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IN THE SUPREME COURT OF FLORIDA

ROBERT P. MCCLOUD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. SC12-2103
Lower Tribunal No. 2009-CF-007439-XX
Death Penalty Case

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. FACTS

On October 4, 2009, Dustin Freeman and Tamiqua Taylor were murdered by Robert McCloud, Joshua Bryson, Andre Brown, Major Griffin and Jamal Brown. While murdering Freeman and Taylor, they also attempted to murder and rob Wilkins Merilan. The criminal conspiracy began while driving in Andre's vehicle trying to determine how to get easy money. (V25/1690). Andre and McCloud met with Bryson, as they were willing to commit any crime for money.[1] (V25/1695, 1697, 1703-04; V28/2159). While meeting with Bryson, McCloud got a call that his wife was at the hospital; McCloud and Andre stopped briefly at the hospital. (V25/1700). Later in the day, Andre, McCloud, Bryson, Griffin and Jamal all reconvened to plan their crime. (V25/1702-03, 1707; V31/2751-54). They decided to head out to Poinciana because Griffin knew they could rob Merilan. (V28/2167-68; V31/2754). They grabbed weapons: Andre had a .9 millimeter semi-automatic, McCloud had a .38 revolver and Jamal and Griffin had larger semi-automatics, either .40 or .45.[2] (V25/1405, 1710).

[1] Andre claimed that Bryson informed McCloud that he knew of an easy robbery victim while Bryson claimed that McCloud wanted to steal a television and then decided to use Bryson as a go-between to buy drugs or illegal items.

[2] No one ever claimed Bryson had a firearm. Jamal claimed in his testimony that he did not have a firearm. (V31/2762).

They arrived at Merilan's home around 10:00 pm. (V25/1712). Instead of entering the home immediately, the codefendants headed to the local Walmart. (V25/1714; V28/2183-86; V31/2760). At the Walmart, they hung out for awhile, just wasting time until they thought the time for the robbery was right. (V25/1714; V28/2183-86; V31/2760). Similarly, upon returning to Merilan's home, the cohorts waited outside for the right moment.[3] (V25/1750; V28/2195; V31/2767). While waiting, Griffin and Jamal were making calls on their phones to Bryson, who was the lookout. (V25/1752; V31/2767). Finally, McCloud got sick of waiting, kicked open the front door and entered the home. (V25/1755; V31/2768). The other three followed, all with guns drawn. (V24/1472; V25/1756; V27/1978). Merilan attempted to escape to the bedroom, but the codefendants followed him and forced open the door. (V25/1756; V27/1977). McCloud started shooting as they forced their way into the room. (V25/1757; V28/2312; V30/2770).

The victims, Taylor, Freeman and Merilan, were tied up at gunpoint. (V25/1757, 1759; V27/1979). Merilan's young child was

[3] Andre claimed Bryson outlined the plan for everyone, from kicking down the door to searching for the drugs and money to where to park the cars for an easy getaway. (V25/1745, 1748, 1760, 1776-77). On the other hand, Bryson claimed Griffin was issuing orders through his cousin, who he was talking to on the phone. (V28/2186).

also present. (V25/1757). Andre and Jamal searched for money and drugs. (V25/1759, 1761; V31/2771). McCloud and Griffin repeatedly beat and kicked Merilan. (V25/1759, 1761; V27/1980). They beat him with a dumbbell. (V25/1766; V27/1984). They beat him with a baseball bat. (V24/1472). He was also beat with a firearm. (V23/1397). Griffin cut Merilan with a knife on his forearm. (V26/1802; V27/1980). The defendants then boiled bleach in a pot and poured it on him. (V23/1399; V24/1472-73; V26/1801; V27/1981-82). Eventually, Merilan was rendered unconscious. (V27/1980).

When gunshots started to ring out, Andre and Jamal were outside trying to remove tires and searching for drugs; Bryson was in his vehicle. (V25/1780; V28/2209; V31/2774-75). Griffin started shooting Merilan because Merilan had gotten away from him inside the bedroom closet. (V24/1473; V26/1793-94; V27/1986). Griffin shot at him about eight times, hitting Merilan four times in the stomach, the groin and the leg. (V27/1987, 1990). Andre saw McCloud shoot Taylor on the living room couch. (V26/1783). No witnesses testified that they saw someone shoot Freeman, but Andre said McCloud told him he had to shoot Freeman and Bryson said that Andre told him he shot Freeman. (V26/1786; V28/2224). Amongst all the gunfire, two distinctive firearm noises could be heard. (V26/1787; V28/2209).

After fleeing from the home, the five codefendants drove back to Orlando.[4] (V26/1784-86; V28/2215-16).

Once paramedics arrived at the crime scene, Taylor and Freeman were already deceased. (V23/1393, 1396). Taylor and Freeman were both shot in the back of the head, execution style, causing their immediate death. (V32/2935-38). Paramedics began attending to Merilan, who was sitting up and speaking to them, although he was very groggy. (V23/1396). Merilan had severe injuries: his face, arms, back and groin were completely swollen; blood was everywhere; his hands were tightly bound; his shirt was torn and wrapped around his neck; he had multiple lacerations across his back; he had bullet holes in his knee, his shoulder and his abdomen; and he had second degree burns across his groin and thighs. (V23/1396-98). He was airlifted to the hospital. (V23/1385-87). At the hospital, Merilan identified Griffin from a photopack. (V30/2662).

Once law enforcement began investigating this crime, they discovered multiple bullet fragments and cartridge cases from a .45 caliber firearm found at the crime scene. (V30/2612, 2616). A .38 caliber bullet fragment was also found. (V30/2614). A fingerprint for Bryson on a timecard slip was found inside

[4] Andre claimed they all split the items stolen. (V26/1789-92). Bryson claimed he received nothing from the robbery but was offered a firearm from McCloud. (V28/2216, 2222).

Merilan's vehicle. (V24/1500; V29/2327-31). Detective Troy Lung, the lead detective, spoke with Bryson, who confessed to the crimes and implicated his codefendants. (V24/1513-15). Eventually, McCloud and Andre Brown also confessed. (V24/1524; V25/1685; V29/2389-90; V30/2654). McCloud first told Sergeant Evans that he went to Poinciana to attend a party, but he could not remember what happened because he had taken Ecstasy. (V29/2389). He told Sergeant Evans that Griffin shot the victims. (V29/2390). Shortly thereafter, McCloud spoke to Detective Bias and told her that the robbery got out of control. (V29/2444). It was supposed to be a simple robbery; instead, they tied up and dominated the victims. (V29/2466, 2449). McCloud claimed that he was trying to protect Taylor from Griffin. (V29/2450). McCloud said he did not know who shot the victims because he was outside the home. (V29/2451). When McCloud was arrested, law enforcement discovered a revolver on him.[5] (V29/2391, 2428, 2432).

B. INDICTMENT

Based on the crimes committed on October 4, 2009, the grand jury indicted McCloud on November 6, 2009. (V1/24). McCloud was charged with first degree murder, both premeditated and felony

[5] This revolver did not match up to any bullet fragments found at the crime scene. McCloud told law enforcement that Griffin gave him the gun. (V29/2467).

murder, of Tamiqua Taylor and Dustin Freeman with the use of a firearm. (V1/25). McCloud was also charged with the attempted first degree murder of Wilkins Merilan with the use of a firearm. (V1/26). The armed burglary of a dwelling with an assault or battery charge occurred at the home of Mr. Merilan. (V1/27). During the armed robbery, money and drugs were taken from Mr. Merilan. (V1/27).

C. MOTION TO SUPPRESS

McCloud filed a motion to suppress his statements made to law enforcement. (V2/207). In his motion, McCloud argued that, after he refused to speak to law enforcement, law enforcement continued to confront him until he spoke with them about the crimes. (V2/207-08). At the suppression hearing, Detective Lung, Lieutenant Giampavolo, Sergeant Evans and Detective Bias testified about their investigation into the murders and other crimes committed by McCloud. (V5/788, 861, 884; V6/953). After interviewing Bryson, Detective Lung wanted to speak with McCloud. (V5/793, 820, 822, 888; V6/970). McCloud was arrested by the Orange County Sheriff's Office on an outstanding warrant. (V5/794-97, 823). Detective Lung met with McCloud and OCSO at a nearby church and provided McCloud with his Miranda warnings. (V5/795-96, 798-99, 802, 824, 826). McCloud agreed that he was provided with Miranda warnings at that time. (V6/1022, 1048).

McCloud was then taken to the Orange County Sheriff's Office. (V5/800, 886). At the Sheriff's Office, McCloud was taken to an interview room. (V5/805; V6/959). Detective Lung entered the interview room, briefly informed McCloud that he had a few other things to do, and asked McCloud if he needed anything and left. (V5/808). McCloud was handcuffed to the chair. (V5/808, 889). When Detective Lung returned to interview McCloud that evening, he told him he wanted to speak with him about the Poinciana crimes. (V5/812). McCloud denied being involved in the murders, burglary and other crimes. (V5/812; V6/1025-26, 1033). He denied any knowledge. (V5/813). Detective Lung spoke with him about one hour. (V5/813, 831). Detective Lung felt the interview was not progressing and wanted to see if another officer would have better success. (V5/814, 834). McCloud claimed that he told Detective Lung that he had nothing further to discuss with him. (V6/1026, 1032). When Detective Lung was speaking to McCloud, he was occasionally being monitored by Lieutenant Giampavolo. (V5/865). Lieutenant Giampavolo monitored all of his officers' interactions with McCloud. (V5/878).

Sergeant Evans and Detective Bias also interviewed McCloud. (V5/887; V6/957). Sergeant Evans and Detective Bias were told that McCloud had already been provided with his Miranda rights.

(V5/889-90; V6/966). McCloud was willing to talk to Sergeant Evans about anything except McCloud's role in the crimes. (V6/921-23, 926, 937-38, 941). Based on McCloud's lack of cooperation, Sergeant Evans decided to let Detective Bias continue with the interview. (V6/904, 964). Sergeant Evans did not question McCloud after Detective Bias began interviewing him. (V6/905). Sergeant Evans did monitor Detective Bias' interview. (V6/906). Detective Bias testified that it did not appear that McCloud was under the influence of any substances during their interview. (V6/975). McCloud was not tired during the interview. (V6/975). McCloud was willing to talk to Detective Bias even when he was unwilling to discuss the crimes with other officers. (V6/979-81, 1002).

McCloud claimed that he first told Detective Bias that he did not want to speak with her but eventually he did tell her about the crime. (V6/1040-41). McCloud told Detective Bias about the vehicles driven to the crime scene, about the victims, about the involvement of the co-defendants and about stealing drugs. (V6/1002-03). He claimed he did not tell the detectives the truth but what he thought they wanted to hear so they would stop pressuring him. (V6/1042, 1045). During McCloud's testimony, he claimed that Lieutenant Giampavolo (later he said it was Detective Bias) brought a laptop into the interview room to show

McCloud an interview from Bryson. (V6/1027, 1049-50). McCloud could not remember if the information he provided to the officers came from Bryson's statement or the information was provided to him from the detectives. (V6/1051-52). He also claimed he told the officers that he had been on Ecstasy the last three days and had no sleep. (V6/1035-37). McCloud said that on the night of the murders he was at his father-in-law's home in Maitland. (V6/1046-47).

Detective Lung, Detective Bias and Sergeant Evans testified that they did not threaten or make promises to McCloud to get him to talk. (V5/801, 869-70, 880-81, 890-91; V6/928-29, 965-66). McCloud was willing to speak with law enforcement. (V5/801-02, 815, 890). McCloud, himself, became nervous about saying more because of a possible premeditated murder charge and a death sentence. (V5/903; V6/931-32, 934-35, 985, 1004). McCloud did not ever say he wanted to stop speaking or that he wanted an attorney. (V5/870, 903; V6/908). McCloud claimed the officers did threaten the "needle" to "whoever did the shooting[.]" (V6/1029-33). While with Detective Lung, McCloud did not request to use the restroom or request anything to drink or eat. (V5/814-15). Detective Bias did bring McCloud something to drink and a snack. (V5/890; V6/919, 977-78). Later, Sergeant Evans also got McCloud a drink. (V5/901-02; V6/920, 977, 990). When

McCloud needed to use the restroom, the officers took him to the restroom. (V5/895; V6/920). McCloud did not say to Detective Lung that he did not want an attorney or that he did not want to speak anymore. (V5/814).

Detective Lung did not activate a recording device inside the interview room, and he was not aware of anyone activating a recording device before he entered the room. (V6/807). He had no personal knowledge about how to operate the recording equipment in the interview rooms and relied on the knowledge of local law enforcement. (V5/838). Sergeant Evans was not aware of any recording capabilities of the Orange County Sheriff's Office. (V5/889). When McCloud told Detective Bias that he did not want the audio recorder on during his interview, Lieutenant Giampavolo requested the interview be recorded using the built-in equipment at the Sheriff's Department. (V5/866-68; V6/976, 986). Corporal Duana Pelton with the Orange County Sheriff's Office testified that Detective Mike Erickson assisted in the investigation and interview of McCloud. (V5/846-48, 850-51, 853). Any recording would have been done by the Orange County Sheriff's Office. (V5/852). A deputy from the office would push a button to record the interview; sometimes the deputies would forget to stop recording after interviews were completed and empty interview rooms would be recorded. (V5/855-56).

The video recorded interview between McCloud and Detective Bias was entered into evidence. (V5/842; V6/946). Before Detective Bias testified, the video was played for the court. (V6/956). A transcript of the video was introduced by McCloud for identification purposes only. (V6/1009).

On November 11, 2011, the court entered an order denying the motion to suppress. (V6/1070). The court found that the totality of the circumstances showed that McCloud never unequivocally or unambiguously requested to terminate the interview with law enforcement. (V6/1071). The court also found that law enforcement never made any threats or promises to get McCloud to speak with them. (V6/1071).

