI 1063 with VI 1070-71);

- At the October 13<sup>th</sup> hearing, Defense counsel informed the trial court that Yacob was limiting defense penalty-phase witnesses to the defense investigator, Mr. Douglas, in spite of counsel's lengthy attempts to "sway" Yacob from that decision (VI 1073), and Yacob confirmed this limitation on his counsel as "accurate" (VI 1074; see VI 1074-76);
- At the October 13<sup>th</sup> hearing, defense counsel conceded that "a lot of this information" from defense-investigator Douglas "would be based on hearsay" (VI 1084; see also VI 1088), the prosecutor complained about being deprived of cross examination (VI 1089), and the trial court indicated its "inclination ... to exclude the investigator's testimony beyond the photographs and the diploma," (VI 1090); then, in a trial court colloquy, Yacob again confirmed his decision to limit his counsel to presenting as mitigation only the investigator's testimony (VI 1090-

94); the trial court repeated that it "believe[d]" it "would be required by law to exclude or prohibit the investigator from testifying as to facts he doesn't have personal knowledge of" and then discussed the types of those facts, and Jacob indicated that this does not change his decision and said he has no questions "as it pertains to [his] decision" (VI 1095-96);

- On October 18, 2011, the date that the penalty phase was scheduled to begin, but prior to penalty opening statements, the trial court conducted another colloquy of the Defendant to confirm that, against his attorneys' advice, he wished to limit his counsel's presentation of mitigation evidence (XIV 1172-77, 1219);
- At the Spencer hearing, the trial court conducted yet-another colloquy of Jacob concerning his request not to call any witnesses (XV 1391-95); Jacob indicated that he was prohibiting defense counsel from calling his mother, grandmother, father, stepmother, and siblings as witnesses because "[i]t's just too much pain for them" (Id. at 1394); he also confirmed that he did not want any other witnesses called "live" (XV 1395).<sup>9</sup>

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<sup>9</sup> The trial court indicated that it "will watch" the video "in great detail" (XV 1395) but the trial court did not indicate

The trial court also conducted colloquies of Yacob concerning his decision not to testify at the jury penalty phase (XIV 1221-24) and at the Spencer hearing (XV 1391-93).

Yacob's free and knowing prohibition of presenting in court the witnesses in the video should be construed as a waiver of ISSUE I. The Defendant should not be allowed to create the very situation about which he complains on appeal. See, e.g., Boyd v. State, 910 So.2d 167, 187 (Fla. 2005); White v. State, 446 So.2d 1031, 1036 (Fla. 1984) ("appellant cannot at trial create the very situation of which he now complains and expect this Court to remand for resentencing on that basis").

Here, Yacob should not be allowed to "profit" from his last-minute decision in which the prosecution was not even provided the ex parte'd video until one-day prior to the Spencer hearing.

Yacob personally, in effect, ambushed the prosecution with his eleventh-hour decision not to call to the witness stand any of the people in the video. The defense made the video months earlier without the prosecutor having the opportunity to cross-examine the witnesses and while the prosecutor was not even present. The defense team palpably biased the video with the

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that it would accredit anything in the video, and, indeed, as detailed in the discussion of this ISSUE supra and in the Facts section supra, the trial court had emphasized the hearsay nature of the video combined with the lack of cross examination.

zoomed-in images of Yacob's mother feeding a baby and crying. The "witnesses" were not sworn.

There has been no indication that any of the would-be witnesses were unavailable for the defense team to call to the witness stand, and, indeed, a number of the witnesses were even present in the courtroom (See V 926 n.17; VI 1063; XIV 1207; XV 1451-52).

If Yacob wished, he could have presented the "witnesses" on the courtroom witness stand, and subject to cross-examination, but Yacob chose not to. On appeal, Yacob should be bound by his decision.

Yacob waived ISSUE 1.

Boyd v. State, 910 So.2d 167, 187 (Fla. 2005), is instructive. There, the defendant on appeal contended that the trial court's competency hearing "did not satisfy constitutional requirements because the judge did not consider the reports of Drs. Shapiro and Block-Garfield." Here, Yacob complains that the trial court should have accredited the hearsay video of, and hearsay testimony regarding, several lay witnesses. Boyd held that the "claim is barred, since at trial he asked that the trial court not call these witnesses or consider their reports. ... **When the defendant refuses to present evidence, he cannot later argue that the trial court erred in not considering the evidence.**" Here, Yacob expressly directed his counsel not to

call the witnesses in the video. Therefore, "he cannot later argue that the trial court erred in not considering the evidence," Boyd.

Accordingly, Spann v. State, 857 So.2d 845, 860 (Fla. 2003), rejected a claim that "a mitigating factor should have been found or greater weight should have been assigned based on evidence the defendant failed or refused to submit." "Spann tied the hands of his trial counsel by refusing to allow any evidence in mitigation . . . ." There, the claim did "not warrant a new penalty phase trial." Here, Yacob partially tied his counsel's hands by limiting the evidence that could be presented. Even more than in Spann, ISSUE 1 does not warrant any new Spencer or other penalty proceedings. See also Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983) ("defense counsel's statement that he had no reason to doubt Lagle's unavailability foreclosed the trial court's inquiry into the matter"; "party may not invite error and then be heard to complain of that error on appeal"; citing Behar v. Southeast Banks Trust Co., 374 So.2d 572 (Fla. 3d DCA 1979)).

### **C. The Standard of Appellate Review.**

Alternatively, if the merits of ISSUE 1 are reached, under any applicable standard of appellate review, it has none.

ISSUE 1 complains (See IB 34-35) that the trial court, for sentencing, failed to accredit the contents of the defense's

video of family members and educators and related hearsay testimony of the defense investigator. Therefore, the standard of review concerns the competence and believability of the evidence that the defense submitted.

Spann v. State, 857 So.2d 845, 858-59 (Fla. 2003) (citation omitted), provided an overview of the standards of review concerning mitigation findings:

The relevant standards of review for mitigating circumstances are as follows: (1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; (2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent, substantial evidence standard; and (3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

"Under the abuse of discretion standard,<sup>10</sup> a trial court's ruling will be upheld unless the 'judicial action is arbitrary, fanciful, or unreasonable, ... discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" Perez v. State, 919 So.2d 347, 372 (Fla. 2005).

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<sup>10</sup> Admissibility is also reviewed under the abuse of discretion standard. England v. State, 940 So.2d 389, 405 (Fla. 2006), explained that "[a] trial judge has discretion in determining what is admissible as mitigating evidence. As with other evidentiary rulings, a trial judge's ruling on the admissibility of mitigating evidence will not be disturbed absent an abuse of that discretion." See also Lebron v. State, 894 So.2d 849, 854-56 (Fla. 2005) ("axiomatic that the trial court has broad discretion in determining the admissibility of evidence in penalty phase proceedings").

Orme v. State, 25 So.3d 536, 548 n.8 (Fla. 2009), explained that the trial court has the discretion to assign "no weight" to a mitigator, and "[a]lternatively, if **competent, substantial** evidence supporting the mitigator does not exist, there is no need for the trial court to engage in a weighing process of that mitigator." Crook v. State, 813 So.2d 68, 74 (Fla. 2002), indicated that evidence of mitigation must be "competent" and "believable" in order to mandate a finding of it and that, in essence, affirmance of rejecting mitigation is required "if the record provides competent substantial evidence to support the trial court's decision."

#### **D. The Trial Judge's Ruling & Order, Meriting Affirmance.**

##### **1. The Trial Court's Order & Ruling.**

At multiple places in the record, in addition to its extensive Koon-type queries of Yacob, See sections A & B supra, the trial court focused on aspects of the defense's tendered hearsay that undermined the hearsay's competence and believability, thereby supporting affirmance of the trial court ruling not to accredit that hearsay.

