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IN THE SUPREME COURT OF FLORIDA

TIMOTHY W. FLETCHER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-2468

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This case presents a direct appeal from the Circuit Court for Putnam County, Florida, following the Appellant's conviction, *inter alia*, for first degree murder and sentence of death. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Fletcher." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

STATEMENT OF THE CASE

On April 29, 2009, the grand jury of Putnam County, Florida, indicted Timothy Wayne Fletcher for the April 15, 2009, murder of Helen Googe. (V1, R7-8).[1] Following various pre-trial proceedings, Fletcher's trial began on May 12, 2012. On May 25, 2012, the jury found Fletcher guilty of the following: Count 1-Escape; Count 2-Grand Theft Motor Vehicle; Count 3-First Degree Murder; Count 4-Home Invasion Robbery; and Count 5-Grand Theft Motor Vehicle. (V22, R3364-67). On June 11, 2012, the penalty phase began. On June 12, 2012, the jury returned an advisory sentence of death by a vote of eight to four (8-4) for Helen Googe's murder. (V25, R3708). The trial court held a *Spencer*[2] hearing on July 25, 2012, (V9, R1385-1409), and, on October 12, 2012, imposed a sentence of death. (V8, R1336-84). The Appellant filed a notice of appeal on October 16, 2012, and

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[1] Cites to the record are by volume number, "V_" followed by "R_" for the page

[2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

filed his *Initial Brief* on or about July 9, 2013. This answer follows.

STATEMENT OF THE FACTS

The State relies on the following facts from the evidence and testimony presented at trial.

Escape from the Putnam County Jail

In April 2009, Timothy Fletcher and Doni Brown were cellmates at the Putnam County Sheriff's Detention Facility. On the morning of April 15, 2009, corrections officers entered their cell, moved the bed covers, and saw linens and mattress stuffing shaped as bodies. (V16, R2499, 2500). Fletcher and Brown were gone. Officers noticed the cell window screen had a hole in it, but it was too small for bodies to fit through. (V16, R2499). Light was coming through a portion of the floor area and officers assumed this was the inmates' escape route. The jail was put in a lock down status. (V16, R2499-2500).

There were no loud noises during the night and nothing suspicious during the hourly cell checks throughout the night. (V16, R2506). When Investigators arrived to process Fletcher's cell subsequent to his escape they noticed the combined sink/commode had been disconnected from the wall and raised up with the jack. (V16, R2516-17, 2525-27, State Exh. 20). Officers subsequently discovered the jack and crank rod was missing from the transport van that was used to transport Fletcher to and from court hearings during the prior weeks. (V16,

R2558-59).

In Fletcher's cell, officers nudged the toilet and it fell off the wall, revealing a hole like a tunnel. (V17, R2588). The tunnel area is called the “chase.” (V17, R2589). The chase led to the outside of the cellblock building and is large enough for a person to crawl through. There was also an exterior door with a “regular lock” that accessed the chase area on the outside of the building. (V17, R2589, 2591). A razor-wired security fence enclosed this area. (V17, R2589, 2591, 2593). Outside of this fenced area was an open space within the jail facility which was surrounded by the jail’s perimeter fence. (V17, R2593-94).

The door that led to the chase had been pried open. (V17, R2591). A jack handle was located next to the door. (V17, R2596). A portion of the bottom part of the razor-wired security fence had been pulled up. (V17, R2595). Footprints were located on the outside of the jail’s perimeter fence near the middle gate area. (V17, R2595). A boot print, consistent with the cast-boot Fletcher had been wearing, was located near a pasture and Highway 17 near the jail’s location. (V17, R2598). PCSO Deputy Zeck, a canine, searched the jail’s surrounding area until he picked up a scent on nearby State Road 17 but eventually lost it in the carbon monoxide fumes from the passing cars. (V16, R2464-65, 2567, 2569-70).