D. MOTION IN LIMINE

On February 9, 2011, the parties discussed the deposition of Dr. William Kremper regarding false confessions. (V7/1164). On or about February 13, 2012, the State filed a motion in limine asking for four avenues of relief because the State had not received Dr. Kremper's report until the day of the deposition and did not receive any testing materials prior to his deposition. (V12/2137). The State asked 1) to be able to depose Dr. Kremper again, 2) to prevent McCloud from discussing false confession experts, 3) for an evidentiary hearing on admissibility and 4) to hire an independent expert. (V12/2138-

39). Furthermore, the State argued that Dr. Kremper's testimony as an expert on false confessions was inappropriate. (V12/2138).

On February 16, 2012, before the trial began, the court held a hearing. (V21/967). The court informed the parties that it had reviewed Dr. Kremper's report, which was placed under seal.[6] (V21/967, 999; V34/3337). McCloud said that he wanted to use Dr. Kremper to testify about how McCloud was vulnerable to false confessions because of his lack of education and psychological background and that the taped confession looked to be coerced. (V21/974). The State wanted the court to determine if Dr. Kremper could testify as an expert and, if he could testify as an expert, could he testify about McCloud's confession. (V21/985). The State also highlighted that there must be evidence that McCloud's confession was, in fact, false. (V21/988). The court excluded the testimony of Dr. Kremper but allowed McCloud the opportunity to proffer Dr. Kremper's testimony. (V21/992-93). The court explained that the jury did not need testimony from anyone with specialized expertise to determine if the defendant had been coerced. (V34/3301).

After both parties had rested at trial, McCloud did proffer the testimony of Dr. Kremper. (V34/3307). The State stipulated

[6] In the supplemental record, defense counsel and the assistant state attorney agreed to unseal the report. (Supp/31-46).

that Dr. Kremper was an expert in the field of ***psychology***. (V34/3307). Dr. Kremper testified that he spoke with McCloud to evaluate his confession. (V34/3308). Dr. Kremper had occasionally looked at other confessions during the course of his practice. (V34/3310). He discussed, in a general sense, the literature and research on false confessions. (V34/3311). He also generally stated that research had been done on what techniques produce false statements and that a lay person may not understand these techniques. (V34/3313). Dr. Kremper tested McCloud for malingering, which was negative. (V34/3318). McCloud showed borderline intellectual abilities. (V34/3318). Dr. Kremper believed that McCloud was suggestible. (V34/3321-22). Dr. Kremper reviewed McCloud's confession and believed law enforcement pressured McCloud into confessing. (V34/3323). Dr. Kremper stated that coercive police tactics were used by early morning custody, isolation in a relatively small room and handcuffs for a lengthy time period. (V34/3326-30). Dr. Kremper agreed that at the time McCloud was originally provided his Miranda rights in the van, he understood that he was waiving those rights. (V34/3333).

E. GUILT PHASE

The trial was held on February 17 through March 5, 2012. (V21/981). Before presenting any evidence, the State and McCloud

entered into a stipulation that Robert McCloud (defendant in this case) was known as Bam, Wilkins Merilan (attempted murder victim) was known as Fang, Joshua Bryson (codefendant) was known as Josh, Andre Brown (codefendant) was known as Dre, Jamal Brown (codefendant) was known as Finger or Mal, and Major Griffin (codefendant) was known as Mate. (V22/1103-04). The State presented testimony from codefendants Andre Brown, Bryson and Jamal Brown.[7] (V25/1681; V28/2145). Victim, Wilkins Merilan, testified. (V26/1955). The cell phone records from the defendants along with corresponding maps of the cell phone towers used to make phone calls and the video tapes from the gas station and Walmart parking lots were presented to the jury. (V24/1547, 1549; V26/1910-12; V28/2162; V30/2515). The cell phone maps tracked the codefendants' trip out to Poinciana and back to Orlando. (V30/2677; V32/2898). Andre's and Bryson's vehicles were in the surveillance videos. (V30/2593-95). Bryson recognized McCloud in the gas station surveillance video. (V28/2190-93). The forensic scientists from law enforcement discovered a fingerprint on a receipt inside Merilan's vehicle parked in front of his home; the fingerprint belonged to

[7] In response to Jamal's recantation of his confession on the stand, the parties decided to introduce into evidence a transcript of Jamal's plea hearing by reading it into the record. (V32/2875-79).

McCloud's codefendant, Bryson. (V24/1500; V29/2327). Sergeant Evans and Detective Bias testified about McCloud's confession. (V29/2378, 2436). The confession was played for the jury. (V29/2455).

McCloud used an alibi defense at trial. (V31/2981). During his testimony, he discussed his interview with law enforcement. (V33/3201).

Among the various instructions provided to the jury, they received an instruction on Attempt to Commit First Degree Murder. (V13/2147; V35/3463). The instruction required the State to prove, beyond a reasonable doubt, that McCloud performed "some act toward committing the crime of First Degree Murder of Wilkins Merilan that went beyond just thinking or talking about it [and McCloud] would have committed the crime except that he failed." (V13/2147). The instruction also stated that, "[i]t is not an attempt to commit First Degree Murder if the Defendant abandoned his attempt to commit the offense or otherwise prevented its commission, under circumstances indicating a complete and voluntary renunciation of his criminal purpose." (V13/2147). When discussing the Attempted First Degree Murder instruction, defense counsel asked the court to clarify that the victim was Wilkins Merilan. (V34/3291).

Other instructions provided to the jury were on burglary of

a dwelling and robbery. (V13/2149, 2152; V34/3293; V35/3464-71). To be guilty of burglary, the State had to prove, beyond a reasonable doubt, that the dwelling, owned by Merilan, was entered by McCloud with the intent to commit a robbery inside. (V13/2149). To be guilty of robbery, the State had to prove, beyond a reasonable doubt, that McCloud took money and drugs from Merilan through force or violence with the intent to temporarily or permanently deprive Merilan of his right to the property. (V13/2152).

After deliberation, the jury made a request for a transcript of McCloud's confession, a transcript of Andre Brown's confession and the video of McCloud's confession. (V35/3493). The judge first told the parties that he would have to tell the jury that the transcripts were not submitted into evidence. (V35/3493). McCloud's counsel agreed that no transcripts were submitted into evidence. As to the video, the judge was willing to provide the video and video equipment to the jury. Both parties were in agreement that this procedure was proper. (V35/3494).

The jury found McCloud guilty of the first degree murders of Tamiqua Taylor and Dustin Freeman, the attempted first degree murder of Wilkins Merilan, the conspiracy to commit burglary, the armed burglary of an occupied dwelling with assault or

battery and the robbery with a firearm. (V13/2194-99; V35/3497-99). The jury specifically found that McCloud was in possession of a firearm during all crimes. (V13/2194-99).

F. ADJUDICATION OF CO-DEFENDANTS

McCloud's codefendant, Andre Brown, pled guilty to the crimes on October 7, 2011 and was sentenced to fifteen years in prison. (V15/1682). Part of the plea agreement was to testify in McCloud's case. (V15/1685). Bryson pled guilty to second degree murder, burglary and conspiracy to commit burglary and was incarcerated for ten years for these crimes. (V28/2145, 2232). Jamal Brown's original plea (from the time he testified in this case) was later withdrawn, and he entered a new plea for fifteen years in prison on two counts of second degree murder, burglary and robbery. (Supp/9-17). The fourth co-defendant, Griffin, was deemed incompetent in March 2012 and has yet to be tried for these crimes. See Online Docket, Polk County Clerk, 09-CF-744.

G. PENALTY PHASE AND SENTENCING

At the penalty phase, the State relied on the evidence presented during the guilt phase in support of five proposed aggravating factors. The defense proposed three statutory mitigating factors and numerous non-statutory mitigating circumstances. The defense presented the testimony of family members (Lashanda McCloud, Shawana McCloud, Monica Zow and Dora

Norman) and two psychologists (Dr. Kremper and Dr. McClain).

The trial court's sentencing order summarized the testimony presented by the defense in mitigation as follows:

> The Defendant's, Robert McCloud's, older sister, Laschanda McCloud, provided an insight into the Defendant's upbringing. The Defendant is 1 of 6 children by their mutual mother, but each one is the offspring of a different father. She described that the family moved around a lot and that various men moved in and out with them over the years. She also testified about how Robert McCloud was physically abused and bullied by these various men who came in and out of their life. Eventually, their mother married a man by the name of Mr. Kelly who treated them well.
>
> Laschanda McCloud described Robert McCloud as having difficulty in school and eventually being expelled and placed into some sort of special classes. She also described the fact that the family was not very close and, other than her, not very supportive of each other.
>
> Shawanna MeCloud (the Defendant's wife) testified that she met the Defendant in either 2005 or 2006 and they began a relationship in 2007. They were married on June 27, 2009, and have a child together.
>
> Shawanna described Robert as a very good father, not only to his own child but to her other 2 children. Shawanna stated that Robert treated her 2 other children as if they were his own.
>
> On cross-examination, Shawanna acknowledged that she knew that Robert was cheating on her and, in fact, he moved out of their home just after the weekend of the murders. In spite of this, Shawanna McCloud was very supportive of her husband, Robert and described how he had become very close to her family, where he never had that type of relationship with his own family.

> Monica Zow (the Defendant's sister-in-law) described her observations of Robert and how Robert had grown very close to his in-laws. Ms. Zow described Robert as being very supportive of the family and a good father figure for her sister's children.
>
> Dora Norman (the Defendant's mother-in-law) testified about her relationship with the Defendant and her observations about Robert. She described Robert as a very positive influence on all of her grandchildren. She further described Robert as a loving and compassionate person who she took in as if he were her own son.
>
> Dr. Kremper, a psychologist, evaluated the Defendant and provided testimony. The court has also received and studied his report dated February 10, 2012. Dr Kremper described the various tests run and what he learned during his personal examination of the Defendant. Based on his testing and evaluation, Dr Kremper concluded that the Defendant functioned intellectually in the middle of a border line range. Dr. Kremper described the Defendant as somebody that is very susceptible to outside influences and pressure. He also described the Defendant as a follower who was more reactive to situations than proactive.
>
> Dr. Valerie McClain, a psychologist, testified about her evaluation of the Defendant She found it important that the Defendant was abused by various "stepfathers" throughout his life. She also noted the significant trouble the Defendant had with schooling. Dr McClain concluded that the Defendant is a slow learner. That he is impulsive in his behavior and is very reactive to situations rather than reflective. She described him as a follower who is very susceptible to suggestions.

(V15/2521).

On March 9, 2010, the jury returned a death recommendation for both murders by a vote of eight to four. (V37/3822). On

March 12, 2012, the defense sought to preclude the imposition death penalty, on the basis of Enmund/Tison. (V13/2187). The defense motion, based on Enmund/Tison, was denied. (V13/2189).

The Spencer hearing was conducted on July 6, 2012. (V13/2222). The defense again presented the testimony of Dr. Kremper and family members (Monica Zow, Shawana McCloud and Dora Norman). On September 6, 2012, the trial court entered a written order imposing the death penalty. (V15/2513). The trial court found the following four aggravating[8] factors: (1) The defendant was contemporaneously convicted of anther capital felony or felony involving use of threat of violence of the person (great weight) § 921.141 (5)(b), Fla. Stat.; (2) the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit or in flight after committing or attempting to commit any homicide, robbery or burglary (great weight) § 921.141(5)(d), Fla. Stat.; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest (great weight) § 921.141(5)(e), Fla. Stat., and (4) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (substantial weight) §

[8] The trial court found that it would be improper to consider the factor that the capital felony was committed for financial gain as it merged with factor #2. (V15/2524).

921.141(5)(i), Fla. Stat.

The trial court also considered all of the proposed mitigators and found as follows: (1) Robert McCloud has learning disabilities (slight weight); (2) psychological impact of being physically abused as a child (some weight); (3) psychological effect of neglect as a child (some weight); (4) psychological and life altering effects of school and other institutional failures (little weight); (5) McCloud's level of emotional maturity (slight weight); (6) McCloud's borderline level of intellectual functioning (some weight); (7) McCloud promoted a positive family life for his own family members (slight weight); (8) McCloud was gainfully employed (slight weight); (9) McCloud is a good parent to his stepdaughter (slight weight); (10) positive influence on minor children of his relatives (some weight); (11) troubled relationship with his natural family (slight weight); (12) raised without a father (some weight); (13) maintained continued contact with, and concern for, his family (very little weight); (14) suffered a difficult and unstable childhood (some weight); (15) disparate treatment of co-defendants (not legally established, given no weight); (16) co-defendant instigated and planned the offense (some weight to fact that McCloud wasn't instigator, but very little weight to argument that he didn't plan offense); (17) McCloud never

experienced a family life that could be considered normal (some weight); (18) confession allegedly was coerced and and/or voluntary statement, not proven (no weight); (19) murders were independent act of a co-defendant (not proven, given no weight); (20) McCloud's emotional and development age (slight weight); (21) McCloud was just an accomplice (not proven, no weight); (22) McCloud was under the influence of extreme mental or emotional disturbance (slight weight). In conclusion, the trial court emphasized that it (1) had considered the jury's recommendation, (2) found that the State had proven, beyond a reasonable doubt, four aggravating factors (three of which were assigned great weight and the fourth, substantial weight), and (3) found that numerous mitigators were established. In closing, the trial court stated, "...the Court's duty is to look at the nature and quality of the aggravating and mitigating circumstances that have been established. Under such an analysis, the aggravating circumstances far outweigh the mitigating circumstances." (V15/2537).

