IN THE SUPREME COURT OF FLORIDA

GARY MICHAEL HILTON

Appellant,

v. CASE NO. SC11-898

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PREELIMINARY STATEMENT

Appellant, Gary Michael Hilton appeals his convictions and sentence to death. He raises six (6) issues in a seventy-nine (79) page brief.

`References to appellant will be to “Hilton” or “Appellant,” and references to appellee will be to “the State” or “Appellee.” The record on appeal consists of forty-three (43) volumes, a great part of which pertains to the media’s access to information regarding the Hilton case.

The State will refer to the record on appeal as “TR” followed by the appropriate volume and page number. Hilton’s initial brief will be referenced as “IB” followed by the appropriate page number.

STATEMENT OF THE CASE

Gary Michael Hilton, born on November 22, 1946, had just turned 61 years old when he kidnapped Cheryl (Sherry) Dunlap on December 1, 2007 and murdered her sometimes between December 1 and December 8, 2007. On February 28, 2008, a Leon County Grand jury indicted Hilton on one count of first degree murder (Count I), one count of kidnapping (Count II), one count of grand theft auto (GTA) (Count III), and one count of grand theft (count IV). (TR Vol. 1 page 36).

Hilton pled not guilty and proceeded to trial on January 31, 2011. Hilton's theory of the case was that the state would not be able to prove, beyond a reasonable doubt, that it was Hilton who kidnapped and murdered Ms. Dunlap. (TR Vol. 24, page 55).

The state called over forty witnesses and then rested its case. (TR Vol. 35, page 1354). Hilton moved for a judgment of acquittal on all counts. (TR Vol. 36, page 1364).

Hilton offered no specific argument on Counts I, II, and IV. The trial court denied the motion on those three counts. (TR Vol. 24, page 1364).

Hilton did offer argument in support of his motion for a judgment of acquittal on the GTA charge. Hilton argued there was no evidence that Hilton "attempted to use or possess in any way or shape the vehicle that belonged to Ms. Dunlap." (TR Vol. 24, page

1364). The state argued there was sufficient evidence to go to the jury because circumstantial evidence supported a conclusion that, after kidnapping Ms. Dunlap, Hilton moved Ms. Dunlap's car from the Leon Sinks parking lot to another location on the side of the road. The trial judge ruled that, although it was a close call, he would allow Count III to go the jury. (TR Vol. 24, page 1368).

The defendant called one witness and then rested its case. (TR Vol. 36, page 1428). The trial court conducted a colloquy with Hilton and advised him of his right to testify on his own behalf. (TR Vol. 36, page 1429-1430). Hilton told the trial court he did not wish to testify. (TR Vol. 36, page 1430).

At the close of the colloquy, Hilton renewed all his motions for a judgment of acquittal without additional argument. The trial court denied the motions. (TR Vol. 36, page 1431).

During deliberations, the jury requested to review some of the evidence again. (TR Vol. 37, pages 1601). The Court granted the request. (TR Vol. 37, page 1601-1602).

On February 15, 2011, contrary to his pleas, a Leon county jury found Hilton guilty of one count of first degree murder, one count of kidnapping and one count of grand theft. The jury found Hilton not guilty of stealing Ms. Dunlap's car. (TR Vol. 36, pages 1603-1604). By way of a special interrogatory, the jury found Hilton guilty of both felony and premeditated murder. (TR Vol. 36, page 1604). Likewise, by way of a special interrogatory verdict,

the jury found Hilton kidnapped Ms. Dunlap with the intent to facilitate a felony and to terrorize and inflict bodily harm. (TR Vol. 36, page 1604; TR Vol. 12, pages 2297-2299).

The penalty phase began on February 17, 2011. The state called one witness, Clay Bridges. (TR Vol. 38, pages 45-86). Mr. Bridges offered testimony about Hilton's prior violent felony conviction. Hilton pled guilty to murdering Meredith Emerson, a young hiker that Hilton kidnapped and murdered in North Georgia. (TR Vol. 38, page 53). Hilton kidnapped Ms. Emerson on January 1, 2008 and held her captive for three and a half days before he murdered her. After murdering her, Hilton decapitated Ms. Emerson and stripped her body naked to, according to Hilton, get rid of any fiber or DNA evidence. (TR Vol. 38, page 53). During a taped conversation with law enforcement officers, Hilton described some of what happened while Hilton held Ms. Emerson captive.1 Hilton also described his general philosophy that "[y]ou either kill them or you get caught" (TR Vol. 38, pages 66). 2

Hilton presented the testimony of a dozen witnesses, including four expert witnesses, at the penalty phase. Hilton's mitigation case centered on evidence that Hilton has brain damage and

1 TR Vol. 38, pages 59-83.

2 Hilton explained a bit later that "…once you've done it, you're either going to kill her or get caught. There's no other solution." (TR Vol. 38, page 67).

schizoaffective disorder, was taking Ritalin at the time of the murder, and suffered emotional abuse and deprivation as a child. The state called one witness, Dr. Greg Prichard, in rebuttal. In Dr. Prichard's view, Hilton does not suffer from schizoaffective disorder. Instead, Hilton has an anti-social personality disorder. He is also a psychopath. (TR Vol. 41, pages 577-578).

The trial court instructed the jury on six statutory aggravators: (1) prior violent felony; (2) murder in the course of a kidnapping; (3) avoiding arrest; (4) pecuniary gain: (5) HAC, and (6) CCP. (TR Vol. 43, pages 695-697). The trial judge instructed the jury on both statutory mental mitigators and the catch-all. (TR Vol. 43, page 699).

On February 21, 2011, the jury recommended unanimously (12-0) that Gary Hilton be sentenced to death for the murder of Cheryl Dunlap. (TR Vol. 43, page 752-754). The State filed a sentencing memorandum with the trial court on March 31, 2011. (TR Vol. 12, pages 2317-2330). The defendant did not file a sentencing memorandum.

The trial court held the Spencer hearing on April 7, 2011. April 7, 2012. (TR Vol. 15 pages 2781-2828). The State put on three victim impact witnesses: (1) Ms. Emma Blount (aunt); (2) Laura Walker (best friend); and (3) Gloria Tucker (cousin). All three read prepared statements. (TR Vol. 15, pages 2804-2813).

Hilton called no witnesses. Both the state and defendant offered argument in support and in opposition to the death penalty.

The trial judge found that the state had proven six aggravators beyond a reasonable doubt. Assigning weight to each aggravator, the trial court found: (1) the defendant was previously convicted of a violent felony (Great weight); (2) the murder was committed in the course of a kidnapping (great weight); (3) the murder was committed to avoid arrest (moderate weight); (4) the murder was committed for pecuniary gain (some weight); (5) the murder was especially heinous, atrocious or cruel (HAC) (great weight); (6) the murder was cold, calculated, and premeditated (great weight). (TR Vol. 12, pages 2344-2356).

The Court also considered and weighed each mitigating circumstance proposed by Hilton. The court found one statutory mental mitigator to exist; at the time of the murder Hilton was under extreme emotional distress. The Court gave this mitigator some weight. The court considered, but rejected, as not proven, the other statutory mental mitigator. (TR Vol. 12, page 2357).

The Court also considered ten non-statutory mitigators. The Court found Hilton had reasonably established eight non-statutory mitigators but rejected two others as not proven. The Court specifically found: (1) Hilton grew up in an abusive household (some weight); (2) Defendant abused drugs, specifically Ritalin (some weight); (3) Hilton was deprived of a relationship with his

biological father (moderate weight); (4) Hilton is already serving a life sentence so society is protected (some weight); (5) Hilton served his country in the US military (very little weight); (6) Hilton suffered maternal deprivation and lack of bonding between mother and child (some weight); (7) Hilton was removed from his home and put into foster care when he was a child (some weight); (8) Hilton grew up in a financially poor family(not proven); (9) Hilton suffered a traumatic brain injury as a child (some weight); (10) Hilton suffers from severe mental defects (not proven). (TR Vol. 12, pages 2359-2363).

On April 21, 2011, the trial court followed the jury's unanimous recommendation and sentenced Hilton to death. The court found, beyond a reasonable doubt, that the aggravators outweighed the mitigators. (TR Vol. 12, page 2364).

On May 4, 2011, Hilton filed a notice of appeal. On January 20, 2012, Hilton filed his initial brief. This is the State's answer brief.

STATEMENT OF THE FACTS

Cheryl Dunlap was 46 years old when Gary Michael Hilton kidnapped, and then murdered her. Ms. Dunlap was a nurse, a Sunday school teacher, a daughter, a niece, a cousin, a best friend, a mother, and a grandmother. In December 2007, she lived alone in Crawfordville, Florida. (TR Vol. 24, page 59).

Ms. Dunlap was an avid reader. (TR Vol. 15, page 2805; TR Vol. 24, page 62). One of her favorite spots to read was Leon Sinks. Ms. Dunlap liked Leon Sinks because she enjoyed the national forest and relaxing there with a book. (TR Vol. 15, page 2805). Although her aunt worried about her going alone to the sinks, Ms. Dunlap always reassured her aunt that she would be perfectly safe. TR Vol. 15, page 2805).

What Ms. Dunlap could not know is that Gary Michael Hilton had come to Tallahassee and was camping in the Apalachicola National Forest not far from Leon Sinks. Indeed, various people saw Hilton in and around the Apalachicola National Forest beginning in late November 2007.

Around Thanksgiving, George Ferguson saw Hilton on LL Wallace Road. Hilton was camping in the vicinity. (TR Vol. 25, page 259). Hilton asked Mr. Ferguson for a jump because, according to Hilton, his van would not crank. Mr. Ferguson does not know why Hilton flagged him down, but Hilton did not really need a jump. (TR Vol.

25, page 250-251). Hilton drove a white Chevrolet Astro van. (TR Vol. 25, page 256; TR Vol. 27, pages 419-420).

Shawn Matthews also saw Hilton in November 2007. Hilton was camping in the vicinity of LL Wallace Road. (TR Vol. 27, page 404). It looked to Matthews as if Hilton had been there a while. (TR Vol. 27, page 407). Hilton seemed familiar with the area. Hilton told Matthews about a nearby limestone sink hole. (TR Vol. 27, page 407).

On the afternoon of December 1, 2007, the day Cheryl Dunlap disappeared, Celeste Hutchins saw Gary Hilton. Hilton was on Crawfordville Highway not far from Leon Sinks. (TR Vol. 25, page 155).