Immediately prior to the jury penalty phase, the trial court pointed out that witnesses not testifying was pursuant to Yacob's instruction, "not because of circumstances beyond the defendant's control" (XIV 1202) and continued:

- No "witness" in the video was placed under oath (XIV 1202);
- No witness in the video was subject to any deposition (XIV 1202); and,
- No witness in the video has been subject to any cross-examination (Id.).

The trial court also offered to allow the defense witnesses to testify by telephone (XIV 1202), which the defense did not take advantage of.

At the sentencing hearing, as quoted in section B supra, the trial court explained that because the "defendant was steadfast in refusing to allow counsel to call witnesses who were at every stage present in the courtroom, except for the teachers and educators in Seattle,"

... there are a number of the mitigating circumstances argued by **the defendant that cannot be established by a preponderance of the evidence** because this Court is deprived of a **full understanding of the circumstances** surrounding those alleged mitigating circumstances. And the State of Florida is denied due process and denied the right of confrontation and **cross examining those witnesses.**

(XV 1451-52)

The trial court's written sentencing order (attached as Appendix infra) provides detailed support for its decision not to accredit incompetent evidence. The order's reasoning merits affirmance, thereby justifying the rejection of ISSUE 1. The Order explained the last-minute nature of Yacob's decision:

The week before the penalty phase began, the Court was advised that the Defendant had instructed his lawyers not to call seven mitigation witnesses on his behalf, including his father, step-mother, mother, grandmother, and three former educators.

(V 912) The Order then listed aspects of their testimony if they had testified. (Id.) The Order continued:

In response [to Yacob's prohibition of witnesses testifying in court], defense counsel requested that the Court permit, during the penalty phase, the introduction of video clips of five of the witnesses, including the Defendant's mother, grandmother, and three of the Defendant's former high school teachers. The State objected. The Court excluded the video clips on the basis that the statements contained therein constituted rank hearsay in violation of the Confrontation Clause. **The State was not present** when the videos were made and had been presented **no opportunity to cross-examine such witnesses**.<sup>11</sup> In response to the Court's ruling, the Defense sought to introduce during the penalty phase, several hearsay statements through the single mitigation witness the Defendant would permit to be called to testify: David Douglas, the investigator and mitigation specialist. Mr. Douglas was deposed and that deposition was provided to the Court. After reviewing the deposition, the Court then issued a detailed ruling regarding which non-statutory mitigating circumstances Mr. Douglas would be permitted to testify. In essence, the Court ruled that Mr. Douglas was permitted to testify as to those facts that were not in dispute, e.g., that the Defendant immigrated from a foreign country, or those facts that Mr. Douglas personally observed during the course of his mitigation investigation, e.g., that the Defendant's mother maintained a religious home (based on the icons and artifacts observed by Mr. Douglas within the Defendant's mother's home).

<sup>11</sup> The State, for instance, would not be able to cross-examine the high school teacher(s)/educator(s) (who would testify that the Defendant was a good student) regarding the fact that the Defendant had been placed in an alternative school due to a violent incident. The Defendant made clear that even if the Court did not permit the introduction of the video clips, he would forego calling such witnesses to testify on his behalf because, in the Defendant's estimation, it would be too painful for his family and the other witnesses.

At the Spencer hearing, the Defense again sought to introduce the video clips consisting of hearsay testimony of the Defendant's mother, grandmother, and three of the Defendant's former high school teachers, as well as the videotaped deposition of Mr. Douglas. The Court, with no objection from the State, admitted the evidence. However, the Court finds that the **Defense's attempt to establish additional non-statutory mitigating circumstances** through the introduction of such evidence fails for the same reasons the Court ruled such evidence inadmissible during the penalty phase: the statements contained therein constitute **rank hearsay** in violation of the Confrontation Clause, which **prevents the fact-finder from being able to properly analyze the credibility of such evidence and properly consider the weight it should be afforded in the determination of the sentence to be imposed.**

In summary, the Court has considered each of the mitigating circumstances set forth in the Defendant's Amended Sentencing Memorandum, which addresses all mitigating circumstances the Defense intended to present during the penalty phase and Spencer hearing.<sup>12</sup> In addition, the Court has carefully reviewed the **video clips** and **deposition** the Defense introduced into evidence at the Spencer hearing.

<sup>12</sup> Unlike aggravating circumstances, mitigating circumstances need only be reasonably established by the greater weight of the evidence. Ford v. State, 802 So. 2d 1121, 1133 (Fla. 2001) (citing Campbell v. State, 571 So. 2d 415 (1990), receded from on other grounds, Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000)).

(V 912-14, underlined cases in original) This well-reasoned order merits affirmance.

## **2. Details of Deprived Cross-examination & Other Rebuttal.**

Yacob's Initial Brief (IB 35) contends that the "State's only concern with the videotaped statement was whether the teachers had knowledge of the incident that resulted in Yacob being at the alternative school." The Initial Brief (IB 35) then argues a defense investigator's deposition statement that "the teacher's

were aware of the incident" resulting in "Jacob being at the alternative school" and the State was able to rebut the mother's testimony that Jacob was a good child with evidence of a school fight . . . ." The State disputes the Initial Brief's contentions.

**a. The "State's only concern with the videotaped statement was whether the teacher's had knowledge of the incident that resulted in Jacob being at the alternative school." (IB 35)**

The Initial Brief is incorrect. The State elaborates.

On October 4 & 6, 2011, when notified that the defense might attempt to rely on a video of mitigation witnesses, the prosecutor warned the defense that the State intended to insist on its right of cross examination, at one point the trial court "anticipate[d]" that the right of "confrontation" applies to the penalty phase, and the defense counsel acknowledged the point. (See XI 761-65; XIII 1061-62, 1063)

Subsequently, after the defense indicated its intent to attempt to rely on the video but prior to the providing the prosecutor a copy of the video, the prosecutor tendered areas of cross-examination of which the video deprived the State:

- The basis of the witness's knowledge (VI 1066);
- The witness's biases (VI 1066);
- Any effect on teachers' statements that Jacob was "arrested for beating up another kid" (VI 1066);
- Exploring all of Jacob's grades (VI 1066);
- Exploring whether Jacob was disruptive (VI 1066);

- Inquiring about the family members' phone calls with Yacob, including discussions of Yacob's "relationship with parents or lack thereof," "difficulties with some family members" (VI 1111-13);
- In contrast with the defense representation of Yacob's loving, harmonious family, cross-examining the family about Yacob having phone sex with his stepmother (XIV 1183-86; see also V 849-50);<sup>11</sup>
- Yacob's arrest and conviction for assault, resulting in being placed in alternative school (XIV 1188-89);
- The cause of Yacob's mother moving to Seattle (XIV 1190);
- The cause of Yacob moving from his mother's residence in Seattle to live with his father in Jacksonville; did Yacob really love his father, did he want to start anew "because he had problems in Seattle" (XIV 1190-91);<sup>12</sup>
- Whether knowing that Yacob went to prison for yet-another crime, committed after this murder, would have affected witness characterization of him as a "good" boy (See XIV 1193; V 855-56; see also arrest record in PSI at pp. 3-4);
- No one visiting Yacob in prison for 22 months (XIV 1193-94; V 857; see also V 861).

After the prosecutor was finally provided the February 17, 2011, video (See DE #1) on November 17, 2011, the day before the Spencer hearing, (See XV 1399), the prosecutor also tendered the following areas of cross-examination of which the video deprived the State:

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<sup>11</sup> However, the trial court ruled that the prosecutor could not cross examine the defense investigator on this matter. (See XIV 12050)

<sup>12</sup> The prosecutor mentioned a number of these areas in conjunction with the defense investigator, and he argued that he was entitled to the investigator's notes, for example, concerning the investigator's conclusion that Yacob was intelligent. (See, e.g., XIV 1191-92)

- As mentioned supra and in contrast with the teachers' characterizing Yacob as a good student and "minimize[ing]" the reason why Yacob was sent to an "alternative school" (XV 1401-1403), including the 2001 incident in which Yacob armed himself with a metal bar and struck one victim in the head and shoulder with it and attempted to strike another person with it and for which Yacob was adjudicated delinquent (XV 1404-1405; see also XV 1414-15); and,
- Exploring the "over 50 suspensions" that Yacob in the PSI "attributed to minor behavioral issues" (XV 1403).