Fletcher's Attempted Car Thefts and Grand Theft

In the morning of April 15, 2009, Justin McKinney's pickup truck had been

broken into where it was parked at a business located on Highway 17 in Palatka. (V17, R2619-20, 2622). That same morning, Sanford "Doug" Neely discovered his van had been broken into outside his home on Highway 17 in Palatka, Florida, across the street from the Putnam County jail. (V17, R2625-26). At 8:30 a.m., on April 15, 2009, Todd Louis arrived at the tire business he owns and operates on Highway 17 in Palatka and noticed the his fence was lying down in the driveway and his pickup truck was missing. (V17, R2643-44, 2650-51). The truck was later found in a wooded area near Helen Googe's home. (V17, R2654).

Discovery of Googe's Body

PCSO Detectives attempted to contacted Helen Googe,[3] a known relative of Fletcher's. (V17, R2658). Googe's Lincoln Town Car had been found in a different county earlier that day. Detectives intended to ask Googe whether or not she had given permission for her car to be driven out of Putnam County. (V17, R2659). When a PCSO detective arrived at Googe's home on Bardin Road sometime in the afternoon of April 15, 2009, no one answered the door. (V17, R2659, 2660). The Detective walked around the property, looking in the windows to see if anyone was inside. She noticed tire track impressions in the front yard that did not go out to the roadway. The tire tracks led from the front of the house to the back of the house to another nearby open field. (V17, R2661). PCSO Detectives went to a nearby

[3] Googe was sixty-six years old. (V20, R3050).

grocery store and inquired whether or not Googe or her car had been seen. However, no one reported seeing Googe, her car, or Louis' missing red and white Ford F150. After returning to Googe's home, three detectives went inside through the kitchen. (V17, R2664). Detectives checked each side of the home and found Googe's body in the living room. (V17, R2665). Googe was deceased, lying face down in front of the fireplace with her left arm bent behind her back. (V17, R2665). Detectives checked the remainder of the house, exited the property, and secured it as a crime scene. (V17, R2666). Louis' stolen red and white truck was located approximately three-quarters of a mile north of Googe's home. (V17, R2667, 2668).

Fletcher's Escape from Florida

Joanna Curtis lives near the border of Clay and Duval counties. (V17, R2702). During the early morning hours of April 15, 2009, Curtis' nephew, co-defendant Donnie Brown, arrived at her home and asked to use her computer. (V17, R2703). Brown got directions from MapQuest. (V17, R2703-04). Brown was at Curtis' home for about ten minutes. When she walked him to the door, Curtis saw Brown get into the passenger seat of a "tan Cadillac." Curtis saw a white male driving the car. (V17, R2705).

Willie Graves lives in Tomkinsville, Kentucky. (V17, R2709). Graves is married to Fletcher's aunt. On April 15, 2009, at about 8:00 p.m., Fletcher called

Graves' home and asked for directions. Graves said Fletcher told him that he was at a gas station about five miles away. (V17, R2711-12, 2716). After Graves hung up with Fletcher, he called local law enforcement before Fletcher arrived. (V17, R2713). Graves was on the phone with law enforcement when his wife came home. Fletcher and another male arrived a few minutes later. (17, R2714). Graves met them in the driveway and informed Fletcher that police were on their way. Fletcher immediately left Graves' home. (V17, R2715-16). Police arrive shortly thereafter. (V17, R2717). The Sheriff's Office in Monroe County, Kentucky searched for Fletcher and Brown in beige-colored Lincoln with Florida tags on April 15, 2009. (V17, R2720). The vehicle was located abandoned behind a church in a wooded area which was about four miles from the Graves' home in Monroe County. (V17, R2725-27).

The Investigation at Googe's Home

Florida Department of Law Enforcement ("FDLE") assisted in processing Googe's home on April 15, 2009. The fireplace had a "firebox" located on the wall. The firebox contained a chute area where firewood could be stored and accessed from both the inside and outside of the home. (V18, R2795). The firebox was covered with a metal plate door and a lock. A pair of pliers was found on a brick shelf located above the firebox. (V18, R2799). Although the lock on the metal plate door was secured, the latch on the metal plate door was broken. (V18,

R2800). The firebox was big enough for someone to crawl through. (V18, R2807).

