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IN THE SUPREME COURT OF FLORIDA

ROBERT P. MCCLOUD

Appellant,

CASE NO.: SC12-2103

v.

STATE OF FLORIDA

Appellee.

INITIAL BRIEF ON MERITS

On Appeal from the Circuit Court
of the Tenth Judicial Circuit
Polk County, Florida

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PRELIMINARY STATEMENT AND REQUEST FOR ORAL ARGUMENT

The record on appeal consists of thirty-seven volumes. Citations to the record will be as follows: (V. _, R. _), (V. _, T. _) for the trial, and (SR. _) for the supplemental record. There are five codefendants who will be identified in this appeal, as follows: *Robert McCloud*- "Appellant" or "Bam," *Joshua Bryson*- "Bryson" or "Josh, *Andre Brown*-"Dre," *Jamaal Brown*- "Finger, " and *Major Griffin*- "Mate" or "Mal." The surviving victim, *Wilkins Merilan*, is referred to as "Fang." Appellant respectfully requests oral argument.

STATEMENT OF THE CASE

On November 5, 2009, Robert Pernell McCloud ("Appellant"), was charged in Polk County, Florida with two counts of first degree murder for the deaths of Tamiqua Taylor and Dustin Freeman, the attempted first degree murder of Wilkins Merilan ("Fang"), conspiracy to commit burglary, armed burglary of an occupied dwelling with an assault or battery, and armed robbery. (V. 1, R. 24-29). The indictment alleged that Appellant personally shot both victims with a firearm. (V. 1, R. 24-29). The State filed a notice indicating it would be seeking the death penalty on November 16, 2009. (V. 1, R. 24-25).

Prior to trial, the defense filed a number of motions challenging various aspects of the death penalty and other substantive motions, including a motion to suppress and motion to preclude imposition of the death penalty pursuant to *Ring.*

v. Arizona. (V. 2, R. 207-530, V. 3, 531-621). The motion to suppress was heard on September 28, 2011 and denied via a written order on November 5, 2011. (V. 5, R. 770, V. 6, 1070-1071). The remainder of Appellant's motions regarding the death penalty were denied.

The case proceeded to trial before Circuit Judge Donald Jacobsen and a jury on February 13, 2012. (V. 7, R. 778). The State's theory of the case was that in October 2009, five men, including Appellant, conspired to burglarize Fang's residence in the Poinciana area of Polk County, Florida. (V. 15, R. 2513). These five men were: Major Griffin, Joshua Bryson, Andre Brown, Jamal Brown, and Appellant. (V. 15, R. 2514). Fang, a known drug dealer, was rumored to have large amounts of cash and drugs at his residence. (V. 15, R. 2514). Mate and Bryson had previously robbed Fang in June 2009, and thought that Fang would be an easy target. (V. 15, R. 2514). According to the State, all five men arrived at Fang's residence, kicked in the door, and robbed the occupants of the home. (V. 15, R. 2515). During the robbery/burglary, Tamiqua Taylor and Dustin Freeman were both shot and killed by a single gunshot to the back of the head. (V. 15, R. 2515). Despite being shot, stabbed, and tortured, Fang survived. (V. 15, R. 2514-2515).

Several of the codefendants received *significantly* lower sentences in exchange for truthful testimony against Appellant. (V. 15, R. 2518). For their

assistance, Dre received fifteen years in prison, and, an identified shooter, Bryson, received ten years in prison. (V. 15, R. 2518). Finger agreed to cooperate, but after two hours of trial testimony, he admitted that everything he said was a lie. (V. 15, R. 2518). After Appellant's trial, the State moved to set aside Finger's plea, but later offered him a sentence of fifteen years which he accepted. (SR. 1-7). The trial court found Mate to be mentally retarded and entered an order barring the imposition of the death penalty. (V. 15, R. 2518). Mate was determined to be incompetent at the time of Appellant's trial. (V. 15, R. 2518).

On March 8-9, 2012, the jury returned a verdict finding Appellant guilty of two counts of first degree murder. (V. 13, R. 2194). However, the jury specifically found by special interrogatory verdict that Appellant actually possessed a firearm, but did ***not*** find that he discharged a firearm. (V. 13, R. 2194).

The penalty phase, before the same jury, began shortly thereafter. The State relied on five aggravating factors to establish death eligibility: Appellant was contemporaneously convicted of a capital felony; the capital felony was committed while Appellant was engaged in, attempted to commit, or in flight after committing or attempting to commit a homicide, robbery of burglary; the murders were committed to avoid or prevent a lawful arrest; the murders were committed for financial gain; and the capital felonies were committed in a cold, calculated, and

premeditated manner (CCP) without any pretense of moral or legal justification. (V. 15, R. 2519-2520). The defense presented three statutory mitigators: (Appellant was an accomplice, Appellant's emotional and developmental age, and Appellant was under the influence of an extreme emotional or mental disturbance) and nineteen non-statutory mitigators. (V. 15, R. 2519-2520). The focus of the penalty phase testimony was on mental issues, Appellant's family life, and the disparate sentences of his codefendants. (V. 15, R. 2521-2522). The jury, by a vote of eight to four, recommended the death penalty for both murders. The defense filed a motion for new trial on April 4, 2012, which was denied on April 9, 2012. (V. 8, R. 2204-2211).

During the penalty phase and the *Spencer* hearing, the defense had previously filed (and repeatedly renewed) motions seeking to preclude the possibility of the death penalty based on the *Edmund/Tyson* culpability requirements, since the jury determined that Appellant ***was not the shooter, and the proportionality of a death sentence based on the codefendants' significantly lower sentences and the fact that two of them were necessarily shooters.*** (V. 8, R. 2184-2186). The defense also challenged various aspects of Florida's death sentencing procedure, specifically asserting a violation of *Ring* and the Sixth Amendment in that Florida is the only state which does not require a unanimous jury finding or a 10-2 super-majority finding (Alabama) of at least one aggravating

circumstance necessary to make the defendant death eligible. (V. 2, R. 225-249).

After the *Spencer* hearing and the submission of sentencing memoranda, Judge Jacobsen entered a written order imposing the death penalty on September 6, 2012. (V. 15, R. 2513-2538). This appeal follows.

STATEMENT OF THE FACTS

A. Pretrial Proceedings

On May 9, 2011, Judge Hunter held a hearing on a number defense motion raising various challenges to Florida's death penalty. (V. 4, 652). The motions were as follows: Motion to Declare Florida Statutes 921.147 (7) Unconstitutional (denied-State limited to two victim impact witnesses per murder), Motion to Require Unanimous Jury in Penalty Phase (denied), Motion Requesting Trial Court State Basis for Rulings (denied), a *Ring* Motion (denied), Motion for Disclosure of Aggravators (granted), Motion for Disclosure of Grand Jury Proceedings (denied), Motion for Individual Voir Dire and Sequestration of Jurors (granted), Motion in Limine to Certain Procedures (granted in part denied in part), motions to declare the prior felony aggravator and jury instruction unconstitutional (denied), motion to declare the felony murder concept in the instructions unconstitutional (denied), motion to declare CCP aggravator and instruction unconstitutional (denied), motion to declare avoid arrest aggravator and instruction unconstitutional (denied), and a length constitutional motion (denied). (V. 4, 659-

723).

Circuit Judge Donald Jacobsen rotated into Appellant's division and heard Appellant's Motion to Suppress on September 28, 2011 and on October 31, 2011. (V. 5, 770, V. 6, R. 952). The defense contended that Appellant was arrested in Orlando by the Orange County Sheriff's Office on a misdemeanor charge. (V. 5, 780). The Polk County Sheriff's Office was alerted to Appellant's arrest and the lead detective, Detective Troy Lung ("Detective Lung") responded and Mirandized Appellant. (V. 5, 781). Several hours later, Appellant was transported to an interrogation room at the Orange County Sheriff's Office. (V. 5, 780). Appellant was then interrogated by Detective Lung, Lieutenant Giampavolo, Detective Evans, and Detective Bias. (V. 5, 780-781). The interrogation began at 9:00 p.m. and ended at 3:00 a.m. (V. 5, 781). According to Appellant, he informed Detective Lung during their initial contact that he did not want to answer questions, and, during an unrecorded portion of the interrogation, he was repeatedly threatened. (V. 5, 785-786). Law enforcement officers disputed Appellant's version of events and testified that he never invoked his right to remain silent and there were no threats made to Appellant. (V. 6, 1071).

Detective Bias stated that, although Appellant never specifically stated that he did not want to talk, he did say that "he was fucked up and that he didn't—he was *not going to talk anymore* about it because he is not trying to get, get the death

penalty. (V. 5, R. 902-903)("emphasis added"). However, during cross-examination, Detective Evans testified that "*he (Appellant) made it clear that he was not going to answer questions*." (V. 5, R. 921-922), ("emphasis added"). Nevertheless, questioning continued with Detective Bias. (V. 5, R. 922-923). On November 2, 2011, Judge Jacobsen denied Appellant's motion to suppress and determined, based on weighing the credibility of the detectives and Appellant, that Appellant did not invoke his right to remain silent and he was not threatened. (V. 6, 1071).

Appellant filed a notice of intent to claim alibi on November 9, 2011. (V. 6, 1072-1074). The notice alleged that on October 3, 2009 Dre drove Appellant to Florida Hospital in Apopka, where his wife, Shawana McCloud, was being treated in the emergency room. (V. 6, 1073). Shortly after midnight on October 4, 2009, Appellant was dropped off to his wife's home to babysit the couple's children. (V. 6, 1073). At about 1:00 a.m., Mark Ayers, drove Appellant to Harold and Sylvia Scott's residence so that he could have help taking care of the children. (V. 6, 1073). According to Appellant's wife and her sister, Monica Zow, Appellant remained at that residence through the early morning hours of October 4, 2009, and, therefore, he could not have been present when the robberies and murders took place. (V. 6, 1076).

B. State's Motion in Limine

Prior to trial, the State filed a motion in limine seeking to exclude expert testimony from a forensic psychologist, Dr. William Kremper ("Dr. Kremper"), who would have testified that Appellant's statements to law enforcement were involuntary. (V. 21, T. 968). According to Dr. Kremper, Appellant's admissions to law enforcement were a psychologically coerced statements based on the facts of the case and Appellant's history. (V. 21, T. 974). The State asserted that such testimony was "infringing on the province of the jury" because the voluntariness of a confession is a jury question. (V. 21, T. 986). Further, the State argued that such an opinion was irrelevant because it did not prove or disprove a material fact. (V. 21, T. 987). The defense countered that the voluntariness of Appellant's confession was a disputed issue, directly involved the question of guilt, and Dr. Kremper's opinion would aid the jury in making that determination. (V. 21, T. 991-992). After hearing argument from both sides, the court granted the State's motion in limine and excluded Dr. Kremper from testifying. (V. 21, T. 993). The trial court filed Dr. Kremper's report under seal. (V. 21, T. 999).

After the jury was sworn, defense counsel renewed Appellant’s previous motions and objections to the death penalty prior to opening statements. (V. 21, T. 1020-1024). Judge Jacobsen reaffirmed Judge Hunter's earlier rulings. (V. 21, T. 1024-1025). The defense further renewed the motion to suppress Appellant's

statements and moved to admit Dr. Kremper's testimony. (V. 21, T. 1025-1028). The court again denied Appellant's request to suppress his confession, and clarified his ruling excluding of Dr. Kremper's testimony. (V. 21, T. 1026, V. 21, T).

C. Trial

The State's evidence at trial purportedly proving Appellant was the actual shooter of both victims consisted solely of: Appellant's statements admitting the robbery, but denying the shootings; testimony of codefendant/accomplices (one of whom admitted he lied about his entire testimony); a .38 caliber revolver that belonged to Fang found on Appellant at the time of his arrest (proven to not be the murder weapon); and a videotape from Walmart and a gas station. There was no forensic or physical evidence proving that Appellant was the actual shooter, and, Fang, the only surviving victim, *identified codefendant Bryson* as one of his shooters. Fang was unable to identify Appellant as even being in his home.

Although originally charged with two counts of first degree murder where the State sought the death penalty, Bryson received ten years in prison, Dre received fifteen years in prison, and Finger received ten years in prison. (V. 11, R. 1889-1907, V. 15, R. 2530). As part of their deals with the State, the prosecutor waived the 10-20-Life minimum mandatory sentences. (V. 11, R. 1889-1907). The trial court found that Appellant was not the main instigator of the robbery. (V. 15, R. 2530). Nevertheless, Appellant received a death sentence.

During jury selection, the defense raised several issues with the trial court. The trial court told both sides "they needed to pick up the pace," and to speed things up. (V. 20, T. 724-725, 742-743, 865-866). Both sides expressed dissatisfaction with the judge and the defense reminded him that death qualification was extremely important and critical stage of the trial. (V. 20, T. 724-725, 742-743, 865-868). *The defense informed the court that the State had a day and a half to question potential jurors while the defense had only three hours.* (V. 20, T. 742-743). The defense also objected and pointed out that the judge was denigrating the role of the jury when he mentioned five or six times to the panel that he (the judge) alone was ultimately responsible to determine the application of the death penalty in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

According to the State in its opening statement, on October 3, 2009 five men, including Appellant, conspired to burglarize Fang's residence in the Poinciana area of Polk County, Florida. (V. 21, T. 1058-1059). The State contended that Appellant and his codefendants kicked in Fang's door and began to frantically search the house for drugs and money. (V. 21, T. 1058-1059). Apparently disappointed with what was found, Fang was allegedly tortured by Appellant and Mate and then shot two or three times with a .45 caliber handgun while locked in a closet. (V. 21, T. 1058-1060, V. 22, T. 1061). According to the State, based on the testimony of only codefendant Dre, Appellant, was armed with

a .38 caliber revolver, shot both Tamiqua Taylor and Dustin Freeman in the back of the head, killing them. (V. 22, T. 1062). The State argued that when Appellant was arrested, he was in possession of a .38 caliber handgun which was stolen from Fang's residence. It conceded, however, that this handgun was not the murder weapon. (V. 22, T. 1064).

The defense contended that Appellant was not even present when murders were committed and had an alibi. (V. 22, T. 1079-1081). On October 3, 2009, Appellant was at a party, met his codefendants, and was recruited by Bryson, the organizer of the crimes, to participate in a robbery. (V. 22, T. 1078).

Dre, a friend of Appellant's, advised him that his wife, Shawana McCloud, has been taken to the hospital. (V. 22, T. 1079). She was kicked in the stomach during an altercation while pregnant and went to the Florida Hospital, located in Apopka, Florida. (V. 22, T. 1079-1080). After being driven to his wife's residence, Mark Ayers, drove Appellant to Harold and Sylvia Scott's residence in Maitland, Florida, where he remained the remainder of the night to take care of the children. (V. 22, T. 1082-1083). Therefore, according to the defense, the Appellant had an alibi and could not have committed the murders. (V. 22, T. 1083-1084).

The codefendants' testimony, while conflicting, revealed that Bryson planned the robbery, that the codefendants, excluding Appellant, had robbed Fang

previously, and that each one of the codefendants received either ten or fifteen years in prison in exchange for their testimony in this case. (V. 22, T. 1084, 1088, 1097-1098). Appellant's statement to police was involuntary due to threats of the death penalty, hours of repeated questioning, and detectives screaming at his wife in a room nearby. (V. 22, T. 1093-1094).

Prior to calling the first witness, the Court read a stipulation to the jury as to the identity of the victims, Tamiqua Taylor and Dustin Freeman. (V. 22, T. 1104). The court further advised the jury of each codefendants' alias, which would be used throughout the trial. (V. 22, T. 1104). *See Preliminary Statement Above.*

Kimberly Hancock ("Ms. Hancock"), was a crime scene investigator with the Polk County Sheriff's Office. (V. 22, T. 1104-1105). She responded to the scene of the murders on October 4, 2009. (V. 22, T. 1106-1107). Ms. Hancock was assigned as the lead crime scene technician. (V. 22, T. 1109). She prepared diagrams of the scene and took photographs, which were entered into evidence. (V. 22, T. 1118-1119). Technicians collected approximately thirty cigarette butts from Fang's home. (V. 22, T. 1125-1125). Ms. Hancock noticed the left front tire of a Hummer parked outside the residence had been slashed. (V. 22, T. 1131). The speaker box of the Hummer had been taken out and left on the driveway. (V. 22, T. 1132). The spare tire was removed. (V. 22, T. 1135). Ms. Hancock processed the bullet casings for DNA, processed knives for DNA and fingerprints, and

processed additional evidence which was later sent to the FDLE evaluation. (V. 23, T. 1266-1269).