The trial court indicated that it would have allowed the prosecutor to explore with the family their knowledge of Yacob's metal-bar incident to contradict Yacob's mother's statements that Yacob was a good student or good child. (XV 1410)

Moreover, it is obvious that in conducting a cross-examination, additional matters often surface of which the examiner was not even aware at the inception of the testimony. For example, in exploring potential bias, the historical relationship of the witness and Yacob would be explored, which, in turn, can lead to intra-family conflicts in which the defendant may be culpable. Exploration on cross examination may reveal other bad acts by the defendant that the witness is willing to overlook and may cast the witness's testimony in a negative light. However, Yacob deprived the State of any such explorations, and, indeed, he failed to afford the State any cross-examination.

**b. A defense investigator stated in a deposition that "the teacher's were aware of the incident" resulting in "Yacob being at the alternative school." (IB 35)**

The most obvious response to Yacob's assertion that relies on the defense investigator's deposition is that it is itself hearsay, in essence attempting to use self-serving hearsay as purported support for hearsay, See §90.801(1)(c). Moreover, the Initial Brief fails to specify the personal-knowledge basis of the investigator's conclusion. See §90.604, Fla. Stat.

Argeundo, even if erroneously accepting the investigator's deposition testimony at face value, the investigator actually testified at the deposition:

Q. [I]n your interview of the teachers or the ex-teacher there in Seattle, did you ask them about his problems in school, specifically the one or two incidents in which he got in a fight with people?

A. No, sir. ... It may be relevant; it may not be helpful ... to the client.

(V 838)<sup>13</sup> Indeed, the video excluded several fertile areas of cross-examination that would have been relevant and would have undermined the mitigation.

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<sup>13</sup> The interviewed teachers were not Yacob's teachers at the time of the incident in which Yacob assaulted others with the metal bar, resulting in Yacob being placed in the alternative school. (V 838-40) The investigator said that the interviewed teachers knew that Yacob was there due to "delinquency problems." (V 840)

A little earlier in the deposition, the defense investigator said he had spoken to "school officials," who were "unaware of the actual incident, other than what was contained in some notes

Therefore, the assault incident had not been explored with the teachers as it could have, and would have, been on cross examination.

**c. the State was able to rebut the mother's testimony that Yacob was a good child with evidence of a school fight . . . ."** (IB 35)

At the Spencer hearing,<sup>14</sup> the State tendered a "complete record of what occurred" in the 2001 metal-bar/school fight incident, but the defense objected on the ground of hearsay, complaining that it would be deprived of cross-examination. (XV 1405-1406, 1409) The prosecutor pointed out that in Yacob's "own interview by police on March 25, 2012, Yacob admitted using a metal bar and admitted that it was wrong to use it. (XV 1407-1409) The trial court rejected the admissibility of the police probable-cause certification on the ground of hearsay. (XV 1410-11)

Therefore, the State was allowed to introduce only the Judgment and Sentence that showed that Yacob pleaded guilty to two counts of Assault in the Third Degree because he believed that there was a "substantial likelihood" that he would be

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and what Mr. Jacob had told them about." (V 833) The investigator did not indicate the identity of those "officials."

The investigator did not interview any of Yacob's Seattle victims. (V 841)

<sup>14</sup> Prior to the opening statements at the jury penalty phase, the trial court expressed its concerns about the records. (See XIV 1208-10)

"found guilty at trial." (XV 1411-13; IV 791-801) The excluded probable-cause certification was placed in the record as marked for identification. (XV 1411-13; V 802-805) The excluded probable cause certification included facts showing that Jacob not only armed himself with the metal bar but also used it to strike someone who had been trying to break up a fight; Jacob struck this person in the head and shoulder with the bar and then attempted to strike another person with it. (V 804)<sup>15</sup>

The prosecutor was deprived of asking any mitigation "witness" in the video about any details of the assault incident, and, due to the defense hearsay objection, no aspects of the incident showing Jacob's culpability were actually introduced as evidence.

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<sup>15</sup> More specifically, the probable-cause fact-narrative, marked only for identification for the record (XV 1412-13; see V 802-805), demonstrates the significance of denying the prosecutor the right to cross examine the witnesses in the video. Those facts, sworn by a detective, indicate that, at the high school, Noble attempted to break up a fight between Robinson, on the one hand, and Getachew and Getachew's companions, on the other hand; the fight started as a result of several students surrounding Robinson. Jacob went to the bushes and retrieved a metal bar and struck Noble on the head and shoulder with it. Jacob attempted to hit Noble again with the pipe but Robinson partially blocked the blow, and when Jacob then swung at Robinson, Robinson was able to catch the weapon, and the police arrived. (V 804) Again, the foregoing facts were excluded from the trial court's consideration, and more importantly, the prosecutor was deprived of asking any "witness" in the video about the incident.

### 3. Additional Support for the Trial Court's Ruling.

Additional factors support the trial court's rejection of a number of matters in the video.

The prosecutor pointed to the unfair prejudice incurred with Yacob's mother recorded while she is holding and feeding a baby, then when she starts crying, the camera zooms in on her face. (XV 1399-1400; See DE #1 at ~8:38) The defense also used Yacob's mother as the translator of Yacob's grandmother's video'd statement. (See V 852-53; DE #1 at ~17:12) After the mother had cried on the video of her statement, the grandmother starting tearing-up, and the mother's voice sounded teary as well (See DE #1 at 21:50-23:00).

Turning to additional law supporting the trial court, any determination of the reasonableness of the trial court's decision and any determination of whether the defense produced "competent" and "believable" evidence of mitigation in the video and related hearsay are guided by Section 921.141(1), Fla. Stat., in pertinent part:

Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. ... In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have **probative value** may be received, regardless

of its admissibility under the exclusionary rules of evidence, **provided the defendant is accorded a fair opportunity to rebut any hearsay statements**. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The **state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death**.

Blackwood v. State, 777 So.2d 399, 411-12 (Fla. 2000), affirmed the "trial court grant[ing] the State's hearsay objection to Ms. Salmon's testimony that the appellant was at the victim's house during the telephone conversation and that appellant often spent the night at the victim's house." Blackwood alternatively held that the "fair opportunity to rebut any hearsay statements" provision protects the State as well as the defendant:

Additionally, we note that even though section 921.141(1) relaxes the evidentiary rules during the penalty phase of a capital trial, the statute clearly states that the defendant must have an opportunity to fairly rebut the hearsay evidence in order for it to be admissible. See *Wuornos v. State*, 644 So.2d 1012, 1018 (Fla. 1994). This rule applies to the State as well. *Cf. Hitchcock v. State*, 578 So.2d 685, 690 (Fla. 1990) (finding no merit to claim that state's ability to introduce hearsay in a penalty proceeding is limited while a defendant's ability to introduce hearsay is unlimited). Thus, while the victim's alleged statement should not have been excluded on hearsay grounds, the trial court did not err in excluding the testimony because **the State had no fair opportunity to rebut the statements of the deceased victim**. The State could not question the victim to determine whether appellant was even at her house, whether he had been invited there, why he was there, or how long he had been there. Thus, appellant is entitled to no relief on this claim.

Parker v. State, 873 So.2d 270, 282-83 (Fla. 2004) (citing Blackwood), rejected a claim that "the trial court erred in failing to admit certain affidavits of witnesses who were found to be unavailable to testify during his penalty phase." Parker explained that "'even though section 921.141(1) relaxes the evidentiary rules during the penalty phase of a capital trial,' a party cannot introduce hearsay evidence unless the opposing party has a fair opportunity to rebut the hearsay." As here, several matters were properly not considered because "the State had no fair opportunity to rebut their contents." There, the affidavits were excluded, and here the trial court properly excluded then ultimately eventually evaluated and properly did not accredit the hearsay.