There was an open filing cabinet drawer in the den as well as an open jewelry box on the den floor. (V18, R2803). A phone cord was found in a chair in the master bedroom. The base to the phone was found on the floor. (V18, R2805). Googe's neck was swabbed for DNA. (V18, R2807, 2833). A broken eyeglasses chain was found lying near Googe's body. (V18, R2808). There was "some type of impression" located just above Googe's wrist and at the base of her thumb going across her palm. (V18, R2809). A safe was located in a hall closet. The safe's door was found open. (V18, R2811-12). A piece of an eyeglasses chain and a pair of eyeglasses that were found in the closet. (V18, R2811). Several areas were processed for fingerprints, but FDLE was not successful in lifting any latent fingerprints from any areas of the house. (V18, R2828). At Googe's autopsy fingernail scrapings as well as a DNA blood standard was collected from her body. (V18, R2815).

The Autopsy

Dr. Predrag Bulic, medical examiner, has been practicing medicine for over thirty years. (V18, R2785). He reviewed the file of the autopsy performed on Googe, which was performed by Bulic's predecessor, Dr. Terence Steiner, who had since retired.[4] (V18, R2747, 2750-51). Bulic reviewed the autopsy photos,

[4] Bulic did not consult with Steiner on Googe's case. (V18, R2777).

toxicology report, DNA analysis performed by FDLE, Steiner's report, and Steiner's October 1, 2009, deposition regarding Googe's case. (V17, R2751, 2777-78). In reviewing the autopsy photographs of Googe's external injuries, Bulic observed blunt force trauma injuries to her face. (V18, R2755, 2761). Googe's left upper eyelid was bruised as well as the right side of her scalp. There were fingertip contusions on her neck area under her chin. Googe also sustained fingertip contusions and abrasions to her right arm. (V18, R2755). Bulic opined that these injuries to Googe were caused by someone restraining her by holding her arm. (V18, R2765, 2781). However, the person may not have had to use much force because Googe was "an elderly person and may have had fragile skin." (V18, R2765). Skin slippage was also present on her right arm. There were also abrasions on Googe's knees. (V18, R2755). In Bulic's opinion, if Googe was on her knees prior to her "terminal fall" to the floor, the abrasions would have occurred at that time. (V18, R2768). Googe also had ligature marks on her wrists. (V18, R2765, 2766).There was an indentation mark on Googe's left wrist as well as congestion of the blood vessels. (V18, R2766). There was bleeding under the skin of Googe's right forearm and wrist in addition a superficial laceration of her skin. (V18, R2766). In Bulic's opinion, the laceration/bruised area was cause by someone holding Googe by her wrist. (V18, R2767).

Bulic reviewed the photographs of Googe's internal injuries. Googe had

hemorrhages in her neck area. The cartilage of the larynx was fractured which was also surrounded by contusions and hemorrhages. (V18, R2755). In Bulic's opinion, the injuries to Googe's neck were consistent with someone grabbing Googe around the neck and squeezing with their thumbs down onto her neck. (V18, R2762). There was "quite a bit of trauma" to Googe's neck. (V18, R2763). In Bulic's opinion, Googe sustained all of the injuries in the same time frame. No injuries were "in healing stages." Bulic was not able to determine the order of the injuries inflicted to Googe with the exception of "the lethal injury around the neck." (V18, R2768-69). However, all of the injuries were inflicted to Googe before she died. (V18, R2769). The injuries to Googe's eye and the right side of her head were not "extreme." (V18, R2771). Bulic said "elderly people can bleed quite easily if they are bumped"[5] but there was no hemorrhaging in Googe's brain. (V18, R2771-72).

In Bulic's opinion, Googe was conscious[6] at the time she was strangled to

[5] Steiner's report indicated Googe had "senile purpura," a condition in elderly people where skin is atrophied to the point where even a small bump or mishandling of that area of the body causes hemorrages. (V18, R2779). However, in order for senile purpura to occur, Bulic said trauma has to be applied because there is "no spontaneous bleeding." (V18, R2781).