SUMMARY OF THE ARGUMENT

Issue I (The False Confession Expert Claim):

The trial court did not abuse its discretion in excluding Dr. Kremper's testimony. Dr. Kremper's testimony would not help the jury resolve a disputed fact, and Dr. Kremper was not qualified to testify as a false confession expert.

Issue II (The Request for Transcripts Claim):

The trial judge properly denied the jury's request for transcripts of confessions because they had not been entered into evidence and written transcripts cannot be taken into jury rooms. McCloud cannot show fundamental error.

Issue III (The Double Jeopardy Claim):

Convictions for armed robbery and armed burglary of a dwelling with assault or battery do not violate double jeopardy.

Issue IV (The Attempt Jury Instruction Claim):

The jury was provided a correct instruction on the law for attempted first degree murder when given the first degree murder and then the attempt jury instructions. McCloud cannot show fundamental error.

Issue V (The Motion to Suppress Claim):

McCloud's confession was not coerced. He made no unequivocal statement to end the interview, and law enforcement made no threats to get him to confess. His statements were

freely and voluntarily obtained.

Issue VI (The Caldwell Claim):

There was no Caldwell violation in this case. The standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate Caldwell.

Issue VII (The Enmund/Tison Claim):

McCloud's major participation in the crimes and his reckless indifference to human life satisfied the Enmund/Tison culpability requirement.

Issue VIII (The Proportionality Claim):

McCloud's death sentences are proportionate. There are four weighty aggravating circumstances in this case, including the prior capital felony and CCP, and the mitigating circumstances, individually and collectively, are of relatively minimal weight.

Issue IX (The Prosecutor Comment Claim):

The prosecutor's unobjected-to comment was not error, much less fundamental error. The prosecutor's comment was a fair comment on the evidence and within the wide latitude afforded closing argument.

Issue X (The Aggravating Factors Claim):

The trial court found four weighty aggravating factors in this case, and the trial court's findings are supported by competent substantial evidence.

Issue XI (The Consideration of Mitigation Claim):

The trial court properly considered each of the mitigating circumstances and cogently explained its rationale as to each proposed mitigator. Again, the trial court's findings are supported by competent, substantial evidence.

Issue XII (The Ring Claim):

Ring is not implicated in the instant case. This Court repeatedly has held that Ring does not apply to cases that involve the prior violent felony aggravator, the prior capital felony aggravator, or the aggravator that the crime was committed in the course of a felony.

ARGUMENT

ISSUE I

False Confession Expert Claim

The trial court properly granted the State's motion in limine to exclude the testimony of Dr. Kremper. McCloud complains because he wanted Dr. Kremper to testify that law enforcement coerced him into confessing. Such testimony would improperly invade the province of the jury. In addition, the information Dr. Kremper wanted to provide involved factual conclusions that the jury could determine without requiring an expert's opinion. Furthermore, Dr. Kremper was not qualified to provide opinions on coercive police tactics. Dr. Kremper's testimony was unnecessary, and the trial court did not abuse its discretion in excluding his testimony.

Trial courts are given broad discretion when limiting expert testimony. Brooks v. State, 762 So. 2d 879, 892 (Fla. 2000). The trial court's ruling will not be refused without clear error. Id. "If scientific, technical, or other special knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion[.]" § 90.702, Fla. Stat. In order for an expert to testify, the court

must make two determinations: 1) will the testimony help the jury determine a disputed fact and 2) is the witness qualified to testify. Chavez v. State, 12 So. 2d 199, 205 (Fla. 2009).

The trial court determined that Dr. Kremper's testimony would not assist the jury in their factual determinations. (V34/3301). Dr. Kremper did not just want to testify about the tactics of law enforcement or even the testing he had provided to McCloud. Dr. Kremper wanted to go even farther and discuss the ultimate conclusion that McCloud's confession was coerced. This factual conclusion is the responsibility of the jury and not the expert witnesses. Thomas v. State, 317 So. 2d 450, 452 (Fla. 3d DCA 1975) (finding that witnesses should not provide opinions on jury's factual determinations).

The testimony McCloud wanted Dr. Kremper to provide was not necessary for the jury's determination on the voluntariness of his confession. Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980). ("[E]xpert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts.") In granting the State's motion in limine, the court informed McCloud that the determination of voluntariness in a confession was not a concept so complicated that the jury required an expert to understand it. The court

referred the parties to Colorado v. Spring, 479 U.S. 564, 574 (1987) and suggested McCloud draft a jury instruction on coercive police tactics that discussed "capacity for self-determination critically impaired" and other such language. Although an expert may testify about what police interrogation techniques may increase the likelihood of false confessions, see Ross v. State, 45 So. 3d 403, 433 (Fla. 2010), such testimony is not required for a jury to understand these facts. (V34/3301).

The factors used to determine police coercion are common factors that do not require expert testimony. See Derrick v. State, 983 So. 2d 443, 451 n.7 (Fla. 2008) (questioning the admissibility of expert testimony on false confessions). Because the court looks at a totality of the circumstances, almost any circumstance surrounding the confession can be an important factor. See Owen v. State, 862 So. 3d 687, 695 (Fla. 2003). Moreover, in Colorado v. Connelly, 479 U.S. 157, 167 (1986), the Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause...." Ultimately, in this case consistent with the trial court's ruling, the jury could assess the evidence without testimony from an expert witness. The jury was able to make factual and credibility determinations on the facts presented in this case.

For example, McCloud presented facts about law enforcement threatening him with the death penalty. (V33/3208). Law enforcement testified that they did not make such threats, and, instead, it was McCloud himself who was concerned about the possibility. (V29/2350, 2385, 2393, 2492). The jury was able to weigh the facts and make a credibility determination. Dr. Kremper's opinion that law enforcement's behavior was coercive by making threats about the death penalty would have been inappropriate. First, Dr. Kremper is accepting as truth, McCloud's claim of law enforcement's threat, and witnesses should provide the facts, not express the truthful nature of them. Second, the determination of whether a threat was made is a factual one that does not require an expert. The same applies to other facts presented to the jury, such as length of interrogation, location of interrogation, etc. The jury could determine the impact of these circumstances, as they believed them to exist, on the voluntariness of McCloud's statements without the assistance of an expert.

The State also disputes that Dr. Kremper, a psychologist, was adequately qualified to testify as an expert in coercive police techniques. The State never agreed that Dr. Kremper was an expert in coercive police techniques; instead, the State stipulated that Dr. Kremper was an expert in psychology.

(V34/3307). Dr. Kremper had testified, in a prior trial, about competency to waive Miranda rights, although there has never been an allegation that McCloud was incompetent. (V34/3309-10). Dr. Kremper knew of two prior occasions where he testified about voluntariness of confessions and believed he was performing about a dozen evaluations (he did not explain what kind of evaluations) a year. (V34/3310). He did not discuss the substance of his evaluations or the context of his testimony. (V34/3310). He provided very general information about the literature on false confessions but did not provide any specifics on when the articles were written, where they were published or if he had done any of the research or publishing. (V34/3310-13). Dr. Kremper never testified that he had been recognized as an expert in coercive police tactics. Dr. Kremper could not have provided expert testimony on coercive police tactics that would have assisted the jury.

Furthermore, McCloud was able to utilize multiple opportunities to highlight coercive police tactics to the jury. McCloud discussed the interrogation techniques during cross-examination of Sergeant Giampalvolo, Detective Evans and Detective Bias. (V29/2350, 2396, 2494). McCloud also highlighted the interrogation during his own testimony. (V33/3201). The confession was also thoroughly discussed during McCloud's

closing argument. (V35/3424). McCloud was able to repeatedly drill his theory of a coerced confession before the jury, and he was able to elicit testimony with regard to all of the relevant facts regarding the circumstances of his confession.

In addition, any alleged error in the admission of this testimony was harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Three of McCloud's codefendants and a victim testified at trial. The surveillance tape from the gas station showed McCloud was in Poinciana. The receipt inside the Hummer had the codefendant's fingerprint. Thorough evidence showed that the five codefendants planned and committed the robbery and murders in Poinciana, even without McCloud's confession. Accordingly, any alleged error was harmless beyond a reasonable doubt based on the overwhelming evidence against McCloud.

Issue II

Jurors' Request for Transcripts of Confession Claim

After the jurors began deliberation, they requested three items from the trial judge: 1) a written transcript of McCloud's confession, 2) a written transcript of Andre Brown's confession and 3) a video of McCloud's confession. (V35/3493). McCloud was interviewed by law enforcement on October 21, 2009. (V29/2440). This was McCloud's only interview with law enforcement. McCloud's confession was videotaped. (V29/2455). Witnesses at trial discussed McCloud's confession, and the video was played for the jury and provided to it in response to the question. (V29/2378, 2436, 2455). Andre's only confession to law enforcement was never submitted as evidence to the jury. Andre and law enforcement testified that Andre confessed, but no details of the confession were discussed at trial. (V24/1524; V25/1685; V30/2654).

In response to the jury's request, the trial judge did not provide transcripts of McCloud's or Andre's confessions because they had never been entered into evidence. The trial judge did provide the video of McCloud's confession. All parties were in agreement that this was proper procedure to follow, and McCloud cannot show that the trial judge committed fundamental error.

Normally, the standard of review for a trial judge's response to questions from the jury is abuse of discretion. Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990). To reverse the trial judge's decision, an appellate court must conclude that no reasonable judge would respond as the trial judge did. See Perriman v. State, 731 So. 2d 1243, 1247-48 (Fla. 1999). But, without an objection, as in McCloud's case, error must be fundamental for reversal on appeal. McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999). "Fundamental error is defined as the type of error which 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Id. at 505 (citing Urbin v. State, 714 So. 2d 411, 418 n.8 (Fla. 1998)). This is because the parties have a responsibility to object when they believe the trial court is committing an error.

Trial courts may allow juries to take all evidence, other than depositions, into the jury room. Fla. R. Crim. P. 3.400(a)(4). Yet the item requested by the jury must have actually been entered into evidence in order for them to obtain it. See Russ v. State, 95 So. 2d 594, 600 (Fla. 1957) ("The jury should confine their consideration to the facts in evidence as weighed and interpreted in the light of common knowledge."). Any existing transcripts of McCloud's and Andre's confessions were

never used or discussed below, let alone entered into evidence, so the jury could not have received them in the jury room.

Even if they had been entered into evidence, the trial judge could not have allowed the transcripts to have been provided to the jury because judges have virtually no discretion in permitting a jury to receive physical transcripts. Fla. R. Crim. P. 3.400. This is so because the jury might emphasize the testimony contained in the physical transcript over oral testimony provided at the trial. Barnes v. State, 970 So. 2d 332, 338 (Fla. 2007). Thus, in McCloud's case, the jury's request for transcripts of McCloud's and Andre's confessions was not proper because such items should not be provided to the jury because they may place undue influence on that testimony. The trial court was absolutely correct in denying the request for those transcripts.

In contrast, trial courts generally have broad discretion in allowing the jury to hear a read back of the testimony provided at trial. See Fla. Std. Jury Inst. (Crim.) 4.4. "Indeed, 'courts have found no abuse of discretion even where the trial judge has, without much consideration, entirely rejected the jury's request for a read back.'" Hazuri v. State, 91 So. 3d 836, 840-41 (Fla. 2012). What a court is not allowed to do is mislead the jury into believing that read backs are not

permitted. Id. Here, the jury was not interested in any specific witness' testimony but receiving transcripts of out-of-court confessions. The judge did not deceive the jury by not offering to read back a specific witness' testimony because the jury did not request the transcript or testimony from any specific witness.

In this case, the trial court's response to the request for transcripts was not in error. The court informed the jury, as is the law, that they had all the admissible evidence with them and that transcripts were unavailable. Even if transcripts were available, the court would not have been allowed to give them to the jury for their consideration during deliberations because they had never been entered into evidence and they could not be taken into the jury room.

Issue III

Double Jeopardy Claim

McCloud's convictions for armed robbery and armed burglary of a dwelling with assault or battery do not constitute double jeopardy. McCloud claims that he could not be charged with home invasion robbery and armed burglary, see, e.g., Schulterbrandt v. State, 984 So. 2d 542 (Fla. 2d DCA 2008), however, he was not convicted of those offenses. The reasoning behind the district court's analysis in the cases upon which he relies is that burglary with assault or battery is subsumed within the offense of home invasion robbery and thus, is a lesser included offense of the crime. See Mendez v. State, 798 So. 2d 749 (Fla. 5th DCA 2001). Since he was not convicted of home invasion robbery, his cases do not demonstrate any basis for relief.

Issues of double jeopardy, because they require purely legal determinations, are reviewed by appellate courts *de novo*. State v. Florida, 894 So. 2d 941, 945 (Fla. 2005). Under a double jeopardy analysis, when the same act is a violation of two statutes, a defendant can be convicted of both statutes if each statute requires proof of an element that the other statute does not. Blockburger v. United States, 284 U.S. 299, 304 (1932). This is known as the Blockburger test in Florida courts.

Florida, 894 So. 2d at 946. The Blockburger test has been codified:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense[.]... For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

§ 775.021(4)(a), Fla. Stat.

This codified Blockburger test has three exceptions: "1) Offenses which require identical elements of proof[;] 2) Offenses which are degrees of the same offense as provided by statute[; and] 3) Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." § 775.021(4)(b), Fla. Stat.

McCloud does not dispute that first two exceptions do not apply. He argues that the third exception applies. Yet, the burglary and robbery convictions are not lesser offenses with statutory elements subsumed by the greater offense. This exception is only for lesser included offenses listed in Category 1 of the Schedule of Lesser Included Offenses. Florida, 894 So. 2d at 945. The only Category 1 lesser included offense of burglary of a dwelling or burglary with assault or battery is burglary. The only Category 1 lesser included offenses of

robbery with a firearm are robbery and petit theft. McCloud fails to show how armed robbery and armed burglary convictions violate double jeopardy. And his case law on home invasion robbery is unpersuasive.