Hilton was still in Tallahassee on December 10, 2007. Loretta Mayfield saw Hilton at a convenience store on Crawfordville Highway on December 10, 2007 at 9:00 a.m. (TR Vol. 25, page 223).

On December 11, 2007, Stephen Prosser saw Hilton in the Apalachicola National Forest. (TR Vol. 27, pages 429-439). On December 12, 2007, Michael Travis saw Hilton in the Apalachicola National Forest near the Bloxham cut-off. On December 14, 2007, Mr. Prosser saw Hilton in the forest again about ½ mile from where he had seen him a few days before. (TR Vol. 27, pages 436-437).

Teresa Johnson saw Hilton on December 18, 2007 in Bristol, Florida about 20 miles from where Cheryl Dunlap’s body was found. (TR Vol. 25, page 236). Hilton told Ms. Johnson that she looked

like Cheryl Dunlap and that it was “too bad” about that girl getting murdered. (TR Vol. 25, page 237).

By January 1, 2008, Hilton was in the mountains of North Georgia. There, he would kidnap a 24 year-old hiker named Meredith Emerson. Hilton took Ms. Emerson from Blood Mountain, a popular hiking spot in North Georgia. Hilton would hold Meredith Emerson captive for nearly four days before murdering her. (TR Vol. 38, page 85).

Well before Ms. Dunlap and Hilton’s paths would cross on December 1, 2007, Hilton had murder on his mind. Sometime in September 2007, Hilton began to “hunt.” (TR Vol. 34, page 1184). On December 1, 2007, he was hunting. His prey? Cheryl Dunlap.

On the Saturday morning she disappeared, Ms. Dunlap spoke to her friend, Kiona Hill. They spoke between 10:00 and 10:30 and made arrangements to meet that evening for dinner. (TR Vol. 24, page 66-67).

After speaking with Ms. Hill, Ms. Dunlap drove to the Ameris Bank in Crawfordville where she had an account. At 11:17 a.m., Ms. Dunlap cashed a check for $100. The bank’s video caught Ms. Dunlap as she went through the bank’s drive through. (TR Vol. 25, page 193-194). Sometime after cashing her check, Ms. Dunlap drove her white Toyota Camry to Leon Sinks.

Visitors access Leon Sinks by car from Crawfordville Highway (Highway 319) between Crawfordville and Tallahassee, Florida. Leon

Sinks has a paved parking lot, with marked parking spots. The parking lot is about 1/8 to 1/4 mile from the road. (TR Vol. 24, page 71). 3

Leon Sinks is part of the Apalachicola National Forest. It lies about 5.5 miles from the intersection of Crawfordville Highway and Capital Circle in Tallahassee. In the park, there are several wet and dry sinkholes and three hiking trails. The sinkhole trail is 3.1 miles around. 4

Leon Sinks has a closing procedure. Hikers are supposed to be off the trail by closing time. If an unoccupied car is still in the parking lot at closing time, a park host will make an effort to find the people from that car. If the host does not find them, the host will contact law enforcement to conduct a search. (TR Vol. 24, page 100).

Upon arrival at Leon Sinks, Ms. Dunlap hiked to Hammock Sink. Hammock Sink can be a fairly short walk from the parking area. Depending on the direction that a person travels (clockwise or counterclockwise), Hammock Sink is one of the first or one of the last sinks on the sinkhole trail.5 Hammock Sink has a boardwalk that runs around the south and west side of the sink. (TR Vol. 24,

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3 Given the distance between the parking lot and the road, it is unlikely that a person intending to hike Leon Sinks would park their car on the road.

4 http://en.wikipedia.org/wiki/Leon_Sinks.

5 http://nfloridahiking.wandering-dwarf.com/leon.htm

page 74). The boardwalk has two areas where visitors can observe turtles and fish. One of the boardwalks has a bench. (TR Vol. 24, page 74).

A married couple, hiking the Leon Sinks trail, saw Ms. Dunlap at Hammock Sink sometime between 1:30 and 2:00 p.m. (TR Vol. 24, pages 76-77, 92).6 When the couple saw Ms. Dunlap, Ms. Dunlap was alone. She was sitting on the boardwalk bench and reading a book. (TR Vol. 24, pages 73-74, 91). Shortly after the couple arrived at Hammock Sink, Ms. Dunlap got up, tucked the book under her arm and walked past the couple. (TR Vol. 24, page 92).

Ms. Dunlap was conservatively dressed, wearing jeans and a sweater. Ms. Dunlap and the couple smiled at each other and exchanged pleasantries. (TR Vol. 24, pages 74-75).

The couple saw Ms. Dunlap once again after they left Hammock Sink to continue their hike. About a ¼ mile down the trail, Ms. Dunlap passed them again, going in the opposite direction. She was still carrying her book. It appeared to the couple that Ms. Dunlap was heading back to Hammock Sink. (TR Vol. 24, page 75). Once again, Ms. Dunlap and the couple exchanged smiles. (TR Vol. 24, page 92).

Sometimes between 2:00 p.m. and 5:30 p.m., Gary Hilton took Ms. Dunlap from Leon Sinks. She would not be seen alive again.

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6 The couple testified that Hammock Sink is about ¾ way around the trail, the entire of which that takes 1 ½ to 2 hours to hike.

Ms. Dunlap did not show up for dinner with Ms. Hill on the evening of December 1, 2007. She did not call to cancel. Ms. Dunlap had never failed to call to cancel if she could not make a scheduled dinner date. (TR Vol. 24, page 67).

On December 2, 2007, Ms. Dunlap was not at church on Sunday morning. Tanya Land, another friend of Ms. Dunlap's, was concerned. When Ms. Land discovered that Ms. Dunlap had not arrived for work the following day, Ms. Land called the police. (TR Vol. 24, page 60).

Captain Tim Ganey took the missing person's report on December 3, 2007 at about 10:35 in the morning. Ms. Land told Captain Ganey that she had seen Ms. Dunlap's car on the side of Crawfordville Highway. (TR Vol. 24, page 106).

Captain Ganey found Ms. Dunlap's car. The car was parked close to a wooded area. The right rear tire was flat but otherwise the car was undamaged. (TR Vol. 24, page 109). The tire had been punctured. Captain Ganey testified that it did not appear the tire had a blow out. Instead, it appeared that someone had punctured the tire. (TR Vol. 24, page 109). 7

Captain Ganey told the jury that Ms. Dunlap's car was parked in a place where he would not expect it to be parked if she had

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7 Florida Highway Patrol Trooper Brian Speigner had "red-tagged" the car a couple of hours before Captain Ganey found Ms. Dunlap's car. When a car is red—tagged, the owner has 48-72 hours to move

simply broken down. Additionally, the tracks made by Ms. Dunlap's car were not consistent with a car that had pulled off the side of the road with a flat tire. Instead, it appeared to Captain Ganey that someone had driven the Camry up near the woods with all four tires intact and the tire punctured after the car was parked. (TR Vol. 24, page 109-110). Ms. Dunlap's car was parked right near a small trail that went into the woods. Captain Ganey told the jury that he believed the trail led to Leon Sinks. (TR Vol. 24, page 112).

When the police found Ms. Dunlap's car, her purse was lying on the driver's side floorboard. The $100 she had withdrawn from her checking was not found in her purse or in the car. There was less than $5 in the car. (TR Vol. 24, pages 128).

The day after Ms. Dunlap disappeared, someone used Ms. Dunlap's ATM card to withdraw money from Ms. Dunlap's account. It was not Cheryl Dunlap. The person who accessed her account had the PIN. (TR Vol. 25, page 192). All of the withdrawals occurred at the Hancock bank on West Tennessee Street in Tallahassee. From December 2 to December 4, 2007, three withdrawals were made on three consecutive days.

The first withdrawal took place on the evening of December 2, 2007 at 9:59 p.m.; about 30 hours after Hilton took Ms. Dunlap. (TR Vol. 25, page 191). Two more withdrawals were made from Ms.

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it from the side of the road. (TR Vol. 24, page 119-120).

Dunlap's bank account; one on December 3, 2007, at 9:54 p.m., and the final withdrawal, on December 4, 2007 at 7:08 in the morning. (TR Vol. 25, pages 191-192). In addition to the three withdrawals which netted $700, two attempted withdrawals were declined because they exceeded permissible limits on ATM withdrawals. (TR Vol. 25, pages 191-192).

A video camera at the ATM captured images of the man using Ms. Dunlap's ATM card. The man clearly took steps to ensure he could not be identified by way of the ATM's video surveillance equipment.

The man accessing Ms. Dunlap's account was dressed in a long sleeve shirt that appeared to be white with a blue pattern. (TR Vol. 26, page 325). The man wore glasses and had on some type of hat. (TR Vol. 26, page 326). The man also had some type of holster on his left side. (TR. Vol. 327). The man's face was hidden. During the first two withdrawals, the man hid his face by way of a mask. A video analyst from the Orange County Sheriff's Office testified that the mask appeared to be made of layered medical tape. (TR. Vol. 25, page 335). On the last day the man accessed Dunlap's account, the man covered his face with some type of cloth. (TR Vol. 26, page 328).

On December 10, 2007, Loretta Mayfield saw Gary Hilton at a convenience store located on Crawfordville Highway. Ms. Mayfield testified that Hilton was wearing a blue and white striped shirt.

The man was also wearing something on his left side. It looked like a large knife holder. (TR Vol. 25, page 218). Ms. Mayfield told the jury that the shirt she saw Hilton wearing on December 10, 2007 looked like the same shirt the man, who withdrew money from Cheryl Dunlap's bank account, was wearing. (TR Vol. 25, pages 217-218).

On December 15, 2007, a hunter found Ms. Dunlap's body in the Apalachicola National Forest. (TR Vol. 25, page 206-207). She was naked. Her hands and head were missing. (TR Vol. 28, page 540-541). According to the medical examiner, it is likely Ms. Dunlap's body had lain in the forest for seven to ten days.8

On January 9, 2008, investigators found what they believed to be the remains of Ms. Dunlap's head and hands. The bones were found in a fire pit at an area known as the Joe Thomas campsite. (TR Vol. 27, page 494). Joe Thomas campsite is about 6-7 miles from the area where Ms. Dunlap's body was found.

The bones found in the fire pit were charred and in pieces. The fire that burned the bones was a very hot fire. Leaves on the trees near the fire pit were singed and burned. (TR Vol. 28, page 502).