Ms. Hancock also documented the scene and reviewed photographs from inside Fang's residence. She also documented that the front door sustained damage near the deadbolt, which was in a locked position. (V. 22, T. 1137-1139). The first victim, Tamiqua Taylor, was found in the foyer area of the home on a loveseat. (V. 22, T. 1141). A bullet projectile was found under her (a .38 class projectile showing two weapons were used). (V. 23, T. 1249). The spare tire from the Hummer and a knife were found nearby. (V. 22, T. 1141). Near the master bedroom closet, Ms. Hancock collected seven spent Winchester .45 caliber casings, projectiles, a cooking pot, and a dumbbell with apparent blood on it. (V. 22, T. 1163-1164). The second victim, Dustin Freeman, was found face down in the master bedroom with his hands and ankles bound. (V. 22, T. 1197). There appeared to be bloody footprints throughout the house. (V. 23, T. 1288). In total, Ms. Hancock collected ninety-four fingerprints during her investigation. (V. 23, T. 1293-1294).

On October 5, 2009, Ms. Hancock attended the autopsies of Freeman and Taylor. (V. 23, T. 1241). The photographs of Mr. Freeman showed what appeared to be ligature marks on his hands, ligature marks on his ankles, and an apparent gunshot wound to the left side of his head. (V. 23, T. 1242). The pictures of Ms.

Taylor demonstrated an apparent gunshot wound to her head and a picture of a wig she was wearing. (V. 23, T. 1243-1244). Ms. Hancock collected bullet fragments and fingernail scrapings from both victims during the autopsies, which were later sent off to the "lab." (V. 23, T. 1251-1254, 1289). She also collected the bindings from Mr. Freeman. (V. 22, T. 1197-1198).

Deputy James Froelich ("Deputy Froelich") with the Osceola County Sheriff's Office was conducting road patrol on October 4, 2009. (V. 23, T. 1300-1301). During the early morning hours, he responded to Fang's residence, located at 419 Dunlin Lane in Poinciana, Florida, to assist Polk County Sheriff's deputies. (V. 23, T. 1301). A total of four Osceola county deputies arrived on scene before the Polk County deputies arrived. (V. 23, T. 1302). Upon arrival he and the other deputies surrounded the house until the Polk County deputies arrived. (V. 23, T. 1303).

Deputy Froelich entered the residence along with two (2) other deputies through the front door. (V. 23, T. 1305). Once inside, he observed a black female with a wound to her head, later identified at Tamiqua Taylor, and a young child on couch. (V. 23, T. 1305). Both were covered in blood and Deputy Froelich assumed they were both dead. (V. 23, T. 1305). He noticed bloody foot prints on the kitchen tiles and saw a black male, later identified as Fang, sitting on a stool. (V. 23, T. 1305). Fang had swelling to his face, cuts, burns, and blood coming

from what appeared to be a gunshot wound to his abdomen and thigh. (V. 23, T. 1305). After leaving Fang with a Polk county deputy, Deputy Froelich entered the master bedroom where he observed a white male, Mr. Freeman, with his hand and ankles bound with a gunshot wound to his head. (V. 23, T. 1306). He and other deputies cleared the remainder of the home, then heard the small child snore, and placed her with the paramedics. (V. 23, T. 1307). The other deputies and EMTs who responded early that morning essentially observed the same things as Deputy Froelich.

Detective Troy Lung ("Detective Lung") with the Polk County Sheriff's Office was assigned as the lead detective. (V. 24, T. 1480, 1485). He arrived on scene on October 4, 2009 and was briefed by the deputies. (V. 24, T. 1487). He interviewed the young child found at the scene, Winter Merilan, and Fang's brother, Chadrick Merilan. (V. 24, T. 1489). After the crime scene technicians finished, Detective Lung conducted a walkthrough of the residence. (V. 24, T. 1493). On October 7, 2009, Detective Lung interviewed Fang at Tampa General Hospital. (V. 24, T. 1499). Fang was unable to identify any of the robbers. (V. 24, T. 1500).

On October 14, 2009, Detective Lung learned that a fingerprint on a time card slip that was located inside Fang's Hummer was identified to Bryson. (V. 24, T. 1500). After looking for Bryson for five days, Detective Lung received a

voicemail from him on October 19, 2009. (V. 24, T. 14505). Bryson voluntarily spoke with Detective Lung at the Polk County Sheriff's office the next day. (V. 24, T. 1507). Bryson initially stated that he did not know anything about what happened at Fang's residence. (V. 24, T. 1508, 1511). By the end of the day, Bryson admitted some involvement and identified all of his codefendants. (V. 24, T. 1514). On October 21, 2009, Detective Lung learned that Mate had been arrested in Orlando for unrelated charges. (V. 24, T. 1516). Mate did not provide any substantive information when interviewed. (V. 24, T. 1516).

Detective Lung interviewed Appellant on October 21, 2009 after his arrest on an unrelated warrant at the Orange County Sheriff's Office. (V. 24, T. 1517). At 5:10 p.m., Detective Lung met with Appellant, read him his *Miranda* rights, and, according to the detective, Appellant agreed to speak with him. (V. 24, T. 1518-1519). He stated that he never promised or threatened Appellant. (V. 24, T. 1519). The interview began at approximately 8:00 p.m. and, despite having the capability; Detective Lung did not record the first portion of the interview with Appellant. (V. 24, T. 1520-1521). Appellant denied any involvement the entire time he was with Detective Lung. (V. 24, T. 1522-1523). He interviewed Appellant's wife ("Mrs. McCloud") in a nearby room for ninety minutes. (V. 25, T. 1620-1621). Mrs. McCloud provided an alibi for Appellant. (V. 25, T. 1621-1622). Appellant was then interviewed by Detectives Bias and Evans. (V. 24, T.

1523).

The remaining two codefendants, Dre and Finger were both arrested after Appellant. Detective Lung interviewed Dre after his arrest on October 26, 2009. (V. 24, T. 1523-1524). He admitted his involvement in the crimes from the beginning. (V. 24, T. 1524). Finger was arrested after he fled to Tennessee on May 6, 2010. (V. 24, T. 1524). He denied his involvement in the robbery and subsequent murders. (V. 24, T. 1524).

Detective Lung continued his investigation into the murders after all of the codefendants were arrested. (V. 24, T. 1525). The .45 caliber shell casings and the potential DNA samples were sent to the Florida Department of Law Enforcement for analysis and comparison. (V. 24, T. 1526-1527). After speaking with the codefendants, Detective Lung obtained a videotape from a Walmart in Poinciana. (V. 24, T. 1530). Other than a single fingerprint from Bryson, none of the nearly one hundred fingerprints found at the scene matched Appellant or the remaining codefendants. (V. 24, T. 1534). Detective Lung obtained cell phone records from Lena Espute, Finger, and Appellant. (V. 24, T. 1535). However, Appellant purchased the cell phone on October 4, 2009 and his records only relate to a time period after the homicides. (V. 24, T. 1535). These records were later reviewed by another Detective. (V. 24, T. 1536).

During cross-examination, Detective Lung was, among other areas of

inquiry, taken through his interview with Appellant and a review of the forensic evidence. (V. 25, T. 1620-1621). The interview with Appellant began at 7:30 p.m. and ended at 3:00 a.m. (V. 25, T. 1621, 1634). According to the detective, the Polk County Sheriff's Office has a policy of not recording pre-interviews with witnesses or suspects to see what a witness or suspect knows first. (V. 25, T. 1628). Of the seven hours of interrogation only fifty-two minutes of Appellant's statements to Detectives Bias and Evans were recorded. (V. 25, T. 1634). Approximately, thirty to fifty items were submitted to the FDLE for DNA comparison. (V. 25, T. 1643). There was no fingerprint or DNA evidence linking Appellant to the crimes. (V. 25, T. 1645). Detective Lung did not send the material found under the victims' or Fang's fingernails for DNA comparison. (V. 25, T. 1644-1645). There was no evidence that Appellant had a cell phone during the time of the crimes. (V. 25, T. 1646).

Dre, Appellant's codefendant, next testified for the State. (V. 25, T. 1681). In exchange for his testimony, Dre was to receive fifteen years in prison in exchange for his truthful testimony. (V. 25, T. 1684-1685). He was also facing a federal violation of probation. (V. 25, T. 1681-1682). Dre met Appellant through a mutual friend and he knew Bryson from high school. (V. 25, T. 1687-1688). He met Mate and Finger for the first time on October 3-4, 2009. (V. 25, T. 168). On October 3, 2009 in Orlando, Florida, Dre and Appellant were riding around in

Dre's Cadillac CTS "trying to find a way to get some money." (V. 25, T. 1690). About 1:00 p.m., Dre and Appellant came into contact with Bryson at his house. (V. 25, T. 1694-1695). Appellant spoke with Bryson for about fifteen minutes and Dre drove them both around the corner to Mate's house. (V. 25, T. 1696-1697). Dre received a telephone call while at Mate's house that Mrs. McCloud was in the hospital. (V. 25, T. 1699). Dre and Appellant then went to the hospital in Apopka, Florida. (V. 25, T. 1700). Both men went into the hospital and met with Mrs. McCloud. (V. 25, T. 1701).

Dre and Appellant left the hospital and drove back to Mate's house in Dre's Cadillac. (V. 25, T. 1702). En route, Appellant allegedly advised Dre that they were planning a robbery with Bryson and a lot of money was involved. (V. 25, T. 1703-1704). All of the codefendants armed themselves after arriving at Mate's house. (V. 25, T. 1704). Appellant had a .38 caliber revolver. (V. 25, T. 1705). The robbery was supposed to be easy as Mate had robbed Fang before. (V. 25, T. 1706). Appellant was not involved in the prior robbery. (V. 25, T. 1706).

After meeting with Finger, the crew drove from the Orlando area to Fang's house in Poinciana. (V. 25, T. 1709). Bryson and Finger went together in Bryson's Ford Expedition, and Appellant, Mate, and Dre traveled together in Dre's Cadillac CTS. (V. 25, T. 1709). Everyone had a cell phone except Appellant. (V. 25, T. 1714). All of the men were armed: Mate had a .45 caliber semi-automatic,

Appellant (according to Dre) had a .38 revolver, and Dre, Finger, and Bryson had either 9 millimeter or .45 caliber semi-automatics. (V. 25, T. 1710). When they arrived at 10:00 p.m. in Poinciana, the men drove by Fang's house, and then met at Walmart where the vehicles parked side by side. (V. 25, T. 1711-1712, 1714). Dre, Mate, and Appellant exited the Cadillac and entered Bryson's Expedition. (V. 25, T. 1715). Bryson gave the men instructions on what to do and where to find Fang's drugs and money. (V. 25, T. 1745). The crew then went to a nearby gas station in the Walmart plaza, left, and drove by Fang's house a second time. (V. 25, T. 1746-1747). Bryson drove back to Walmart, Dre and Appellant got back into the Cadillac, and all five men drove back to Fang's house in two separate vehicles. (V. 25, T. 1749).

Once at Fang's residence, Appellant, Dre, Mate, and Finger parked in the driveway of a nearby house and climbed over Fang's fence, where they hid in the backyard for three or four hours. (V. 25, T. 1749-1750). Finger and Mate called Bryson, who was waiting out front in his vehicle, numerous times. (V. 25, T. 1752). According to Dre, Appellant became impatient, kicked in the front door, and all four men entered the residence with their guns drawn. (V. 25, T. 1755-1756). Fang ran into his bedroom where a female and a young child were. (V. 25, T. 1758). The men searched the master bedroom and demanded Fang tell them where the drugs and money were. (V. 25, T. 1758). Mr. Freeman came out of one

of the back bedrooms and he and Fang were tied up. (V. 25, T. 1759). Appellant handed Dre car keys and told him to search the vehicles outside, while Fang was being beaten by Appellant and Mate. (V. 25, T. 1760-1761). Mate also poured boiling water over Fang and cut him. (V. 26, T. 1801-1802). The men believed that there was nearly $100,000 in the house because Bryson, Mate, and Finger had previously robbed Fang of $20,000 to $30,000, but missed the rest of it. (V. 25, T. 1763-1764).

Dre went outside and began searching Fang's Hummer and the other two vehicles present. (V. 25, T. 1771). He did not find any drugs or money in any of the cars, and went inside to inform the other codefendants. (V. 25, T. 1774). After being beaten again, Fang stated that the money is in the spare tire of the Hummer. (V. 25, T. 1775). Dre and Bryson (who was called and came to help) took the off the spare tire, brought it in the house, and placed it on the living room floor. (V. 25, T. 1775-1776). Dre got a knife from the kitchen, sliced open the tire, found nothing inside, and informed everyone else nothing was in the tire. (V. 25, T. 1777). Fang promptly informed the group that the money and drugs were in the front driver's side tire, not the spare. (V. 25, T. 1777). Dre went back outside and jacked up the Hummer, got the second tire off, sliced open the tire, and still found no drugs or money inside. (V. 25, T. 1778-1780). After returning inside again, Fang stated that the money and drugs were in the passenger side tire. (V. 25, T.

1780). Dre and Finger went outside to take off the front passenger tire when they heard a gunshot, they go inside, and hear another volley of shots. (V. 25, T. 1780, V. 26, T. 1781-1782).

Once inside, Dre goes into the living room. (V. 26, T. 1781-1782). He allegedly sees Appellant standing over the woman (Ms. Taylor) as Appellant shoots her once in the head. (V. 26, T. 1782). Dre did not see this person's face, but knows it was Appellant. (V. 26, T. 1782-1783). Dre then ran out of the house, jumped the fence, and got into his Cadillac. (V. 26, T. 1783-1784). Appellant gets in the front passenger seat, Finger gets into the back seat, and they all meet up at Finger's house. (V. 26, T. 1785). In a back bedroom, the men open a duffle bag taken from Fang's residence to see the proceeds from the robbery, which included money, marijuana, and a .38 caliber revolver. (V. 26, T. 1790). The parties split the money and the marijuana amongst themselves. (V. 26, T. 1791). Dre later learned that Mate fired a series of shots at Fang when he broke free from his restraints. (V. 26, T. 1793). Appellant and Dre left in his vehicle and dropped Appellant off at his home in Apopka at around 5:00 a.m. or 6:00 a.m. (V. 26, T. 1793). Dre admitted to having twelve felony convictions, a pending violation of probation in federal court, and, that in exchange for his testimony, he received fifteen years in prison. (V. 26, T. 1807-1808).

The defense cross-examined Dre about his role in the crimes. Dre testified

that after he left the hospital with Appellant he may have stopped at Appellant's mother's house in Orlando and picked up an eighteen month old infant and a two year old boy. (V. 26, T. 1828-1829). He also may have dropped the two children off at the address in Apopka where Dre picked Appellant up from earlier. (V. 26, T. 1829). According to Dre, Bryson, not Appellant, was the one who was in charge and made all of the plans. (V. 26, T. 1834). Appellant was not involved with the June 2009 robbery at Fang's residence. (V. 26, T. 1835). Bryson, who was involved in the previous robbery, told the other codefendants where to look throughout Fang's residence to find more money and drugs. (V. 26, T. 1837-1838).

In October 2009, Fang lived at 619 Dunlin Lane in Poinciana, Florida. (V. 26, T. 1957). At the time of trial, he was serving a three year prison sentence for trafficking in cocaine. (V. 26, T. 1955-1956). While living in Poinciana, Fang sold drugs, including cocaine and marijuana. (V. 26, T. 1959). Mr. Freeman was a good friend of Fang's who was spending the night on October 3, 2009. (V. 27, T. 1960-1961). Fang fell asleep about 1:00 a.m. on October 4, 2009 and awoke to the sound of his front door being kicked in. (V. 27, T. 1976-1977). He tried to close his bedroom door, but two men forced their way in with Mr. Freeman in front of them. (V. 27, T. 1976-1977).