Furthermore, those home invasion robbery cases appear to be of questionable precedent as none of them address this Court's precedent in Florida that the third exception under Blockburger, offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense, only applies to lesser offenses listed in Category 1 of the Schedule of Lesser Included Offenses. Florida, 894 So. 2d at 945. The Schedule of Lesser Included Offenses lists robbery and petit theft as Category 1 lesser included offenses of home invasion robbery, not burglary. Even if McCloud was actually charged with home invasion robbery, convictions for home invasion robbery and burglary would not violate double jeopardy as the statutory elements of burglary of a dwelling with a battery are not subsumed within the crime of home invasion robbery.

In addition, any double jeopardy violation would not affect McCloud's death sentence. The trial court found four aggravators: 1) contemporaneously convicted of another capital felony or violent felony, 2) committed while engaged in the commission of a homicide, robbery or burglary, 3) committed to

avoid arrest and 4) committed in a cold, calculated and premeditated manner. (V15/2522-27). To support the contemporaneous violent felony aggravator, the court used McCloud's dual capital convictions. (V15/2522—23). For the homicide/robbery/burglary aggravator, the court used the robbery and burglary conviction. (V15/2523). Even though the court used both of these crimes to support this aggravator, only one conviction is required, and a reversal on the burglary does not change the evidence supporting the robbery conviction. Thus, the robbery conviction, by itself, provides great weight to this aggravator. The other two aggravators, avoid arrest and CCP, are based on factual circumstances of the crimes and not the burglary conviction. A reversal on the burglary based on double jeopardy would not change a factual determination on these aggravators. The reversal of McCloud's burglary conviction, although the State does not concede was erroneous, would not affect the jury's death recommendation or the trial judge's sentence of death.

Issue IV

Jury Instruction on Attempt Claim

During the charge conference, the parties and the judge all agreed to the instructions provided to the jury. (V34/3289-97). This included providing the attempt instruction for count three, attempted first degree murder. (V34/3291-92). It was not fundamentally erroneous to provide the first degree murder instruction and then an attempt instruction to the jury. The jury was not provided with an incorrect statement of the law.

Trial judges have wide discretion when instructing the jury. James v. State, 695 So. 2d 1229, 1236 (Fla. 1997). When properly preserved, the standard of review on issues involving jury instructions is abuse of discretion. Coday v. State, 946 So. 2d 988, 994 (Fla. 2006). Yet, along with the discretion afforded the trial judge comes a responsibility for the State and the defendants: when a trial court provides both parties an opportunity to review the jury instructions prior to presentation, the parties must object to possible errors. See Ray v. State, 403 So. 2d 956, 960 (Fla. 1981) ("It is well established law that where the trial judge has extended counsel an opportunity to cure an error, and counsel fails to take advance of the opportunity, such error, if any, was invited and

will not warrant reversal."). See also Thomas v. State, 730 So. 2d 667, 668 (Fla. 1998) ("Where counsel communicates to the trial judge his acceptance of the procedure employed, the issue will be considered waived."). A contemporaneous objection allows the judge to fix the error immediately; when there is no contemporaneous objection, there must be fundamental error for reversal. Ray, 403 So. 2d at 960.

The parties agreed to use the general attempt to commit crime instruction, 5.1,[9] instead of providing the jury with two attempt instructions, 6.2[10] and 6.3.[11] There was nothing erroneous

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[9] To prove the crime of Attempt to Commit *(crime charged)*, the State must prove the following two elements beyond a reasonable doubt:

1. *(Defendant)* did some act toward committing the crime of *(crime attempted)* that went beyond just thinking or talking about it.

2. *[He] [She]* would have committed the crime except that

a. someone prevented *[him] [her]* from committing the crime of *(crime charged)*. **[or]***

b. [*he] [she]* failed. (*supplied by Appellee)

[10] To prove the crime of Attempted First Degree Premeditated Murder, the State must prove the following three elements beyond a reasonable doubt:

1. *(Defendant)* did some act intended to cause the death of *(victim)* that went beyond just thinking or talking about it.

2. *(Defendant)* acted with a premeditated design to kill *(victim)*.

3. The act would have resulted in the death of *(victim)* except that someone prevented (defendant) from killing *(victim)* or *[he] [she]* failed to do so.

[11] To prove the crime of Attempted Felony Murder, the State must prove the following three elements beyond a reasonable doubt:

1. *(Defendant) [committed] [attempted to commit]* a *(crime*

about this decision, let alone, fundamentally erroneous. By providing the first degree murder instruction and the attempt instruction, the jury was instructed on the law. Stephens v. State, 787 So. 2d 747, 756 (Fla. 2001) (finding that a trial judge has an obligation, when instructing the jury, to make "correct statement[s] of the law and not mislead[] or confus[e]"). The trial judge correctly instructed the jury on attempted first degree murder. McCloud cannot, and does not, point to any error in the way the trial judge instructed the jury. The choice by the parties to provide a first degree murder instruction with an attempt instruction was a choice that cannot be reversed for fundamental error on appeal.

The jury was properly instructed on all the essential elements of the crime of attempted first degree murder. (V35/3463). The jury was provided with the instruction on first degree murder, both premeditated murder and felony murder, along with the attempted murder instruction. (V35/3460-63). Thus, the jury was provided instructions on all elements that McCloud complains about, acting with premeditated design and acting with

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alleged).

2. While engaged in the *[commission] [attempted commission] [escape from the immediate scene]* of *(crime alleged)*, the defendant *[committed] [aided or abetted]* an intentional act that is not an essential element of *(crime alleged)*.

3. This intentional act could have but did not cause the death of *(victim)*.

intent to cause death. McCloud cannot show that the instructions, as provided, amounted to fundamental error.

The general rule in criminal law is that where a trial court has extended counsel an opportunity to cure an error, and counsel fails to take advantage of such an opportunity, the error is considered acquiesced to and does not warrant reversal. See Calloway v. State, 37 So. 3d 891, 897 (Fla. 1st DCA 2010) (citing Ray v. State, 403 So. 2d 956, 960 (Fla. 1981)). When defense counsel agrees to a standard jury instruction and then alleges fundamental error on appeal, reversal would have the unintended consequence of encouraging defense counsel to "stand mute and, if necessary, agree to an erroneous instruction" or sacrifice his client's opportunity for a second trial, in essence inviting error. Calloway, 37 So. 3d at 896-97. At trial, McCloud failed to make any objection to the standard attempt instruction. He cannot now object to the instruction on appeal merely because he prefers a different standard instruction.

Issue V

Motion to Suppress Claim

The trial court properly denied McCloud's motion to suppress his confession because his statements were freely and voluntarily given. The Fifth Amendment to the United States Constitution guarantees all individuals the right against self-incrimination: "[n]o person ... shall be compelled in any criminal case to be a witness against himself.". In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), the United States Supreme Court established certain procedural safeguards to protect an individual before commencing custodial interrogation.

McCloud was provided his Miranda rights by Detective Lung at the church before any custodial interrogation began. (V5/795-96; V6/1048). However, he now claims that he invoked his right to silence during his interview with law enforcement. McCloud also claims that law enforcement threatened him with the death penalty if he did not confess to the murders.

In appeals of motion to suppress hearings, appellate courts provide a "presumption of correctness to the trial court's... determination of historical facts[.]" Connor v. State, 803 So. 2d 598, 608 (Fla. 2001). "[M]ixed questions of law and fact that ultimately determine constitutional issues arising in the

context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution" are independently reviewed. Id.

McCloud claims that he tried to tell Sergeant Giampavolo and Detective Evans that he did not want to speak to them anymore. Proper invocation of those rights by a suspect cannot be ambiguous or equivocal statements. Davis v. United States, 512 U.S. 452, 458-59 (1994). Instead, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis, 512 U.S. at 459. When a suspect makes an equivocal invocation of a Miranda right, after already receiving proper warnings, law enforcement need not terminate questioning or limit themselves to clarifying questions. Berghuis v. Thompkins, 560 U.S. 370, 381-82 (2010). The trial court specifically found that McCloud never requested to stop questioning. Instead, McCloud would say things to the detectives like, I don't want to talk about that, then keep talking to the detectives about other subjects, or he would say that he did not want to talk to a specific detective but he would be willing to talk to someone else (for example, he was willing to talk with Detective Bias). (V6/921-23, 926, 937-38, 941, 1026, 1032). An officer need not terminate an

interrogation because a suspect does not want to discuss a specific subject. See State v. Owen, 696 So. 2d 715, 719 (Fla. 1997) (finding that defendant's statements about not wanting to talk after specific topics were raised were not invocations of his right to remain silent). Nor does law enforcement have to terminate an interrogation because a suspect makes equivocal statements about speaking with an officer. United States v. Plugh, 648 F.3d 118, 125-26 (2d Cir. 2011) (finding that statement of about not being sure if he should talk with the officer was not unequivocal invocation of right). McCloud never made an unequivocal statement that he no longer wanted to speak to law enforcement. The officers properly continued to question him.

During their questioning of McCloud, the officers did not use coercive tactics to illicit his confession. This issue involves a factual dispute between McCloud, who claims that law enforcement coerced him into confessing, and law enforcement, who testified that no such action took place. The voluntariness of a confession is governed by the preponderance of the evidence standard. Drake v. State, 441 So. 2d 1079, 1081 (Fla. 1983). The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained. State v. LeCroy, 461 So. 2d

88, 90 (Fla. 1984). "The rule in Florida generally is that the trial court's conclusion on the issue of voluntariness will not be upset on appeal unless clearly erroneous." Thompson v. State, 548 So. 2d 198, 204 n.5 (Fla. 1989).

Under due process requirements, law enforcement may not use coercion or threats to obtain confessions of suspects. See Spano v. New York, 360 U.S. 315 (1959). Nor may law enforcement make promises to obtain confessions of suspects. Blake v. State, 972 So. 2d 839, 843-44 (Fla. 2007). Yet a promise alone is not enough to make a confession involuntary; there has to be coercive police conduct to overcome the defendant's free will, i.e., not all promises are coercive. Id. at 844. Here, the trial court found that no promises or threats had been made, let alone threats that were coercive.

At the suppression hearing, the law enforcement officers' and McCloud's testimony directly conflicted. McCloud claimed that law enforcement officers threatened him with the death penalty if he did not start talking about the murders. (V6/1029-33). All four officers, Lieutenant Giampavolo, Detective Lung, Detective Evans and Detective Bias, testified that they did not threaten him with any form of punishment, including the death penalty. (V5/903; V6/931-32, 934-35, 985, 1004). In fact, they repeatedly denied making any threats or promises to get McCloud

to confess. (V5/801, 869-70, 880-81, 890-91; V6/928-29, 965-66). The trial court made a credibility determination and found that it believed the law enforcement officers. It found that no threats were made to McCloud to obtain his confession. McCloud's claim itself lacked credibility because he could not say when during the interviews the officers threatened him or how specifically they made such threats. (V6/1071). Such factual and credibility determinations should not be overturned on appeal.

In addition, during the interview, McCloud was provided with food, drink, and bathroom breaks whenever he requested them. (V5/890, 895, 901-02; V6/919-20, 977-78, 990). He was allowed to rest, and maintained his composure throughout questioning. He was able to easily answer questions, even legal questions. McCloud did not acquiesce to law enforcement's questioning, maintained his innocence for quite some time and clarified and provided specific details about the crime. At the time of his confession, McCloud was in his late twenties and had extensive experience with the criminal justice system. The detectives did not put any undue pressure on McCloud and did not overcome his will. Based on the totality of the circumstances, McCloud's confession was not a result of coercive police conduct. The trial court correctly determined that McCloud's confession was freely, knowingly and voluntarily made.

Furthermore, McCloud's confession, on its own, is not dispositive of his conviction. Even without the confession, the evidence against Appellant was overwhelming. Any alleged error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Three of McCloud's codefendants and a victim testified at trial. The surveillance tape from the gas station placed McCloud in Poinciana. Bryson's fingerprint was found on the receipt inside the Hummer. McCloud had the victim's firearm. Significant evidence showed that the five codefendants planned and committed the robbery and murders in Poinciana, even without McCloud's confession. Accordingly, any alleged error was harmless beyond a reasonable doubt based on the overwhelming evidence against McCloud.[12]

[12] This Court is required to do an independent sufficiency analysis on all capital cases before it. Davis v. State, 2 So. 3d 952, 967 (Fla. 2008) (finding competent, substantial evidence to support the murder convictions). Similar to the evidence showing harmless error, the evidence presented by the State shows that the five codefendants planned to rob Merilan. Once they broke into his home, they tied up Taylor, Freeman and Merilan. They tortured Merilan until he was unconscious as they searched through his home for money, drugs and other items of value. After Merilan barricaded himself in the bedroom closet, they shot into the closet multiple times, attempting to kill him. They then shot, execution style, Freeman and Taylor in the back of the head. All five codefendants then drove back to Orlando, splitting the proceeds of their robbery. This evidence is sufficient for McCloud's convictions for first degree murder, attempted first degree murder, conspiracy, burglary, and robbery.

ISSUE VI

The *Caldwell* Claim

McCloud next argues that the trial court's remarks during jury selection allegedly violated Caldwell v. Mississippi, 472 U.S. 320 (1985). For the following reasons, McCloud is not entitled to any relief based on Caldwell.