Thus, in situations where mitigation evidence was contested, Barnes v. State, 29 So.3d 1010, 1027 (Fla. 2010), emphasized the significance of cross examination. Barnes rejected a defense claim that material "was prejudicial testimonial hearsay." Rather than simply being in the PSI, several of the matters were "subjected to full cross-examination during the Spencer sentencing hearing." See also McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980) (explained the broad scope of cross-examination includes clarifying a misimpression that the defendant's prior act was not very serious).

It is beyond dispute that the matters in the video and the related testimony are hearsay. See also §90.801(1)(c). And, as detailed supra, lacking cross-examination, they are not sufficiently competent and believable to mandate accreditation.

Here, using the language of the statute, there was no "fair opportunity to rebut any hearsay statements," especially through the denial of cross-examination, as detailed supra. Indeed, to summarize some of the points made above:

- This situation of the defense attempting to rely on the video and related investigator testimony was created entirely by Yacob's personal, knowing, and voluntary decision to prohibit the defense from calling any witness other than the investigator;
- No witness in the video (DE #1) was sworn;
- The recorded interviews were entirely ex parte, with the defense investigator and defense attorney asking each "witness" the questions;
- There was no defense motion to perpetuate testimony;
- The video included a number of leading questions;
- When Yacob's mother started tearing-up, the camera zoomed in and when the grandmother teared-up, the mother's translating voice cracked;
- There was no cross examination, and, in accord with Yacob's wishes, the defense presented no opportunity for cross-examination; and,
- Indeed, the prosecutor was not even provided the video until November 17, 2011, the day before the penalty phase had been scheduled to begin.

Moreover, defense counsel even initially characterized the mitigation "evidence" on the video as "minor" (VI 1061).

**E. The PSI and Beyond.**

The Initial Brief (IB 34) lists several facts without specifying the purported competent and believable evidence that proved those facts. Instead, it lumps the video with the investigator with the PSI. It (IB 36) mentions the PSI again without discussing what credible facts in it the trial court failed to find. In this sense, none of ISSUE 1, and especially the PSI portion of the claim, is developed and therefore is unpreserved at the appellate level. See, e.g., Whitfield v. State, 923 So.2d 375, 379 (Fla. 2005) ("we summarily affirm because Whitfield presents merely conclusory arguments"). Yacob, as Appellant, failed to demonstrate reversible error.

If the merits concerning the PSI are reached, ISSUE 1 still has no merit.

As a threshold matter, as discussed in section "A" supra, since Muhammad is not applicable here, neither is its PSI requirement.

Nevertheless, the trial court here ordered a PSI (XV 1383-85), and considered its contents (XV 1395-99; V 903-904). The only items in the PSI that the trial court refused to consider were matters that would have prejudiced Yacob, including statements about Yacob's lack of remorse and maintaining his innocence. (See XV 1396-97; V 904 n.4)

Concerning the other content of the PSI, all of the arguments on the foregoing pages apply to the self-serving hearsay in Yacob's statements to the PSI officer. If he wished those matters to be considered as possibly competent, he should have taken the witness stand, sworn to them, and subjected himself to cross-examination. Indeed, even if the PSI is accredited, it explains (p. 6) the alleged paternal abuse as one incident and only a "cultural misunderstanding" that resulted in a "bruise."

Thus, the defense team had obtained records of the single alleged incident of abuse by Yacob's father, but they did not present them to the trial court (See V 845) or allow the prosecutor to see them (V 848). The defense investigator said it was a physical altercation while Yacob was 13 or 14 years old. (V 846) It was in New Jersey, (V 848) and, by the evidence the defense introduced, subsequently Yacob chose to live with the father in Jacksonville (XIV 1287), undermining the significance of the supposed prior "abuse" incident. The investigator did not even know the disposition of the father's case. (V 848-49)

Indeed, on October 13, 2011, when defense counsel was tendering mitigation evidence the defense wished to elicit from the defense investigator, he did not even mention the paternal incident. (See VI 1084-87) Then shortly thereafter, during a colloquy of Yacob concerning his decision to limit the mitigation evidence, he did not bring up the paternal incident.

(See VI 1090-97) At that juncture, neither defense counsel nor Jacob thought the paternal incident was significant enough to mention.

Thus, Jacob was deprived of nothing that was significant and competent in the PSI. This suggests the next topic: Arguendo, any technical error was harmless.

#### **F. Harmless Error.**

Here, arguendo, if there was any error, it was harmless.

Jacob should be bound by his attorney's initial characterization of the video-related evidence as "relatively minor" (VI 1061). Accordingly, the trial court also indicated that it "carefully studied the PSI Report," which was "unremarkable." (VI 927) Perhaps most importantly, the deprivation of cross-examination and other factors that supported the trial court's decision not to accredit the "evidence," as discussed in the foregoing sub-sections, also demonstrate the harmlessness of any purported error.

The trial court found the following mitigation: age (no weight) (V 914-15); Jacob not attempting to locate and harm the customer who entered the store (little weight) (V 919-20); Jacob immigrated from a foreign country (slight weight) (V 920); Jacob's intelligence and graduation from high school (slight weight) (V 920-21); and, Jacob loves his family and his family loves him (slight weight) (V 921-22).

The below-minimal probative value of the non-accredited hearsay would have not changed, and should not change, the death sentence.

For each and all of the foregoing reasons, ISSUE 1 should be rejected.

**ISSUE 2: IS THE DEATH SENTENCE IN THIS CASE PROPORTIONATE DUE TO ITS DISTINCTIVE FACTS? (IB 38-55, RESTATED)**

The trial court correctly approached its decision whether to sentence Yacob to death as a fact-intensive analysis. Here, the aggravation facts are distinctive and extremely weighty, and the mitigation is weak. The death sentence is proportionate.

Yacob's contention that this was simply an "unplanned, reactive shooting" (IB 38) ignores the video (SE #22) that shows Yacob repeatedly demanding the videotape and then returning to the victim Maida's location with one determined purpose, to shoot and kill the victim.

Camera 3's view in SE #22 shows that, after Yacob repeatedly demanded the videotape, obtained his robbery loot, and left the cashier's room, the clerk stood up and reached for the door-lock switch. At about this juncture, SE #22 shows Yacob on the other side of the cashier-room glass-wall pulling out his gun and pointing it at Mr. Maida. Then, as Mr. Maida hurried to the cashier room door to lock Yacob out of that room, Yacob tracked him with his pistol and also hurried towards that door. But

there were items against the glass that blocked Jacob's shooting line of sight. Then, having decided to kill Mr. Maida, when Jacob had his first opportunity to shoot Mr. Maida, he took it as he and Mr. Maida reached the cashier's glass door, on opposite sides of it. Jacob immediately fired one round, but it struck the door frame. Jacob then placed his bag of robbery loot on the floor, faced Mr. Maida, aimed at Mr. Maida, and fired another round, shooting Mr. Maida in the heart, killing him.

When Jacob pulled out his gun again and approached the victim again and shot at him and then killed him, he already had the robbery loot and demanded nothing. He had one determined purpose, to kill the victim. This is a very distinctive murder during a robbery. Here, the shooting approaches CCP and avoid arrest, and the meager mitigation discussed at length in ISSUE 1 supra pales. Here, under this case's distinctively weighty video'd during-robbery aggravator, merged with pecuniary gain, deserved the death penalty.

The State elaborates.