The men made Fang and Mr. Freeman lay down on the bedroom floor. (V. 27, T. 1977). Ms. Taylor was taken out of the bedroom along with her small child,

Winter Merilan, to the living room. (V. 27, T. 1978-1979). Fang was then beaten, cut, and then had boiling water poured over his back. (V. 27, T. 1980). He was repeatedly asked where the drugs and money were. (V. 27, T. 1980). To buy time, Fang told his attackers that the drugs and money were in one of the tires of his Hummer. (V. 27, T. 1985). Fang was then kicked into the master bedroom closet when there was nothing found in the tires. (V. 27, T. 1985). Someone starting shooting into the closet and Fang was hit in the stomach, the groin, and in both of his legs. (V. 27, T. 1990). Fang exited the closet, found Mr. Freeman dead on the bedroom floor, found Ms. Taylor dead in the living room, and eventually called 911. (V. 27, T. 2017, 2019).

Stacy Greatens ("Ms. Greatens"), a crime scene investigator with the Polk County Sheriff's Office, responded to Fang's residence on October 4, 2009. (V. 27, T. 2072-2073). Ms Greatens processed the bathroom, master bedroom, and master bedroom for fingerprints, and obtained nine fingerprint cards. (V. 27, T. 2074-2075). She also collected the dumbbell and processed it for fingerprints and blood. (V. 27, T. 2076). On October 6, 2009 and October 27, 2009, Ms. Greatens processed a Chrysler 300 and a Cadillac CTS. (V. 27, T. 2080).

Amy Losciale ("Ms. Losciale"), another crime scene technician, responded to Fang's residence to document blood stains and trajectory. (V. 27, T. 2109, 2112). Trajectory refers to the path a bullet takes from when it leaves a firearm

until the time it reaches its target. (V. 27, T. 2113). Ms. Losciale focused her trajectory analysis on the bullet holes found in the master bedroom entrance door and the bullet holes found the master bedroom closet door. (V. 27, T. 2113). While processing the house, crime scene technicians located a projectile on the garage floor, a projectile and jacketing in the master bedroom closet wall, and a partial projective found behind the headboard in the master bedroom. (V. 27, T. 2121-2123). The analysis revealed that the master bedroom door was not completely closed when the shots were fired, and that the closet door was closed when the shots were fired. (V. 27, T. 2130). Ms. Losciale also processed Fang's Hummer and located fingerprints on various papers from the rear cargo area. (V. 27, T. 2131-2132).

Bryson was the next witness to testify and his version of events was drastically different from Dre. At the time of trial, he had been convicted of six felonies and received ten years in prison for his role in the crimes. (V. 28, T. 2145-2146, 2232). Bryson knew Appellant for a few years prior to the robbery and knew Dre from high school. (V. 28, T. 2149). Bryson knew Mate and Finger from the neighborhood where he lived near Orlando, Florida. (V. 28, T. 2150). He met Fang through a series of drug deals where Bryson would buy marijuana for personal use and several ounces of cocaine to sell. (V. 28, T. 2152).

On October 3, 2009, Bryson met Appellant at Dre at a neighborhood party

during the early afternoon hours. (V. 28, T. 2154). Dre and Appellant were driving a Cadillac and he was driving a Ford Expedition. (V. 28, T. 2157). According to Bryson, Appellant approached him about using his vehicle to transport some stolen televisions. (V. 28, T. 2159-2160). Bryson left the party and, later on during the day, Appellant, using Dre's cell phone, contacted Bryson about burglarizing Fang's residence. (V. 28, T. 2164-2165). The idea for the burglary came from Mate's cousin, Robert Early, who informed them that Fang was not going to be there and it would be easy. (V. 28, T. 2165, 2167).

At around 9:00 p.m. on October 3, 2009, Bryson testified that he met Appellant and Dre at Mate's house, and they picked up Finger on the way to Poinciana. (V. 28, T. 2170). Finger rode in Bryson's Expedition and the other three men drove in Dre's Cadillac to Finger's residence. (V. 28, T. 2177). At this point, Bryson did not see any guns and he did not have a gun. (V. 28, T. 2177). They drove by Fang's house, then met up at Walmart. (V. 28, T. 2180, 2182). The codefendants then drove by Fang's house a second time, went back to Walmart, and stopped at a nearby gas station where Appellant purchased some items. (V. 28, T. 2187). Apparently, while at Walmart the second time, Dre, Mate, Finger, and Appellant get into Dre's Cadillac and Bryson follows them to Fang's house. (V. 28, T. 2193). Bryson supposedly sat in his Expedition three or four blocks away from Fang's house, while the other codefendants parked around back and

went inside. (V. 28, T. 2194). Bryson called Dre and Finger a number of times to see what was taking so long. (V. 28, T. 2195).

After awhile, Finger called Bryson to come to Fang's residence to come get the TVs. (V. 28, T. 2197). He pulled up in front, Appellant came out to meet him, and motion for Bryson to come inside. (V. 28, T. 2199). As he neared the front, Bryson noticed that the front door was severely damaged and hanging from the frame, like it had been kicked in. (V. 28, T. 2203-2204). He then noticed Ms. Taylor lying on the couch alive and confronted Appellant about it being a home invasion when he was told it would only be a burglary. (V. 28, T. 2207). Bryson informed Appellant that he would not be taking any TVs, he got in his Expedition, and left. (V. 28, T. 2208-2209). As he was leaving, Bryson heard a series of gunshots, which sounded like they came from different guns. (V. 28, T. 2209).

Bryson drove home alone to his house in the Malibu neighborhood near Orlando. (V. 28, T. 2214-2215). He supposedly did not get anything out of the robbery. (V. 28, T. 2216). About thirty minutes after he arrived home, Appellant and Dre pulled up to his house. (V. 28, T. 2217). Appellant allegedly told him to keep his mouth shut, which Bryson took as a threat. (V. 28, T. 2220). Later, while they were in jail, Dre admitted to him that he had in fact shot Mr. Freeman. (V. 28, T. 2224). After his arrest on October 20, 2009, Bryson initially told the police that he did not know anything about the crimes, and maintained this for some time. (V.

28, T. 2228-2229).

During cross-examination, Bryson admitted that he lied to the police throughout his interviews and provided impeachment evidence against Dre. (V. 28, T. 2240-2242). Contrary to Dre's testimony, Bryson stated that Dre approached him while at the Polk County Jail and advised him to change his statement to become a better witness. (V. 28, T. 2266). Dre wanted Bryson to say that Appellant shot Ms. Taylor and that they could walk away with a sweet deal. (V. 28, T. 2266).

Patty Newton ("Ms. Newton"), a latent fingerprint examiner with the Polk County Sheriff's Office, compared the fingerprints found at the crime scene to all of the codefendants. (V. 29, T. 2321). She viewed a fingerprint from a time card located in the back of Fang's Hummer and identified it as Bryson's right thumbprint. (V. 29, T. 2327, 2330). Ms. Newton compared 122 fingerprints of value against 188 peoples' fingerprints, including all of the defendants. Not one of Appellant's fingerprints or the remaining codefendants were found at the crime scene. (V. 29, T. 2331).

Lieutenant Louis Giampavolo ("Lt. Giampavolo") was one of the two sergeants assigned to the homicide unit at the Polk County Sheriff's Office in October 2009. (V. 29, T. 2341). On October 4, 2009, he received information about the murders that occurred in Poinciana, he arrived on scene, and assigned

Detective Lung as the lead detective. (V. 29, T. 2342). On October 21, 2009, Lt. Giampavolo came into contact with Appellant at the Orange County Sheriff's Office. (V. 29, T. 2345). While at the Orange County Sheriff's Office, he noticed that Appellant's wife was interviewed as well, and she did not appear to be crying or talking too loud. (V. 29, T. 2347-2348). During the late hours of October 21, 2009 into the early morning hours of the following day, Lt. Giampavolo knew that Appellant was being interviewed, and ordered someone to begin recording Appellant's statements. (V. 29, T. 2348-2249). He never witnessed anyone threaten Appellant or promise Appellant anything to get him to cooperate. (V. 29, T. 2350).

Detective Michael Evans ("Detective Evans"), a detective with the Polk County Sheriff's Office, interviewed Appellant along with Detective Consuelo Bias ("Detective Bias") on October 21-22, 2009. (V. 29, T. 2379, 2385-2386). The interview began with these detectives at 10:49 p.m. on October 21, 2009. Appellant allegedly told Detective Evans that he had been read his *Miranda* rights and Appellant agreed to speak with him. (V. 29, T. 2385). Supposedly, Appellant never told the detective that he did not want to speak any longer. (V. 29, T. 2392). Detective Evans did not threaten or promise Appellant anything to get him to cooperate. (V. 29, T. 2385). Both detectives interviewed Appellant for about an hour, and then Detective Bias left. (V. 29, T. 2387). Detective Bias returned with

a drink and a snack for Appellant. (V. 29, T. 2388). According to Detective Evans, Appellant initially informed the detectives that he had taken Ecstasy pills and that he was in Poinciana to go to a party. (V. 29, T. 2389). Appellant was then allowed to go to the restroom. (V. 29, T. 2389). When he returned Appellant stated that Mate shot the people in Fang's residence. (V. 29, T. 2390). Appellant told the detectives that he bought Fang's gun, which he was arrested with, from Mate after the robbery. (V. 29, T. 2391).

At about 1:55 a.m. on October 22, 2009, Detective Evans left the interview room and Detective Bias took over the questioning. (V. 29, T. 2393, 2443). The latter part of Detective Bias's interview was videotaped. (V. 29, T. 2441-2442). Appellant allegedly told Detective Bias that things got out of control, it got crazy, and it was supposed to be a quick thing to get money. (V. 29, T. 2444). Bryson and Mate called Appellant and advised him that they had a robbery they wanted him to participate in. (V. 29, T. 2446). They all drove to Walmart and went over the plans for the home invasion. (V. 29, T. 2447). Fang and Mr. Freeman were tied up and Ms. Taylor was told to remain on the couch. (V. 29, T. 2449). Appellant went outside the house and heard a series of gunshots. (V. 29, T. 2451). Detective Bias supposedly never threatened or promised Appellant anything in order to get him to cooperate. (V. 29, T. 2491-2492).

The State then moved a videotape of Appellant's statement to Detective Bias

into evidence. (V. 29, T. 2453). The defense objected and renewed the arguments raised the previous motion to suppress. (V. 29, T. 2453-2454). During the robbery, Bryson had a .38 caliber revolver, Mate had a .45 caliber, and Finger had a .45 caliber. (V. 29, T. 2460). Bryson and Finger tied up Fang and Mate tied up Mr. Freeman. (V. 29, T. 2460). Meanwhile, Appellant told Ms. Taylor to stay on the couch and to not worry. (V. 29, T. 2460). Mate cut Fang and poured hot water over him. (V. 29, T. 2461). Appellant left, heard gunshots from the master bedroom, went back in, left, and heard more gunshots from the living room. (V. 29, T. 2461-2462). Appellant denied shooting anyone. (V. 29, T. 2470).

John Podlesnik ("Deputy Podelsnik"), with the Orange County Sheriff's Office, arrested Appellant in Orlando, Florida on October 21, 2009. (V. 29, T. 2424). Deputy Podlesnik noticed Appellant exiting a dark green Infiniti. (V. 29, T. 2426). He approached Appellant after exiting from an unmarked police vehicle and Appellant allegedly began to run. (V. 29, T. 2426). Deputy Podlesnik caught Appellant, arrested him, and, subsequent to a search, found a loaded handgun. (V. 29, T. 2428). The gun was later determined to be a .38 caliber revolver. (V. 29, T. 2435).

Detective Aaron Campbell ("Detective Campbell"), a homicide detective with the Polk County Sheriff's Office, collected videos from Walmart and the gas station near Walmart in Poinciana, Florida. (V. 30, T. 2584-2485). Detective

Campbell viewed the videotapes from the Walmart parking lot on October 3-4, 2009 and observed a Ford Expedition and a Cadillac CTS in the parking lot. (V. 30, T. 2591). He made a composite to show the different times the vehicles entered the parking lot. (V. 30, T. 2591-2592). The vehicles appeared in the Walmart parking lot at approximately 11:16 p.m. on October 3, 2009 and again at 12:16 a.m. on October 4, 2009. (V. 30, T. 2593-2594).

Chad Smith ("Mr. Smith"), a firearms analyst with the Florida Department of Law Enforcement, examined the various casings and projectiles found at the scene. (V. 30, T. 2606). Mr. Smith determined that all of the .45 caliber casings were fired from the same firearm. (V. 30, T. 2613). He further determined that the .38 caliber projectile removed from one of the victims was not fired from the .38 caliber revolver found on Appellant during his arrest. (V. 30, T. 2614-2615, 2633).

Detective Dustin Kendrick ("Detective Kendrick") interviewed Ms. McCloud at the Orange County Sheriff's Office on October 21, 2009. (V. 30, T. 2651). Detective Kendrick allegedly questioned Ms. McCloud in an interview room with a closed door. (V. 30, T. 2651). Ms. McCloud never got loud during the interview, and it was difficult to hear someone being interviewed if a person were standing outside the door. (V. 30, T. 2651-2652). Detective Kendrick became the case agent after Detective Lung left the Polk County Sheriff's Office for any follow up work that needed to be done. (V. 30, T. 2655). He followed up

with FDLE and confirmed that there was no DNA evidence found at the scene that had value. (V. 30, T. 2655). When Detective Kendrick interviewed Fang, he identified Mate as one of the people who previously robbed him. (V. 30, T. 2662).

Jason Paulley reviewed the cell phone records and cell tower locations of phone calls made during the time of the crimes. (V. 30, T. 2673). He received cell phone records from (407) 486-7808 and (407) 591-1824, which belonged to Byson and Finger. (V. 30, T. 2675). Carolyn Herman ("Ms. Herman"), an analyst with the Polk County Sheriff's Office, assisted detectives with analyzing the cell phone records from Bryson and Finger. (V. 32, T. 2896, 2898). She created maps of the cell towers that the phone were pinging off of revealed that the phone were moving toward the crime scene on October 3, 2009 and away from Fang's residence on October 4, 2009. (V. 11, R. 1850-1862, 1879-1886, V. 32, T. 2901-2902).

Finger testified for the State for several hours and, in exchange for his testimony, he accepted an offer of ten years in prison. (V. 31, T. 2685-2786). After nearly mirroring Dre's testimony, Finger stated during cross-examination that the prosecutor threatened him with Life in prison and his attorney forced him to enter the plea agreement. (V. 31, T. 2836). Finger further admitted that everything he testified to at trial was a lie and he had read Dre's statement transcript and testified accordingly because he was scared of a Life sentence. (V. 31, T. 2837-2839). Surprised by this testimony and with the consent of both the State and

defense counsel, the trial court read to the jury the plea colloquy Finger entered where he swore under oath that no one had coerced or threatened him to enter his plea. (V. 32, T. 2870, 2887).

Dr. Vera Volnikh ("Dr. Volnikh"), an associate medical examiner, performed autopsies on both Mr. Freeman and Ms. Taylor. (V. 32, T. 2921, 2924). Ms. Taylor had a single gunshot wound to the back of the head. (V. 32, T. 2927, 2938). Due to a wig that prevented stippling or soot, Dr. Volnikh could not determine the range at which the particular gunshot had been fired. (V. 32, T. 2931). Mr. Freeman also died as a result of a single gunshot wound to the back of the head. (V. 32, T. 2933, 2938). However, unlike Ms. Taylor, the wound revealed that the gun was placed against Mr. Freeman's scalp at the time it was discharged. (V. 32, T. 2934). Dr. Volnikh collected three bullet fragments from Ms. Taylor's head and five bullet fragments from Mr. Freeman's head. (V. 32, T. 2934-2935). Mr. Freeman had skin imprints on his wrists and ankles from his bindings. (V. 32, T. 2936). Both Ms. Taylor and Mr. Freeman died instantaneously as a result of the gunshots. (V. 32, T. 2937, 2942).

The State rested its case-in-chief after Dr. Volnikh's testimony. (V. 32, T. 2949). Outside the presence of the jury, the defense moved for a judgment of acquittal. (V. 32, T. 2953). The defense asserted that the State failed to prove a prima facie case of Appellant's guilt on all charges in the indictment. (V. 32, T.