First of all, although McCloud states that the trial court advised the jury "on five or six occasions that the ultimate decision to impose the death penalty rested with the court," McCloud fails to cite any pages from the *voir dire* transcript with these "five or six occasions." (See IB at 71). McCloud's "Statement of the Facts" likewise asserts that the trial court mentioned "five or six" times . . . that he was "ultimately responsible" [to determine the application of the death penalty], but does not include any citations to the transcript with these "five or six" occasions. (IB at 10). Furthermore, the cited transcript pages which immediately precede McCloud's Caldwell allegation do not reflect the alleged "five or six" occasions either. (See IB at 10, citing V20/T724-725; 742-743; 865-868). This Court should decline McCloud's invitation to comb the multi-volume record on his behalf. See U.S. v. Boyles, 57 F.3d 535, 549 (7th Cir. 1995) (stating, "[w]e refuse to 'comb

and search the record in search of 'the [errors]' alleged by Boyles.") (citations omitted).

Second, although McCloud cites to Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1988) and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) [modified on denial of rehearing, Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987)], he also recognizes that "this Court expressed disagreement with Adams and Mann." (IB at 71). Any continued reliance on the Eleventh Circuit's disposition of the Caldwell claims in Adams and Mann is entirely misplaced. In Dugger v. Adams, 489 U.S. 401 (1989), the United States Supreme Court reversed the Eleventh Circuit's judgment and held that Caldwell did not provide cause for Adams' procedural default.[13] And, in Davis v. Singletary, 119 F.3d 1471 (11th Cir. 1997), the Eleventh Circuit retreated from that portion of the Mann decision which was predicated on alleged Caldwell error. See State v. Collins, 985 So. 2d 985, 990 fn. 5 (Fla. 2008), citing Davis, 119 F. 3d at 1482 (recognizing that references to and descriptions of the jury's verdict as "advisory," as a "recommendation," and of the judge as the

[13] In Dugger v. Adams, the United States Supreme Court further noted, "We do not decide whether in fact the jury as instructed in this case was misinformed of its role under Florida law. The petition for certiorari did not raise this issue, and the merit of respondent's Caldwell claim is irrelevant to our disposition of the case." 489 U.S. at 408, fn.4.

"final sentencing authority" are permissible under Romano v. Oklahoma, 512 U.S. 1 (1994). Furthermore, this Court "has consistently rejected Caldwell challenges to the standard penalty-phase jury instructions." McKenzie v. State, 29 So. 3d 272, 288 (Fla. 2010). This Court repeatedly has held that "[t]he standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate Caldwell v. Mississippi." Patrick v. State, 104 So. 3d 1046 (Fla. 2012) (quoting Jones v. State, 998 So. 2d 573, 590 (Fla. 2008)). As a result, McCloud is not entitled to any relief based on Caldwell.

During *voir dire*, the trial court informed the jury that the court was bound to give their recommendation great weight. (V17/288). During closing arguments, counsel reinforced this point (V35/3528), and the trial court instructed the jury in accordance with the standard penalty-phase jury instructions. (V35/3525; V37/3805). Again, this Court consistently has "rejected Caldwell challenges to the standard penalty-phase jury instructions." Ault v. State, 53 So. 3d 175, 207 (Fla. 2010), quoting McKenzie, 29 So. 3d at 288.

ISSUE VII

The *Enmund / Tison* Claim

Next, McCloud argues that the Enmund/Tison culpability requirement was not met. (IB at 76). For the following reasons, the trial court correctly denied this claim below and determined that McCloud's major participation in the crimes and his reckless indifference to human life satisfied Enmund/Tison.

In Sanchez-Torres v. State, 130 So. 3d 661, 672 (Fla. 2013), this Court reiterated that the holdings of the United States Supreme Court in Enmund and Tison have been summarized as follows:

> The United States Supreme Court and this Court have consistently held that a sentence of death must be proportional to the defendant's culpability. Thus, in Enmund the Court indicated that in the felony murder context a sentence of death was not permissible if the defendant only aids and abets a felony during the course of which a murder is committed by another and defendant himself did not kill, attempt to kill, or intend that a killing take place or that lethal force be used. Later, in Tison the Court said a sentence of death in the felony murder context can be proportional if the defendant is a major participant in the felony and the defendant's state of mind amounts to a reckless indifference to human life. Stephens v. State, 787 So. 2d 747, 759 (Fla. 2001).

Sanchez-Torres, 130 So. 3d at 672.

In this case, the trial court scrupulously analyzed McCloud's Enmund/Tison claim, assessed the facts of this case

under the requirements of Enmund/Tison and concluded that, due to McCloud's major participation in the crimes and his reckless indifference to human life, he was constitutionally eligible to have the Death Penalty imposed as he met the Enmund/Tison culpability requirements. (V15/2535). The trial court's sentencing order states, in pertinent part:

> C. *ENMUND/TISON* CULPABILITY REQUIREMENTS
>
> At the conclusion of the Guilt Phase, the jury, by Special Interrogatory Verdict, found Robert McCloud Guilty of 2 Counts of First Degree Murder and further found that he actually possessed a firearm However, the jury was not able to find, beyond a reasonable doubt, that he actually discharged a firearm.
>
> Since the jury was not able to find Defendant, Robert McCloud, to be the shooter/trigger man, the Court must focus on Mr. McCloud's culpability to determine whether or not the Death Penalty can constitutionally be imposed upon him. *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Nathaniel Jackson v. State*, 502 So.2d 409 (Fla. 1987); and *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990) and recently discussed at __So.3d__ 37 FLW S17 (Fla. June 14, 2012).
>
> In *Clinton Jackson v State*, 575 So.2d 181 (Fla. 1991), it was held
>
> > "Mere participation in a robbery that resulted in murder is not enough culpabthty to warrant a Death Penalty even if the defendant anticipated that lethal force might be used, because the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." (at page 191)

In order for this Court to enter a sentence of death, the State must demonstrate, beyond a reasonable doubt, that Robert McCloud was a major participant and that his state of mind amounted to a reckless indifference to human life. *Tison v Arizona*, 481 US 131, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), *Clinton Jackson v. State*, 575 So.2d 181 (Fla. 1991), and *Lebron v. State*, 799 So.2d 997 (Fla. 2001).

Robert McCloud was clearly a major participant in the home invasion robbery that occurred at Wilkins Merilan's (Fang's) house. From the mid afternoon on (but for the time he was at the hospital with his wife) he actively participated in discussions about hitting a lick on Fang. He and his co-defendants armed themselves in anticipation of the robbery.

After the decision to rob was made, the Defendant (with his co-defendants) travelled to Poinciana, scouted out Fang's house, and then gathered together at the Poinciana/Wal-Mart parking lot to further discuss their plans. The Defendant, Robert McCloud, actively participated in the discussions and further planning.

Thereafter, Mr. McCloud (Bam), along with Dre, Mate, and Finger climbed over a fence into Fang's backyard. They concealed themselves there when they realized Fang's house was occupied and that some neighbors were still up having a party. The four co-defendants hid in Fang's backyard for several hours before they finally invaded Fang's house.

The Defendant, Robert McCloud, was physically present and actively participated in the breaking down of Fang's door, the rush into the house, the rounding up of occupants, and the securing of the premises. He then actively participated in the search of the house for drugs and money and, according to Dre, the eventual torture of Fang. The Jury found that the Defendant actually possessed a firearm during the course of this burglary and robbery, but the Jury was not able to find, beyond a reasonable doubt, that he actually discharged a firearm. Nonetheless, Mr. McCloud was a major participant in this entire

criminal episode and played a substantial role in it.

The real analysis concerning the appropriateness of imposing the Death Penalty is to gauge and determine Mr. McCloud's state of mind and whether or not beyond a reasonable doubt, Mr. McCloud acted with reckless indifference to human life satisfying the *Enmund/Tison* Culpability Requirements.

It does not appear from the evidence that Mr. McCloud went to Fang's home with the intention that somebody would actually be killed. However, **he was well aware of Major Griffin's (Mate's) state of mind as Mr. McCloud had formed the impression that Mate** fully intended to injure, or possibly kill, Fang. In his recorded statement, Mr. McCloud specifically states

> ". . . Mate had done already hit him one time and Fang buck on him. So he already had a personally [sic] vendetta out against him about that. So Mate was saying that what he was going to do to Fang or whatever. You see what I'm saying, we were gonna fuck him up. At the moment I didn't know that he was gonna fuck him up, meaning to kill him or whatever." (at page 4 of 28)

Later, in response to Detective Bias's question, Did Mate already have intentions of killing somebody before he went there?, Mr. McCloud responded, Pretty much he say he say he was gonna do 'em so. (at page 14 of 28)

Physically, Mr. McCloud is the largest, and most imposing, of the co-defendants. He apparently understood that he was the muscle in the group. This is further demonstrated in his recorded statement where Detective Bias asked him, Why do you think they called and asked you?, to which Mr. McCloud responded:

> "Cause they know me. They know about my reputation. They know about me. Handle my business in the streets; you know what I'm saying? They know I don't fuck off. But I

> didn't do it. And, everything I didn't do it." (at page 21 of 28)
>
> **Knowing Mate's state of mind and knowing that they were going to be invading Fang's house, Mr. McCloud, and the others, armed themselves with guns and it was certainly foreseeable that the guns would be used either on Fang or anyone else that got in their way.**
>
> The Court concludes that Mr. McCloud both objectively and subjectively understood and appreciated that a life, or lives, may be taken during the course of the robbery.
>
> > In *Tison v Arizona*, the Supreme Court stated: "We hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into consideration in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." (481 U S 137, at page 157)
>
> **Based on the above, this Court finds that, due to the Defendant's major participation in the crimes and his reckless indifference to human life, he is constitutionally eligible to have the Death Penalty imposed as he has met the *Edmund [sic, Enmund]/Tison* Culpability Requirements.**

(V15/2533) (e.s.).

Notably, McCloud does not claim that the trial court's findings are not supported by competent, substantial evidence. Instead, McCloud simply disagrees with the trial court and discounts to irrelevance the testimony of Bryson and Dre [who identified McCloud (Bam) as participating in the torture of Fang

and also shooting Tamiqua]. McCloud notes that Fang could not identify McCloud as assisting Mate in the torture. (IB at 75). However, Fang was face down on the floor. Fang was beaten; had boiling water poured on him; had a 40 pound barbell dropped on his head; and was shot multiple times. Not surprisingly, Fang was not sure which defendant was doing what to him.

In cases such as this, where the defendant played a major role in the felony-murder and acted with reckless indifference to human life, his death sentence meets the Enmund/Tison standard. See Van Poyck v. State, 116 So. 3d 347, 359 (Fla. 2013); Van Poyck v. State, 908 So. 2d 326, 329-30 (Fla. 2005) (recognizing that "[e]vidence establishing that Van Poyck was not the triggerman would not change the fact that he played a major role in the felony murder and that he acted with reckless indifference to human life"); Lebron v. State, 2013 WL 321817, 3-4 (Fla. 2014) (noting that trial court found that Lebron's death sentence was supported by an Enmund/Tison analysis because he was a major participant in the murder and demonstrated a reckless disregard for human life); Parker v. State, 89 So. 3d 844, 869 (Fla. 2011) (concluding that, [e]ven if Parker was not the shooter, he was a major participant in the felony and [his] state of mind amount[ed] to a reckless indifference to human life); Perez v. State, 919 So. 2d 347, 368 (Fla. 2005) (finding

that the jury was properly instructed and, by voting to recommend the death penalty, concluded that the Enmund/Tison culpability requirement was satisfied . . . [and] the trial court provided a detailed analysis of the evidence presented at trial in support of its finding that the requirement had been established beyond a reasonable doubt). In this case, as in the foregoing cited cases, the trial court's sentencing order should be affirmed.

ISSUE VIII

The Proportionality Claim

In this issue, McCloud argues that his death penalty is "proportionally impermissible." (IB at 76). For the following reasons, the death penalty is proportionate in this case.

In Kalisz v. State, 124 So. 3d 185, 212-214 (Fla. 2013), this Court recently reiterated the standards applied to proportionality review. In Kalisz, this Court reiterated that it has described its obligation to conduct a proportionality review as follows:

> Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. Hurst v. State, 819 So.2d 689, 700 (Fla. 2002). In determining whether death is a proportionate penalty in a given case, we have explained our standard of review as follows:
>
> > "[W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails "a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances."

> Williams v. State, 37 So.3d 187, 205 (Fla. 2010)(quoting Offord v. State, 959 So.2d 187, 191 (Fla. 2007)). Thus, our proportionality review requires that we discretely analyze the nature and weight of the underlying facts; we do not engage in a "'mere tabulation' of the aggravating and mitigating factors." Terry v. State, 668 So.2d 954, 965 (Fla. 1996)(quoting Francis v. Dugger, 908 F.2d 696, 705 (11th Cir. 1990)).
>
> Scott v. State, 66 So. 3d 923, 934–35 (Fla. 2011).

Kalisz, 124 So. 3d at 212.