#### **A. The Standard of Appellate Review.**

In this case, the application of the fact-intensive standard of review is extremely important. Butler v. State, 842 So.2d 817, 832-33 (Fla. 2003) (citing, e.g., Sexton v. State, 775 So.2d 923 (Fla. 2000)), for example, explained that "[i]n deciding whether the death sentence is proportional in a particular case,

this Court is required to consider the totality of circumstances surrounding the case and compare it to other capital cases." Indeed, Butler's reliance upon a single aggravator, there HAC in a domestic setting, illustrates that a single weighty aggravator can sustain a death penalty. (See also IB 41 n.14) Here, the robbery-pecuniary gain aggravator is sufficient.

Here, Yacob's determined execution-style murder of Mr. Maida while perpetrating a robbery is sufficient.

**B. The Trial Judge's Sentencing Order (V 902-34, attached as Appendix infra): Clear Evidence Showing Yacob's Determined Execution-Style Murder of Mr. Maida.**

At the sentencing hearing, the trial court summarized the analysis in its sentencing order:

[T]his Court must consider the legal precedent argued by the defendant in advancing its position that no case in the history of Florida law has sustained the imposition of the death penalty on facts analogous to this. And yet in each of those cases, there are two critically important distinctions.

In those cases, first of all, the Supreme Court determined there was the presence of substantial mitigating circumstances. No such substantial -- and I emphasize that word -- mitigating circumstances are present in this case.

Secondly, the Supreme Court acknowledged that there was a level of uncertainty as to the events surrounding the murder. That was their conclusion. And because a videotape lays bare for the ages to see the exact conduct of the defendant and the victim, there can be no uncertainty in this case.

What the evidence in this case and importantly the videotape make abundantly clear to the Court is that Michael Yacob must bear the full consequence of law.

(V 1453)

The trial court's written sentencing order was extremely thorough and learned. In addition to detailing the facts of the murder (V 904-909) and discussing Yacob's partial waiver of mitigation (V 925-27), the aggravation (V 910-12)) and mitigation (V 912-25), the trial court's order discussed the fact-intensive method of analysis. The trial court's order correctly rejected the defense's erroneous per-se approach in this case:

[I]t must be stated with no uncertainty or ambiguity, the consideration of such aggravating and mitigating circumstances - and thus the sentence to be imposed - is much more than the routine, pre-determined working out of some simplistic (or even complex) legal algorithm. Indeed, the determination of whether to sentence any person to death is much more than the following legal equation put forward by the Defendant: murder + only felony murder/pecuniary gain aggravator = sentence of life without parole.

The Defendant's argument essentially invites this Court to rule that a crime and case such as this is not eligible for the death penalty as a matter of law. The Court declines this invitation. Such a ruling is contrary to the statutory analysis and requirements in considering both the aggravating and mitigating circumstances. **The determination of the imposition of the death penalty is a peculiarly fact-intensive, case-specific analysis.**

Thus, this Court considers the facts of this case, within the framework of aggravating and mitigating circumstances required by Florida law, in determining the proper sentence.

(V 909-910)

After evaluating the aggravation and mitigation, the trial court then addressed many of the cases on which Yacob now relies. Because of the trial court's compelling and learned

treatment, the State quotes the trial court's discussion at length (unless otherwise noted, bold and italics emphases and case underlining in original; underlining added to trial court's bold typeface emphasis):

THE COURT'S CONSIDERATION OF PRECEDENT

In considering precedent argued by the Defendant, there are two material distinctions<sup>21</sup> between the case *sub judice* and comparable cases where the Florida Supreme Court has reversed the death sentence.

<sup>21</sup> The Court is confident in the materiality of such distinctions, as the factors underlying the distinctions have been specifically cited to by the Florida Supreme Court as factors undermining the proportionality of a death sentence.

**1. Presence of substantial mitigating circumstances**

The first material distinction between the case *sub judice* and those cases with comparable facts where the Florida Supreme Court has reversed the death sentence is the presence of substantial mitigation. See Sinclair v. State, 657 So. 2d 1138 (Fla. 1995) and Thompson v. State, 647 So. 2d 824 (Fla. 1994). In Sinclair, the defendant during a robbery shot the cab driver in the side of the head. Sinclair, 657 So.2d at 1139. The Defendant admitted to shooting the driver, but argued that the gun accidentally discharged when he pulled out the gun to scare the driver, testimony contrary to the medical examiner's finding of two distinct and separate gunshots to the victim's head. Id. The court, in holding the death sentence to be disproportionate, found that the low intelligence level of and the emotional disturbance inflicting the defendant were mitigating circumstances that had substantial weight. Id. at 1142. In Thompson, the defendant walked into a Subway shop, conversed with the attendant, and then shot him once through the top of the head. Thompson, 647 So. 2d at 825. The court, in holding the death sentence to be disproportionate, cited to the fact that substantial mitigation existed, including the fact that the Defendant had no violent propensities prior to the murder and had been honorably discharged from the military. Id. at 826-27. The court stated that death sentences affirmed in the past where there was only a single aggravating circumstance had no or little mitigation. Id. at 827.

Contrary to Sinclair or Thompson, in the case *sub judice*, very little mitigation exists, primarily due to a voluntary choice made by the Defendant who is unquestionably competent. The mitigation that does exist, due to its nature, has been properly assigned little or slight weight.

## **2. Level of uncertainty as to events surrounding the murder.**

The second material distinction between the case *sub judice* and those cases with comparable facts in which substantial mitigation did not exist but the Florida Supreme Court reversed the death sentence, is the level of certainty regarding what occurred just prior to the victim being shot, in terms of whether the Defendant's actions exhibited premeditation or whether they were in response to resistance offered by the victim. See Terry v. State, 668 So.2d 954 (Fla. 1996); Jones v. State, 963 So. 2d 180 (Fla. 2007); Johnson v. State, 720 So.2d 232 (Fla. 1998); and Scott v. State, 66 So. 3d 923 (Fla. June 30, 2011).

In Terry, the defendant shot to death a patron in a Mobil station. Terry, 668 So.2d at 957. The victim's husband, held at gunpoint by a co-defendant in the station's garage, testified that he heard a scream and thirty seconds later a shot. Id. The Florida Supreme Court found that there was insufficient evidence for the jury to have found the defendant guilty of First Degree Murder based on the premeditation theory. Id. at 964. The court went on to find that the death sentence was disproportionate, in part, due to the court's **inability to conclusively determine what transpired immediately prior to the victim being shot.** Id. at 965.

In Jones, the Defendant was informed that the victim was someone that sold beer and cigarettes out of his home and who had money. Jones, 963 So.2d at 182. The Defendant traveled to the home of the victim, and when the victim opened the door, the Defendant pushed open the door and hit the victim with the gun. Id. During a struggle, the victim was killed by a single gunshot at close range in the chest. Id. at 182-83. No one testified as to the details of the struggle. The Florida Supreme Court held that the death sentence, because like Terry, **'there is little or no evidence of what happened immediately before the victim was shot. Further, as with many cases of murders during a robbery there is no evidence of premeditation.'** Id. at 188-89. The court also mentioned that the vote in favor of death was 7-5. Id. at 189.

In Johnson, the victim and his son were outside the victim's home repairing a car when approached by the defendant and his brother. Johnson, 720 So. 2d 233. While the defendant's brother held the victim's son at gunpoint, the Defendant stuck 'an object' in the victim's back and escorted him inside of his home, where 2-3 shots were fired. Id. at 233-34. The Defendant then led the victim outside onto the front porch and shot him in the jaw. Id. at 234. There were allegations that the victim's son owed the Defendant's brother a gambling debt. Id. There was also testimony from two witnesses that the victim was shot when he resisted the Defendant, one stating that the Defendant had indicated the victim pulled a gun and tried to shoot the Defendant. Id. Ultimately, the Florida Supreme Court, stating it was a 'close question' as to whether death was warranted, held that the death sentence was disproportionate, citing among other things, to Terry for the proposition that **the facts surrounding the homicide were unclear and that the aggravating circumstances were not extensive.** Id. at 238.