2953). The trial court denied the motion. (V. 32, T. 2954).

The defense proffered the testimony of Dr. Kremper after the court denied the motion for judgment of acquittal. The trial court clarified that it excluded Dr. Kremper because his testimony is not "such of a nature that requires special knowledge or expertise," so the jury could draw its' own conclusions. (V. 34, T. 3300). The court and the State stipulated that Dr. Kremper was an expert psychologist. (V. 34, T. 3307). Dr. Kremper was asked to review the voluntariness of Appellant's confession. (V. 34, T. 3308). In addition to being a licensed psychologist, Dr. Kremper has testified numerous times in the area of false confessions. (V. 34, T. 3310). According to Dr. Kremper, the scientific and psychological literature specifies different environmental factors, individual factors, and methods or techniques utilized by law enforcement that would lead to coerced false confessions. (V. 34, T. 3312-3313). In Dr. Kremper's expert opinion, these factors would not be obvious to a lay person evaluating the voluntariness of a confession. (V. 34, T. 3313).

Kremper interviewed Appellant and determined that Appellant did not appear to be malingering when he was interviewed. (V. 34, T. 3318). Second, Dr. Kremper assessed Appellant's intellectual assessment measure using the Weschler Adult Intelligence Scale, the Weschler Memory Scale, and a suggestibility scale. (V. 34, T. 3318). Appellant’s verbal intellectual abilities fell within the borderline

range and his verbal memory as it relates to narrative information was "very, very poor." (V. 34, T. 3318-3319). Appellant's reading level was the equivalent of an eleven or twelve year old. (V. 34, T. 3320). According to Dr. Kremper, individuals, such as Appellant, who have verbal memory difficulties, are particularly susceptible to suggestion. (V. 34, T. 3320). Based on the test results, Appellant was the type of person who would be more likely to tell someone what they wanted to hear and even invent things. (V. 34, T. 3321). After reviewing a significant amount of documents, including Appellant's interrogation, and the results of his diagnostic testing, Dr. Kremper concluded that coercive tactics were used, Appellant's statements to police were coerced, and the voluntary waiver of his *Miranda* rights was questionable. (V. 34, T. 3332).

Corporal Duwana Pelton ("Corporal Pelton) with the Orange County Sheriff's Office, was a supervisor of one of the homicide squads. (V. 32, T. 2959, 2961). On October 21, 2009, Detective Mike Erickson (deceased) was assigned to assist the Polk County detectives interviewing Appellant. (V. 32, T. 2961). There are five interview rooms, which are sound proofed, on the second floor of the Orange County Sheriff's Office. (V. 32, T. 2963-2964, 2967). There is a monitoring room for each interrogation room, where a detective can monitor the questioning via a closed-circuit television. (V. 32, T. 2965). Each interview room was equipped with audio/visual devices that allow detectives to digitally record an

entire interview if it is turned on. (V. 32, T. 2966).

Detectives from the Orange County Sheriff's Office would be operating the recording equipment if there were any interviews conducted by an outside agency. (V. 32, T. 2966). Detectives from Polk County would advise whether they wanted an interview recorded or not. (V. 32, T. 2966). Corporal Pelton stated that Detective Erickson was trained by her to record the entire interview with a suspect from beginning to end. (V. 32, T. 2972-2973). According to their training, the equipment is supposed to be turned on before a suspect even enters the room. (V. 32, T. 2980).

Shawana McCloud ("Ms. McCloud"), Appellant's wife, testified that she lived with him in Apopka, Florida. (V. 32, T. 2981). Ms. McCloud had four young children living with her. (V. 32, T. 2985). On October 3, 2009, she went to the hospital twice after being in a physical altercation while she was pregnant. (V. 32, T. 2982-2983). After the fight, paramedics rushed her to the hospital. (V. 32, T. 2984). Appellant arrived at hospital with Dre. (V. 32, T. 2987). Ms. McCloud's relatives picked her up from the hospital and took her home. (V. 32, T. 2989). Late in the evening, she began experiencing extreme pain and Ms. Zow, her sister, took her back to the hospital while Appellant remained home with the children. (V. 32, T. 2990-2991). Ms. McCloud remained at the hospital until early the next morning, she went home to get a diaper bag, and then went to her father, Harold

Scott's, house in Maitland, Florida. (V. 32, T. 2992). Appellant and the children were at Mr. Scott's house when Ms. McCloud arrived. (V. 32, T. 2993). The children and both the McClouds stayed at the Scott residence overnight and left later on the morning of October 4, 2009. (V. 32, T. 2995). In support of Appellant's alibi, the defense introduced Ms. McCloud's hospital medical records into evidence. (V. 12, R. 2078-2136).

On October 21, 2009, detectives asked Ms. McCloud to come to the Orange County Sheriff's Office to answer some questions. (V. 32, T. 2996-2997). She did not know that the police wanted to ask her about a murder. (V. 32, T. 2997). In response to questioning, Ms. McCloud informed detectives her husband's whereabouts on October 3-4, 2009. (V. 32, T. 2997). The detectives were not satisfied with her answers and began to yell at her. (V. 32, T. 2998). She became very upset and began crying. (V. 32, T. 3001).

On October 3, 2009 at approximately 2:00 p.m. or 3:00 p.m., Dora Norman ("Ms. Norman"), Appellant's mother-in-law, testified that she witnessed a fight and observed several individuals attacking her pregnant daughter, Ms. McCloud. (V. 32, T. 3030, 3032, 3034). An ambulance responded and took Ms. McCloud to Florida Hospital in Apopka. (V. 32, T. 3032). Ms. Norman did not go to the hospital, but returned home to 214 West Tenth Street in Apopka, to take care of her children. (V. 32, T. 3032). Shortly after the fight, Ms. Norman came into contact

with Appellant and advised him what happened to Ms. McCloud. (V. 32, T. 3035). Later, Appellant picked up the children from her residence and took them to Ms. McCloud's father's house. (V. 33, T. 3047).

Mark Ayers ("Mr. Ayers") testified that he lived with Ms. McCloud's father, Harold Scott ("Mr. Scott") and his wife, Sylvia Scott ("Ms. Scott") in Maitland, Florida. (V. 33, T. 3049-3050). Between 11:00 p.m. and midnight on October 3, 2009, Ms. Scott asked Mr. Ayers if he could pick up Appellant and the baby from Ms. McCloud's residence in Apopka. (V. 33, T. 3054-3056). Mr. Ayers drove to Apopka, picked up Appellant and an infant child, and drove back to Scott residence in Maitland. (V. 33, T. 3058). Mr. Ayers fell asleep in his room at about 2:00 a.m., and did not see the McClouds at the Scott residence when he woke up the next morning. (V. 33, T. 3061). He left for work and noticed the McClouds at the home when he returned at 11:00 or 11:30 a.m. that morning. (V. 33, T. 3061-3062).

Marlon Britton ("Ms. Britton") is Shawana McCloud's younger sister and Appellant's sister-in-law. (V. 30, T. 2547). She testified that in October 2009, she lived with her mother, Dora Norman, her step-father, Rashon Norman, and her half-sister, Monica Zow, in Apopka, Florida. (V. 30, T. 2548). On October 3, 2009, Ms. McCloud was in an altercation causing her to go to the hospital because she was pregnant. (V. 30, T. 2549). Ms. Britton called Appellant on Dre's cell

phone and advised him of the situation. (V. 30, T. 2550). Appellant called Ms. Britton and stated that he needed a ride to the hospital. (V. 30, T. 2556). Ms. Britton and a friend, Lisa, drove to the McCloud residence in Apopka, picked up Appellant and three children up, and went to the hospital. (V. 30, T. 2557-2558). They were at the hospital for two to three hours. (V. 30, T. 2559). Ms. Britton and Lisa left the hospital with Appellant and the children and dropped him back off at his residence in Apopka. (V. 30, T. 2560).

The defense recalled Fang during its case-in-chief. (V. 33, T. 3088). Fang was familiar with the Malibu area of Orlando and had a friend named "Chunky A" who lived there. (V. 33, T. 3090). While he was living in Poinciana, Fang was robbed at gunpoint on Father's Day 2009, before this October 2009 robbery. (V. 33, T. 3091, 3092). The robbers advised that they would be back. (V. 33, T. 3091). Fang identified Mate and Bryson as the Father's day 2009 robbers, and he further stated that, during the October robbery herein, Mate and Bryson told him "we're back." (V. 33, T. 3092-3093).*Contrary to Bryson's trial testimony, Fang confirmed that Bryson indeed went into his house, had a gun, and shot him in his leg.* (V. 33, T. 3094, 3097). *Fang could not identify Appellant as being present during either robbery.* (V. 33, T. 3095).

Appellant was the last defense witness to testify. (V. 33, T. 3132). Appellant was thirty year old, married, and had a one year old son at the time of

trial. (V. 33, T. 3135). In October 2009, Appellant, his wife, and three children lived together in Apopka, Florida. (V. 33, T. 3136). On October 3, 2009, Appellant met Dre just after lunch and they drove to the Malibu area of Orlando. (V. 33, T. 3143). Once in Malibu, Appellant and Dre saw Bryson at a neighborhood party, where they stayed for several hours. (V. 33, T. 3143, 3146). Appellant, Bryson, Dre, and Chunky A, who had joined them at the party, left and went to Mate's house. (V. 33, T. 3148). At Mate's house, Bryson mentioned that he had an idea for a robbery. (V. 33, T. 3153). Appellant received a call via Dre's cell phone advising him that his wife was in the hospital. (V. 33, T. 3158). Appellant and Dre then drove to the hospital in Apopka to visit Ms. McCloud. (V. 33, T. 3158). Appellant stayed for awhile and then left to pick up his infant son from his mother-in-law's house. (V. 33, T. 3164). Dre dropped Appellant off, and ten minutes later, Appellant learned that his wife was hungry. (V. 33, T. 3166). Ms. Britton and her friend, Lisa, drove Appellant and his son back to the hospital and dropped off food for Ms. McCloud. (V. 33, T. 3167). Ms. Britton dropped Appellant off at his Apopka residence along with his son. (V. 33, T. 3168).

Ms. McCloud arrived at the Apopka residence after being released from the hospital. (V. 33, T. 3170). Due to increasing pain, Ms. McCloud had her younger sister, Ms. Zow, take her back to a hospital a little before midnight. (V. 33, T. 3171-3172). Appellant received a call from Ms. McCloud at the hospital and she

advised him to go to the Scotts' residence in Maitland, Florida. (V. 33, T. 3174). Mr. Ayers picked Appellant up and drove him to Maitland with his young son. (V. 33, T. 3176). He stayed up for awhile talking with his in-laws, Ms. McCloud arrived, they went to sleep, and they woke up on October 4, 2009 at about 6:00 a.m. (V. 33, T. 3183). After they woke up, the McClouds attempted to go to Chic-Fil-A for breakfast, and instead ate at Burger King. (V. 33, T. 3186). Upset about not being able to contact his wife, McCloud then purchased a cell phone from a nearby Radio Shack. (V. 33, T. 3188).

The following Monday, Appellant called Bryson on Mate's phone and he then had Dre drive him to Mate's house in Malibu. (V. 33, T. 3191). Once he arrived at Mate's house, Appellant asked Mate about the proceeds from the robbery, and Mate sold him Fang's .38 caliber revolver. (V. 33, T. 3193-3194). Appellant left Mate's house with the gun, and left the Orlando area with a new girlfriend, with whom he stayed for several weeks. (V. 33, T. 3200).

Appellant was arrested in Orlando on October 21, 2009. (V. 33, T. 3200). Appellant was taken to the Orlando County Sheriff's Office where he was handcuffed to a chair and questioned. (V. 33, T. 3201). He noticed his wife's voice and heard detectives yelling and screaming at her. (V. 33, T. 3202). She began to cry and even sob. (V. 33, T. 3203). Detective Lung questioned him first and he denied any involvement. (V. 33, T. 3205). After he denied involvement in

the shootings, Appellant testified detectives threatened him with the death penalty (V. 33, T. 3208). Appellant continued to deny that he was involved, and detectives left him alone in the interrogation room for long periods of time. (V. 33, T. 3210). Earlier in the day, Appellant smoked marijuana prior to being questioned. (V. 33, T. 3210). Upon being questioned by Detective Evans and Bias, Appellant continued to deny involvement and they again threatened him with the death penalty. (V. 33, T. 3216). Detectives promised Appellant that if he cooperated they would see to it that he would not get the death penalty. (V. 34, T. 3221). Appellant then told them he did not want to talk anymore. (V. 33, T. 3216). Appellant felt scared and intimidated by the threats. (V. 33, T. 3217). Finally, feeling he had no choice, Appellant falsely told detective that he was involved in the robbery, when he in fact was with his child at his father-in-law's house. (V. 34, T. 3222-3223). The State called Detective Bias in rebuttal. She testified that she did not ever threaten Appellant and she never made any promises. (V. 34, T. 3273).

When the trial court excluded Dr. Kremper, it granted the defense request to modify the standard jury instruction on the voluntariness of a defendant's statement by adding the following factors: whether the defendant was threatened in order to get him to make the statement, whether someone promised the defendant anything to get him to make a statement, the duration and conditions of detention, the manifest attitude of the police toward the defendant, the defendant's attitude and

mental state, and the diverse pressures which sap and sustain the defendant's powers of resistance and self-control. (V. 35, T. 3479-3480, V. 13, R. 2182).

The jury instructions were replete with errors. The trial court instructed the jury on both Armed Home Invasion Robbery and Armed Burglary. (V. 13, R. 2149-2153). The trial court gave the wrong jury instruction on Attempted First Degree Murder. Instead of giving Standard Jury Instruction 6.2-Attempted Murder First Degree (Premeditated) or Instruction 6.3-Attempted Felony Murder, as was charged in the indictment, the court instead read Standard Jury Instruction 5.1-Attempt to Commit Crime § 777.04(1) Fla. Stat. and merely inserted the words "First Degree Murder." (V. 1, R. 26),(V. 13, R. 2147), (V. 35, T. 3463). This instruction omitted the required elements that Appellant must have had either a premeditated design to kill Fang or that the murder was committed while the defendant was engaged in a specified felony and that Appellant committed an "intentional act." The jury was instructed during the penalty phase that Attempted Murder could be used as an aggravator to prove that Appellant was previously convicted of felony involving the use of violence. (V. 13, R. 2174). It is a violation of double jeopardy for a defendant to be charged with both as demonstrated below. This error was compounded when the felony murder instruction included both burglary and robbery. (V. 13, R. 2146).

During jury deliberations, the foreman of the jury asked for transcripts of Appellant's confession, a transcript of Dre's confession, and he said that the jury would like to see the video of Appellant's confession. (V. 13, R. 2193). The trial court did not bring the jury back in the court room, but merely advised them in writing that advised that neither transcript was in evidence, but that they could view the video of Appellant's confession. (V. 13, R. 2193), (V. 35, T. 3493-3494). Significantly, the trial court did not tell the jury that any testimony could be read back. (V. 13, R. 2193),(V. 35, T. 3493-3494).

The jury found Appellant guilty on all charges alleged in the indictment. (V. 35, T. 3497). The verdict form contained special interrogatories that required the jury to determine whether Appellant merely possessed a firearm or whether Appellant had in fact discharged a firearm during the robbery, murders, attempted murder, and burglary. (V. 13, R. 2194-2199).*The jury found that Appellant merely possessed a firearm and that he did not discharge it.* (V. 13, R. 2194-2199). Thereby, the jury determined that Appellant was not the actual shooter of either one of the deceased victims, nor Fang.

D. Penalty Phase

The penalty phase began near in time to the finding of guilt. After trial court gave preliminary instructions to the jury, the State announced that it would be relying on the evidence presented at trial to support the aggravating circumstances.

(V. 35, T. 3527). During the defense opening statement the state objected to and the trial court precluded defense counsel from discussing the law surrounding the aggravators and mitigators. (V. 35, T. 3528-3532). The defense further outlined its case by advising the jury that they would be calling Appellant's family members and mental health professionals who would testify that Appellant had a difficult life growing up, learning disabilities, and other (non-statutory) mitigating factors. (V. 35, T. 3533-3535).