8 The medical examiner testified that it was possible Ms. Dunlap's body had lain in the woods since December 1, 2007. (TR Vol. 28, page 567). However, it is his best expert opinion the body was in the forest for 7-10 days. (TR Vol. 28, page 572)

The bones were so damaged by the fire that no DNA, not even mitochondrial DNA, could be obtained to determine whether the bones were indeed Cheryl Dunlap's head and hands. However, Dr. Anthony Falsetti, a forensic anthropologist, could tell three things about the bones. First, there were two hands represented in the bones. Second, the bones were those of an adult human being. Third, the bones were those of a person with small hands. (TR Vol. 30, pages 807-808).

Despite Hilton's protestations to the contrary at trial, there was much to link Hilton to Ms. Dunlap's kidnapping and murder, apart from the various sightings of Hilton in and around the area where her body was found. First, around 5:00 and 5:30 p.m. on December 1, 2007, the day Ms. Dunlap was taken, Celeste Hutchins saw Ms. Dunlap's white Camry on the side of Crawfordville Highway. Ms. Hutchins saw Gary Hilton rummaging around in Cheryl Dunlap's car. 9 (TR Vol. 25, page 151-152).

Hilton's bayonet was recovered in Georgia. An expert in tool mark identification testified that, in his opinion, it was Hilton's bayonet that punctured Ms. Dunlap's tire. (TR Vol. 33, page 1097; 1121).

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9 Ms. Hutchins originally picked another man from a photo line-up. Hilton was not in the line-up. Ms. Hutchins testified that she knew later the man she picked out was not the man she saw at the car and Hilton was, for certain.

Numerous artifacts collected from Dunlap's car and Hilton's possessions, van, and two principal campsites, including the Joe Thomas campsite where the head and hands were found, linked Hilton to the murder. For example, Hilton's DNA was found on a cigarette butt found at the Joe Thomas campsite. (TR Vol. 35, page 1290). A palmetto piece was found in Hilton's van. Palmetto leaves covered Dunlap's body. (TR Vol. 33, page 1035; TR Vol. 27, page 478). When Hilton's van was searched upon arrest, among the many items found in the van were nicotine gum packs and allergy medication blister packs. (TR Vol. 33, page 1045-1046). In a statement to law enforcement officers, Hilton complained about his sinus condition and the need to take over the counter sinus medications. (TR Vol. 34, page 1186-1188). These same types of medications were found at both of Hilton's campsites. (TR Vol. 25, pages 286; TR Vol. 27, pages 447). Beads, ostensibly from a necklace or bracelet, were found in Dunlap's white Camry, in and around the burn pit at the Joe Thomas campsite, and in Hilton's backpack. (TR Vol. 27, pages 476, 501, 509; TR Vol. 35, page 1312).

Hilton also talked about murdering Cheryl Dunlap while he was in the Leon County jail. A jail officer overheard the conversations that Hilton had with another inmate, Fred Summers. Jail Officer Caleb Wynn testified that Hilton told Summers he had spent hours or a few days with Dunlap. Hilton described Dunlap as a Sunday school teacher who plenty of guys must have wanted. (TR Vol.

34, page 1245-1246). Hilton told Summers that, if the State would give him life, he would answer all of the questions that Willie Meggs had, including how he pulled it off on the busy Crawfordville Highway, where the head and hands were, and how he put the bayonet in her tire. (TR Vol. 34, page 1243-1245).

On December 3, 2007, two days after Hilton kidnapped Ms. Dunlap, Hilton made a video of himself (perhaps unintentionally). Hilton was in his van and talking to his dog, Dandy. Hilton told Dandy that they were going to the park. Hilton told Dandy that first, he "got to go hide this somewhere else." Hilton bragged that "I killed them with (unintelligible) yeah. Killed those bitches. I killed them (unintelligible)". (TR Vol. 32, page 978.)

Finally, DNA discovered on several things that were found among Hilton's possessions and on Ms. Dunlap's body, established, beyond any reasonable doubt, that Hilton kidnapped and murdered Cheryl Dunlap. Jo Ellen Brown testified at trial about the DNA results. The first item of significance was pair of Hi-tec (High-Tech) boots. The boots were found in a Dumpster after Stephen Shaw saw Hilton, who appeared to have something in his hands, walk around to the back of a convenience store in the direction of the store's Dumpsters. (TR Vol. 28, page 579). Shaw called the police and GBI agent Mitchell Posey, along with other Georgia law enforcement officials, recovered numerous items from the Dumpster.

Both Hilton and Cheryl Dunlap's DNA was found on the Hi-tec boots. Ms. Brown found mixtures of DNA consistent with two people, Gary Hilton and Cheryl Dunlap. (TR Vol. 35, page 1295-1296). Cheryl Dunlap's DNA was found on the shoestring of the right boot. The chance of the DNA belonging to another individual is 1 in 63 million Caucasians. (TR Vol. 35, page 1296).

A black duffel bag found with Hilton when he was arrested in Georgia contained DNA that includes Hilton and Ms. Dunlap. Ms. Brown got results at 12 of 13 loci for Ms. Dunlap's DNA. (TR Vol. 35, page 1298).

DNA found on the swabs from Ms. Dunlap's thighs was very degraded. Nonetheless, Ms. Brown found foreign DNA on the swabs. Hilton could not be excluded from donating the foreign DNA found on Ms. Dunlap's thighs. (TR Vol. 35, page 1314).

Finally, Ms. Brown found Cheryl Dunlap's DNA on three items recovered in, or just outside, Hilton's van after he was arrested. The first item was a pair of blue pants found in Hilton's van. The chance of the DNA belonging to someone other than Ms. Dunlap is 1 in 29 quadrillion Caucasians. (TR Vol. 35, pages 1306-1307).

The second item was a purple sleeping bag found just outside Hilton's van. The sleeping bag tested positive for blood. Ms. Dunlap was included as a contributor to the DNA found on the purple sleeping bag, (TR Vol. 35, pages 1303).

The third item where Ms. Dunlap's DNA was found was on a blue sleeping bag found among Hilton's belongings. This sleeping bag tested positive for blood. The chance of the DNA belonging to someone other than Ms. Dunlap is 1 in 11 trillion Caucasians. (TR Vol. 35, pages 1304-1305). Hilton's DNA was also found on the same sleeping bag. (TR Vol. 35, page 1304). Dunlap's DNA on Hilton's boots, sleeping bags, and pants, along with all the other evidence introduced at trial, unquestionably proved Hilton kidnapped and murdered Cheryl Dunlap.

SUMMARY OF THE ARGUMENT

Issue I: The trial judge committed no error in admitting Hilton's statement to law enforcement that he began "hunting" in September 2007, some three months before Hilton kidnapped and murdered Cheryl Dunlap. The statement did not constitute collateral crime evidence because it did not clearly state, and would not necessarily imply to a lay jury, that Hilton had committed other murders or other crimes (such as stalking) before he kidnapped Cheryl Dunlap. Even if Hilton's statements did constitute collateral crime evidence, it was still admissible. Collateral crime evidence is admissible to prove premeditation. Indeed, it is not admissible only if it is introduced solely to prove propensity. In this case, the State charged Hilton with 1st degree murder and proceeded under both premeditated murder and felony murder theories of guilt. Accordingly, evidence that Hilton began "hunting" some three months before the murder was relevant to show the murder of Cheryl Dunlap was premeditated. In the same vein, it was admissible to show the murder was CCP.

Issue II: The trial court committed no error in allowing Dr. Prichard to testify in rebuttal about other "bad" acts that Hilton committed prior to murdering Cheryl Dunlap. When such evidence is offered to rebut the defendant's experts as it was in this case, the evidence is properly admitted as rebuttal evidence and not as

non-statutory aggravation. Even if this were not the case, any error was harmless.

Issue III: The trial judge committed no error in excusing Dr. Prichard from the rule of sequestration because his presence in the courtroom was essential to the presentation of the State's case. The dangers which the rule of sequestration is designed to prevent are much less acute when the excused witness is an "opinion" witness not a "fact" witness. Moreover, the trial judge committed no error in allowing Dr. Prichard to testify that he disagreed with Hilton's experts as to their diagnoses and conclusions that both statutory mitigators applied to the Dunlap murder. Dr. Prichard did not testify about what he thought of Hilton's experts. Nor did Dr. Prichard opine on the expert's credibility, competence, ability or reputation. Accordingly, it was perfectly proper for Dr. Prichard to testify that he disagreed with the conclusions reached by Hilton's experts and to tell the jury why. Finally, the trial judge committed no error in denying Hilton's request to add to the standard "expert witness" jury instruction a sentence that would advise the jury that one expert witness is not allowed to offer an opinion about the credibility of another expert. Dr. Prichard did not offer an opinion on the credibility of any of Hilton's experts. Instead, Dr. Prichard testified that he disagreed with them. Because Dr. Prichard did not opine on the credibility of Hilton's

experts, the trial judge committed no error in denying Hilton's request for a special instruction.

Issue IV: There was sufficient evidence to support the trial judge's finding that the murder was especially heinous, atrocious, or cruel. There was also sufficient evidence that the murder was cold, calculated, and premeditated. The evidence demonstrated that Hilton kidnapped Cheryl Dunlap and kept her hostage between 30 hours and seven days before he murdered her. The medical examiner testified that Ms. Dunlap suffered a deep ante-mortem bruise to the back. Such evidence showed Dunlap physically suffered prior to her death. More importantly, the evidence showed that Dunlap endured hours if not days of fear, emotional strain, and terror at the hands of Gary Hilton. This Court has consistently held that the fear, emotional strain, and terror of the victim during the events leading up to the murder can make an otherwise quick death especially heinous, atrocious, or cruel. Hilton ensured that law enforcement authorities could not determine whether he raped Ms. Dunlap or killed Cheryl Dunlap quickly or slowly and painfully. However, the evidence clearly supports a finding that in the hours and days that she was held captive, Ms. Dunlap endured unimaginable fear, emotional strain and terror. There was more than sufficient evidence the murder was heinous, atrocious, or cruel.

Likewise, there is sufficient evidence the murder was cold, calculated, and premeditated. Hilton began hunting for prey well

before the murder. Additionally, Hilton told law enforcement that his victim is doomed from the start because once you've taken someone, "you either kill them or get caught. If you release them, you are going to get caught." Finally, Hilton told law enforcement that he is calm as can be during his crime. Hilton's own statements coupled with the facts of the murder constitute competent substantial evidence the murder was CCP.