[6] Bulic disgreed with Steiner's opinion as stated in his October 1, 2009, deposition. Steiner said that he could not tell whether or not Googe was conscious at the time of the manual strangulation. (V18, R2783). In Bulic's May 2, 2012, deposition, he stated that he could not rule out the fact that Googe may have been unconscious at the time of the strangulation. (V18, R2784-85). However, at trial, he stated that it was his opinion that Googe "was conscious during the manual strangulation" due to the absence of significant trauma that would have caused a loss of

death because "there was no significant trauma to the head that would cause her to lose consciousness." (V18, R2770). Bulic said there are stages involved when a person dies from strangulation. The person first loses consciousness which takes "an average of ten seconds." (V18, R2772). Although the time frame can be from eight to fifteen seconds, the average is ten seconds for a person to lose consciousness. (V18, R2772). In addition, the time frame depends upon the amount of pressure applied as well as the musculature of the person's neck. (V18, R2772-73). If the pressure is applied and then let off prior to the ten seconds, the person would not lose consciousness and it would take several attempts." (V18, R2773). However, if the pressure is applied continuously, "it would take two to three minutes . . . even up to five minutes for the brain death to occur." (V18, R2774).

Bulic explained that a person being manually strangled is in "a highly alerted mode of operation . . . a flight-and-fight reaction." (V18, R2774). There is a lot of adrenaline circulating throughout the body, along with anxiety and apprehension. "There is a sense of . . . doom." (V18, R2774). There is pain in the neck area, increased heartbeat, increase in respiration, and an increase in blood pressure. (V18, R2775). In Bulic's opinion, the cause of death for Googe was asphyxia due to manual strangulation. (V18, R2753). The manner of death was homicide. (V18, R2776).

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consciousness. (V18, R2786).

Fletcher's Return to Florida and Apprehension

On April 16, 2009, after Googe's car had been located in Tomkinsville, Kentucky, arrangements were made to transport it back to Florida for processing by FDLE. (V19, R2862-63). On April 18, Detective Schwall learned that Fletcher and Brown had returned to Putnam County. The two escapees were found and apprehended by law enforcement. (V19, R2863, 2864).

Schwall and Sergeant Walls transported Fletcher to the Putnam County Sheriff's Office. (V19, R2864-65). Schwall and Investigator Brendel (State Attorney's Office) conducted a recorded interview with Fletcher. (V19, R2865-66, 2869, State Exh. 120). The interview was published for the jury.[7] (V19, R2873-2978, V20, R2983-3118).

Fletcher's Statements to Law Enforcement

Fletcher was advised of his *Miranda*[8] rights and he signed a waiver. (V19, R2867, 2873, State Exh. 119). He explained the events that led to his escape.

Fletcher stole the jack from the transport van on his way back from a court hearing on April 2, 2009. Prior to April 2, he had not fully planned on escaping but "I had just got sentenced to the ten years." (V20, R3073-74). Fletcher took the

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[7] A transcript of the interview was provided to the jury. (V19, R2871). The jury was instructed that the audiotape was evidence and that the transcript was not. (V19, R2872).

[8] *Miranda v. Arizona*, 384 U.S. 436 (1966).

crank rod of the jack from the transport van on the way back from court on April 14, 2009. (V19, R2875-76). Doni Brown, Fletcher's cell mate, knew Fletcher already had taken the jack. (V19, R2895; V20, R3073).

Fletcher initially tried to remove the cell window with the jack on April 2 but was unsuccessful. (V19, R2896-97). On April 14, Fletcher said Brown told him there was a "big hole" behind the toilet in their cell. Fletcher wedged the jack between the wall and the toilet and busted a section loose. However, if Fletcher lifted the toilet too high off the wall, the water started running out. (V19, R2899-2900; V20, R3081). In between cell checks, Fletcher and Brown eventually removed the toilet and rebar in the wall. (V19, R2902, 2903).