In Scott, the defendant entered a coin laundry to find one man sitting in a chair near the door and the victim, who was sitting on the floor next to the chair fixing a broken machine. Scott, 66 So. 3d at 926. The defendant hit the man in the chair in the back of the head with the butt of his gun. Id. The victim then got up and told the defendant that he did not have any money and to go away. Id. The defendant pointed the gun at the victim and fired a fatal shot into the victim's face. Id. A witness testified that the Defendant admitted to shooting the victim after the victim 'had jacked the buck,' i.e., refused to give the Defendant money. Id. On a wire recording, the Defendant stated he shot the victim after the victim told him to get out of the store and grabbed a chair like he was going to hit the Defendant. Id. at 927. The court, in finding that the death sentence was disproportionate, stated that while Scott is not a textbook 'robbery gone bad' case, one could view the murder as a reaction in response to the victim's resistance to the robbery. Id. at 937. The court then went on to compare Scott to Johnson, discussed *supra*, in stating that Johnson's actions were even more aggravating, considering Scott only shot once and it was in response to the victim rushing at him with a chair. Id. at 937-38.

Unlike Terry, Jones, and Johnson, and Scott, there is no meaningful uncertainty as to the facts of the case *sub judice*.<sup>22</sup> **The facts surrounding the murder of Mr. Maida were displayed to the jury in unimpeachable clarity - by a**

video/audio recording containing several different camera angles of such quality that every action and sound made by the victim and the Defendant can be viewed and heard.

[emphasis supplied] The events surrounding this murder and the nature of the crime are laid bare for the ages. The victim, while being robbed by the Defendant, completely submitted in every respect to the Defendant's demands.

(emphasis supplied) After full compliance, Mr. Maida places himself on his knees and places his arms outstretched in front of him as he places his face very close to the floor. Mr. Maida stands up only to hand the Defendant the remote control to the 'video tape' he was demanding. Mr. Maida did so without objection of the Defendant. The Defendant exited the enclosed area and continued toward the store's exit, all the while keeping his eye on the victim. When the Defendant saw Mr. Maida move to the clerk's door, the Defendant returned to the door and fired his gun, hitting the frame of the door. The Defendant then laid his bag of loot on the floor, assumed a shooter's stance, and aimed his gun directly at the victim who was standing just on the other side of the door still operating with the lock. The Defendant then fired a shot into the victim's chest killing him. [emphasis supplied]

<sup>22</sup> As an initial matter, the Defendant's identity as the murderer is certain. All DNA recovered from these locations matched that of the Defendant, identifying him as the murderer. The probability of the DNA matching that of the Defendant is 1 in 59 quadrillion African Americans (i.e. 1 in 59,000,000,000,000,000). By way of comparison, the world's population is only approximately 7 billion. The white plastic bag also was examined for latent prints, and Defendant's right thumb and palm print were identified. Thus, the Defendant has been proven guilty, not only beyond a reasonable doubt, but to a moral certainty.

The jury, able to view every action of Mr. Maida and the Defendant, returned a verdict finding that the Defendant committed First Degree Murder based on both the theories of premeditation and felony murder. The jury recommended by a vote of 10-2 that the Defendant be sentenced to death for such murder. Unlike the cases discussed *supra*, there is no uncertainty as to the complete and unending submission of Mr. Maida. He never brandished a weapon, physically assaulted or battered the Defendant, struggled or offered any form of physical resistance to the robbery.

In addition, there was ample evidence the Defendant's decision to murder Mr. Maida was premeditated. The Defendant simply carried out what he had planned from the moment he chose not to cover his trigger finger with a glove, **an execution** [emphasis supplied] meant not to prevent an actual threat, but to avoid any possible threat. **These intentions and actions do not constitute a 'robbery gone bad.'** [emphasis supplied] These actions are those of a murderer who on May 4, 2008, happened to be committing an armed robbery.

(V 927-32)

The trial court concluded that it agreed with the jury's 10-to-2 recommendation of death based on its full assessment of aggravation and mitigation presented to it, as well as to the jury. (V 932) For the reasons that the trial court's analysis illuminates in its order (V 902-34, excerpted above and attached as the Appendix), the death penalty merits affirmance.

### **C. The Trial Court Was Correct.**

#### **1. Johnson.**

The State submits that the trial court's analysis of Johnson v. State, 720 So.2d 232 (Fla. 1998), is especially noteworthy because, there, as the trial court indicated (V 930), Johnson indicated that the facts there "pose[d] **a close question** on whether the sentence of death is warranted," Johnson, 720 So.2d at 238. Here, the facts are stronger for upholding the death penalty than in Johnson and, therefore, the question is not "close."

In Johnson, 720 So.2d at 236-38, unlike here, there was evidence that an accomplice "Anthony" was the prime instigator

of the events from which the shootings arose. And there, unlike here, there were various versions of what occurred from several witnesses. Further, unlike here, there was evidence in Johnson that the shooting started at about the time that one witness struggled for the defendant's accomplice's gun. Indeed, one witness, "Amada," twice identified [accomplice] Anthony as the shooter [not the defendant], but admitted that she was very upset at the time of the attack."

In Johnson, initial instigator and co-shooter and "[c]odefendant Anthony was also convicted of first-degree murder and other crimes, but was sentenced to life in prison."

Here, in contrast, Jacob does not share any culpability with anyone other than himself, and it is absolutely clear that there was never any struggle for any gun. Instead, Jacob, alone, had the gun totally in his control, in his pocket, pulled the gun out of his pocket and pointed it at the victim, tracked the victim with it until he could get a clear shot at the victim, then, as soon as he had a shot, he immediately fired at the victim, but hit the door frame, then placed his robbery loot on the floor, re-positioned and aimed at the victim and shot the victim in the heart.

Moreover, in Johnson, while the trial court also found prior violent felony, there, the mitigation was stronger than here. In Johnson, for example, the defendant had a "troubled childhood,"

720 So.2d at 235, whereas here, the so-called abuse was one incident that resulted in a bruise from a "cultural misunderstanding" with the father and subsequently, Yacob even moved to Jacksonville, Florida, to reside with his father. (XIV 1287; V 927 n.20). Indeed, also, there, a culpable accomplice received life. Furthermore, the facts of the merged aggravators here, while not including prior violent felony, do contain a level of premeditation that approaches CCP and a motive that approaches avoid arrest.

## **2. Execution-Style Heightened Premeditation.**

As the prosecutor argued below, the facts here nearly support CCP. (VI 1159; see also XV 1430) During the events immediately surrounding both gunshots that Yacob aimed at the victim --

- Yacob made no demands on Mr. Maida;
- There was no verbal warning;
- There was no warning shot;
- There was no struggle for a weapon;
- The victim had not resisted Yacob taking the store's property; and,
- There was no frenzied-type reaction.

In contrast with these other situations, Yacob decided to kill the victim and persisted in that execution-style task. Without saying a word, Yacob pulled out his gun from his pocket, turned around, closed-in on the victim, then fired at the victim,

freed-up his other hand so he could more carefully aim, and fired again, killing the victim.

LaMarca v. State, 785 So.2d 1209, 1216-17 (Fla. 2001), explained that "[t]his Court has vacated numerous death sentences where there was only one aggravating factor; however, those cases generally involved **substantial mitigating circumstances**." In terms of method of analysis, this case is like LaMarca, which reasoned that the other single-aggravator cases "are distinguishable from the instant case because the mitigation found by the trial court is less than substantial." Here, there is no "substantial" mitigation. Here, the mitigation is "less than substantial." Moreover, as LaMarca also explained, "[t]his Court has also vacated the death sentence where the sole aggravating factor is not considered weighty." While LaMarca characterized other cases' "committed during the course of a felony" as weak in those cases, it is not weak here, but rather, the **determined execution-style murder** here is at a near-CCP level.