Over numerous defense objections, the State presented it victim impact evidence. (V. 35, T. 3601-3633). There were four impact statements from Mr. Freeman's family and friends. (V. 35, T. 3635-3654). Ms. Taylor's mother read a victim impact statement, which informed the jury that Ms. Taylor's youngest daughter would curl up with Tamiqua's urn, another daughter had a complete mental breakdown, and her little boy chose not to believe in God for a period of time. (V. 35, T. 3655-3659).

Lashonda McCloud ("Lashonda"), Appellant's sister, was the oldest of six (6) children. (V. 35, T. 3537). Appellant, two years younger than Lashonda, was the second oldest, and the children grew up without a father figure. (V. 35, T. 3537). While her mother worked, Lashonda, ate age six, took care of the children, including Appellant. (V. 35, T. 3538). When Lashonda was six and Appellant was four, a man who had been acting as their father figure, Anthony Harris, committed

suicide. (V. 35, T. 3540). The next man to live with Appellant, Willy Biggins, was extremely abusive. (V. 35, T. 3541). He threatened to kill Appellant's mother, shot at her in Appellant's presence, and attempted to burn down the house with the children in it. (V. 35, T. 3542, 3544). He would regularly hit Appellant. (V. 35, T. 3542). Appellant was bullied at school and appeared to be more of a follower than a leader. (V. 35, T. 3546).

Ms. McCloud, Appellant's wife, had been married three years at the time of the penalty phase. (V. 35, T. 3559). They had two children together, Kalila McCloud and Irana McCloud, age two. (V. 35, T. 3559). Kalika died twenty two hours after she was born. (V. 35, T. 3560). Ms. McCloud has two other children that Appellant welcomed as his own. (V. 35, T. 3560). Appellant was very close with her family and he cherished family time, which he did not experience growing up. (V. 35, T. 3565). Appellant and Ms. McCloud tried to reach out multiple times to Appellant's mother and they were rebuffed. (V. 35, T. 3567).

Ms. Zow, Appellant's sister-in-law, and Ms. Norman, Appellant's mother-in-law, both testified on Appellant's behalf. (V. 35, T. 3575, 3578). She was studying to be a law enforcement officer and Appellant encouraged her to maintain this career goal. (V. 35, T. 3575). He encouraged her not to have a child out of wedlock and he encouraged her to maintain her education. (V. 35, T. 3577). Ms. Norman stated that Appellant was a part of their family and he was extremely

protective of the children. (V. 35, T. 3586). Appellant became extremely fond of an infant child, little Robert, Ms. Norman had custody of. (V. 35, T. 3588).

Dr. Kremper and Dr. Valerie McClain ("Dr. McClain"), both forensic psychologists, provided the jury with mental mitigation. Dr. Kremper testified that Appellant's intellectual functioning and IQ fell within the borderline range. (V. 35, T. 3664-3665). School records revealed that Appellant was in emotionally handicapped classes. (V. 35, T. 3668). Dr. Kremper further concluded that Appellant was susceptible to interrogative pressure and influence. (V. 35, T. 3664-3668). However, upon objection, the court would not let Dr. Kremper testify regarding his conclusion that Appellant's statements to police were coerced. (V. 35, T. 3674). Appellant's suggestibility would make him more likely to acquiesce to people he is hanging around to go do whatever they wanted. (V. 35, T. 3679). Appellant was also emotionally immature. (V. 35, T. 3681). Dr. McClain reviewed Appellant's medical records, mental health records, school records, and discovery. (V. 35, T. 3732-3733). Appellant's learning disabilities as a young child manifested later into behavioral issues and impulsivity. (V. 35, T. 3735-3736). Dr. McClain also diagnosed Appellant as suffering from posttraumatic stress disorder (PTSD). (V. 35, T. 3739). PTSD is a continuous disorder can go into remission, but Appellant was not treated for PTSD. (V. 35, T. 3740). Appellant would also be more of a follower and susceptible to suggestion. (V. 35,

T. 3741).

The defense made several requests to modify the penalty phase standard jury instructions and objections to the instructions themselves. First, the defense asked the court to all the following language to the initial instruction:

> The law requires the court to give great weight to your recommendation. I may reject your recommendation only if the facts are so clear and convincing that virtually no reasonable person could differ. (V. 35, T. 3693-3694).

The court declined to give the special instruction. (V. 35, T. 3694). The defense asserted that the pecuniary gain aggravator should not be given because it was not proven during the trial. (V. 35, T. 3699). The court disagreed. (V. 35, T. 3700). The defense also argued that the cold, calculated, and premeditated aggravator was also not proven, especially based on the jury's finding that Appellant never fired a gun. (V. 35, T. 3700). The trial court again disagreed and left the CCP aggravator in the jury instructions. (V. 35, T. 3702).

The defense re-raised all of its previous objections and motions, including the objection to excluding a portion of Dr. Kremper's testimony. The court affirmed its previous rulings. (V. 35, T. 3757).

During closing arguments, the State asserted that the aggravating circumstances outweighed the mitigation circumstances, and the defense argued for a life recommendation. The defense made several objections during the prosecutor's closing, including misstating the law, personal editorial comment,

bolstering, and asserting facts not in evidence. (V. 37, T. 3775, 3781, 3782, 3784). The State also stated that Appellant shot both victims and inferred that the .38 caliber he was arrested with the murder weapon. (V. 37, R. 3785). The defense renewed all of its previous motions after the jury was instructed. (V. 37, T. 3821). On March 9, 2010, the jury returned a death recommendation for both murders by a majority vote of eight to four. (V. 37, T. 3822). On March 12, 2012, the defense sought to bar the death penalty as a violation of *Enmund/Tison*, due to the jury's finding Appellant did not discharge a firearm and evidence presented during the case. (V. 13, 2187-2188). The trial court denied the motion. (V. 13, 2189).

The defense filed a timely Motion for New Trial on April 3, 2012. (V. 13, R. 2208-2211). The motion, among other issues, asserted that the death penalty could not be applied, pursuant to *Enmund/Tison*, when the jury found that Appellant did not discharge a firearm, it was error to exclude Dr. Kremper, and the prosecutor made various remarks during his closing argument that constituted fundamental error. (V. 13, R. 2208-2211). The trial court denied the motion without explanation two days later. (V. 13, R. 2212).

D. Spencer Hearing

The *Spencer* hearing began on July 6, 2012. (V. 13, R. 2222). The defense called Dr. Kremper, who testified that Appellant's statements to police were coerced and involuntary. (V. 13, R. 2259). Appellant's family members also

emphasized positive traits Appellant had. (V. 13, R. 2268-2294). At the end of the hearing, the defense again renewed its objections to the death penalty based on an *Enmund/Tison* analysis. The defense further asserted that the death penalty was disproportionate because the jury found that Appellant did not discharge a firearm and the codefendants received especially lenient sentences ranging from ten to fifteen years with no minimum mandatory under 10-20-Life. (V. 13, R. 2297-2304).

After the Spencer hearing and the submission of sentencing memoranda, Judge Jacobsen entered a written order imposing the death penalty on September 6, 2012. (V. 15, R. 2513-2538). The trial court found that Appellant was not the main instigator of the robbery and that none of the defendants, including Appellant, "never meant to, or intended to murder anyone..." (V. 15, R. 2525, 2530-2531). This appeal follows.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ERRED WHEN EXCLUDED DR. KREMPER FROM TESTIFYING THAT APPELLANT'S STATEMENT TO LAW ENFORCEMENT WERE COERCED.

II. THE TRIAL COURT ERRED WHEN IT ADDRESSED THE JURY'S REQUEST FOR TRANSCRIPTS OF APPELLANT'S AND CODEFENDANT'S CONFESSIONS.

III. APPELLANT'S CONVICTIONS FOR ARMED ROBBERY AND ARMED BURGLARY VIOLATE DOUBLE JEOPARDY.

IV. THE TRIAL COURT FUNDAMENTALLY ERRED WHEN IT GAVE THE INCORRECT JURY INSTRUCTION ON ATTEMPTED FIRST DEGREE MURDER.

V. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION.

VI. THE TRIAL COURT VIOLATED THE HOLDING OF CALDWELL V. MISSISSIPPI DURING JURY SELECTION.

VII. THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED BY ENMUND/TISON.

VIII. THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY IMPERMISSIBLE.

IX. THE TRIAL COURT ERRED WHEN IT DENIED MOTIONS FOR A MISTRIAL WHEN THE PROSECUTOR MADE IMPROPER COMMENTS DURING CLOSING ARGUMENT.

X. THE STATE FAILED TO PROVE SEVERAL AGGRAVATORS BEYOND A REASONABLE DOUBT.

XI. THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER PROVEN MITIGATORS.

XII. THE DEATH PENALTY AND INSTRUCTIONS TO THE JURY ARE FACIALLY AND AS APPLIED UNCONSTITUTIONAL.

ARGUMENT

I. WHETHER THE TRIAL ERRED WHEN EXCLUDED DR. KREMPER FROM TESTIFYING THAT APPELLANT'S STATEMENT TO LAW ENFORCEMENT WERE COERCED

A. Standard of Review

A trial court's decision to exclude an expert witness is reviewed by the abuse of discretion standard. *Welty v. State*, 402 So. 2d 1159, 1163 (Fla. 1981).

B. Argument

According to the United States Constitution, a criminal defendant has a Sixth Amendment right to call witnesses on his own behalf and a Fourteenth Amendment right to fundamental and procedural due process. Similarly, the Article I, Section 9 and Article I, Section 16 of the Florida Constitution guarantees a criminal defendant the right to due process of law and the compulsory attendance of witnesses at a criminal trial. As Florida courts have consistently held, "there are few rights more fundamental than the right of an accused to present witnesses in his or her own defense." *Jenkins v. State*, 872 So. 2d 388, 389 (Fla. 4th DCA 2004). A defendant's fundamental right to defend himself or herself under the Sixth Amendment is denied when exculpatory evidence is excluded. *Mattear v. State*, 657 So. 2d 46, 47 (Fla. 4th DCA 1995). The right to call witnesses is one of the most important due process rights of a party and accordingly, the exclusion of the testimony of expert witnesses must be carefully considered and sparingly done.

Pascual v. Dozier, 771 So. 2d 552, 554 (Fla. 3d DCA 2000); *State v. Gerry*, 855 So. 2d 157, 159-160 (Fla. 5th DCA 2003). As the Supreme Court held in *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1991):

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing."* (Emphasis added, citations omitted).

Expert psychological testimony regarding interrogations and confessions has been presented in other Florida trials. *See Ross v. State*, 45 So. 3d 403 (Fla. 2010)(false confession expert utilized in part in reversing conviction for involuntary confession); *Terry v. State*, 467 So. 2d 761 (Fla. 4th DCA 1985)(error to exclude expert witness from testifying at suppression hearing that that "her mental state at the time of the post-arrest statement affected her ability to voluntarily waive her *Miranda* rights."); *Fields v. State*, 402 So. 2d 46 (Fla. 1st DCA 1981); *United States v. Roark*, 753 F. 2d 991 (11th Cir. 1985)(expert testimony admissible where psychologist would have testified about defendant's

condition, known as "compulsive compliance," which made her more susceptible to psychological coercion).

The admission of a false confession expert has been recognized in other jurisdictions as admissible. In *People v. Sanford*, 2013 WL 5379673 (Mich. App. 2013) the Michigan Court of Appeals held:

> [A]purported false confession ... constitutes counterintuitive behavior that is not within the ordinary person's common understanding, and thus expert assistance can help jurors understand how and why a defendant might confess falsely. The exclusion of such expert testimony when it meets all the requirements of our evidentiary rules could, in some instances, hinder the jury in its task because without the enlightenment of expert's opinion the jury's ultimate determination may not be arrived at intelligently.
>
> …this Court and the circuit court had erred in presuming "that the average juror possessed the knowledge to evaluate factors that might lead to a false confession."

The Court in *Sanford* quoted the holding by the Michigan Supreme Court in *People v. Kowalski*, 821 N.W. 2d 14 (Mich. 2012), which held in a first-degree murder case that is was reversible error to preclude the defense from calling two expert witnesses who would have testified regarding false confessions, and the defendant's mental state during the interrogation ("we hold that because the claim of a false confession is beyond the common knowledge of the ordinary person, expert testimony about this phenomenon is admissible").

Other courts have reached similar results: *Caine v. Burge*, 2013 WL 1966381 (N.D. Ill. 2013)(denying motion to bar expert testimony on false

confessions); *Miller v. State*, 770 N.E. 2d 763, 770-774 (Ind. 2002)(exclusion of expert witness testimony in murder case reversible error); *State v. Pate*, 2011 WL 6935329, at *12 (Tenn. Crim. App. Nov. 22, 2011)(holding that the trial court did not err in allowing the defendant's expert to testify about the defendant's particular personality traits and mental conditions that rendered him more susceptible to suggestion than other people). *See United States v. Olafson*, 2006 WL 1663011 (N.M. Ct. Crim. App. 8 June 2006) (unpub.) (Doctor Jerry Brittan permitted to testify that appellant fit the criteria for those who give false confessions). *See also: United States v. Shay*, 57 F. 3d 126, 130-135 (1st Cir. 1995) (finding trial court erred in excluding expert testimony regarding defendant's mental condition that caused him to give false confession); *United States v. Raposo*, 1998 WL 879723, 5-6 (S.D.N.Y. Dec. 16, 1998) (admitting expert testimony on false confessions); *United States v. Hall*, 974 F. Supp. 1198, 1203-1205 (C.D. Ill. 1997) (permitting specified expert testimony on the subject of false confessions); *State v. Buechler*, 572 N.W. 2d 65, 72–74 (Neb. 1998)(holding that the trial court committed prejudicial error when it excluded expert testimony on false confessions); *Callis v. State*, 684 N.E. 2d 233, 239 (Ind. App. 1997) (affirming trial court's decision to admit, on limited grounds, expert witness testimony regarding police interrogation tactics); *State v. Baldwin*, 482 S.E. 2d 1, 5 (N.C. App. 1997) (holding that the trial

court erred in excluding expert witness testimony that police interrogation tactics made defendant susceptible to giving a false confession).

A trial court commits reversible error when it precludes a psychologist from testifying that a defendant's confession was not voluntarily made. *Boyer v. State*, 825 So. 2d 418, 419 (Fla. 1st DCA 2002). In *Boyer,* the defendant, charged with second-degree murder, filed a motion to suppress arguing that his statements to police were not knowingly and voluntarily made, and thus involuntary. *Id.* At the motion to suppress was denied, the defense sought to have an expert, Dr. Ofshe, testify concerning "phenomenon that causes innocent people to confess to a criminal offense; police techniques that secure false confessions under certain circumstances; and his explanation of the parameters within which one can evaluate a confession to determine its veracity." *Id.* The trial excluded that Dr. Ofshe's testimony would not aid the jury in understanding any facts in issue and would lead a jury to speculate to reach a verdict. *Id.* The appellate court reversed and remained for new trial based on the exclusion of this expert testimony. *Id.* at 420. It reasoned that the trial court erred when it concluded that the jury it would add nothing to what the jury would know from common experience because the jury was entitled to hear relevant evidence on the issue of voluntariness and it "would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case

being tried." *Id. See also Harrison v. State*, 33 So. 3d 727, 730-731 (Fla. 1st DCA2010) (citing *Boyer*).

The trial court erred when it excluded Dr. Kremper's testimony that Appellant's confession was coerced and involuntary. Identical to *Boyer*, Appellant filed a motion to suppress his confession asserting that it was involuntary, the trial court denied the motion, and Appellant sought to have an expert testify regarding psychological factors, environmental factors, and police tactics that rendered Appellant's statement involuntary. Like the trial judge finding Dr. Ofshe's testimony would not aid the jury in understanding any facts in issue and it would add nothing to what the jury would know from common experience, the trial judge in the instant case, excluded Dr. Kremper's testimony because such of a nature that requires special knowledge or expertise" so the jury could draw its' own conclusions. As in *Boyer*, the jury here was entitled to hear relevant evidence on the issue of voluntariness and such testimony would have let the jury know about the phenomena of false confessions exists, how to recognize them, and how, based on diagnostic testing, Appellant's statements were involuntary.