Issue V: The trial judge committed no error in rejecting the "capacity" mental mitigator. Hilton's mental health experts opined the mitigator applied. The state's mental health expert disagreed. The trial judge found the state's expert more credible. He also found the evidence, especially the evidence of Hilton's efforts to cover up his crime, belied any notion that Hilton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. This Court has previously upheld rejection of this statutory mitigating factor where a defendant took logical steps, as Hilton did here, to conceal his actions from others.

Issue VI: Hilton's sentence to death satisfies Ring. Hilton committed the murder in the course of an enumerated felony. Hilton had also been previously convicted of a violent felony. This Court has consistently ruled that Ring is satisfied, in any event, when the defendant commits the murder in the course of a felony and has previously been convicted of a prior violent felony.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ADMITTING STATEMENTS HILTON MADE TO LAW ENFORCEMENT BECAUSE THE STATEMENTS INCLUDED REFERENCES TO INADMISSIBLE COLLATERAL CRIMES

In this claim, Hilton alleges the trial judge erred in admitting statements that Hilton made to law enforcements officers. Hilton argues this evidence included statements concerning other murders (or crimes) and as such constituted improper collateral crime evidence. In particular, Hilton challenges the admission of his statement that he began "hunting" in September 2007.

Hilton claims his statement is a reference to other crimes that are irrelevant to any issue at trial. Hilton also alleges the statements were inadmissible because the only relevance was to show Hilton's propensity to commit crimes.

The State disagrees. Hilton's statement that he began "hunting" in September was relevant in the guilt phase to prove premeditation and in the penalty phase to prove the CCP aggravator.

Below, Hilton challenged the admissibility of this particular statement. After hearing argument on the motion, the trial judge found Hilton's statement was admissible. (TR Vol. 30, page 693).

The trial judge found that "the fact that he says he started hunting in September [does not] necessarily implicate[] that he committed other crimes." (TR Vol. 30, page 691). The Court went on

to conclude that Hilton's statements that he started looking for victims, "does not necessarily rule out or imply that Ms. Dunlap was not his first victim." (TR Vol. 30, page 693). [10]

The trial judge also found Hilton's statement to be "highly probative" and "highly relevant." (TR Vol. 30, page 693). Even though the trial judge rejected the notion that Hilton's statements constituted collateral crime evidence, the trial judge, nonetheless, balanced the probative value of the evidence against the danger of unfair prejudice pursuant to Section 90.403, Florida Statutes. The trial judge found the danger of unfair prejudice did not outweigh the probative value of the evidence. (TR Vol. 30, page 693).

The standard of review is an abuse of discretion. Conde v. State, 860 So.2d 930 (Fla. 2003). A trial court's decision does not constitute an abuse of discretion "unless no reasonable person would take the view adopted by the trial court." Scott v. State, 717 So.2d 908, 911 (Fla.1998).[11]

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[10] Hilton alleged at a hearing on his motion to exclude the statement that his statement that he started hunting in September suggests that he was stalking. (TR Vol. 30, page 693).

[11] In reviewing this claim, this Court must, as must the litigants, guard against viewing this statement through the eyes of ones who suspect that Hilton is a serial killer. Instead, the statement must be viewed through the eyes of the lay jury who, at least at the guilt phase, was not presented with any evidence of other crimes.

In determining whether the trial judge abused his discretion, this Court must resolve two core issues. The first issue requires this Court to determine whether Hilton's statement constitutes evidence of collateral crimes at all. The State suggests that the answer to this question is NO.

Nothing about Hilton's statement, that he began hunting in September 2007, implies Hilton was successful before December 1, 2007 when he kidnapped and then murdered Cheryl Dunlap. As such, this Court should find the statement does not constitute collateral crime evidence at all. Moreover, because the statement was highly relevant as evidence of premeditation in both phases of Hilton's capital trial, the trial judge committed no error in admitting the evidence.

If this Court were to conclude that Hilton's statements constitute collateral crime evidence, the next question is whether this statement was admissible anyway. The answer is YES.

Collateral crime evidence is governed by a rule of admissibility that is a rule of inclusion rather than exclusion. That is, collateral crime is admissible unless the evidence is relevant solely to prove bad character or propensity. *Section 90.404(2), Florida Statutes*. Collateral crime evidence is admissible when offered to prove a relevant material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

mistake or accident. The test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy. Durousseau v. State, 55 So.3d 543 (Fla. 2010).

In this case, the State charged Hilton with first degree murder and proceeded on theories of both premeditated murder and felony murder. The State also sought to prove the murder was cold, calculated and premeditated (CCP). Hilton's statement that he began hunting some three months before the murder was relevant to prove premeditation.

This Court has on many occasions deemed collateral crime evidence admissible to prove premeditation. This is so even when the evidence was not inferential as it was here but, instead, direct and unequivocal evidence that the defendant had committed other crimes, including murder.

For instance, in Durousseau v. State, 55 So.3d 543 (Fla. 2010), this Court ruled that evidence Durousseau murdered three other women was admissible to prove identity and premeditation. Additionally, this Court went on to rule the evidence satisfied the 403 balancing test because the probative value of the collateral crime evidence substantially outweighed any danger of unfair prejudice. Id. at 554. 12

12 If requested, the court must give a limiting instruction on the permissible use of collateral crime evidence. The limiting instruction is a proper consideration of whether the evidence meets the 403 balancing test. The State did not find anywhere in

In this case, the so called collateral crime evidence was admissible because it was relevant to prove that Hilton premeditated the murder of Cheryl Dunlap. Likewise, the evidence passed the 403 balancing test. When balancing the probative value of the evidence against the danger of unfair prejudice, it is necessary to first evaluate the relevance and probative value of the evidence sought to be offered. If evidence is highly relevant, as the trial court found in this case, it follows that the danger of unfair prejudice must be extremely high to tip the scales to inadmissibility. In this case, because Hilton's statement was highly relevant to an element in dispute and because the jury would have to draw an inference from Hilton's statement to conclude he had hunted successfully before he found Cheryl Dunlap, the trial court committed no error in admitting Hilton's statement. Durousseau v. State, 55 So.3d 543, 551-554 (Fla. 2010); Conde v. State, 860 So.2d 930, 945 (Fla.2003) (upholding admission of Williams rule evidence where defendant was on trial for strangulation of a prostitute and the State introduced evidence of five other murders as relevant to identity, intent, and premeditation); Bradley v. State, 787 So.2d 732, 741–42 (Fla.2001)

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the record where the instruction was requested. Durousseau v. State, 55 So.3d 543 (Fla. 2010). Certainly, no such instruction was requested at the hearing where the trial court made the final determination of admissibility. (TR Vol. 30, page 693).

(affirming admission of collateral crime evidence that was relevant to prove intent and premeditation).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT NON-STATUTORY AGGRAVATION THROUGH THE TESTIMONY OF DR. GREG PRICHARD

In this claim, Hilton alleges the trial court erred in allowing the State to introduce non-statutory aggravation through the testimony of Dr. Greg Prichard. The trial court overruled Hilton's objections to Dr. Prichard's testimony.

The court noted that although some of what Dr. Prichard testified to would normally be *verboten*, it was not in this case because the theme of the defense's experts was that Mr. Hilton did not do anything wrong until these murders and the sudden change in character was created by Ritalin and medical problems caused by brain damage. The court ruled this testimony opened the door to Dr. Prichard's testimony. (TR Vol. 41, page 607). The trial court was correct.

The defense's theory during the penalty phase was that Hilton was brain damaged and suffered from schizoaffective disorder. Additionally, Hilton offered evidence that his use of Ritalin, prescribed to him by a doctor in May 2005 through July 2007, was the trigger to the murder. (TR Vol. 38, page 88). Indeed, one of Hilton's experts, Dr. Wu, went so far as to conclude that without

the Ritalin, Hilton would not have committed the murder. According to Dr. Wu, Hilton was "never violent until he started to get on Ritalin." (TR Vol. 38, page 129). 13

Another witness, Dr. Abbey Strauss, testified that Hilton had never killed anyone until he was 60 years old. Accordingly, the question was, from a psychiatric standpoint, what changed? (TR Vol. 39, page 239). Dr. Strauss told the jury that Hilton may have been involved in "minor scrapes" but nothing that rose to the level of these horrible crimes. (TR Vol. 39, page 239). Dr. Strauss testified that, in his opinion, what had changed about Hilton was that Hilton was put on Ritalin and Effexor which made him impulsive and probably delusional at times. (TR Vol. 39, page 240). Dr. Strauss told the jury that "it was the situation, the culmination of the situation mostly triggered by the inappropriate prescriptions of the Ritalin and the Effexor that just pushed him over the edge. (TR Vol. 39, page 260). Dr. Strauss opined that both statutory mental mitigators applied because the medication that Hilton was prescribed induced the change in his mental status. (TR Vol. 39, page 260-261)

Dr. Prichard's testimony did not introduce improper non-statutory aggravation into the case. Instead, Dr. Prichard's testimony was proper rebuttal evidence. Accordingly, the trial

13 During cross examination, Dr. Wu admitted Hilton had been aggressive before Ritalin. (TR Vol. 38, pages 144-146).

court committed no error in allowing Dr. Prichard to testify in rebuttal to Hilton's expert witnesses.

This Court has drawn the distinction between improper non-statutory aggravation and proper rebuttal evidence. In Zack v. State, 911 So.2d 1190 (Fla. 2005), the defendant presented expert testimony that Zack killed his victim because she pushed his "hot button." In rebuttal, the State called Dr. Harry McClaren. Dr. McClaren testified that Zack hated women. This Court found that because the State offered this evidence in rebuttal to the defendant's theory of the murder, Dr. McClaren's testimony was properly admitted. Zack v. State, 911 So.2d at 1209.

The same is true in this case. Hilton's theory of defense was that "Ritalin made me do it." In support of that theory, Hilton presented experts who opined that Ritalin was the trigger for the murders because, according to them, up until the age of 60, Hilton had not engaged in such violent behavior. As such, the State was entitled to present evidence that Hilton had been violent and aggressive long before he was prescribed Ritalin. Moreover, just as Hilton was, the State was entitled to present the factual bases upon its expert based his diagnosis.

In claiming the trial judge erred in allowing much of Dr. Prichard's testimony to come before the jury, Hilton cites to several cases decided by this Court. All of them are distinguishable from the case at bar.

Hilton first cites to Geralds v. State, 601 So.2d 1157 (Fla. 1992) (IB 54). In Geralds, this Court found it was improper for the prosecution to impeach a lay witness, Dana Wilson, who testified that Geralds had been a good neighbor who played well with Wilson's children. On cross-examination, the State attempted to impeach Mr. Wilson by asking him whether he knew about Gerald's eight felony convictions. This Court ruled the State improperly introduced inadmissible evidence of non-statutory aggravating circumstances in the guise of impeachment of a lay witness. Geralds v. State, 601 So.2d at 1162.