As Wright v. State, 19 So.3d 277, 298 (Fla. 2009), explained, the "CCP aggravator is one of the most serious aggravators provided by the statutory scheme." Accord Martin v. State, 2012 WL 4125813, \*37 (Fla. 2012) (same); Buzia v. State, 82 So.3d 784, 800 (Fla. 2011) ("CCP, HAC, and prior violent felony conviction, which are among the most serious aggravators"); Baker v. State,

71 So.3d 802, 823 (Fla. 2011) ("both HAC and CCP, which we have previously emphasized are 'two of the most serious aggravators set out in the statutory sentencing scheme'").

Moreover, "[t]he calculated element [of CCP] 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, 19 So.3d at 299. Thus, in discussing Wright, Martin, at \*37, indicated that "the defendant had obtained a firearm in advance of abducting his victims, drove them to a remote location, and then shot them **execution style.**"

Here, the trial court found that the facts showed **an "execution" style murder.** (V 932) While the State, ultimately, did not request the CCP aggravator, and the trial court did not find it, the trial court's fact-intensive discussion implicates a level of premeditation that is clearly above what is required for the First degree Murder itself, resulting in the finding of an execution-style murder. (See also jury's explicit finding of premeditation, at III 598) The near-CCP level of premeditation in this case vests the merged aggravator with a weight justifying upholding the death penalty.

Ibar v. State, 938 So.2d 451, 473-474 (Fla. 2006), upheld CCP where, like here, there was a video. Ibar rejected a challenge to CCP based on how "quickly" the murders occurred. As the murder of Mr. Maida here, there the murders were "execution-

style." Here and in Ibar, the perpetrators "had ample opportunity to reflect on their actions and abort any intent to kill." In Ibar, the victims were killed by shooting them "in the back of the head," and here Jacob shot Mr. Maida in the heart after tracking him down, missing, placing his loot on the floor, re-positioning and re-aiming. Although the events leading up to the murders in Ibar appeared to be more protracted than here, the events here approached CCP. In Ibar, CCP was "properly found," and here, the near-CCP facts make this murder much more serious than a simple instantaneous reflex or unintentional shooting during a robbery-gone-bad.

In Alston v. State, 723 So.2d 148, 162 (Fla. 1998), "appellant had ample opportunity to release Coon after the robbery." Here, Jacob could have allowed Mr. Maida to live. He killed Mr. Maida while attempting to do nothing else other than kill him. Jacob demanded nothing. He threatened nothing to motivate Mr. Maida to do anything. Instead, Jacob persisted in shooting the victim dead.

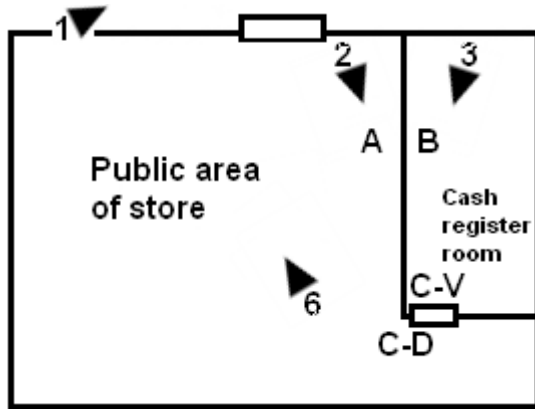
While CCP was found in Ellerbe v. State, 87 So.3d 730, 743 (Fla. 2012), like here, it was not simply a matter of a reflexive shooting in a "robbery gone bad." Here while not underlying an actual CCP finding, the execution-style facts showed substantially more premeditation than required for the First Degree Murder conviction. In Ellerbe, competent evidence

demonstrated substantially more mitigation than here. There, mitigation included "most of the twenty-three mitigating circumstances argued in his Sentencing Memorandum." Compare Ellerbee, 87 So.3d at 742 ("minimal," "very little," or "little" weight).

The trial court's characterization of this as an execution-style murder is based on the video of the murder scene from four different camera angles, as the murder was transpiring, on which the State focuses in the next sub-section.

### **3. Illustrating Yacob's Execution of Mr. Maida.**

In the "Video of the Murder as It Occurred" section of the Facts *supra*, the State described what was depicted in the four camera views, but, because of its importance, the State now compiles that information gleaned from the video and presents it through a diagram of the murder scene. Of course, SE #22 is part of the record, so the Court can independently verify the State's presentation of the crime scene in this diagram. It is not intended to be to-scale but rather to show the relative locations of the sequence of events of the murder as reflected in the four camera-views in the video.



The numbers 1, 2, 3, and 6 are the approximate locations of the four cameras, numbered accordingly, that resulted in the video shown to the jury. The arrows show the approximate direction of each camera's view.

In the sequence of events:

LOCATION	EVENT AT THAT APPROXIMATE LOCATION
<b>A</b>	Where Yacob initially accosts Mr. Maida with a gun
<b>B</b>	Location to which Yacob forces Mr. Maida at gunpoint and then robs Mr. Maida there while repeatedly demanding "videotape"
<b>A&amp;B</b>	Yacob's location @ A and Mr. Maida's location @ B when Yacob sees Mr. Maida at the counter; Yacob pulls out his gun again @ A and points it at Mr. Maida @ B

LOCATION	EVENT AT THAT APPROXIMATE LOCATION
<p style="text-align: center;"><b>C-D &amp; C-V</b></p>	<p>Yacob immediately moves towards C-D, pointing the gun at Mr. Maida, as Mr. Maida moves towards C-V</p> <p>As soon as Mr. Maida reaches C-V, he begins locking that door</p> <p>As soon as Yacob reaches C-D, he fires a shot at Mr. Maida, hitting the door frame, Yacob then places his bag of robbery loot on the floor at that location, stands facing Mr. Maida, and aims and fires at Mr. Maida, shooting him in the heart.</p>
<p style="text-align: center;"><b>B</b></p>	<p>Mr. Maida staggers and, at B, falls to the floor, where he dies.</p>

As SE #22 depicts, this was an execution-style murder.

#### **4. Yacob's Pre-Occupation with Not Being Caught.**

In addition to the facts of the committed-during-a-robbery/pecuniary gain approaching near-CCP level, they also approach establishing the avoid arrest aggravator. It is clear that Yacob was pre-occupied with not getting caught. He wore a hood and a mask, and a glove on one hand. He repeatedly demanded the "videotape" and the "CD." (See SE #22) This near-avoid arrest aspect of the facts of the murder provide additional weight to the merged aggravator. See Ibar v. State, 938 So.2d 451, 474 (Fla. 2006) (assailant had reason to know that premises videotaped; victim may have recognized defendant; "Ibar wore something over his head to conceal his identity"; "avoid arrest aggravator was also properly found").

#### **D. Yacob's Incorrect Factual Inferences.**

Yacob contends (IB 43; see also IB 54) that the "trial court's conclusions as to Yacob's intent is not supported by the evidence." Yacob points to the trial court's finding that when Yacob decided to kill the victim, he was "walking toward the front doors of the store." However, this is a simple observation of the general direction Yacob was heading. Instead, what is important is what Yacob actually did next, which shows that, at some point, prior to the shooting he decided to kill the victim and was determined to carry out that intent. Yacob pulled out his gun again, intercepted the victim at the cashier room door, and fired twice -- with Yacob's placement of the loot, re-positioning his body, and re-aiming at the victim intervening between the two shots. As the trial court found, the murder of Mr. Maida was "both vengeful and gratuitous," but what motivated that evil state of mind is "an operation" of Yacob's mind and "difficult to determine" (V 907 n.7).

Thus, the trial court did not find that Yacob's shootings were motivated by knowledge that Mr. Maida "had locked him in the store" (IB 44). The trial court's discussion of mitigation made this abundantly clear. (See V 916; accord XV 1445-46)

The Initial Brief speculates that the evidence shows that Yacob was "attempting to get into the cashier's area himself" (IB 44) or was intending "to scare Maida into deactivating the

switch" (IB 45). Such self-serving inferences are not supported by the evidence. Yacob did not demand that Maida open the door before he fired the gun at Maida. Yacob did not make such a demand when he missed on the first shot. He did nothing to simply scare Maida. Instead, when Yacob's first shot missed, he put down the robbery loot, positioned himself, aimed, and fired again, this time directly into Mr. Maida's heart.