This error was not cured or rendered harmless by the trial court reading a special jury instruction mentioning several factors for the jury to consider in determining whether Appellant's statement was involuntary. The exclusion of Dr. Kremper prevented the jury from learning that Appellant's verbal intellectual

abilities fell within the borderline range, his verbal memory as it relates to narrative information was "very, very poor," and his reading level was the equivalent of an eleven or twelve year old. Individuals, such as Appellant, who have verbal memory difficulties, are particularly susceptible to suggestion. Based on the test results, Appellant was the type of person who would be more likely to tell someone what they wanted to hear and even invent things. Dr. Kremper concluded that coercive tactics were used, Appellant's statements to police were coerced, and the voluntary waiver of his *Miranda* rights was questionable. Therefore, not only was the jury precluded from hearing about factors that cause false confession, the jury was not allowed to hear that Appellant's *mental state* during the interrogation could have affected the voluntariness of his statement. *See Terry, Fields, supra.*

Appellant's confession to law enforcement was the centerpiece of the state's case. It was featured in the prosecutor's opening statement. At trial, a videotape of the confession was played to before the jury. Two detectives testified as the contents of Appellant's inculpatory statements. References to the contents of statements permeated the prosecutor's rebuttal closing argument to the jury. When the jurors retired to deliberate, they requested a copy of Appellant's statements.

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court recognized that a confession is like no other evidence; it is probably the most

probative and damaging evidence that can be admitted against a defendant; and confessions certainly have a profound impact on the jury. *Id.* at 296. The impact of a confession is magnified when the jurors watch it on a videotape, and when, as here, the jurors specifically request and are given the opportunity to watch the videotaped confession again - this time during their deliberations--it clearly cannot be shown beyond a reasonable doubt, as the *DiGuilio* standard requires, it could not have contributed to their verdict.

As such, the exclusion of expert testimony as to the voluntariness of Appellant's statements was harmful error.

II. WHETHER THE TRIAL COURT ERRED WHEN IT ADDRESSED THE JURY'S REQUEST FOR TRANSCRIPTS OF APPELLANT'S AND CODEFENDANTS' CONFESSIONS

A. Standard of Review

In response to a jury request to view transcripts of Appellant's and codefendants' confessions, the Court advised the jury that there were no written transcripts of the confessions. The Court did not inform the jury that those portions of the testimony could be read back to them by the court reporter. Appellant maintains that, based on the facts of this case, the error was fundamental. Fundamental error is "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.'" *Brooks v. State,* 762 So. 2d 879, 899 (Fla. 2000) (quoting *McDonald v. State,* 743 So. 2d 501, 505 (Fla. 1999)).

B. Argument

Rule 3.410 of the Florida Rules of Criminal Procedure provides that a trial court may, in its discretion, have portions of the trial testimony read back to the jury upon request. A trial court "may not mislead a jury into believing that a read-back was prohibited." *Hazuri v. State*, 91 So. 3d 836, 843 (Fla. 2012). An improper denial of a jury's request for transcripts of the testimonies of specific witnesses is also subject to a harmless error analysis. *Id.* The harmless error test requires the State "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." *Ventura v. State*, 29 So. 3d 1086, 1089 (Fla. 2010).

In *Hazouri*, this Court found that trial court abused its discretion when it misled a jury into believing that a read back of testimony was prohibited. *Hazuri*, 91 So. 3d at 843. There, the jury sent a note requesting transcripts of testimony, the trial court determined that the jury did not have a right to transcripts, and advised the jury to rely on their memory of the testimony. *Id.* at 839. Although the jury did not specifically request a read back of testimony, this Court ruled that the judge's response failed to convey that the jury could have testimony read back and the judge failed to clarify which portions of the trial the jury wished to review. *Id.*

at 845. Therefore, the following two rules to be applied by a court when responding to a jury request for transcripts: "*(1) a trial judge should not use any language that would mislead a jury into believing that read-backs are prohibited and (2) when denying a request for transcripts, the trial judge is to inform the jury of the possibility of a read-back.*" *Id.* at 846, ("emphasis added"). This rule similarly applies when a jury requests transcripts of specific witnesses. *State v. Barrow*, 91 So. 3d 826, 834 (Fla. 2012) (trial court abused its discretion when, after a jury made a request during deliberations for transcripts pertaining to the testimonies of five witnesses, it informed the jury that no transcripts were available and instructed the jury to rely on the evidence presented during the proceedings, and the error in trial court's response to the jury's request was not harmless).

The facts of the instant case are similar to *Hazouri* and *Barrow*. Like the juries in *Hazouri* and *Barrow*, the jury here asked for a transcript of Appellant's confession and a transcript of Dre's confession. Similar to the trial court in *Hazouri* and *Barrow*, the trial judge advised the jury, without bringing them into the courtroom to clarify their question, that the transcripts were not in evidence. As in *Hazouri* and *Barrow*, this response from the trial court would mislead the jury into thinking that a read back of testimony was prohibited, and the failed to instruct the jury that a read back was possible.

Although there is recent case law in the Second and Fifth Districts that holds this type of error is not fundamental, Appellant would assert that there error here is fundamental and should be addressed by this Court as harmful error. *Delestre v. State*, 103 So. 3d 1026, 1027 (Fla. 5th DCA 2013); *Adams v. State*,__So. 3d __, 2013 WL 5576095 (Fla. 2d DCA 2013). In *Delestre*, an appeal from a possession of a firearm by a convicted felon and possession of heroin case, the jury asked for "all of the testimony." *Delestre*, 103 So. 3d at 1027. *Adams* involved an attempted robbery case where the jury requested "all depositions," an officer's report, and "all trial testimony." Dissimilar from broad requests *Delestre* and *Adams*, the jury in the instant case, a case involving the death penalty, asked for specific transcripts of Appellant's confession and Dre's confession.

The voluntariness of Appellant's confession was a critical issue. As such, this error "goes to the very heart of the judicial process" and "extinguishes a party's right to a fair trial," such that it results in a miscarriage of justice.

III. APPELLANT'S CONVICTIONS FOR ARMED ROBBERY AND ARMED BURGLARY VIOLATE DOUBLE JEOPARDY.

A. Standard of Review

Double jeopardy violations may be raised for the first time on appeal as fundamental error, *Bailey v. State*, 21 So. 3d 147 (Fla. 5th DCA 2009), and that such violations based on undisputed facts are reviewed de novo. *McKinney v. State*, 66 So. 3d 852 (Fla. 2011).

B. Argument

Trial court violated the prohibition against double jeopardy, guaranteed by the Fifth Amendment to the United States Constitution and article I, section 9 of the Florida Constitution by entering a conviction and sentence on both the armed burglary of a dwelling conviction and the attempted armed home-invasion robbery counts of the indictment because both convictions arose out of the same incident. *Schulterbrandt v. State*, 984 So. 2d 542 (Fla. 2d DCA 2008), and *Olivera v. State*, 92 So. 3d 924 (Fla. 4th DCA), *See also Jules v. State*, 113 So. 3d 949 (Fla. 5th DCA 2013) (holding that the defendant's home-invasion robbery conviction violated double jeopardy because it arose from the same incident as the defendant's burglary with an assault or battery conviction); *Mendez v. State*, 798 So. 2d 749 (Fla. 5th DCA 2001) (explaining that burglary of a dwelling with an assault or battery is subsumed by the offense of home-invasion robbery).

Based on the cases cited above, Appellant could not have been charged with both Armed Burglary and Armed Robbery of the same home. One of the counts should be stricken from the judgment and/or a new trial should be granted. Similarly, it was error to include both crimes in the jury instructions during the penalty phase instructions related to the aggravators or allow the State to argue alternative theories of two crimes precluded by double jeopardy. (V. 13, R. 2174-

2175).The trial court make specific note of both crimes in is sentencing order. (V. 15, R. 2523).

As such, Appellant should be entitled to a new penalty phase pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution (fair trial, cruel and unusual punishment, and due process clauses). *See Armstrong v. State*, 862 So. 2d 705, 717-718 (Fla. 2003)(holding that a post-trial reversal or vacating of prior violent felony conviction can be basis for new penalty phase, where is error is found to be harmful); *Lebron v. State*, 894 So. 2d 849 (Fla. 2005).

IV. THE TRIAL COURT FUNDAMENTALLY ERRED WHEN IT GAVE THE INCORRECT JURY INSTRUCTION ON ATTEMPTED FIRST DEGREE MURDER

A. Standard of Review

"[I]t is fundamental error to fail to give ... [an] accurate instruction in a criminal case if it relates to an element of the charged offense." *Davis v. State*, 804 So. 2d 400, 404 (Fla. 4th DCA 2001).

B. Argument

The trial court gave the wrong jury instruction on Attempted First Degree Murder. The indictment charged Appellant with Attempted First Degree Murder of Fang either with a premeditated design or while in engaged in the commission of a robbery or burglary. (V. 1, R. 26). Instead of giving Standard Jury Instruction

6.2-Attempted Murder First Degree (Premeditated) or Instruction 6.3-Attempted Felony Murder, as was charged in the indictment, the court instead read Standard Jury Instruction 5.1-Attempt to Commit Crime § 777.04(1) Fla. Stat. and merely inserted the words "First Degree Murder." (V. 1, R. 26),(V. 13, R. 2147). Because there was clearly dispute over whether Appellant actually did some act which intended to cause death or whether he acted with premeditated design, it was fundamental error to give jury instruction which omitted those elements. This error was compounded when the jury was instructed that they could use the attempted murder conviction as evidence that Appellant was previously convicted of a felony involving the use of violence.

Appellant therefore is entitled to a new trial or new penalty phase. *See Armstrong v. State*, 862 So. 2d 705, 717-718 (Fla. 2003) (holding that a post-trial reversal or vacating of prior violent felony conviction can be basis for new penalty phase, where is error is found to be harmful).

V. WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION

A. Standard of Review

The standard of review for motion to suppress is that the appellate court affords a presumption of correctness to a trial court's findings of fact but reviews de novo the mixed questions of law and fact that arise in the application of the law to the facts. *Fitzpatrick v. State*, 900 So. 2d 495, 510 (Fla. 2005).

B. Argument

"If the suspect indicates *in any manner* that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop." *Traylor v. State,* 596 So. 2d 957, 966 (Fla. 1992). If that request is equivocal or ambiguous, the police may continue questioning. *State v. Owen,* 696 So. 2d 715, 719 (Fla. 1997). A suspect unequivocally invokes the right to remain silent if, with sufficient clarity, he or she expresses a desire to end questioning in such a manner that a reasonable officer under the circumstances would understand that the suspect has invoked his or her right to end questioning. *Id.* at 18. When determining whether an individual has invoked his or her right to remain silent, an officer must consider "*any manner*" in which the defendant may have invoked that right, meaning that there are no magic words a defendant must use to invoke that right. *Id.*

Here, Appellants statements and conduct gave law enforcement the clear indication that he did not wish to speak anymore concerning the robbery. Detective Evans testified that Appellant either indicated or stated that "he was *not going to talk anymore* about it because he is not trying to get, get the death penalty. (V. 5, R. 902-903). During cross-examination, Detective Evans testified that "*he (Appellant) made it clear that he was not going to answer questions*." Appellant asserts that, based on Detective Evans's testimony, he unequivocally invoked his

right to remain silent and law enforcement did not scrupulously honor his request. There was no evidence that Appellant was re-*Mirandized*, detectives kept questioning Appellant, the questioning took place at the same location, and the questions were concerning the same crime. *See Henry v. State*, 574 So. 2d 66, 69 (Fla. 1991).

Before a confession may be introduced, the state bears the burden of establishing by a preponderance of the evidence that it was voluntarily made. *Cuervo v. State*, 967 So. 2d 155, 160 (Fla. 2007); *Martinez v. State*, 545 So. 2d 466 (Fla. 4th DCA 1989). The question which must be resolved is whether:

> the confession [is] the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. *Id.*

To establish that a confession or inculpatory statement is involuntary, it must be the product of coercive conduct on the part of the police. *Colorado v. Connelly*, 479 U.S. 157,163-67 (1986); *Chavez v. State*, 832 So. 2d 730,749 (Fla. 2002). Police coercion can be psychological as well as physical. *Colorado v. Connelly*, 479 U.S. at 164; *State v. Sawyer*, 561 So. 2d 278, 281 (Fla. 2d DCA 1990).

The deliberate use of deception and manipulation by police interrogators raises serious concerns about whether the suspect's will was overborne, and appears to be incompatible "with a system that presumes innocence and assures

that a conviction will not be secured by inquisitorial means." *Voltaire v. State*, 697 So. 2d 1002, 1004 (Fla. 4th DCA 1997); quoting *Miller v. Fenton*, 474 U.S. 104, 116 (1985).

Under this analysis courts have also recognized that while a single or isolated use of a coercive interrogation technique may not render a confession involuntary, when two or more such tactics are employed the resulting confession is likely to be found involuntary. *See Miller v. Fenton*, 474 U.S. at 116, citing *Gallegos v. Colorado*,370 U.S. 49 (1962)(suggesting that "a compound of two influences" requires that some confessions be condemned); *State v. Sawyer*,561 So. 2d at 281-82 ("[a]lthough particular statements or actions considered on an individual basis might not vitiate a confession, when two or more statements or courses of conduct are employed against a suspect, courts have more readily found the confession to be involuntary"); see also *Commonwealth v. DiGiambattista*, 813 N.E. 2d 516, 524, 527-28 (Mass. 2004). Furthermore, where the police use psychologically coercive interrogation methods, "an accused's emotional condition is an important factor in determining whether statements were voluntarily made." *Sawyer* at 282; *Rickard v. State*, 508 So. 2d 736 (Fla. 2d DCA 1987).

Threatening a defendant with the death penalty can render a confession involuntary and therefore inadmissible. *Brewer v. State*, 386 So .2d 232, 233-235 (Fla. 1980). Similarly, a defendant's statements can be considered to be coerced

when the defendant is informed that his or her children can be removed from their custody. *Williams v. State*, 441 So. 2d 653, 654 (Fla. 3d DCA 1983).

In the instant case, as in *Brewer* and *Williams*, Appellant testified that detectives from the Polk County Sheriff's Office threatened him with the death penalty, threatened to take his children away, and promised if told the truth everything would be okay. Furthermore, the interrogation lasted for a very long time, Appellant was under the influence of drugs, and had not slept in sometime. Additionally, Appellant was placed in an interrogation room near his wife where he could hear law enforcement yelling at her and her crying. Although the detectives testified otherwise, based on the totality of the circumstances, Appellant would assert his confession was involuntary and should have been suppressed.

Admission of Appellant's statements at trial violated violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution. Therefore, his statements should have been excluded and he should be entitled to a new trial.

VI. WHETHER THE TRIAL COURT VIOLATED THE HOLDING OF *CALDWELL V. MISSISSIPPI* DURING JURY SELECTION.

Appellant contends that the trial court's remarks during jury selection violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, he United States Supreme Court held in *Caldwell* that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to

believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328–29. Similarly, in *Adams v. Wainwright,* 804 F. 2d 1526 (11th Cir. 1986), the judge told Adams' jurors that he was not bound by their decision and that the "ultimate responsibility" for the sentence rested on his shoulders. "That's only my decision to make and it has to be my conscience. It cannot be yours." *Id.* The Eleventh Circuit found that this was a violation of the principles set forth in *Caldwell*. *Mann v. Dugger,* 817 F. 2d 1471 (11th Cir. 1988) (This case dealt with a similar statement to that made by the court in *Adams*, once again found to be error). Although this Court expressed disagreement with *Adams* and *Mann*, Appellant asserts that these cases are illustrative of the type of comments a trial court should avoid during jury selection.

In the instant case, the trial court advised the jury on five or six occasions that the ultimate decision to impose the death penalty rested with the court. The defense specifically objected and Appellant contends as a result he was denied a fair trial pursuant to the due process clauses of the Florida and United States Constitutions.

PENALTY PHASE

VII. THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED BY *ENMUND/TISON*

A. Standard of Review

A trial court's finding that a defendant satisfies the requirements of *Emund/Tison* is reviewed by this Court to determine whether competent substantial evidence supports the lower court's ruling. *Benedeth v. State*, 717 So. 2d 472, 477 (Fla. 1998).