Hilton also cites to Perry v. State, 801 So.2d 78 (Fla. 2001). In Perry, the State, in its case in aggravation, presented the testimony of the defendant's ex-wife, who testified about the numerous instances of domestic violence. Id. at 90. While the State alleged that defense counsel "opened the door" to this testimony during the guilt phase of the trial by claiming the defendant was nonviolent, the record did not support this claim. This Court ruled that the ex-wife's testimony regarding the defendant's prior violent acts, all unrelated to the crime at issue and not offered in support of any aggravating circumstance, constituted impermissible non-statutory aggravation, not "anticipatory rebuttal." Id.

Next, Hilton cites to Hitchcock v. State, 673 So.3d 859 (Fla. 1996). In Hitchcock, the State elicited testimony from the

defendant's sister, during the State's case in aggravation, that Hitchcock had sexually abused her. This Court found the testimony constituted impermissible non-statutory aggravation.

Finally, Hilton cites to Robinson v. State, 487 So.2d 1040 (Fla. 1986). As in Geralds, Robinson's lay witnesses testified, essentially, that Robinson was a good guy. The prosecutor asked these witnesses whether they were aware that Robinson had committed other crimes after the murder, including rape. This Court found the trial judge erred in overruling the defendant's objections.

All of the cases to which Hilton cites are not the least bit like the case at bar. In Geralds, Perry, Hitchcock and Robinson, the state introduced non-statutory aggravation into the case through lay witnesses, none of whom offered an opinion about the murder or its triggers. In contrast, the State put on Dr. Prichard in rebuttal to the defense's mitigation witnesses who testified that in their view, the defendant had brain damage, a major mental illness and that "Ritalin made him do it." *See* Zack v. State, 911 So.2d 1190, 1209 (Fla. 2005). This Court's decision in Zack supports the admission of Dr. Prichard's testimony and all of the cases to which Hilton cites are clearly distinguishable. Accordingly, this Court should find the trial court committed no error in allowing Dr. Prichard to testify.

Even if this Court were to find the trial court erred in allowing some of Dr. Prichard's testimony, any error is harmless.

The prosecutor did not argue that the jury should consider any of Hilton's prior criminal acts as statutory aggravation. Moreover, Hilton's own experts testified about some of Hilton's prior criminal conduct. For instance, Dr. Wu testified, without objection, that Hilton had shot his step-father at the age of 14, and had been involved in arson and an aggravated assault. (TR Vol. 38, page 144; TR Vol. 39, page 192). Dr. Golden also told the jury that Hilton stole from people, got arrested, was vagrant, cheated people, used multiple illegal drugs and he did things he clearly should not have done. (TR Vol. 39, page 193, 204).

Finally, the trial court properly instructed the jurors as to the aggravating factors they could consider. None of the aggravators upon which the jury was instructed included any of the alleged non-statutory aggravators about which Hilton complains. Accordingly, any error in allowing Dr. Prichard to testify, as to the underlying acts that caused him to reach his professional opinions, was harmless. Zack v. State, 911 So.2d 1190, 1209 (Fla. 2005).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN EXCUSING THE STATE'S MENTAL HEALTH EXPERT, DR. GREG PRICHARD, FROM THE SEQUESTRATION RULE, IN PERMITTING DR. PRICHARD TO RENDER AN OPINON ON THE OPINIONS OF THE DEFENDANT'S MENTAL HEALTH EXPERTS AND TO DENY THE DEFENDANT'S REQUEST FOR A JURY INSTRUCTION CONCERNING THE TESTIMONY OF THE STATE'S MENTAL HEALTH EXPERT

In this claim, Hilton makes three allegations of error: (1) the trial judge erred in excusing Dr. Prichard from the sequestration rule; (2) the trial judge erred in permitting Dr. Prichard to testify that he disagreed with the diagnosis and opinions of the defendant's mental health experts and (3) the trial judge erred in denying the defendants request for a jury instruction concerning the state's mental health expert. The trial court committed no error.

A. The Sequestration Issue

Because the state filed its notice of intent to seek the death penalty more than 45 days after arraignment, the defendant filed a motion requesting an order precluding the state's expert from examining Hilton pursuant to Rule 3.202, Florida Rules of Criminal Procedure. (TR Vol. 10, pages 1870-8172). 14 The court granted the motion. (TR Vol. 10, pages 1931-1932).

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14 Rule 3.202, Florida Rules of Criminal Procedure allows the state to choose a mental health expert to examine the defendant before the penalty phase. The rule allows such an examination if the defendant gives notice of its intent to present expert testimony of mental mitigation. The caveat is, that in order to take advantage

As such, before the penalty phase began, the State asked the court to allow Dr. Prichard to remain in the courtroom to assist the state and to possibly testify in rebuttal. The defense objected. (TR Vol. 38, page 33). The court overruled the objection and permitted Dr. Prichard to remain in the courtroom. (TR Vol. 38, page 33).

Generally, once the witness sequestration rule has been invoked, a trial court should not permit a witness to remain in the courtroom during proceedings when he or she is not on the witness stand. Randolph v. State, 463 So.2d 186, 191-92 (Fla.1984). The rule of sequestration is not an absolute rule, however, and the trial court has discretion to determine whether a particular witness should be excluded from the rule. Id. Indeed, Section 90.616, Florida Statutes, permits the trial court to excuse a witness from the sequestration rule if the person's presence is shown by the party's attorney to be essential to the presentation of the party's cause. This exception to the sequestration rule set forth in Section 90.616, Florida Statutes, is applied most commonly to expert witnesses because "experts are testifying to their opinions rather than to factual matters." *Charles W. Ehrhardt, Florida Evidence § 616.1, at 510 (1998 ed.*). *See also* Knight v.

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of the rule, the State must give notice of its intent to seek the death penalty within 45 days of arraignment. Nothing in the rule suggests the trial judge has discretion to excuse the 45 day rule for good cause shown or to inquire whether the defendant suffered

State, 746 So.2d 423, 430 (Fla. 1998). The trial court has wide discretion in determining which witnesses are essential. Knight v. State, 746 So.2d at 430.

In this case, Dr. Prichard was an expert witness whose presence in the courtroom, under the circumstances, was essential to the State's ability to rebut mental mitigation that Hilton offered at the penalty phase of his capital trial. The defendant called four expert witnesses and the only meaningful way for the State to rebut the defendant's mental mitigation was to have Dr. Prichard present in the courtroom. Burns v. State, 609 So.2d 600 (Fla. 1992). The trial court did not abuse its wide discretion in exempting Dr. Prichard from the rule of sequestration because having Dr. Prichard in the courtroom was the only meaningful way to level the playing field.

Even if the trial court erred in allowing Dr. Prichard to remain in the courtroom, any error is harmless. The purpose of the rule of sequestration is to avoid a witness coloring his or her testimony by hearing the testimony of another, thereby discouraging fabrication, inaccuracy, and collusion. Knight v. State, 746 So.2d 423 (1998). Hilton makes no allegation that Dr. Prichard's testimony was colored by the testimony of the defendant's four mental health experts.

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any prejudice from the "late" notice.

Additionally, Dr. Prichard was not a fact witness. Instead, he was offered only to render an opinion. Dr. Prichard did not directly rebut any factual assertions made by lay witnesses during the penalty phase, including evidence of Hilton's difficult childhood and his history of drug abuse, including Ritalin abuse. Indeed, Dr. Prichard even agreed with Hilton's experts that Hilton was anti-social. (TR Vol. 41, page 577).

Further, the jury was aware that Dr. Prichard had listened to the testimony of the other witnesses during the penalty phase. On cross-examination, Hilton elicited Dr. Prichard's testimony that he has "sat through the entire penalty phase, in this case … and handed notes to Mr. Meggs." (TR Vol. 42, page 633).

Moreover, the defense was permitted to tell the jury, in the form of a question, that Dr. Prichard had not personally examined Hilton because "the State violated the rules." (TR Vol. 42, page 638). Indeed, one persistent theme of the defendant's cross-examination was that Dr. Prichard had not personally interviewed Hilton. (TR Vol. 42, pages 635, 636, 637, 638,639, 643, and 644).

Because Dr. Prichard did not directly refute the factual testimony of the lay witnesses during the penalty phase but merely offered opinions that differed from the defendant's experts, admitted he had observed the testimony of other witnesses during the penalty phase, and because there is no suggestion that either Dr. Prichard's opinions or factual predicates upon which his

opinions were based would have been different if he had not been allowed direct access to the other testimony elicited during the penalty phase, any error is harmless. Hernandez v. State, 4 So.3d 642, 664-665 (Fla. 2009).

B. The opinion issue

In this part of his third claim, Hilton alleges the trial judge erred in allowing Dr. Prichard to offer an opinion about the diagnoses offered by the defendant's experts. Hilton claims it is improper to comment on the credibility of another witness. While that may be true, this is not what happened in this case.

Hilton cites to several cases, none of which support reversal for a new penalty phase. First, Hilton cites to Caban v. State, 9 So.3d 50 (Fla. 5th DCA 2009). In Caban, the Fifth District Court of Appeal ruled that questions that seek to elicit an expert opinion critical of the validity of an opposing expert's opinions are improper. The court went on to say that an expert may properly explain his opinion on an issue in controversy by outlining the claimed deficiencies in the opposing expert's methodology, so long as the expert does not attack the opposing expert's ability, credibility, reputation or competence.

Hilton next cites to Carver v. Orange County, 444 So.2d 452 (Fla. 5th DCA 1984). In Carver, the Fifth District Court of Appeal ruled that it was improper for the trial court to allow counsel for Orange County to elicit testimony from its own expert as to the

ability of the plaintiff's expert. According to the Court, it is improper to impeach an expert witness by eliciting from another expert witness what he thinks of that expert. Carver, 444 So.2d at 454.

Finally, Hilton cites to this Court's opinion in Schwab v. Tolley, 345 So.2d 747 (Fla. 1977). In a medical malpractice case, this Court noted that it was improper to elicit from one expert what he thinks of another. This Court observed that the proper method for impeaching an expert's opinion is by the introduction of contrary opinion based on the same facts. Id. at 754.