Yacob suggests (IB 45) that the video shows that he may have "dropped" the robbery booty, perhaps in a frenzied panic. While the shooting transpires at the other end of the cashier's room from the cameras' viewpoints, Yacob can be seen bending over towards the floor between the two shots. Yacob had the bag of loot in his hands immediately prior to the first shot, and he did not have the bag of loot in his hands immediately after the second shot. So, while the cameras did not show the molecules of the bag being gently placed on the floor, it is clear that, when Yacob bent over towards the floor, he was placing the bag on the floor after missing Mr. Maida on the first shot.

Moreover, contrary to Yacob's suggestion (IB 45) when the second shot was fired, Yacob was directly facing the victim.<sup>16</sup>

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<sup>16</sup> Indeed, even defense counsel's penalty closing argument, in essence, may have admitted that Yacob assumed a "shooter's stance" (See XIV 1347). Defense counsel referenced the

The Initial Brief (IB 45-47) assumes that the evidence shows that Yacob thought that the glass was "bulletproof," then argues that he really did not intend to kill Maida. However, Yacob did not take the witness stand, and there is no sign visible on the glass indicating that it was bulletproof. Although some officers may have thought some of the glass was possibly bulletproof, there is no evidence that Yacob did. Yacob working at another convenience store proves nothing about his knowledge, reasonable or otherwise, about the glass at this store. Indeed, the jury rejected this theory in finding Yacob guilty of premeditated murder. (See III 598; see also V 917-19 and defense counsel's related closing arguments at XII 988-89; XIV 1345-480)

Whatever knowledge Yacob had, he was determined to shoot through the barrier between him and the victim, as he used damage-heightened hollow-point bullets (XI 796) in his semi-automatic pistol, and when one shot did not do what he wanted, he freed-up his hands, re-positioned, aimed, and fired again. Thus, the trial court and the jury correctly concluded that the murder was premeditated. Indeed, it was premeditated-plus by a wide margin, thereby meriting a upholding the death penalty.

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prosecutor's argument and then contended it was only to scare the victim so "no stance was necessary." (XIV 1347)

Indeed, Yacob's actions, shooting twice at the victim at the cashier room door while verbally demanding nothing, clearly demonstrate that he believed that his hollow point bullets would effectuate his intent. And, when he accomplished his desired result, he immediately left the area of the cashier room door.<sup>17</sup>

Yacob (IB 52), in pointing to Scott, may be suggesting that his failure to try to kill the customer, Mr. Hardy, proves his lack of intent to kill anyone. Most importantly, this is belied by Yacob's determined efforts to kill Mr. Maida. While studying SE #22, as the trial court did (See V 919-20), might lead a detached observer to infer that Mr. Hardy was still in the store somewhere, there is no evidence that Yacob actually thought that any other person was still in the store or in an accessible area of the store. Indeed, SE #22 shows that when the door chime sounds as Mr. Hardy enters the store, Mr. Hardy takes an immediate right turn away from the cashier's room and Yacob only glances up, then, a little while later, as Mr. Hardy starts to approach the cashier area, he backs away and hides away from the cashier's room (See Hardy's testimony at X 486, 488; description of Camera 6 video in "Video of the Murder as It Occurred," in

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<sup>17</sup> He only returned to the door area to pick up his loot. After the shooting, he is also seen profanely walking around the store after he realized he could not exit the store's front door.

Facts supra) Perhaps most importantly, there is no evidence that Jacob passed up an actual opportunity to harm another potential victim-target who was obvious and readily accessible. Jacob failing to search for another victim who may be in the store does not prove Jacob's lack of intent to kill Mr. Maida, especially when that intent to kill is reinforced with facts demonstrating determined premeditation to kill Mr. Maida.

Here, contrary to Jacob's contention (IB 47-53) that comparable cases require a life sentence, the merged aggravator was especially weighty, weighted with CCP-like facts and avoid-arrest-like facts. Here, the mitigation was very weak, even if one were to include the other proposed mitigation that was based upon incompetent evidence. The death penalty was proportionate.

For each and all of the foregoing reasons, ISSUE 2 should be rejected.

**ISSUE 3: ARE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS UNCONSTITUTIONAL UNDER RING V. ARIZONA, 536 U.S. 584 (2002)? (IB 56-57, RESTATED)**

No.

This Court has "repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*." Ault v. State, 53 So.3d 175, 205-206 (Fla. 2010) (citing Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); King v. Moore, 831 So.2d 143 (Fla. 2002)). It should reject Jacob's challenge.

The jury's guilt-phase finding of guilty as charged of Armed Robbery (IV 601-602; XIII 1053) satisfies Ring. See, e.g., Salazar v. State, 991 So. 2d 364, 378 (Fla. 2008); Johnson v. State, 969 So.2d 938, 961 (Fla. 2007); Parker v. State, 873 So.2d 270, 294 (Fla. 2004) ("in addition to a conviction for first-degree murder, Parker was convicted by a unanimous jury of kidnapping and robbery"; aggravator of " committed the murder in the course of a kidnapping"; "Parker is likewise not entitled to relief").

Further, the jury also found beyond a reasonable doubt that the First Degree Murder was committed under both premeditation and during the commission of a felony (Robbery) (XIII 1052-53; III 598-600), further supporting the rejection of this issue.<sup>18</sup> See, e.g., Durousseau v. State, 55 So.3d 543, 563 (Fla. 2010) ("Durousseau lacks standing to make a unanimity challenge to Florida's death penalty statute because in the guilt phase the jury unanimously found the that the murder was committed

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<sup>18</sup> Furthermore, Ring does not apply where, as in Florida, the jury is not increasing the maximum penalty, which is already set at death. Compare §782.04(1) with §775.082, Fla. Stat. The State notes that in Peterson v. State, 2012 WL 1722581, \*23 (Fla. 2012), Justice Pariente **dissenting**, joined by two other justices disagreed: "I conclude that the maximum penalty after a finding of guilt for first-degree murder in Florida is life imprisonment."

during the course of committing the felonies of robbery and sexual battery").

Yet further, arguendo, even if Ring otherwise applied to this case and even if Jacob had standing to raise it, it was satisfied. This is not an override case. Jacob's jury in his penalty phase recommended death by a 10 to 2 vote (XV 1377-79; IV 691). As this Court explained in State v. Steele, 921 So.2d 538, 544-46 (Fla. 2005), a jury recommendation of death is a jury finding at least one aggravator, thereby satisfying any Ring requirement. See also Ault v. State, 53 So.3d 175, 205 (Fla. 2010) (rejecting a Ring challenge and noting "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute"; citing Steele).

Moreover, there is no constitutional requirement of jury-unanimity. See Ault, 53 So.3d at 206 (citing Coday v. State, 946 So.2d 988, 1006 (Fla. 2006)). Cf. Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding a conviction based on a 9-to-3 jury vote); Apodaca v. Oregon, 406 U.S. 404 (1972) (upholding convictions by less than unanimous jury, 11-1 and 10-2).

For each and all of these reasons, ISSUE 3 should be rejected.

**CONCLUSION**

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

**CERTIFICATE OF SERVICE**

I certify that a copy hereof, including its Appendix, have been furnished by e-mail on September 24, 2012, to NADA M. CAREY, ASSISTANT PUBLIC DEFENDER at "Nada Carey" <nada.carey@flpd2.com> and "Anna Lovcy, assistant to Nada Carey" at <anna.lovcy@flpd2.com>.

**CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,  
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IN THE SUPREME COURT OF FLORIDA

MICHAEL MULUGETTA YACOB,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC11-2505

APPENDIX

SENTENCING ORDER (V 902-934)