B. Argument

It is well settled that a fundamental requirement of the Eighth Amendment of the United States Constitution is that the death penalty must be proportional to the culpability of the defendant. *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982). In *Enmund*, the United States Supreme Court, "citing the weight of legislative and community opinion, found a broad societal consensus, with which it agreed, that the death penalty was disproportional to the crime of robbery-felony murder" under the circumstances of that case. *Tison*, 481 U.S. at 147, 107 S.Ct. at 1682; *cf.Coker v. Georgia*, 433 U.S. 584 (1977) (holding the death penalty disproportional to the crime of rape). Individualized culpability is key, and "[a] critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." *Tison*, 481 U.S. at 156. Hence, if the state has been unable to prove

beyond a reasonable doubt that a defendant's mental state was sufficiently culpable to warrant the death penalty, death would be disproportional punishment. See generally *Id.*; *Enmund,* 458 U.S. at 782.

In *Enmund* and *Tison*, the Court said that the death penalty is disproportional punishment for the crime of felony murder where the defendant was merely a minor participant in the crime and the state's evidence of mental state did not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery that resulted in murder is not enough culpability to warrant the 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." *Tison*, 481 U.S. at 151; *Jackson v. State*, 575 So. 2d 181, 191 (Fla. 1991). As this Court held, in *Stephens v. State,* 787 So. 2d 747, 759 (Fla. 2001):

> [I]n *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*. (emphasis added).

However, the death penalty may be proportional punishment if the evidence shows both that the defendant was a major participant in the crime, and that the defendant's state of mind amounted to reckless indifference to human life. As the Court said, "we simply hold that major participation in the felony committed,

combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Tison*, 481 U.S. at 158. Courts may consider a defendant's "major participation" in a crime as a factor in determining whether the culpable state of mind existed. However, such participation alone may not be enough to establish the requisite culpable state of mind. *Id.*, 481 U.S. at 158 n. 12.

This Court has questioned whether the *Emnund/Tison* culpability requirement can be met in an armed robbery committed by two or more codefendants, where there were no eyewitnesses, circumstantial evidence, and the killer is not clearly identified. *Jackson v. State*, 575 So. 2d 181, 192-193 (Fla. 1991). In *Jackson*, the defendant and codefendant robbed a hardware store in St. Petersburg, Florida, and during the robbery, the clerk was killed. *Id.* at 184-185. Although there was evidence that the defendant was a major participant in the crime, this Court held that there was insufficient evidence that the defendant acted with reckless disregard for human life where there was no proof that the defendant shot the victim, that he intended to harm anyone when he entered the store, or that he expected violence to occur. *Id.* at 191-192. *See also Benedeth v. State*, 717 So. 2d 472 (Fla. 1998).

In the instant case, as in *Jackson* and *Benedeth*, the State had failed to prove beyond a reasonable doubt that Appellant was a major participant in the robbery and that he acted with a reckless disregard for human life. Summarizing the

evidence at trial, like *Jackson* and *Benedeth*, Appellant was not the shooter of either victim, he merely possessed a firearm, Bryson was the "major instigator of the robbery," Bryson and Mate previously robbed Fang, and Bryson and Mate both shot Fang. The self-serving testimony of Dre and Bryson failed to convince the jury that Appellant was the murderer of both Mr. Freeman and Ms. Taylor. Furthermore, contrary to Bryson's direct testimony, the lone surviving victim, Fang, asserted that Bryson entered his house with a firearm, previously robbed Bryson, and actually shot Fang in the leg. Dre testified that Bryson set the entire robbery up and advised individuals in the house where to look for money and drugs. Bryson knew this because, as Fang stated, he and Mate committed another armed home invasion robbery at Fang's house on Father's Day. Furthermore, Fang was unable to identified Appellant as even entering the residence much less torturing or shooting him.

Additionally, in the case at bar, there was no evidence presented that there was any plan to harm or kill anyone. The trial court even found that Appellant was not the main instigator of the robbery and that none of the defendants, including Appellant, "never meant to, or intended to murder anyone..." The prosecution's witnesses all testified that the intent was to rob Fang. According to the testimony of Fang, the surviving victim, Appellant was not the person who assisted Mate in torturing him. There is no testimony that Appellant threatened lethal force or

pointed a gun at any of the murdered victims. There is no evidence that Appellant restrained, or even interacted with Ms. Taylor or Mr. Freeman.

As such, the *Enmund/Tison* culpability requirement was not met. Appellant would point out that the testimony of the prosecution's expert witnesses indicated that there were a plethora of phone calls to Bryson during the early morning hours on the day of the robbery when testimony and evidence adduced by the prosecution indicates that those who entered the residence were gathered outside. It is unrefuted that Appellant had no cell phone. Therefore, the imposition of the death penalty is disproportionate in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution (fair trial, cruel and unusual punishment, and due process clauses).

VIII. THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY IMPERMISSIBLE.

Proportionality review is a unique process and death is a punishment reserved only for the most aggravated and least mitigated of first degree murders. *Green v. State*, 975 So. 2d 1081, 1087-88 (Fla. 2008). It is not merely a counting process; what matters is the nature and quality of the aggravators and mitigators -- and the totality of the circumstances --and how they compare with other capital cases in which the death penalty has been upheld or overturned. *Id.* at 1088;

Larkins v. State, 739 So. 2d 90, 93 (Fla. 1999). The proportionality standard is two-pronged: "We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of [first degree] murders." *Crook v. State*, 908 So. 2d 350, 357 (Fla. 2005); *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999); *Cooper v. State*, 739 So. 2d 82, 85 (Fla. 1999).

A. Relative Culpability

In cases where more than one defendant was involved in the commission of the crime, there is an additional analysis of relative culpability. Underlying a relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment. *See Ray v. State,*755 So. 2d 604, 611 (Fla. 2000).

This Court encountered a similar case in *Slater v. State*, 316 So. 2d 539 (Fla. 1975). In *Slater*, three individuals, Darius Slater ("Slater"), Charlie Ware ("Ware"), and Larry Gore ("Gore") were charged with robbery and murder after a manager was shot during a robbery at a motel in Orlando, Florida. *Id.* at 540. Two of the codefendants, Ware and Gore, pled guilty and agreed to testify against the defendant in exchange reduced sentences. *Id.* Ware received Life in prison while Gore received five years in prison. *Id.* Although he was granted immunity, Ware refused to testify at trial and was held in contempt. *Id.* Gore testified that he was

the "wheel man," while Slater and Ware went into the motel to rob the manager. *Id.* Gore further stated that Ware admitted to shooting the victim, which was confirmed by the Orlando Police Department. *Id.* The jury found Slater guilty of all charges, but recommended that Slater be sentenced to life in prison. *Id.* Despite Ware's negotiated plea bargain with the State, this Court ruled that Slater's death sentence was disproportionate because he was an accomplice who was clearly not the "triggerman." Justice Overton, writing for the majority, reasoned:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.) separately in that fashion,' and then went ahead and did so….it is our opinion that the imposition of the death penalty under the facts of this case would be an unconstitutional application under *Furman v. Georgia*, 408 U.S. 238 (1972). *Id.* at 542.

Similarly, in *Hazen v. State*, 700 So. 2d 1207, 1207-1208 (Fla. 1997) three codefendants, Hazen, Koromandy, and Buffkin, forcibly entered a home at gun point, raped the victim's wife, and, at some point, the victim was shot point-blank in the head. Buffkin accepted a plea bargain, pled guilty to first degree murder, and agreed to testify against his codefendants in exchange for a life sentence. *Id.* at 1208. Hazen was convicted, based on Buffkin's testimony, and sentenced to death. *Id.* The trial court rejected the assertion of disparate sentences between Buffkin and Hazen and stated that:

> The rule of law precluding disparate treatment of equally culpable non-triggerman co-defendants is inapplicable when (as in this case) the state elects not to pursue the death penalty against one co-defendant in exchange for testimony establishing the identity and participation of the other. Under these circumstances any resulting difference in the severity of sentence arises from a tactical choice made by the prosecuting authority and not by the exercise of independent discretion by either the jury or sentencing judge. *Id.*

This Court rejected this finding by the trial court and held that Hazen's death sentence was disproportional to Buffkin's life sentence, even though the life sentence was the result of a negotiated plea with the State. *Id.* at 1211. This Court reasoned that Buffkin was more culpable than Hazen because the evidence revealed the Buffkin and Kormondy were the primary instigators of the crime, and Kormondy was the actual shooter. *Id.* at 1211.

*Hazen*is very similar to Appellant's case. Like the crime in *Slater* and *Hazen*, five codefendants entered a residence to rob the occupants, where two people were killed. As in *Slater* and *Hazen*, all of the codefendants originally were indicted for first degree murder and the State sought death. Similar to codefendant Buffkin, the State made a strategic choice to waive both the death penalty and the 10-20-Life minimum mandatory penalties, and allowed three of the codefendants to enter pleas ranging from ten years to fifteen years in prison, minus time already served in jail. Significantly, the jury determined, contrary to the indictment, that Appellant merely possessed a firearm, and, thus, was not the shooter of either victim. Additionally, like *Slater* and *Hazen*, the evidence revealed that Appellant

was much less culpable than Bryson and equally culpable, if not less than, Dre. Bryson, as the court found, was one of the instigators and major planners of the robbery, he previously robbed Fang so he knew were the drugs and money were (or so he thought), and he was identified by Fang as one of the men who shot him in the leg (a 25 to Life minimum mandatory that was waived). There were also a significant number of phone calls from Bryson's cell phone and Dre's cell phone during the time of the robbery, while it was undisputed that Appellant did not have a phone. Appellant was also much less culpable than Mate, who, like Bryson, was a major instigator of the robbery, previously robbed Fang, tortured Fang, and was identified as Fang's other shooter. Interestingly, Finger, who admitted he lied throughout his testimony, still received fifteen years for his role the crime, even after the State moved to invalidate his plea agreement.

Several other cases support Appellant's argument that the death penalty is disproportionate. In *Curtis v. State*, 685 So. 2d 1234 (Fla. 1996), where the codefendant shot the victim during a robbery, this court reversed the death sentence because the actual killer pled and was sentenced to life. Unlike *Curtis* who shot another victim the foot, Appellant here merely possessed a firearm. Similarly, in *Puccio v. State*, 701 So. 2d 858, 859 n. 1 (Fla. 1997), the sentence of death was found to be disproportionate when compared to the sentences of the other equally culpable participants who received sentences ranging from seven

years to life, some on second-degree murder charges. This Court determined that a life sentence was appropriate because trial court's finding defendant was more culpable than the others was not supported by competent substantial evidence in the record and is contrary to the State's own theory at trial.

B. Factually distinguishable case law regarding plea deals

The State will undoubtedly assert that the plea deals are irrelevant to a proportionality analysis here because they were the result of prosecutorial discretion. The cases upon which the State will rely are readily distinguishable. In *Smith v. State,* 998 So. 2d 516, 520 (Fla.2008), the defendant stated, in preparation for an escape attempt, that "he would kill any correctional officer guarding them" and the plan include one codefendant, Eglin, to attack a guard with sledge hammer. The defendant in *England v. State,* 940 So. 2d 389, 394-395 (Fla. 2006), hit the victim with a fire poker until he died and told a fellow inmate that "he bludgeoned "an old pervert" to death with a pipe." Similarly, in *Knight v. State,* 784 So. 2d 396, 401 (Fla. 2001) the defendant told four inmates that he killed the victim and blamed it on his codefendant, and the codefendant testified that he was present in the cab but that the defendant actually killed the victim. Likewise, in *Brown v. State,* 473 So. 2d 1260 (Fla. 1985), the defendant planned the burglary, bound, and then sexually battered the victim. Finally, in *Melendez v. State,* 612 So. 2d 1366

(Fla.1992), the defendant shot the victim in the head. *See Melendez v. State*, 498 So. 2d 1258, 1259 (Fla. 1986).

C. Comparison-Similar Cases Where Death Penalty Found to be Disproportionate

Although there were multiple victims here, there are several cases that are arguably similar to Appellant's case. In *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988), this Court held that a death sentence was disproportionate where the appellant shot a victim during a robbery when the trial court found three aggravators (prior violent felony, committed during armed robbery, and committed to avoid or prevent arrest) and two mitigators (appellant's age of seventeen and his "unfortunate home life and rearing"). *Id.* at 1292. This Court explained that the appellant suffered "*severe* beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him" and there was testimony that the appellant's intellectual functioning was "marginal." *Id.* In *Urbin v. State*, 714 So. 2d 411 (Fla. 1998), this Court held a death sentence to be disproportionate when the appellant shot the victim during a robbery where the trial court found three aggravators (prior violent felony, committed for purpose of preventing lawful arrest, and committed during commission of robbery and for pecuniary gain (merged)), and six mitigators.

As in *Livingston* and *Urbin*, the two victims died during a robbery. Similar to the aggravators in *Livingston* and *Urbin*, the trial court here found prior violent

felony, committed during armed robbery, and committed to avoid or prevent arrest, and pecuniary gain. Like the appellants in *Livingston* and *Urbin*, Appellant proved that he suffered beatings by his mother's boyfriend, his intellectual functioning was borderline, and, although he was not seventeen at the time of the robbery, the trial court found that his emotional and mental age were a mitigator. Unlike *Livingston* and *Urbin*, the trial court here found sixteen nonstatutory mitigating factors. (the CCP finding will be discussed below).

The Appellant here would assert that his sentence of death is disproportionate. But well beyond that, it constitutes a "manifest injustice." For the law to permit this court to impose a death sentence on the Appellant under these facts would be unconscionable. That is so in light of the fact that the jury clearly found the Appellant was not one of the two shooters. Further, the clear evidence shows that at least one shooter (Bryson) received a ten year plea, and another shooter was either given a similar deal or was ineligible for the death penalty due to retardation. Further, the evidence clearly showed Bryson was the mastermind and organizer of this crime not the Appellant. In light of all these facts this death penalty offends every precept of moral decency, fairness, and equal treatment imbedded in our law. Appellant's sentence, due to the facts herein, manifests the fundamental flaw in the application of the death penalty by applying it in a manner that is capricious, irrational, and arbitrary. This sort of application is

one which the United States and Florida Supreme Courts have been attempting to eliminate since *Furman* and *Gregg v. Georgia*.

As such, this imposition of the death penalty is disproportionate in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution (fair trial, cruel and unusual punishment, and due process clauses).

IX. THE TRIAL COURT ERRED WHEN IT DENIED MOTIONS FOR A MISTRIAL WHEN THE PROSECUTOR MADE IMPROPER COMMENTS DURING CLOSING ARGUMENT.

A. Standard of Review

The standard of review appellate courts generally apply when considering errors in improper comments made during closing arguments is abuse of discretion. *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997).

> The key question in determining proper review of an improper argument is whether or not the court can see from the record that the conduct of the prosecuting attorney did not prejudice the accused, and unless this conclusion be reached, the judgment should be reversed. *Robinson v. State*, 881 So.2d 29, 31 (Fla. 1st DCA 2004).

A trial court can still reverse a conviction even if the comments are not objected to if it amounts to fundamental error. *Spencer v. State*, 842 So. 2d 52, 74 (Fla. 2003).

B. Argument

"A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in

analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and non-record evidence . . . ." *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999). "While the state is free to argue to a jury any theory that is reasonably supported by evidence, *it may not subvert the truth-seeking function of trial by obtaining a conviction or sentence based on obfuscation of relevant facts*." *Garcia v. State*, 622 So. 2d 1325, 1332 (Fla. 1993), ("emphasis added").

In the instant case, among other impermissible comments, the prosecutor specifically told the jury that "we know his .38 caliber shot these two people and we know that he was caught with a .38." (V. 37, TR. 3785). This comment was improper based on the jury finding that Appellant merely possessed a firearm and based on the forensic evidence produced at trial that the .38 caliber Appellant possessed at the time of his arrest was *not* the murder weapon of either victim. Although a contemporaneous objection was not made, the issue was raised to the trial court in a motion for new trial and should be considered as fundamental error.