In this case, the jury recommended, by a vote of 8 to 4, that McCloud be sentenced to death for the two murders. The trial court found the following aggravating[14] factors: (1) The defendant was contemporaneously convicted of another capital felony or felony involving use of threat of violence of the person (great weight); (2) the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit or in flight after committing or attempting to commit any homicide, robbery or burglary (great weight); (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest (great weight) and (4) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (substantial weight). The trial court also

[14] The trial court found that it would be improper to consider the factor that the capital felony was committed for financial gain as it merges with factor #2.

considered numerous mitigators and found, as follows: (1) Robert McCloud has learning disabilities (slight weight); (2) psychological impact of being physically abused as a child (some weight); (3) psychological effect of neglect as a child (some weight); (4) psychological and life altering effects of school and other institutional failures (little weight); (5) McCloud's level of emotional maturity (slight weight); (6) McCloud's borderline level of intellectual functioning (some weight); (7) McCloud promoted a positive family life for his own family members (slight weight); (8) McCloud was gainfully employed (slight weight); (9) McCloud is a good parent to his stepdaughter (slight weight); (10) positive influence on minor children of his relatives (some weight); (11) troubled relationship with his natural family (slight weight); (12) raised without a father (some weight); (13) maintained continued contact with, and concern for, his family (very little weight); (14) suffered a difficult and unstable childhood (some weight); (15) disparate treatment of co-defendants (not legally established, given no weight); (16) co-defendant instigated and planned the offense (some weight to fact that McCloud wasn't instigator, but very little weight to argument that he didn't plan offense); (17) McCloud never experienced a family life that could be considered normal (some weight); (18) confession

allegedly was coerced and and/or voluntary statement, not proven (no weight); (19) murders were independent act of a co-defendant (not proven, given no weight); (20) McCloud's emotional and development age (slight weight); (21) McCloud was just an accomplice (not proven, no weight); (22) McCloud was under the influence of extreme mental or emotional disturbance (slight weight). The trial court's sentencing order also addressed the issue of proportionality and explained, in pertinent part:

> D. PROPORTIONALITY
>
> There appears to be 2 levels of proportionality analysis that need to be addressed in determining whether the Death Penalty is appropriate (1) external comparison to other Capital cases and (2) internal comparison to the relative culpability of co-defendants.
>
> The external comparison of the proportionality of a death sentence that is imposed in a particular case to other cases throughout the State is the province of the Florida Supreme Court. *Cole v. State*, 36 So.3d 597, 610 (Fla. 2010)(. . . we [the Florida Supreme Court] have a duty to conduct a "proportionality review to prevent the imposition of 'unusual' punishments contrary to Article I, Section 17 of the Florida Constitution.")(emphasis added) Citing *Simmons v. State*, 934 So.2d 1100, 1122 (Fla. 2006), Also see, *Caballero v State*, 851 So 2d 655, 663 (Fla. 2003) ("In performing a proportionality review, this Court [the Florida Supreme Court] is committed to reserving the death penalty for only the most aggravated and the least mitigated of First Degree Murders.")(emphasis added)
>
> In regard to the internal comparison of the relative culpability of co-defendants, the Florida Supreme Court seems to imply that it is likewise their

province and responsibility. *Shere v. Moore*, 830 So.2d 56, 60 (Fla. 2002). ("However, in cases where more than one defendant was involved in the commission of the crime, this Court [the Florida Supreme Court] performs an additional analysis of relative culpability")(emphasis added), *Caballero v State*, 851 So. 2d 655, 662 (Fla. 2003)("Where more than one defendant was involved in the commission of a crime, this Court [the Florida Supreme Court] performs an analysis of relative culpability to ensure that equally culpable co-defendants were treated alike in capital sentencing and received equal punishment")(emphasis added).

However, the analysis of relative culpability of co-defendants is based on the qualitative analysis of the totality of the circumstances which begins with a factual determination and therefore necessarily involves the Trial Court.

In this case, it is difficult to compare the co-defendant's relative culpability as three of them (Joshua "Josh" Bryson, Andre "Dre" Brown, and Jamal "Finger" Brown) have all pled to lesser offenses of Second Degree murder, have been convicted of those lesser crimes, and have been sentenced to between 10—15 years in State prison. Major "Mate" Griffin has been found to be mentally retarded under Florida Statutes §921.137, and therefore he is not eligible for the imposition of the Death Penalty.

It is further difficult to compare the relative culpability of the various codefendants as the State Attorney exercised its Prosecutorial Discretion in negotiating pleas with the various co-defendants *Palmer v. Wainwright*, 460 So.2d 362 (Fla. 1984) and *Garcia v. State*, 492 So.2d 360 (Fla. 1986). Therefore, it is likely that there will not be a trial in any of the other cases where a jury would be called upon to determine who the actual "shooter" was. Again, the jury in Mr. McCloud's case could not find, beyond a reasonable doubt, that Mr. McCloud "actually discharged a firearm."

Certainly, the "shooter" deserves the Death

Penalty for the execution style murders that occurred here. Without knowing who the actual "shooter" is, each co-defendant is arguably equally culpable for the murders Therefore, the disparate treatment of Mr. McCloud "may render the defendant's punishment disproportionate." *Farina v. State*, 801 So.2d 44, 55 (Fla. 2001)(emphasis added) and *Cardona v State*, 641 So.2d 361 (Fla. 1994). Also see *Shere v Moore*, 830 So.2d 56 (Fla. 2002).

Earlier in this Order, the Court addressed the subject of disparate treatment of the Defendant when compared to his co-defendants. This Court concluded that the Defendant has not, legally, been treated disparately. (See page 17 above).

However, disparate treatment and relative culpability, while connected, are not the same. Disparity of treatment has to do with the outcome of what sentences are imposed for crimes of which co-defendants are convicted. Relative culpability has to do with a comparison of a Defendant's involvement in the crime to his co-defendant's involvement in the crime.

In this case, the State Attorney's Office exercised its Prosecutional Discretion and chose to enter into plea negotiations with several of the co-defendants. It further chose to pursue the imposition of the Death Penalty against the Defendant, Robert McCloud. The jury (which is the same jury that was not able to find that the Defendant "actually discharged a firearm" beyond a reasonable doubt) recommended the imposition of the Death Penalty, 8-4, and this Court must give that recommendation great weight. **The State has established 4 significant Aggravators beyond a reasonable doubt. The Court has given 3 of them great weight and the fourth substantial weight and finds they significantly outweigh the Mitigators. The Defendant has not been, legally, treated disparately His relative culpability is at least equal to some of his co-defendants and possibly greater than others as he was a major participant in the home invasion, was armed with a firearm and knew Mate was contemplating (if not planning) to at least injure, if not kill, Fang.**

> Cases addressing proportionality and relative culpability seem to imply that a Defendant who is equally culpable with other co-defendants may be sentenced to the Death Penalty even if the co-defendants are sentenced to lesser sentences. That is the case here as we do not know who the actual shooter is and the Jury (recommending the imposition of the Death Penalty against Mr. McCloud) could not find, beyond a reasonable doubt that Mr. McCloud "actually discharged a firearm."
>
> If the proportionality standard concerning relative culpability among codefendants should be that the most culpable of the co-defendants be sentenced to the Death Penalty before any lesser culpable defendant can be, that is a new bright line determination and that is for the Florida Supreme Court to draw. For a discussion of proportional sentencing and a comparison of how the various States address it, see, *Executing Those Who Do Not Kill A Categorical Approach to Proportional Sentencing*, by Trigilio and Casadro, 48 American Criminal Law Review 1371 (Summer 2011).

(V15/2535)(e.s.).

In conclusion, the trial court emphasized that it (1) had considered the Jury's recommendation, (2) found that the State had proven, beyond a reasonable doubt, four aggravating factors (three of which were assigned great weight and the fourth, substantial weight), and (3) found that numerous mitigators were established. The trial court recognized that "the Court's duty to look at the nature and quality of the aggravating and mitigating circumstances that have been established. Under such an analysis, the aggravating circumstances far outweigh the mitigating circumstances." (V15/2537).

In this case, as in Kalisz v. State, 124 So. 3d 185, 212-214 (Fla. 2013), this Court's precedent supports McCloud's death sentences as proportionate given that the trial court properly found four aggravating circumstances, two of which are among the most serious aggravating circumstances — CCP and prior violent felony, and weighed them against multiple mitigating circumstances. See Buzia v. State, 82 So. 3d 784, 800 (Fla. 2011); Chamberlain v. State, 881 So. 2d 1087, 1109 (Fla. 2004); Wright v. State, 19 So. 3d 277, 304 (Fla. 2009); Diaz v. State, 860 So. 2d 960, 971 (Fla. 2003); see also Heath v. State, 648 So. 2d 660, 663 (Fla. 1994) (holding death sentence proportionate where the aggravating factors of prior violent felony and murder committed during course of a robbery were balanced against statutory mitigating factor of extreme mental or emotional disturbance and several non-statutory mitigating circumstances).

In this case, the aggravator of prior conviction of another capital felony or a felony involving the use or threat of violence to the person was established by McCloud's multiple convictions. McCloud was convicted of first degree murder in Count 1 of the Indictment, involving the death of Tamiqua Taylor. McCloud also was convicted of first degree murder, a capital felony, on Count 2 of the Indictment, which involved the

death of Dustin Freeman. In addition, McCloud also was convicted of the attempted murder of Wilkins Merilan and the armed robbery of Wilkins Merilan, both felonies involving the use or threat of violence. The murder of a second human being is certainly one of the most powerful aggravating factors that can be proven by the State. Furthermore, the CCP aggravator was supported both by the substantial period of reflection and the execution-style murders. The defendant traveled from Orlando to the Poinciana area of Polk County to commit a burglary. Once the perpetrators arrived at the victim's house, they waited in the backyard for over two hours. During this time, the perpetrators were aware that the house was occupied by a least two persons, the owner of the home, Wilkins Merilan, and a female. Once the perpetrators entered the residence, they spent an extended period of time inside and outside searching for drugs and money. The perpetrators had ample time to decide what to do about the witnesses inside the home. The murders of the two victims were accomplished by a single gunshot wound to the back of the head. Mr. Freeman was completely restrained and had no opportunity to resist. Ms. Taylor was cooperatively laying on the couch in the living room area when she was shot, execution style.

In light of the number and severity of the crimes committed, and the comparable case law, the imposition of the

death penalty is proportionate. See Kalisz, 124 So. 3d at 214; Martin v. State, 107 So. 3d 281, 324-325 (Fla. 2012) (noting death sentences affirmed as a proportionate penalty when a finding of CCP was coupled with other aggravators in addition to multiple mitigating factors. Id., citing Mosley v. State, 46 So. 3d 510, 527–29 (Fla. 2009) (holding death penalty proportionate where the trial court found CCP and three other aggravators and twenty-nine nonstatutory mitigators); Zakrzewski v. State, 717 So. 2d 488, 494 (Fla. 1998) (holding imposition of the death penalty proportionate where the trial court found two aggravating circumstances, CCP and contemporaneous murder, two statutory mitigating factors, and "a number of nonstatutory mitigating factors"); Braddy v. State, 111 So. 3d 810, 862-863 (Fla. 2012), (collecting cases and finding death penalty proportionate in case with five aggravators, which included CCP and prior conviction of another capital felony or of a felony involving the use or threat of violence to another person and multiple non-statutory mitigators).

McCloud also insists that his death penalty is disproportionate based on "relative culpability." However, the trial court specifically found that (1) McCloud was not, legally, treated disparately, and (2) McCloud's "relative culpability is at least equal to some of his co-defendants and

possibly greater than others as he was a major participant in the home invasion, was armed with a firearm and knew Mate was contemplating (if not planning) to at least injure, if not kill, Fang." (V15/2537). In this case, the co-defendants entered plea agreements and were convicted of the lesser charge of second degree murder. As a result, their sentences are legally irrelevant to McCloud's proportionality claim.[15] See Krawcuk,

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[15] McCloud minimizes the fact that two victims were killed in this case, execution style. In addition, McCloud's cited cases are distinguishable. For example, Slater v. State, 316 So. 2d 539 (Fla. 1975) was a jury override. And, in Slater, this Court held that the *less culpable* non-triggerman could not receive a death sentence when the more culpable triggerman received a life sentence. In Hazen v. State, 700 So. 2d 1207, 1214 (Fla. 1997), one of the defendants was a prime instigator and the other was not. In Puccio v. State, 701 So. 2d 858, 863 (Fla. 1997), the trial court's determination that Puccio was more culpable was not supported by competent substantial evidence and was contrary to the State's theory at trial. In Curtis v. State, 685 So. 2d 1234 (Fla. 1996), "the actual killer was sentenced to life." Furthermore, unlike Urbin v. State, 714 So. 2d 411 (Fla. 1998) and Livingston v. State, 565 So. 2d 1288 (Fla. 1988), this was not a "robbery gone bad." Instead, it was a deliberate execution-style killing. Furthermore, both Livingston and Urbin were 17-year-old minors at the time of the murders.

In this case, as the trial court recognized, co-defendant Major Griffin (Mate) has been "declared incompetent to proceed and is also suffering from mental retardation." (V15/2517). In Shere v. Moore, 830 So. 2d 56, 62 (Fla. 2002), this Court explained that "only when the codefendant has been found guilty of the same degree of murder should the relative culpability aspect of proportionality come into play. Moreover, the codefendant should not only be convicted of the same crime but should also be otherwise eligible to receive a death sentence, i.e., be of the requisite age and not mentally retarded." Id. at fn. 6, citing Henyard v. State, 689 So. 2d 239 (Fla. 1996).

supra; Farina v. State, 937 So. 2d 612, 618-19 (Fla. 2006) (noting that codefendant's life sentence was "irrelevant" to defendant's proportionality review because the codefendant's sentence was reduced to life because he was a juvenile); Kight v. State, 784 So. 2d 396 (Fla. 2001) (rejecting disparate treatment argument when codefendant entered plea deal with State to second degree murder); Howell v. State, 707 So. 2d 674, 682-83 (Fla. 1998) (rejecting claim of disparate sentencing where codefendant pled to second-degree murder and received sentence of forty years); Hayes v. State, 581 So. 2d 121, 127 (Fla. 1991) (rejecting claim of disparate sentencing where codefendant pled guilty to second-degree murder and testified against defendant); Brown v. State, 473 So. 2d 1260, 1268 (Fla. 1985) (rejecting claim of disparate sentencing where codefendant pled guilty to second-degree murder). Here, as in the foregoing cases, McCloud's death penalty is proportionate.

ISSUE IX

The Prosecutor Comment Claim

In this issue, McCloud states that the "trial court erred when it denied motions for a mistrial when the prosecutor made improper comments during closing argument." (IB at 84). However, McCloud fails to cite any portion of the transcript where (1) the prosecutor allegedly made an improper comment, and (2) the defense timely objected to the prosecutor's comment, and (3) a mistrial was sought, and (4) a mistrial was improperly denied. (See IB at 84-85). Again, this Court should decline McCloud's invitation to comb the multi-volume record on his behalf. McCloud's *pro forma* complaint is insufficient to fairly present any objected-to prosecutor comment/mistrial claim for appellate review. See Peterson, supra.