In this case, the trial judge committed no error because Dr. Prichard did not tell the jury what he thought of Drs. Wu, Golden, Strauss, or Morton. Nor did he comment on their credibility, competence, ability or their reputation. Instead, Dr. Prichard testified that he disagreed with the various diagnoses offered by Hilton's experts. He also offered his own diagnosis. As noted by this Court in Schwab, that is exactly what an expert is permitted to do. *See e.g.* Hernandez v. State, 4 So.3d 642 (Fla. 2009) (noting that Dr. McClaren testified that he disagreed with Drs. Bingham and Turner on whether Hernandez's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and noting as well that Dr. McClaren also disagreed with Dr. Turner regarding whether the crime was committed while Hernandez was under the influence of

extreme mental or emotional disturbance). The trial court committed no error.

Even if it was error to allow Dr. Prichard to testify that he disagreed with the diagnoses offered by Hilton's mental health experts, any error is harmless. Even assuming the prosecutor could not elicit testimony, directly, that Dr. Prichard disagreed with Hilton's mental health experts, the State could do so indirectly. For example, it would be perfectly proper to ask Dr. Prichard whether he believed Hilton had schizoaffective disorder. It would have been perfectly proper for Dr. Prichard to say no. Likewise, it would have been perfectly proper for the State to ask Dr. Prichard whether he believed that Hilton was under an extreme emotional disturbance at the time of the crime or whether Hilton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. It would have been perfectly proper for Dr. Prichard to say no and why. Accordingly, any error in allowing the state to ask whether Dr. Prichard agreed or disagreed with a particular diagnosis is harmless.

C. The instruction issue

In this final sub-claim of Issue III, Hilton alleges the trial judge erred in denying defense counsel's request for an added instruction to the standard expert witness instruction. Hilton requested the court to add a line to the standard "expert witness"

instruction advising the jury that experts cannot testify about the credibility of other experts. (TR Vol. 42, page 616). The trial judge denied the request ruling that it would not assist the jury in evaluating the experts' testimony. The court found that, as such, it was not an appropriate instruction. (TR Vol. 42, page 617).

The standard of review is an abuse of discretion. Stephens v. State, 787 So.2d 747, 755-756 (Fla.2001). The standard jury instructions are presumed correct and are preferred over special instructions. Id. When the defendant avers the standard instruction is insufficient and the trial court disagrees, the defendant has the burden of demonstrating, on appeal, that the trial court abused its discretion in giving standard instructions.

Hilton has not demonstrated an abuse of discretion. This is true for one simple reason. Dr. Prichard did not opine on the credibility of any of Hilton's witness. Instead, Dr. Prichard simply disagreed with Hilton's experts' opinions and then offered his own opinion that Hilton is a psychopath. This is precisely what an expert does; offer an opinion. Because Dr. Prichard did not offer an opinion on the credibility of any of Hilton's mental health experts, the trial judge committed no error in refusing Hilton's request for a special instruction.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS HAC AND CCP AND IN RELYING IN PART ON THE FACTS OF A COLLATERAL CRIME TO PROVE THE AGGRAVATORS IN THIS CASE

In this claim, Hilton alleges the trial court erred in finding the murder was especially heinous, atrocious, or cruel (HAC). Hilton also argues the trial judge erred in finding the murder was cold, calculated, and premeditated (CCP). (IB 68-73).

The standard of review is competent, substantial evidence. Guardado v. State, 965 So.2d 108, 115 (Fla.2007). "When reviewing a trial court's finding of an aggravator, 'it is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt-that is the trial court's job.' " Aguirre-Jarquin v. State, 9 So.3d 593, 608 (Fla.2009) (quoting Willacy v. State, 696 So.2d 693, 695 (Fla.1997). Rather, it is this Court's task on appeal "to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Id. (quoting Willacy, 696 So.2d at 695).

A. The murder was HAC

In his sentencing order, the trial court found the murder was HAC. The trial court found:

> *..It should be noted that "[t]he intention of the killer to inflict pain on the victim is not a necessary element*

of the aggravator." Guzman v. State, 721 So.2d 1155, 1160 (Fla. 1998). "[T]he HAC aggravator may be applied to torturous murders where the killer was utterly indifferent to the suffering of another." Id. at 1160. Defendant's indifference to Ms. Dunlap's suffering is best illustrated by the calm and callous way he describes his method of killing to the Georgia authorities. It is clear from those statements that he views his victims as nothing more than prey to be hunted, used to suit his purposes, and then simply discarded.

The Florida Supreme Court "has held that the actions of the defendant preceding the actual killing are relevant to this aggravator .... [T]he fear and emotional strain of the victim from the events preceding the killing may contribute to its heinous nature [cites and internal quotation marks omitted]. Accordingly, the HAC aggravating circumstance has been repeatedly upheld where the victims were acutely aware of their impending deaths [cites and internal quotation marks omitted]." Hertz v. State*, 803 So.2d 629, 651-652 (Fla. 2001); and Looney v. State, 803 So.2d 656, 680 (Fla. 2001). Great weight should be given this aggravating circumstance because of the length of time the victim was bound and because of her cognition of impending death. Swafford vs. State, supra.; Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986); Lightbourne v. State, 438 So.2d 380, 391 (Fla. 1983); Vaught v. State, 410 So.2d 147, 151 (Fla. 1982); Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979); and James vs. State, 695 So.2d 1229, 1235 (Fla. 1997).*

There is no real hard evidence as to exactly when Ms. Dunlap was finally murdered. However, there are a number of circumstances that establish that she was alive for an extended period of time. The medical examiner was unable to establish a definitive time of death and acknowledged some uncertainty about the time of death. However, his best estimate was that she died between December 5, 2007, and December 8, 2007 (This would be four to seven days in captivity). Defendant was over heard by a correctional officer telling another inmate that he kept Ms. Dunlap alive for "hours or days." The "home video" seized from the Defendant's camera dated December 3, 2007, is in large part very difficult to understand, however, there are audible comments that suggest that the Defendant just committed the murder and is in the process of hiding the

evidence of his crime. Since the Defendant's motive in kidnapping Ms. Dunlap was to gain access to her bank account with her ATM card, it is certainly reasonable to believe that he would have kept her alive long enough to make sure she had given him the correct PIN number. The bank account was not accessed until December 2, 2007, about 10:00 p.m.

We also do not know a great deal about under what circumstances she was held in captivity. However, we do know that she suffered some abuse during this time. The medical examiner testified to a large, deep bruise to Ms. Dunlap's back which shows she suffered some type of painful trauma prior to her being murdered.

Furthermore, where there is some evidence to support an aggravating factor in the murder for which the Defendant is to be sentenced, the Court may rely on the circumstances of a collateral crime to support the finding of an aggravating circumstance when it tends to prove a material fact necessary to establish an aggravating circumstance. Conde v. State, 860 So.2d 930, 954 (Fla. 2003). There was evidence of a collateral crime introduced in the penalty phase. Defendant's statements to the Georgia authorities regarding the abduction and murder of Meredith Emerson tends to prove that Defendant adheres to a particular modus operandi when he "hunts", kidnaps, and murders his victims. It is reasonable to believe that Ms. Dunlap and Ms. Emerson were treated similarly by the Defendant.

Taking all of this into consideration, it is clear Ms. Dunlap endured great fear and emotional strain for an extended period of time before the Defendant decided to murder her. This emotional strain must be considered in determining the presence of the HAC aggravator. Clark v. State, 443 So.2d 973 {Fla. 1983), Cook v. State, 542 So.2d 964 (Fla. 1989), Preston v. State, 607 So.2d 404 {Fla. 1992).

The Court finds this aggravating circumstance to have been established beyond a reasonable doubt. This aggravating circumstance is given great weight.

(TR Vol. 12, pages 2351-2354).

Hilton claims the HAC aggravator is not supported by competent, substantial evidence. Hilton also alleges the trial judge relied on the "unsupported" assumption that the victim was in fear of impending death. (IB 69). Contrary to Hilton's arguments, there is competent substantial evidence to support the HAC aggravator. As such, the trial judge committed no error in finding this murder was especially heinous, atrocious or cruel.

A murder is especially heinous, atrocious, or cruel if the murder is conscienceless or pitiless and unnecessarily torturous to the victim. *See* Rogers v. State, 783 So.2d 980, 994 (Fla.2001). The HAC aggravator applies in physically and mentally torturous murders. *See* Barnhill v. State, 834 So.2d 836, 850 (Fla.2002) (citing Williams v. State, 574 So.2d 136 (Fla.1991)). This Court has consistently held that fear, emotional strain, and terror of the victim during the events leading up to the murder may make even an otherwise quick death especially heinous, atrocious, or cruel." James v. State, 695 So.2d 1229, 1235 (Fla.1997); *see also* Russ v. State, 73 So.3d 178 (Fla. 2011); Francis v. State, 808 So.2d 110, 135 (Fla.2001); Farina v. State, 801 So.2d 44, 53 (Fla.2001).

In this case, Hilton kidnapped the victim and, by his own admission, held her captive for hours or days. (TR Vol. 34, page 1245). The medical examiner testified that in his best expert opinion, Ms. Dunlap's body had lain in the forest for 7-10 days.

(TR Vol. 28, page 572). Given that Ms. Dunlap was kidnapped on December 1, 2007 and her body found on December 15, 2007, the medical examiner's best expert opinion supports a conclusion that Ms. Dunlap was held captive for four to seven days before Hilton murdered her. Even if Hilton murdered her earlier than that, it is almost certain that Ms. Dunlap was alive and held captive for at least 30 hours. Hilton made his first ATM withdrawal, from Ms. Dunlap's account, on December 2, 2007 at 10:00 in the evening. The trial court reasonably concluded that Hilton would have kept Ms. Dunlap alive at least for a period of time sufficient to ensure the PIN, she must have been forced to disclose, was valid.

It borders on the absurd, indeed crosses over the border by about 100 miles, to suggest that there is no evidence to support a finding that Ms. Dunlap was in fear of impending death. Indeed, this Court has embraced the notion that when examining evidence to determine whether a victim suffered from enormous fear, emotional strain, and terror, it is proper to apply common-sense inferences to the evidence. Lynch v. State, 841 So.2d 362, 370 (Fla. 2003). *See also* Hernandez v. State, 4 So.3d 642, 669 (Fla.2009)(The victim's mental state may be evaluated in accordance with common-sense inferences from the circumstances).