X. THE STATE FAILED TO PROVE SEVERAL AGGRAVATORS BEYOND A REASONABLE DOUBT

A. Standard of Review

At trial, the State has the burden of proving aggravating circumstances beyond reasonable doubt. *Robertson v. State*, 611 So. 2d 1228, 1232 (Fla. 1993). Moreover, the trial court may not draw "logical inferences" to support a finding of particular aggravating circumstance when the state has not met its burden. *Clark v.*

State, 443 So. 2d 973, 976 (Fla. 1983). Most recently, this Court has stated that it will not reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt. "Rather, our 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." *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997) *See also*, *Way v. State*, 760 So. 2d 903, 918 (Fla. 2000).

As such, this Court closely scrutinizes the evidence to ensure the CCP finding is supported by examining the totality of the circumstances. *See Santos v. State*, 591 So. 2d 160, 162 (Fla. 1992) ("[T]he record discloses that the State failed to prove beyond a reasonable doubt that the present murder was cold, calculated, and premeditated."); *McGirth v. State*, 48 So. 3d 777, 793 (Fla.2010)

B. Cold, Calculated, and Premeditated

To establish the cold, calculated, and premeditated ("CCP") aggravator, the State must prove beyond a reasonable doubt that (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) *the defendant* had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) *the defendant* exhibited heightened premeditation (premeditated); and (4) the murder was committed with no pretext of legal or moral justification. Florida Statutes § 921.141(5)(i); *Pearce*

v.State, 880 So. 2d 561, 575–76 (Fla. 2004). As this Court stated in *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999), the CCP aggravator is one of the "most serious aggravators set out in the statutory sentencing scheme."

In a felony murder case, this circumstance *would not apply if the only plan were to commit the underlying felony; the plan would have to also include the commission of the murder.* ("Emphasis added"). *Guzman v. State*, 721 So. 2d 1161, 1162 (Fla. 1998); *Pomeranz v State*, 703 So. 2d 465, 471-472 (Fla. 1997). Where the evidence as to this aggravator is circumstantial, the evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." *Mahn v. State*, 714 So. 2d 391, 398 (Fla. 1998). Evidence of a plan to commit a crime other than murder (such as, in this case, robbery) is in and of itself insufficient to support CCP. *See, e.g., Castro v. State*, 644 So. 2d 987, 991 (Fla. 1994)(holding that CCP not proven where defendant only planned to rob victim, not kill him).

The State failed to prove that the murders were committed in cold, calculated, or premeditated manner. Indeed, like *Castro* and *Guzman*, the evidence at trial demonstrated that there was absolutely no carefully planned scheme to murder either victim or Fang. Instead, no one was supposed to be home. Although there was a plan for a burglary as in *Pomeranz*¸ there was no careful or prearrainged design to commit either murder. Moreover, the record is barren of any evidence

that *Appellant* exhibited a heightened premeditation to commit either murder. Conversely, the jury specifically found by specific interrogatory that Appellant only possessed a firearm, and thus, determined that he was not the shooter. There was no evidence that there was a plan to murder anyone to facilitate the robbery. Therefore, pursuant to the plain language of the statute and the evidence presented at trial, there was insufficient evidence to find that *Appellant* had a careful plan or prearranged design to commit murder before the fatal incident (calculated), that *Appellant* exhibited heightened premeditation, or that the murders were the result of a calm, cool reflection.

The sentencing order supports Appellant's argument. The trial court specifically found that "it does not appear that any of the 5 co-defendants specifically meant to, planned to, murder anyone…" (V. 15, R.2525). Similarly, the court found that Appellant was not the instigator of the offenses, and actually this factual finding, similar to the *Castro* and *Guzman*, demonstrates that there was no prearranged plan to murder anyone. Instead, at best, there was only a plan to commit the underlying felony. Furthermore, the trial judge noted that the jury was not able to determine that Appellant discharged a firearm. However, despite finding that there was no plan to commit the murders and that Appellant was not the shooter, the trial court somehow assigned this aggravator "significant weight." (V. 15, R. 2525).

C. Avoid Arrest Aggravator

The avoiding arrest aggravator is applicable when "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." § 921.141 (5)(e), Fla. Stat. (2009). Where the victim of the homicide is not a law enforcement officer, the State must prove beyond a reasonable doubt that the sole or dominant motive for the murder was to avoid a lawful arrest. *Foster v. State*, 778 So. 2d 906 (Fla. 2000). The mere fact of a death is not enough to invoke this factor. *Consalvo v. State*, 697 So. 2d 805 (Fla. 1996). Where witness elimination was only part of the motive for the killing and theft of victim's property, there is not a sufficient basis for the avoid arrest aggravator. *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000). A suspicion that a plan existed is insufficient to support this aggravator. *Besaraba v. State*, 656 So. 2d 441, 446 (Fla. 1995).

The trial court erred when it determined that avoid arrest aggravator applied. There was no evidence adduced at trial that Ms. Taylor or Mr. Freeman knew Appellant. Similarly, there was no evidence that Appellant shot either of the victims to avoid arrest or that it was the dominate motive for the murders. Conversely, the jury found that Appellant was not the shooter. Florida law does not allow any presumption of the existence of this circumstance. *Perry v. State*, 801 So. 2d 78 (Fla. 2001). In fact, our courts require a finding of strong supporting

evidence in order to establish this circumstance. *Riley v. State*, 366 So. 2d 19, 22 (Fla. 1978). Mere speculation by the State has been specifically rejected as to establishing this circumstance. *Comior v. State*, 803 So. 2d 598 (Fla. 2001). In *Consalvo v. State*, 697 So. 2d 805 (Fla. 1996) the court held that though the victim had known the defendant for some time and could identify him, that alone was not sufficient to establish the aggravator. Without strong proof of intent, the State has not proven this circumstance beyond a reasonable doubt.

D. Contemporaneous Felony Aggravator

In the instant case, the trial instructed the jury that an aggravating circumstance that they could consider if proven by the State was that Appellant was contemporaneously convicted of another capital felony, or a felony involving the use of violence. (V. 13, R. 2174). The court then informed the jurors that attempted first degree murder and armed robbery were both felonies involving the use of violence. (V. 13, R. 2174). As discussed above, the trial court gave an improper jury instruction on attempted first degree murder that amounted to fundamental error. Thus, it was error to instruct the jury on a crime that qualified as a contemporaneous felony when the jury instructions defining the crime during the guilt phase were fundamentally flawed. *See Armstrong v. State*, 862 So. 2d 705, 717-718 (Fla. 2003)(holding that a post-trial reversal or vacating of prior

violent felony conviction can be basis for new penalty phase, where is error is found to be harmful).

E. Harmful Error

Error in finding an impermissible aggravator can only be harmless beyond a reasonable doubt if there is no reasonable possibility that the evidence presented in mitigation is sufficient to outweigh the remaining aggravators. *Hill v. State*, 643 So. 2d 1071, 1073 (Fla. 1994). The trial court found CCP and gave it significant weight. CCP is considered one of the weightiest aggravators. *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999) (noting that CCP is one of "the most serious aggravators set out in the statutory sentencing scheme.").

In the instant case the trial court found three statutory aggravators: Appellant was contemporaneously convicted of another felony, the capital felony was committed while Appellant was engaged in a burglary and/or robbery, the capital felony was committed for the purpose of avoiding a lawful arrest, and the homicides were committed in a cold, calculated and premeditated manner. (V. 15, R. 2527). The court found great weight in the first three aggravators and *substantial* weight in the CCP aggravator. The defense proved two statutory mitigators (Appellant under the influence of extreme mental or emotional disturbance, Appellant's emotional and developmental age) and sixteen nonstatutory mitigators. (V. 15, R. 2527-2533). Based on the significant amount

of mitigators found there is a reasonable possibility that the evidence presented in mitigation is sufficient to outweigh the remaining aggravators.

Including the avoid arrest aggravator in the sentencing equation was a violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution (fair trial, cruel and unusual punishment, and due process clauses).

XI. THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER PROVEN MITIGATORS.

A. Standard of Review

Whether a particular circumstance is truly mitigating in nature is a question of law and subject to *de novo* review. *Blanco v. State*, 706 So. 2d 7, 10 (Fla. 1997). Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard. *Id.* The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. *Id.*

B. Argument

A sentence of death is different in its degree and its finality than any other form of punishment imposed under our system of jurisprudence. The imposition of the death penalty is reserved for those crimes that fall within the category of both the most aggravated, and the least mitigated of murders. *Taylor v. State*, 937 So.

2d 590 (Fla. 2006), *Crook v. State*, 908 So. 2d 350 (Fla. 2005). It is the duty of the trial court to decide whether the case at bar falls within both those categories. *Id.* The trial court is charged with analyzing all the mitigating and aggravating factors found to exist, and then weighing each factor. *Id.* The analysis is not simply tabulation, but is more analogous to the type of review undertaken by the Florida Supreme Court in proportionality review. *Hurst v. State*, 819 So. 2d 689 (Fla. 2002). Florida Supreme court described utilization of a "comprehensive analysis" and a "qualitative review of the basis for each aggravator and mitigator" (emphasis in original). *Id.* The proper analysis is not a comparison between the number of aggravating and mitigating circumstances, but an analysis of the underlying basis for each mitigating and aggravating circumstance. *Id.* The trial court is required to analyze the nature and weight of each circumstance, and refrain from a mere tabulation of the factors. *Urbin v. State*, 714 So. 2d 411 (Fla. l998); *Williams v. State*, 37 So. 3d 187 (Fla. 2010).

> "A mitigating consideration is anything shown by believable evidence that, in fairness or in the totality of the defendant's life or character, extenuates or reduces the degree of moral culpability for the crime committed or that reasonably serves as a basis for imposing a sentence less than death." *Crook v. State*, 813 So. 2d 68, 74 (Fla. 2002).

A defendant must prove mitigating factors by the "greater weight" of the evidence. *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990). Whenever a

reasonable amount of competent, uncontroverted evidence of mitigation has been presented, the mitigating consideration has been proved and it must be accepted. "A *mitigating circumstance* shown by the evidence may *only be rejected when competent, substantial evidence contradicts its existence*." *Mansfield v. State*, 758 So. 2d 636, 646 (Fla. 2000),("emphasis added").

Under Florida law the disparate treatment of a codefendant can constitute a nonstatutory mitigating circumstance in cases where the defendants are equally culpable. *See, e.g., Parker v. Dugger*, 498 U.S. 308, 315 (1991); *White v. Dugger*, 523 So. 2d 140 (Fla. 1988). The prosecution put forth testimony of three codefendants who testified that they were given plea deals of ten and fifteen years in prison. Dre testified that he was given a plea deal of fifteen years in prison. He further stated Bryson had asked him to change his testimony and tell the jury that he had seen Appellant shoot Ms. Taylor. Bryson testified that he had received a plea deal for ten years in prison. Finally, Finger further testified he received a plea deal for ten years in prison and that statement and, during cross-examination, he admitted the testimony he had sworn to in order to get the plea deal was a lie. Nevertheless, the State did not charge him with perjury and allowed him to plead to fifteen years in prison even after his plea agreement was invalidated. The State did not seek any 10-20-Life minimum mandatory penalties against any of the

codefendants. This mitigator was proven and it was error for the trial court to reject it.

The defense presented three mitigating circumstances that the trial court rejected: a codefendant instigated and planned the offense for which Appellant was convicted, Appellant was merely an accomplice, and the murders were an independent act of a codefendant. Based on the evidence presented, it was error for the court to reject these mitigating circumstances. *See Scott v. State*, 66 So. 2d 923 (Fla. 2011). Fang testified that Bryson robbed him on Father's Day 2009, and told him he would rob him again. At trial, Fang stated that a voice he attributed to Bryson told him "we're back" during the October robbery. The testimony of the prosecution's expert witnesses indicated that there were a plethora of phone calls to Bryson during the early morning hours on the day of the robbery when testimony and evidence adduced by the prosecution indicates that those who entered the residence were gathered outside. It is unrefuted that Appellant had no cell phone. In the security video introduced by the prosecution, the vehicle of Bryson leads the way both upon entry, and exit to the Walmart parking lot. The codefendants gave testimony that Bryson was the one who knew Fang, and that they followed him to the residence because he was the one who knew the way.

Failing to include these mitigators in the sentencing equation was a violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution

and Article I, Sections 9, 16 and 17, of the Florida Constitution (fair trial, cruel and unusual punishment, and due process clauses). Appellant should be entitled to a new penalty phase or a reduction of his sentence to life.

XII. THE DEATH PENALTY AND INSTRUCTIONS TO THE JURY AREFACIALLY AND AS APPLIED UNCONSTITUTIONAL

A. Standard of Review

This issue is entitled to de novo review. *Miller v. State*, 42 So. 3d 204, 215 (Fla. 2010).

B. Argument

Prior to trial, Appellant sought a judicial determination that the imposition of the death penalty in Florida is unconstitutional. The State successfully urged the trial court to uphold Florida's capital sentencing scheme "despite" the pronouncements of the United States Supreme Court in *Ring v. Arizona*, 522 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Appellant asserts and asserted below that section 921.141, Florida Statutes, violates Article I, sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), and 22 (trial by jury) of the Florida Constitution, and the Sixth (notice, right to present defense), Eighth (cruel and unusual punishment), and Fourteenth (due process and incorporation) Amendments to the United States Constitution.

In *Ring v. Arizona*, supra, the United States Supreme Court struck down Arizona's capital sentencing statute because it violated the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 630 U.S. 466 (2000), where the statute provided that a judge, rather than the jury, would determine the findings of fact necessary to impose a sentence of death. The Court predicated its holding in Ring on its earlier decision in *Apprendi* that "[it] is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v. New Jersey*, 630 U.S. at 490, quoting *Jones v. United States*, 526 U.S. 227, 252-253 (1999)(Stevens, J., concurring). In so holding, the Ring decision overruled *Walton v. Arizona*, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring v. Arizona*, 122 S.Ct. at 2443.

In *Mills v. Moore*, 786 So. 2d 532, 537 (Fla. 2001), this Court rejected a claim that Section 921.141, Florida Statutes, was unconstitutional under *Apprendi* because *Apprendi* did not overrule *Walton*. However, Appellant maintains that *Ring* did. Florida's capital sentencing statute suffers from the identical flaw found to exist in the Arizona statute. A death sentence in Florida is contingent on a judge's factual findings regarding the existence of aggravating circumstances. In Florida, as in Arizona, a defendant convicted of first-degree murder cannot be

sentenced to death without additional findings of fact that must be made, by explicit requirement of Florida law, by a judge and not a jury:

The distinctions *Walton* attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues that does a trial judge in Arizona. *Walton v. Arizona*, 497 U.S. 639, 648 (1990). In addition, a Florida jury's advisory sentencing recommendation cannot be equated with a verdict for several reasons. First, an advisory jury in Florida does not make findings of fact. Second, their recommendation need not be unanimous or even a super-majority. Finally, their determination is merely advisory.

The jury fact-finding requirement imposed under *Apprendi* and *Ring* is based on the sound recognition of the importance of interposing independent jurors between a criminal defendant and punishment at the hands of a "compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). A reliable jury recommendation is necessary to ensure the integrity of the sentencing determination. However, in the absence of the required findings of fact, appellate review of a jury recommendation of death under current Florida law is rendered

meaningless because it presupposes that there were no misapplications of the law by laypersons untrained in death penalty jurisprudence. The present procedure in Florida effectively conceals the improper application of invalid aggravating circumstances by a penalty phase jury as well as any improper rejection of valid mitigating considerations.

Appellant asserts and asserted below that section 921.141(5)(b), 921.141(5)(d), and 921.141(5)(e), Florida Statutes, the standard jury instruction on it, and the death penalty as applied in Florida violate Article I, sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), and 22 (trial by jury) of the Florida Constitution, and the Fifth (due process), Sixth (notice, right to present defense), Eighth (cruel and unusual punishment), and Fourteenth (due process and incorporation) Amendments to the United State Constitution.

Appellant nevertheless raises the claim to preserve these issues for further review and avoid the subsequent application of a procedural bar.

CONCLUSION

Based upon the arguments presented and authorities cited herein, Appellant respectfully requests that this Honorable Court reverse his sentence of death and remand the case to the trial court with instructions consistent with this Court's decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished via email to mail to the Office of the Attorney General 507 E Frontage Rd Ste 200 Tampa, Florida 33607 at capapp@myfloridalegal.com and katherine.blanco@myfloridalegal.com on January 9th , 2014

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this document is typed in Times New Roman 14 point font with one inch margins.

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