However, McCloud does cite to one *unobjected*-to comment from a single sentence in the prosecutor's closing argument. (IB at 85). That unobjected-to comment is "[w]e know his .38 caliber shot these two people and we know that he was caught with a .38." (V37/3785). Because McCloud did not object to this comment below, he failed to properly preserve it for appellate review. See Conahan v. State, 844 So. 2d 629, 641 (Fla. 2003). As this Court repeated in Conahan, the only exception to this procedural

bar "is where the unobjected-to comments rise to the level of fundamental error, which has been defined as error that 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Conahan, 844 So. 2d at 641, quoting Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000). In King v. State, 130 So. 3d 676, 687 (Fla. 2013), this Court summarized the following principles applied to closing argument claims:

> "Attorneys are permitted wide latitude in closing argument, but that latitude does not extend to allowing improper argument." Silvia, 60 So.3d at 977. "[T]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Gonzalez v. State, 990 So.2d 1017, 1028–29 (Fla. 2008) (quoting Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985)). "Counsel must contemporaneously object to improper comments to preserve a claim for appellate review. Unobjected-to comments are grounds for reversal only if they rise to the level of fundamental error." Merck v. State, 975 So.2d 1054, 1061 (Fla. 2007).
>
> A review of the context surrounding the comments in this case reveals that the prosecutor's statements were not only "fair comment[s] on the evidence adduced at trial," Wade v. State, 41 So.3d 857, 868 (Fla. 2010), but were used to argue that the committed during the course of a burglary aggravator should be accorded significant weight. Even assuming that the comments were improper, they clearly did not rise to the level of fundamental error-that is, error that "reaches down into the validity of the trial itself to the extent that a . . . jury recommendation of death could not have been obtained without the assistance of the alleged error." Poole v. State, 997 So.2d 382, 390

(Fla. 2008) (quoting Card v. State, 803 So.2d 613, 622 (Fla. 2001)).

King, 130 So. 3d at 687.

In this case, the prosecutor's unobjected-to comment was not error, much less fundamental error. The prosecutor's comment was a fair inference from the evidence: the murder victims were shot with a .38; and, although the murder weapon was not recovered, a .38 was stolen from the residence and McCloud was found with the stolen .38. (V29/2467, 2480). The prosecutor's comment was within the wide latitude afforded closing argument. It was legitimate rebuttal to the defense argument that the murders were the independent act of a co-defendant and a fair inference from the evidence presented at trial and its application to the Enmund/Tison culpability requirement. The prosecutor's comment, in context, was:

> . . . Because when you're talking about the same instruction that I just went over that you've got to find he's a major participant and reckless indifference to human life, that--that is--we know that his .38 shot these two people and we know that he was caught with a .38. And we know that he was participating in the beating of Fang.

(V37/3785).

Again, counsel is permitted to review the evidence and fairly discuss and comment upon the testimony and logical inferences from that evidence. King, 130 So. 3d at 687. The

prosecutor's comment was a fair inference from the evidence presented at trial. Furthermore, error, if any, is harmless. See Conahan, 844 at 641 (prosecutor's comments did not deprive defendant of a fair penalty phase hearing).

ISSUE X

The Aggravating Factors Claim

McCloud next alleges that the trial court erred in finding the aggravating factors that the murders were committed in a cold, calculated, and premeditated manner (CCP) and to avoid arrest. In addition, McCloud repeats his reliance on his guilt phase jury instruction claim regarding attempted murder. (IB at 86-90).

When a capital defendant challenges the finding of an aggravator, this Court does not reweigh the evidence to determine whether the State proved the aggravating circumstance beyond a reasonable doubt. Peterson v. State, 94 So. 3d 514, 530-537 (Fla. 2012), citing Aguirre-Jarquin v. State, 9 So. 3d 593, 608 (Fla. 2009). Rather, this Court's task on appeal is "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 v. State, 696 So. 2d 693, 695 (Fla. 1997)).

In this case, both of the murdered victims, Dustin Freeman and Tamiqua Taylor, were compliant and posed no threat when they each were shot in the back of the head, execution style. Dustin

Freeman was bound and placed on the floor in the master bedroom, next to Fang. Freeman was shot in the back of the head while he was bound and laying on the floor. Tamiqua Taylor was told to go sit on the couch, along with Fang's three-year-old daughter, Winter. While she was on the couch, Tamiqua Taylor was shot in the back of the head.

The CCP Aggravator

In finding the CCP aggravator in this case, the trial court stated, in pertinent part:

> **5) The Capital Felony was a Homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.**
>
> F.S. § 921.141(5)(i)
>
> In *Salazar v State*, 991 So.2d 364 (Fla. 2008), the Florida Supreme Court reiterated the four part test to determine whether the CCP Aggravator is applicable. See, *Evans v. Jones*, 800 So.2d 182, 192 (Fla. 2001)(quoting *Jackson v. State*, 648 So.2d 85, 89 (Fla. 1994)). Those factors apply here as follows:
>
> > a) COLD. The killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy panic, or a fit of rage.
> >
> > Dustin Freeman was bound and placed on the floor in the master bedroom. He remained there for quite some time while Fang was being tortured and the home ransacked. He was fully compliant and does not appear to have struggled with anyone. He was shot, execution style, in the back of the head while still bound and laying on the floor.

Tamiqua Taylor was ordered to sit on a couch and fully complied with that order. She remained on the couch throughout the entire criminal episode, was fully compliant and never put up a struggle. She was likewise shot in the back of the head (execution style).

Neither of the victims offered any resistance or provocation and the various co-defendants had ample opportunity reflect upon their actions before the murders took place. Also, see, *Looney v. State*, 803 So.2d 656 (Fla. 2001).

The execution style killing of each of the victims was a "cold" crime.

b) CALCULATED. The Capital Felony must have been committed as a result of a careful plan or prearranged design to commit murder before the fatal incident.

Before going to Fang's home, the various co-defendants armed themselves with several different hand guns. While it does not appear that any of the co-defendants specifically meant to, or intended to, murder anyone, they were aimed and prepared to use their weapons. Moreover, the Defendant, Robert McCloud, admits in his confession that Major Griffin (Mate) may have had it in for Fang and may have had intentions to kill, at least, Fang during the robbery.

After ransacking the house and before leaving, the codefendants had time to coldly and calmly decide to kill both Dustin Freeman and Tamiqua Taylor. Again, both Dustin Freeman and Tanuqua Taylor were shot in the back of the head, execution style, and at very close range. Both victims were shot in nearly the same place in the back of their heads. This means that the shooter took the time to stand over the respective victims, carefully aim the gun, and shoot.

There was a calculated decision to kill the two victims.

c) PREMEDITATED. The Capital Felony must have been committed with exhibited heightened premeditation.

Heightened premeditation is more than what is required to prove First Degree Premeditated Murder and includes deliberate ruthlessness. *Buzia v. State*, 926 So.2d 1203 (Fla. 2006).

"Heightened premeditation necessary for CCP is established where the Defendant had ample opportunity to release the victim but instead, after substantial reflection, acted out the plan he had conceived during the extended period in which the offense occurred." *Hudson v State*, 992 So.2d 96, 116 (Fla. 2008).

The various Defendants armed themselves with handguns before going to Fang's house. They were in the house for what appears to be a couple of hours while they tortured Fang and searched for drugs and money. They had ample opportunity to release the victims rather than kill them but, instead, Dustin Freeman and Tamiqua Taylor were each shot in the back of the head "execution style."

d) NO JUSTIFICATION. There must have been no pretense of moral or legal justification.

Dustin Freeman and Tamiqua Taylor were executed at the conclusion of a home invasion robbery where the various co-defendants were bent on stealing drugs and money. There was no justification for these murders.

The evidence demonstrates beyond and to the exclusion of any reasonable doubt that Dustin Freeman and Tamiqua Taylor were murdered in a cold, calculated and premeditated manner for which there is no pretense of moral or legal justification.

> This is the type of Aggravator that Florida Trial Courts regularly assign great weight but, in light of the fact that the Jury was not able to conclude, beyond a reasonable doubt, that Defendant, Robert McCloud, actually discharged a firearm, this Court assigns substantial weight to this Aggravator.

(V15/2524) (e.s.).

As previously noted, the review of a trial court's finding of an aggravating factor is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). A determination of whether CCP is present is properly based on a consideration of the totality of the circumstances. Gosciminski v. State, 2013 WL 5313183 (Fla. 2013); See also Franklin v. State, 965 So. 2d 79, 98 (Fla. 2007); Victorino v. State, 23 So. 3d 87, 105 (Fla. 2009). The CCP aggravator can be indicated by circumstances showing factors 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. All of these circumstances are present here. See Brown v. State, 126 So. 3d 211 (2013); Eutzy v. State, 458 So. 2d 755, 757 (Fla. 1984) (shooting the victim once in the head execution-style); Lynch v. State, 841 So. 2d 362, 372 (Fla. 2003) (CCP upheld where victim shot in back of head, victim did not offer any resistance or provocation, and there was five to

seven minute delay between initial shots and fatal shots). In this case, the execution-style murders of the two victims clearly satisfied the aggravating factor that murder was cold, calculated, and premeditated (CCP). See also Looney v. State, 803 So. 2d 656 (Fla. 2001) (CCP upheld where evidence that defendants bound victims and rendered them harmless during robbery and, despite opportunity to leave crime scene without injuring victims, defendants murdered them instead). In Jennings v. State, 718 So. 2d 144 (Fla. 1998), this Court noted that although evidence of a plan to commit a robbery was, by itself, insufficient to support CCP, citing Castro v. State, 644 So. 2d 987, 991 (Fla. 1994), the evidence did not suggest a "robbery gone bad." Instead, the execution-style murders, combined with advance procurement of the murder weapon, previously expressed dislike for a victim, and expressed intent not to leave any victims, supported the elements of a calculated plan and heightened premeditation. Jennings, 718 So. 2d at 152. Here, as in Jennings, the murders were not the result of a "robbery gone bad." Instead, it was a cold-blooded execution.

The Avoid Arrest Aggravator

When evaluating the avoid arrest aggravator, this Court has considered "whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination;

whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant." McGirth v. State, 48 So. 3d 777, 792-93 (Fla. 2010) (citing Nelson v. State, 850 So. 2d 514, 526 (Fla. 2003). In finding that the "capital felony was committed for the purpose of avoiding or preventing lawful arrest," the trial court stated, in pertinent part:

> **3) The Capital Felony was committed for the purpose of avoiding or preventing lawful arrest.**
> F.S. 921.141(5)(e)
>
> In *Looney v. State*, 803 So.2d 656 (Fla. 2001), it was held that, in considering the Avoid Arrest Aggravator, the Court should focus on the Defendant's motivation for the crime. Moreover, the evidence must prove that the sole or dominate motive for the killing was to eliminate a witness.
>
> The evidence in this case establishes that Dustin Freeman was subdued, bound and placed on the floor. Tamiqua Taylor was ordered to sit on a couch and take care of the young 3 year old (Winter) which she did. Thereafter, the various codefendants ransacked the house and tortured Wilkins Merilan (Fang). During the entire period of time, Dustin Freeman laid bound and compliant on the floor. Likewise, Tamiqua Taylor remained compliant, sitting on the couch.
>
> At the conclusion of the burglary and robbery, it appears that shots rang out and there was cause to believe that Wilkins Menilan (Fang) was dead in the closet. **The various co-defendants, including the Defendant, could have easily left the premises without further injuring or killing either Dustin Freeman or Tamiqua Taylor. Instead, Dustin Freeman and Tamiqua Taylor were each shot in the back of the head (execution style). There was really no reason to kill either of the victims other than to eliminate them as**

witnesses to the crimes that had occurred.

> While it is true that neither of the victims knew any of the co-defendants, the various co-defendants had spent a significant amount of time in the home and were clearly visible to the victims. Both Dustin Freeman and Tamiqua Taylor would have been able to easily identify each and every one of the perpetrators. **Both Dustin Freeman and Tamiqua Taylor were compliant, were not in a position to pose a threat to the defendants, and both were shot "execution style." Therefore, the Court concludes, there is evidence beyond and to the exclusion of all reasonable doubt, that the dominate motive for the murders of Dustin Freeman and Tamiqua Taylor was for the purpose of eliminating witnesses and avoiding arrest and/or eventual prosecution.** See, *Farina v. State*, 801 So.2d 44, 54 (Fla. 2001) and *Jennings v. State*, 718 So.2d 144, 150 (Fla. 1988).
>
> The Court assigns great weight to this Aggravator.

(V15/2523) (e.s.).

In McGirth, this Court upheld the avoid arrest aggravator where McGirth never made an effort to conceal his identity from the victims and could have accomplished the robbery without killing the victims, who posed no resistance to McGirth or his codefendants. Once McGirth and his codefendants obtained the victims' property and secured a getaway, there was no reason to kill one victim and attempt to kill a second victim except to eliminate them as witnesses. McGirth, 48 So. 3d at 792-794; See also Looney v. State, 803 So. 2d 656, 677-78 (Fla. 2001) (finding that once the defendants immobilized the victims, obtained their property, and secured a getaway, there was no

reason to kill the victims except to eliminate them as witnesses). Here, as in McGirth, because sufficient evidence exists to support the aggravators of avoid arrest and CCP, the trial court did not err in finding these aggravating factors.