In this case, the evidence and the common-sense inferences from that evidence, provides competent, substantial evidence that Ms. Dunlap suffered hours if not days of abject terror, fear, and

emotional strain. Hilton kidnapped Ms. Dunlap from a place of perceived safety and took her by force to a place where no one could help her. The medical examiner found a large bruise on her back that was inflicted prior to her death. Ms. Dunlap was alone, injured, and surely terrified for an extended period of time before Hilton murdered her. There is competent substantial evidence to support the HAC aggravator and this Court should affirm. Baker v. State, 71 So.3d 802, 820-821 (Fla. 2011)(finding sufficient evidence to support the HAC aggravator even though the victim was executed quickly by a single gunshot wound to the forehead when there was evidence that the victim was wounded during the initial attack, kidnapped, and then forced to remain with her captors at gunpoint for several hours before being driven to a rural area and shot to death).

B. The murder was cold, calculated and premeditated

Hilton claims the CCP aggravator is not supported by competent, substantial evidence. Hilton also complains the trial judge improperly relied on the circumstances surrounding the murder of Meredith Emerson to support the CCP aggravator.

Contrary to Hilton's arguments, there is competent substantial evidence to support the CCP aggravator. Additionally, the trial

judge committed no error in relying on evidence of a collateral crime to support the CCP aggravator.15

In finding the CCP aggravator, the trial court found:

> *..This aggravating factor focuses on Defendant's state of mind. This aggravator requires proof beyond a reasonable doubt that the killing was the product of cool and calm reflection involving a careful plan or prearranged design to commit murder. The Defendant must have exhibited a heightened premeditation without pretense of moral or legal justification. Jackson v. State, 648 So.2d 85(Fla. 1994).*
>
> *This aggravator was clearly established by the State. Nothing illustrates this better than the Defendant's own statements. Those statements, taken in their totality, illustrate an extraordinary amount of cool and calm reflection. His approach to these crimes was very matter of fact. He needed money, so he had to go hunting. He needed to avoid arrest, so he had to kill. There was no anger, panic, or emotion associated with his actions. And, the manner in which Defendant dismembered and disposed of the body further evidence that Defendant's actions were a product of calm reflection.*
>
> *Defendant had a prearranged plan to commit the murder of Cheryl Dunlap. This is evidenced by several facts in evidence. Cheryl Dunlap was a stranger to Defendant. He "hunted" her. He had tools of his trade in the ready; including zip ties, duct tape, chains, and BB guns. He fashioned a homemade mask to disguise himself at the A TM machine. He took the victim to a remote location(s) which he had thoroughly scouted beforehand. He dismembered the body and burned the head and hands to prevent identification and collection of forensic evidence. In short, he did many things which would have required a methodical period of planning and reflection prior to*

15 To some extent, the trial court relied on the collateral crime evidence (Meredith Emerson's murder) to support the HAC aggravator as well. Accordingly, because the trial court properly considered the evidence to support the CCP aggravator, he also properly considered it to find the HAC aggravator.

> *this murder showing a "heightened premeditation." Preston v. State, 444 So.2d 939 (Fla. 1984).*
>
> *In Swafford v. State, 533 So.2d 270 (Fla. 1988), the court stated: "The cold, calculated, premeditated murder, committed without pretense of legal or moral justification, can also be indicated by circumstances showing facts such as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course." 533 So.2d at 277. The murder of Cheryl Dunlap was a senseless act for which no moral or legal justification of any kind has been offered to this Court. The circumstances and evidence show that this murder was calmly planned and executed, and that it was in no way provoked by Ms. Dunlap.*
>
> *The Court finds this aggravating circumstance to have been established beyond a reasonable doubt. This aggravating circumstance is given great weight.*

(TR Vol. 12, pages 2354-2356).

A murder is CCP if: (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), (3) the defendant exhibited heightened premeditation (premeditated), and (4) the defendant had no pretense of moral or legal justification. Jackson v. State, 648 So.2d 85, 89-90 (Fla. 1994). Contrary to Hilton's suggestion, the evidence in this case, was more than sufficient to support the CCP aggravator.

The "cold" element of CCP is generally found wanting only in "heated" murders of passion in which the loss of emotional control

is evident from the facts. There is no evidence, or even a suggestion, that Hilton murdered Ms. Dunlap as a result of a loss of control. Indeed, the evidence supports a conclusion that every aspect of Hilton's crime was calmly and coldly planned and executed.

Hilton had a careful plan or prearranged design to commit the murder before her kidnapped Cheryl Dunlap from Leon Sinks. Hilton told Georgia and Florida law enforcement authorities that he "started hunting" in September 2007. (TR Vol. 34, page 1184). Additionally, Hilton carried tools of his trade with him including, zip ties, chains, a knife and sheath, police batons, a bayonet, duct tape, medical tape, and two BB guns. Although Hilton claims these items are not necessarily tools of a murderer, the fact the evidence can support a contrary view does not defeat a finding of CCP. Moreover, evidence that Hilton carefully planned the murder so he could, in his words, pull it off on a busy highway and staged Ms. Dunlap's car to make it look like a breakdown is evidence supporting the heightened premeditation factor. And not even Hilton claims there was a pretense of moral or legal justification.

Even if this were not enough, the trial court properly considered evidence from the murder of Meredith Emerson. In Conde v. State, 860 So.2d 930, 954 (Fla. 2003), this Court found that a trial court commits no error in considering collateral crime evidence when there is other evidence supporting the aggravator and

the collateral crime tends to prove a material fact necessary to establish an aggravating factor.

In confessing to the Emerson murder, Hilton outlined his approach to murder under circumstances remarkably similar to the Dunlap murder. Hilton told Georgia Bureau of Investigation (GBI) officials that he went to Blood Mountain to “hunt” because it’s the most used day hiking trail in the State of Georgia. According to Hilton, Blood Mountain is a good place because there is a huge selection. (TR Vol. 38, pages 69-70). Hilton was broke so he was going to have to kill somebody. (TR Vol. 38 page 69).

Hilton kidnapped Ms. Emerson with a knife or bayonet and told her to move down the trail. When Ms. Emerson fought and got the better of Hilton, Hilton deployed the police baton. Eventually, he finally gained control of her. (TR Vol. 38, pages 71-72). Hilton zip-tied Ms. Emerson to a tree while he cleaned up the crime scene.

Hilton also used the BB gun. Hilton told Ms. Emerson that he would “shoot her ass” if she tried to run. (TR Vol. 38, page 78).

After he got Ms. Emerson off the mountain, Hilton kept Ms. Emerson in his van chained to the base of the driver’s seat. She was chained so she could not see out of the vehicle. (TR Vol. 38, page 57).

Hilton also raped Ms. Emerson. Hilton told the GBI agents that he raped Ms. Emerson because “she owed it to him due to the fact he had spent so much money driving around trying to obtain money from

her ATM account and kept giving him the wrong PIN number." (TR Vol. 38, page 58). Hilton kept Ms. Emerson captive for three and ½ days. (TR Vol. 28, page 64).

Ms. Emerson was doomed from the beginning. (TR Vol. 38, page 67). According to Hilton, once you've taken someone, "you either kill them or get caught. If you release them, you are going to get caught." (TR Vol. 38, page 66).

Hilton also told the agents that he is as "calm as can be." According to Hilton, he is a very experienced fighter. (TR Vol. 38, page 73). Hilton bragged about his professional approach to killing. Hilton told the GBI agents that part of his professionalism and training is the calmness he has. (TR Vol. 38, page 76). It is a combination of experience and knowledge. (TR Vol. 38, page 76). The secret of Hilton's success is "planning, training, and equipment." (TR Vol. 38, page 76).

The trial judge's finding of CCP is supported by competent, substantial evidence introduced in the guilt phase of Hilton's capital trial. If that were not enough, the trial judge properly considered the evidence from the Emerson murder because that evidence tended to prove material facts that established the CCP aggravator. Conde v. State, 860 So.2d at 954. Considered together, there is more than competent substantial evidence to support the CCP aggravator. This Court should affirm.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN REJECTING THE IMPAIRED CAPACITY MITIGATOR

In his fifth claim, Hilton alleges that the trial judge erred in rejecting the mitigating circumstances that Hilton's capacity for conform his conduct to legal requirements was impaired. (IB 74). In his order, the trial judge explained:

> *The defense presented the testimony of Dr. Charles Golden, a board certified psychologist, and Dr. Abbey Strauss, a psychiatrist, who both opined that Defendant's ability to conform his conduct to the law was substantially impaired. The state presented the testimony of Dr. Gregory Prichard, a psychologist, who opined to the contrary. The Court finds that Dr. Prichard's testimony was more credible and more consistent with the other evidence in the case as to this point. The Court finds that this factor in mitigation was not proven*.

(TR Vol. 12, pages 2356-2357).

The standard of review is competent substantial evidence. This Court will not disturb a trial court's rejection of a mitigating circumstance if the record contains competent, substantial evidence to support the trial court's rejection of the mitigation. Durousseau v. State, 55 So.3d 543, 560–61 (Fla.2010

In presenting his argument to this Court, Hilton acknowledges that the trial judge was presented with conflicting evidence on the "capacity" mitigator. Drs. Golden and Strauss opined that Hilton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially

impaired. Dr. Prichard disagreed and opined that, in his view, Hilton both knew the criminal nature of his conduct and could have conformed his behavior to the requirements of the law but simply chose not to. (TR Vol. 41, pages 600-601).

Nonetheless, Hilton's argument on this issue seems to center on two primary complaints. First, Hilton complains the trial judge erred when found Dr. Prichard more credible than Drs. Golden and Strauss. Hilton avers the trial judge was wrong to find that Dr. Prichard was a more credible witness because Drs. Golden and Strauss had actually examined Hilton, while Dr. Prichard merely reviewed records and listened to the defendant's experts testify. (IB 75). In effect, Hilton asks this Court to re-weigh the evidence and find Drs. Golden and Strauss more credible. This the Court will do not. This Court has consistently found that credibility of expert witnesses is for the fact finder and not the responsibility of this Court. Duckett v. State, 918 So.2d 224, 234 (Fla. 2005). *See also* Ellerbee v. State, --- So.3d ----, 2012 WL 652793 (Fla. 2012)(rejecting Ellerbee's suggestion that this Court should reweigh the evidence and make factual determinations on the credibility and reliability of the evidence because such an argument invades the province of the fact-finder and disregards the proper standard of review).

Hilton's second complaint is that the trial judge failed to set forth, in his sentencing order, a sufficient explanation for

his rejection of the mitigation. According to Hilton, the trial judge must set forth, with specificity, the competent substantial evidence that supports rejection of a mitigator proposed by the defendant. (IB 75-76).