McCloud also renews his guilt phase jury instruction claim regarding his contemporaneous felony conviction. This issue has been previously addressed in Issue IV and the State relies on the arguments previously presented in Issue IV herein. In conclusion, the trial court found that McCloud was contemporaneously convicted of another Capital Felony, the Capital Felony was committed while the defendant was engaged in a burglary and/or robbery, the Capital Felony was committed for the purpose of avoiding arrest, and the Capital Felony was a homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The Court assigned great weight to three of the aggravators and substantial weight to the fourth. (V15/2527). Error, if any, in finding the aggravators was harmless beyond a reasonable doubt; any of the aggravators found, including previous convictions of a capital offense based on the murders committed contemporaneously to each murder, would outweigh defendant's mitigation. Carter v. State, 980 So. 2d 473 (Fla. 2008).

ISSUE XI

The Consideration of Mitigation Claim

In the title of this issue, McCloud asserts that the trial court "failed to consider proven mitigators." (IB at 92, e.s.). However, the trial court did consider and address all of the proposed mitigating circumstances below. (See V15/2527). Therefore, McCloud's argument is, in reality, that the trial court erred when it rejected some of the proposed mitigating circumstances. (See IB at 95).

This Court has established several principles applicable to the trial court's evaluation of proposed mitigators. In Heyne v. State, 88 So. 3d 113 (Fla. 2012), this Court reiterated:

> A trial court must find as a mitigating circumstance each proposed factor that has been established by the greater weight of the evidence and that is truly mitigating in nature. However, a trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection. Even expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case. Finally, even where a mitigating circumstance is found a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case.
>
> Coday v. State, 946 So.2d 988, 1003 (Fla. 2006).
>
> When this Court reviews a trial court's finding on a mitigator, it operates under the following standards of review:
>
> Where it is clear that the trial court has considered all evidence presented in support of a

> mitigating factor, the court's decision as to whether that circumstance is established will be reviewed only for abuse of discretion. See Harris v. State, 843 So.2d 856, 868 (Fla. 2003); Foster v. State, 679 So.2d 747, 755 (Fla. 1996). The trial court's findings will be upheld where there is competent, substantial evidence in the record to support each finding. See Lebron v. State, 982 So.2d 649, 660 (Fla.2008). The weight assigned to an established mitigating circumstance is also reviewed for abuse of discretion. Id.
>
> ...However, a trial court's findings on mitigation are also subject to review for harmless error, and this Court will not overturn a capital appellant's sentence if it determines that an error was harmless beyond a reasonable doubt. See Lebron, 982 So.2d at 661; Singleton v. State, 783 So.2d 970, 977 (Fla. 2001).
>
> Ault v. State, 53 So.3d 175, 186-87 (Fla. 2010).

Heyne, 88 So. 3d at 123.

In this case, the trial court's comprehensive sentencing order thoroughly addressed all of the proposed mitigating circumstances. McCloud first argues that the trial court erred in rejecting his "disparate treatment" sub-claim. (IB at 94-95). The trial court painstakingly addressed and rejected this issue as follows:

> 15) Disparate treatment of Robert McCloud and co-defendants:
>
> All 5 of the co-defendants, Major Griffin (Mate), Joshua Bryson (Josh), Andre Brown (Dre), Robert McCloud (Bam), and Jamal Brown (Finger) actively participated in the planning and execution of the home invasion robbery. While their specific roles might have varied, one (or perhaps two) of them put a .38 caliber revolver to the back of the heads of Dustin Freeman and Tamiqua Taylor and executed them. These

murders, committed by whoever, were committed during the course of a home invasion robbery in order to eliminate witnesses and were committed in a cold, calculated and premeditated "execution style."

Each one of the co-defendants, based on their active participation, is culpable for the murders of Dustin Freeman and Tamiqua Taylor. The State, after obtaining Indictments, including 2 Counts of First Degree Murder against each co-defendant, filed a Notice of Intent to Seek the Death Penalty in each case and against each of the codefendants.

The Court has concluded (and entered an Order finding) that Major Griffin (Mate) suffers from Mental Retardation and is precluded from facing the Death Penalty pursuant to Florida Statutes §921.137.

Co-defendants, Joshua Bryson (Josh), Andre Brown (Dre), and Jamal Brown (Finger), all entered into negotiations with the State. These various negotiations resulted in all 3 of them entering Pleas to Second Degree Murder on each of the Murder Counts, and they are serving terms of imprisonment between 10 and 15 years.

The State has pursued the Death Penalty against Defendant, Robert McCloud.

As a practical matter, all five of the defendants are arguably guilty of Murder as all of them actively participated in the home invasion robbery. All five of the codefendants knew that several of them had armed themselves with firearms and that lethal force may very well be used. All five had witnessed (and some actually participated in) the torture of Merilan Wilkins (Fang), and the evidence demonstrates that there was a general disregard for human life and that there was a grave danger that a death would occur.

However, from a legal point of view, there is no disparate treatment of the codefendants as the co-defendants that have been sentenced were found guilty of the lesser offense of Second Degree Murder. The Florida Supreme Court has repeatedly stated:

> "In instances where the co-defendant's lesser sentence was the result of a plea agreement or prosecutorial discretion, this Court has rejected claims of disparate sentencing." *Wade v. State*, 41 So.3d 857, 868 (Fla. 2010); *Cole v. State*, 36 So.3d 597, 610 (Fla. 2010); *England v. State*, 940 So.2d 289, 406 (Fla. 2006); *Also see, Kight v. State*, 784 So.2d 396, 401 (Fla. 2001).
>
> While it is true that the jury either concluded that someone else shot Dustin Freeman and Tamiqua Taylor, or that there was insufficient evidence to prove beyond a reasonable doubt that Robert McCloud was the shooter, there is no disparate treatment of Mr. McCloud as a jury convicted him of 2 Counts of First Degree Murder and the other 3 co-defendants have pled to the lesser included offense of Second Degree Murder.
>
> This Mitigator has not been legally established and is given no weight.

(V15/2529-2531).

McCloud does not dispute the well-established precedent cited by the trial court for the principle that "[i]n instances where the co-defendant's lesser sentence was the result of a plea agreement or prosecutorial discretion, this Court has rejected claims of disparate sentencing." See V15/2530, citing Wade v. State, 41 So. 3d 857, 868 (Fla. 2010); Cole v. State, 36 So. 3d 597, 610 (Fla. 2010); England v. State, 940 So. 2d 289, 406 (Fla. 2006); Kight v. State, 784 So. 2d 396, 401 (Fla. 2001). Instead, McCloud cites to Parker v. Dugger, 498 U.S. 308, 111 S. Ct. 731 (1991) and White v. Dugger, 523 So. 2d 140 (Fla.

1988). Parker involved a jury override; and, as this Court noted on remand, "many of these mitigating factors have been found sufficient in other cases to preclude a jury override and sustain a life recommendation." Parker v. State, 643 So. 2d 1032 (Fla. 1994). In this case, unlike Parker, there is no life recommendation and jury override. In White, the co-defendant was convicted of third-degree murder and this Court explained, "[w]hile this is fortunate for him, it does not require the reduction of White's sentence. White was the executioner, and his sentence is warranted." White, 523 So. 2d at 141; See also White v. State, 817 So. 2d 799, 804 (Fla. 2002) (noting that co-defendant testified at trial that he was convicted and sentenced to 15 years in prison for third-degree murder).

In this case, the trial court applied the correct rule of law to the circumstances of this case. Any claim of disparate sentencing must be rejected where the co-defendants entered plea agreements and were convicted of lesser charges (second degree murder). As a result, the trial court correctly found that McCloud's claim of "disparate treatment" was not legally established. See Krawczuk v. State, 92 So. 3d 195 (Fla. 2012) (because co-defendant pleaded guilty to second-degree murder and was sentenced to 35 years, Krawczuk's [disparate sentencing] claim was "without merit"), Id. at 207, citing Kight, 784 So. 2d

at 401; Brown v. State, 473 So. 2d 1260, 1268 (Fla. 1985). Moreover, McCloud's assertion that he was not "equally culpable" was previously addressed in Issue VIII (proportionality) and the State also relies on the arguments set forth in Issue VIII.

Next, McCloud alleges that the trial court erred in rejecting three other circumstances: (1) a co-defendant instigated and planned the offense, (2) McCloud was merely an accomplice and (3) the murders were an independent act of a codefendant. (IB at 95). However, contrary to McCloud's conclusion, the trial court did find and did give "some weight to the fact that Mr. McCloud was not the instigator of the crimes, but very little weight to the argument that he did not plan the offense." (V15/2531). With regard to the two remaining circumstances (alleged independent act of co-defendant and relatively minor participation of McCloud), the trial court concluded that they were "not proven." (V15/2532). The trial court specifically found that "McCloud actively participated in the home invasion robbery which ultimately resulted in Dustin Freeman and Tamiqua Taylor being executed." Thus, the trial court did "not find that the murders were the independent act of a co-defendant." (V15/2521). Furthermore, the trial court explicitly determined that McCloud's participation in the crimes was "not relatively minor," but "McCloud played an active and

integral role in the home invasion robbery." (V15/2532). A "trial court may reject a mitigator if the defendant fails to prove the mitigating circumstance, or if the record contains competent, substantial evidence supporting its rejection." Oyola v. State, 99 So. 3d 431, 445 (Fla. 2012) citing Ault, 53 So. 3d at 186.

In this case, as in Allen v. State, 2013 WL 3466777 (Fla. 2013), "[t]he trial court identified each mitigating circumstance presented by the defense and stated its conclusion as to each mitigator, supplying facts and reasoning for its conclusions. The trial court adequately reviewed each of the proposed aggravators and mitigators and applied the relevant facts of the case to each. The trial court gave careful consideration to the aggravating and mitigating circumstances, carefully weighed them, and found that the aggravation outweighed the mitigation." Lastly, even if any arguable error occurred, a proposition which the State strenuously disputes, error, if any, is harmless beyond a reasonable doubt. See DiGuilio, 491 So. 2d at 1135; Heyne v. State, 88 So. 3d 113, 123 (Fla. 2012).

ISSUE XII

The Constitutionality of Florida's Death Penalty

Lastly, McCloud challenges the constitutionality of Florida's death penalty sentencing scheme. (IB at 96-99). The constitutionality of Florida's death penalty statute is a question of law reviewed by this Court *de novo*. Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002).

The majority of McCloud's 3-1/2 page argument focuses on Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002) and Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). (IB at 97-98). However, McCloud also includes a "checklist" paragraph listing various section/amendment numbers and types of other constitutional challenges. (IB at 99). Merely identifying arguments made below is insufficient to preserve these additional claims for appeal.[16] As a result, they are waived. See Peterson v. State, 94 So. 3d 514, 527 (Fla. 2012), citing Pagan v. State, 29 So. 3d 938, 957 (Fla. 2009) (holding that the "purpose of an appellate brief is to present arguments in

[16] McCloud's title to Issue XII also states that the "instructions to the jury are facially and as applied unconstitutional." (IB at 96). However, McCloud fails to present argument on any specified jury instructions; thus, any purported jury instruction claim also is waived.

support of the points on appeal" and failing to do so or merely referring to arguments made below will mean that such claims are deemed to have been waived (quoting Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990)).

Ring is not implicated in the instant case. This Court repeatedly has held that Ring does not apply to cases that involve the prior violent felony aggravator, the prior capital felony aggravator, or the aggravator that the crime was committed in the course of a felony. See McGirth v. State, 48 So. 3d 777, 796 (Fla. 2010) (noting that this Court has repeatedly rejected Ring claims where the trial court has found the "during the course of a felony" aggravator and the "prior violent felony" aggravator); Frances v. State, 970 So. 2d 806, 822-23 (Fla. 2007) (rejecting application of Ring when the defendant's death sentence was supported by the prior-violent-felony aggravating circumstance based on contemporaneous convictions of murder); Caylor v. State, 78 So. 3d 482, 500 (Fla. 2011) (reaffirming that "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"); Baker v. State, 71 So. 3d 802, 824 (Fla. 2011) (same); Matthews v. State, 124 So. 3d 811 (Fla. 2013) (concluding that this Court need not reach

the merits of Ring claim where the jury also convicted the defendant of burglary while armed, thereby establishing the aggravator of committed during the course of a felony).

Moreover, this Court consistently has denied similar challenges to the constitutionality of Florida's death penalty statute. See Gore v. State, 964 So. 2d 1257, 1276–77 (Fla. 2007) (holding Florida's death penalty statute does not violate a defendant's Sixth Amendment right to jury trial or his federal constitutional right to due process); Rigterink v. State, 66 So. 3d 866, 895-897 (Fla. 2011) (citing Frances v. State, 970 So. 2d 806, 822 (Fla. 2007)) which highlighted that this Court had rejected Ring claims in over fifty cases since Ring's release); see also Ault v. State, 53 So. 3d 175 (Fla. 2010), (collecting cases rejecting challenges based on Ring and Caldwell); Kalisz v. State, 124 So. 3d 185, 212 (Fla. 2013) (again rejecting objections based on Caldwell to Florida's standard jury instructions. Kalisz, at 212, citing, *inter alia*, McCray v. State, 71 So. 3d 848, 879 (Fla. 2011), and reaffirming that "Ring does not apply to cases when the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable.") In conclusion, Ring is not implicated in this case. Moreover, this Court repeatedly has rejected similar constitutional challenges to Florida's capital

sentencing scheme and McCloud has not offered any basis to revisit this Court's well-established precedent. See Abdool v. State, 53 So. 3d 208, 228 (Fla. 2010).

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2014, a true and correct copy of the foregoing has been furnished electronically to J. Andrew Crawford, Esquire, Joseph T. Sexton, Esquire, Byron P. Hileman, Esquire, Asst. Regional Counsels, Post Office Box 9000 - Drawer RC-2, Bartow, Florida 33831-9000, at the following designated e-mail addresses: **andrew@crawforddefense.com; appeals@flrc2.org;** [and] **bhileman@flrc2.org.**

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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