In reality, the standard of review on appeal is competent substantial evidence. The trial court's obligation in his sentencing order is to "expressly evaluate in its written order each mitigating circumstance proposed by the defendant." Rogers v. State, 783 So.2d 980, 995 (Fla.2001). This the trial court did.

In his sentencing order, the trial court expressly evaluated the "capacity" mitigator proposed by the defendant. The Court then rejected the mitigator because Dr. Prichard's testimony was more credible and consistent with the evidence in the case; evidence the trial court set forth in detail in other parts of his order. (TR Vol. 12, pages 2344-2354). Contrary to Hilton's suggestion, the trial court committed no error in evaluating the "capacity" mitigator.

Even if the trial judge could have been more detailed in the "capacity" mitigator section of his order, the trial court committed no error because there is competent substantial evidence to support the trial court's rejection of the "capacity" mitigator. After Hilton kidnapped Ms. Dunlap, he took logical steps to cover up his crime and to prevent his identification as the killer. These included; moving Cheryl Dunlap's car from the Leon Sinks

parking lot to the side of the road and staging it as a "breakdown," using a disguise to conceal his identity as he stole money from Ms. Dunlap's bank account, and removing Ms. Dunlap's clothing, head and hands to prevent, or at least slow down, discovery of her identity, cause of death, and any DNA or fiber evidence that might link him to the murder.

This Court has previously upheld rejection of this statutory mitigating factor where a defendant took logical steps to conceal his actions from others. Evidence of "logical steps" conflicts with expert testimony on this mitigator because logical steps constitute "purposeful actions ... indicative of someone who knew those acts were wrong and who could conform his conduct to the law if he so desired." Snellgrove v. State, --- So.3d ----, 2012 WL 1345485 (Fla. 2012)(citing from Hoskins v. State, 965 So.2d 1, 18 (Fla. 2007). *See also* Nelson v. State, 850 So.2d 514, 531 (Fla. 2003); Provenzano v. State, 497 So.2d 1177, 1184 (Fla.1986) ("[S]everal actions taken by Provenzano on the day of the shootout support a finding that he knew his conduct was wrong and that he could conform his conduct to the law if he so desired.").

The record clearly demonstrates Hilton took logical steps to conceal his actions from others. Accordingly, there is competent

substantial evidence to support the trial court's rejection of the "capacity" mitigator. 16

ISSUE VI

WHETHER HILTON'S DEATH SENTENCE WAS UNCONSTITUTIONALLY IMPOSED IN VIOLATION OF RING V. ARIZONA

In this claim, Hilton alleges his sentence to death violates the dictates of Ring v. Arizona, 536 U.S. 584 (2002). In Ring, the United States Supreme Court held that, with the exception of a prior violent felony, when an aggravating circumstance operates in capital sentencing as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that the aggravator must be found by the jury.

Hilton's jury unanimously recommended death. The jury found, unanimously beyond a reasonable doubt, that Hilton kidnapped and murdered Cheryl Dunlap. In doing so, the jury necessarily found, unanimously beyond a reasonable doubt, that Hilton committed the murder in the course of an enumerated felony. Likewise, the trial court found, in aggravation, that Hilton committed the murder in the course of a kidnapping. Finally, the trial court found that Hilton had previously been convicted of a violent felony, specifically, the murder of Meredith Emerson.

16 Any error was harmless.

This Court has held that a death sentence resting on the aggravators of murder committed during the course of an enumerated felony and prior violent felony complies with Ring because it involves facts that were already submitted to a jury [or admitted by the defendant] during trial. See Owen v. Crosby, 854 So.2d 182, 193 (Fla.2003) (rejecting the defendant's Apprendi claim in light of Ring on the basis of Bottoson, but noting that the "during the course of an enumerated felony" and the prior violent felony aggravators "involve[d] circumstances that were submitted to the jury and found to exist beyond a reasonable doubt"). *See also* Gudinas v. State, 879 So.2d 616, 617-618 (Fla. 2004). Indeed, this Court has consistently found Ring is satisfied when the defendant has previously been convicted of a prior violent felony and committed the murder in the course of an enumerated felony, like kidnapping. Baker v. State, 71 So.3d 802, 823-824(Fla. 2011)(Ring satisfied when Baker was convicted of the underlying felony of kidnapping); Caylor v. State, 78 So.3d 482, 500 (Fla. 2011)(Ring is not implicated when, as here, the trial court has found as an aggravating circumstance that the murder was committed in the course of a felony that was found by the jury during the guilt phase); Doorbal v. State, 837 So.2d 940, 963 (Fla.2003)(rejecting Ring claim where one of the aggravating circumstances found by the trial judge was defendant's prior conviction for a violent felony). Hilton offers no good reason for this Court to recede from nearly a

decade of precedent on this point. This Court should reject Hilton's sixth claim on appeal.

PROPORTIONALITY

Although Hilton did not raise a claim that his death sentence is disproportionate, this Court reviews proportionality in every capital case. To ensure uniformity of sentencing in death penalty proceedings, this Court conducts a comprehensive analysis to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders. This is so because this Court has consistently held that the law of Florida reserves the death penalty for only the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So.2d 1, 7–8 (Fla.1973).

In conducting its proportionality review, this Court does not simply compare the number of aggravating and mitigating circumstances. Instead, this Court considers the totality of circumstances and compares each case with other capital cases. Kopsho v. State, --- So.3d ----, 2012 WL 652790 (Fla. 2012); Taylor v. State, 937 So.2d 590 (Fla.2006).

This case is one of the most aggravated and least mitigated. The trial judge found six aggravators to exist in this case. Three of these, HAC, CCP and a prior murder conviction, are among Florida's weightiest. Ellerbee v. State, --- So.3d ----, 2012 WL 652793 (Fla. 2012)(noting that CCP is among Florida's weightiest

aggravators); Caylor v. State, 78 So.3d 482, 500 (Fla. 2011)(HAC is among Florida's weightiest aggravators); Silvia v. State, 60 So.3d 959,974 (Fla. 2011)(prior violent felony the prior violent felony aggravator is considered one of the weightiest aggravators); Hodges v. State, 55 So.3d 515, 542 (Fla. 2012)(noting that qualitatively, prior violent felony and HAC are among the weightiest aggravators set out in the statutory sentencing scheme). In mitigation, the trial court found one statutory mental mitigator to exist but only gave it some weight because Hilton's acts were volitional and he does not suffer from any major mental illness. (TR Vol. 12, page 2358). Moreover, many of Hilton's non-statutory mitigators, most of which were only given some weight, were related to his childhood, events that occurred over 40 years before Hilton murdered Cheryl Dunlap.

There are several cases which support a finding Hilton's sentence to death is proportionate. The first is Hildwin v. State 727 So.2d 193 (Fla. 1998). Hildwin, who was 25 years old at the time, murdered Vronzettie Cox and stole money and property from her because he was broke.

The trial court found four aggravators: (1) Hildwin committed the murder for pecuniary gain; (2) the murder was especially heinous, atrocious and cruel ("HAC"); (3) Hildwin had previously been convicted of prior violent felonies; and (4) Hildwin was under a sentence of imprisonment at the time of the murder. The trial

court also found two statutory mitigators, both of which it assigned "some weight": (1) Hildwin was under the influence of an extreme mental or emotional disturbance at the time of the murder; and (2) Hildwin's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Finally, the trial court found five non-statutory mitigators, all of which it also assigned "some weight": (1) Hildwin had a history of childhood abuse, including sexual abuse by his father; (2) Hildwin had a history of drug or substance abuse; (3) Hildwin had organic brain damage; (4) Hildwin had the ability to do well in a structured environment like prison; and (5) Hildwin's type of mental illness was readily treatable in a prison setting.

This Court found Hildwin's death sentence proportionate. Hildwin v. State, 727 So.2d at 198. This Court may look to Hildwin to find Hilton's death sentence proportionate.

In Hildwin, the trial court found four aggravators including HAC. In Hilton, the trial court found six aggravators that included both HAC and CCP. Hildwin had been convicted of two prior violent non-homicide felonies. Hilton, on the other hand, had previously been convicted of premeditated murder. Finally, in Hildwin, the trial court found that both statutory mental mitigators applied. The trial court in Hilton found only one.

Hildwin is a good comparator case to Hilton's. This Court should look to Hildwin and find Hilton's sentence to death proportionate.

Another case to which this Court may look is Johnston v. State, 841 So.2d 349 (Fla.2002). Johnson kidnapped and murdered (by strangulation) Leanne Coryell, a clinical orthodontic assistant shortly after she left work. The jury recommended by a vote of 12-0 that Johnson be sentenced to death. The trial court, in sentencing Johnston to death found the following aggravators: (1) the defendant was previously convicted of violent felonies; (2) the crime was committed while Johnston was engaged in the commission of sexual battery and a kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, or cruel. The trial court one statutory mental mitigator; that Johnston's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired and gave it moderate weight. Johnston v. State, 841 So.2d at 355. The Court also found and weighed twenty-six non-statutory mitigators (although about a dozen were given no weight). Id at 360. This Court found Johnston's sentence to death proportionate.

Johnston is a good comparator case to Hilton's. In both cases, the trial court found one statutory mental mitigator. In both cases, one of the non-statutory mitigators found was military

service. In Johnston, the state proved the murder was HAC. In Hilton's case, both HAC and CCP were proven. Johnston had a long history of mental illness. Hilton has no major mental illness and is a psychopath whose acts toward Ms. Dunlap were entirely volitional. (TR Vol. 12, page 2358). This Court may look to Johnston to find Hilton's death sentence proportionate. *See also* Suggs v. State, 923 So.2d 419, 440 (Fla. 2005)(sentence to death proportionate when the trial court found seven aggravating factors and three mitigating factors, including one statutory mental mitigator and this Court noted that the murder "particularly heinous and premeditated"); Owen v. State, 862 So.2d 687 (Fla.2003) (finding death sentence proportionate for 23 year old defendant, despite the presence of three statutory mitigators, including both mental mitigators and sixteen other mitigators where there was evidence of multiple stab wounds and the presence of multiple aggravators, including HAC, CCP, and a conviction for another murder); Rose v. State, 787 So.2d 786 (Fla.2001) (finding death sentence proportionate despite the presence of eleven non-statutory mitigators where trial judge found four aggravators—murder committed while on probation, prior violent felony, murder committed during a kidnapping, and HAC).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to William C. McClain, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301 this 25th day of April 2012.

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
MEREDITH CHARBULA