Brown crawled through the wall behind the toilet at midnight and jacked open the door that led to the outside of the cellblock just after cell check at 2:00 a.m. (V19, R2904-05). Fletcher and Brown crawled through the chase area, underneath an outside fence that surrounded the cellblock, and then squeezed out through the jail's perimeter gate. (V19, R2907-08). The two attempted to steal several vehicles before gaining access to a Ford truck. (V19, R2910-11; V20, R3085-86). Fletcher drove to Googe's house "to try and get some money." (V19, R2917). They arrived at about 3:00 a.m. and parked in the backyard. (V19, R2918, 2924; V20, R3086).

Fletcher's First Version of Events at Googe's House

Fletcher initially said he beat on the window and that Googe let them in through the front door. (V19, R2918, 2921). Fletcher said Googe knew he was in jail but assumed she did not know that he had escaped. (V19, R2919). Although Fletcher told Googe that he was in trouble, he had already decided "we were gonna rob her." (V19, R2921, 2921). Fletcher thought Googe kept quite a bit of money in a safe. (V19, R2923). After gaining entry, Fletcher said "Doni made her open the safe." Fletcher claimed he could not rob Googe because he knew her for 20 years and "I couldn't rob her or nothing." (V19, R2926).

Fletcher claimed Brown and Googe were "arguing a bunch." Googe said "she was scared." After Brown instructed Googe to open the safe, Googe cursed at him. Brown slapped Googe on the left side of her head. Googe punched Brown in his face. (V19, R2928, 2829, 2933). Fletcher claimed Brown "spun her around and grabbed her by the neck." Fletcher said Brown "grabbed her in a choke hold." (V19, R2933). Brown "was wrenching her up" while Googe was "kicking and clawing and screaming." (V19, R2934, 2935). Fletcher said Brown was "trying to get her to open the safe" but Fletcher did "nothing." (V19, R2935). Fletcher went into Googe's bedroom and took some jewelry from the dresser drawers. (V19, R2936).

He walked back to where Brown and Fletcher were "still arguing and

fighting" but Brown was no longer choking Googe. Fletcher saw that Brown had taken one of his grandfather's unloaded guns off the wall. (V19, R2936-37). Fletcher said Googe was scared of it and he assumed she did not realize it was her former husband's gun. (V19, R2938). Although Googe was "shaking real bad," she "fussed and fought and argued" with Brown. Fletcher "got tired of listening to it" and "smacked her in the top of her head one time." (V19, R2938). Googe insisted she did not have money in the house. Brown and Fletcher took Googe into her bedroom where she said she kept the combination to the safe. Googe said she had to go to the bathroom. When Brown allowed her to do so, she hit Brown with a hairdryer and attempted to slam the door shut. Brown then pinned Googe by her neck against the bed and threatened to kill her. (V19, R2940, 2941).

Fletcher continued rummaging through the dresser drawers while Brown took Googe to the safe in the den. (V19, R2942). When Fletcher went into the den a few minutes later, he saw the safe was open but only contained paperwork. Brown and Googe were still fighting. (V19, R2943). Fletcher was angry that he had just escaped from the county jail for "nothing." (V19, R2944). Fletcher took several pieces of jewelry along with Googe's wallet which contained $37.00 and credit cards. (V19, R2944-45).

Fletcher went back into Googe's bedroom. Brown walked in and told Fletcher that Googe had died of a heart attack. (V19, R2947-48). Fletcher

eventually saw Googe lying dead on the living room floor. He noticed a bruise on her face but did not see any blood. Googe's face "was turning blue." (V19, R2949). Fletcher said he and Brown had never discussed killing Googe. (V19, R2951). After grabbing Googe's purse on the way out of the house, Fletcher stole Googe's car. (V19, R956; V20, R3092). Brown drove the stolen Ford truck into a wooded area and abandoned it. (V19, R2956, 2957).

Fletcher and Brown drove toward Middleburg, Florida, where they purchased gas on Googe's stolen credit card. (V19, R2959, 2963; V20, R3099). Fletcher only used the card two more times in Georgia because he did not want to leave a trail. (V19, R2963, 2967). Brown sold Googe's stolen jewelry to a business in Tennessee. (V19, R2967). Fletcher drove to his aunt's house in Tomkinsville, Kentucky. (V19, R2969). When they arrived, Fletcher learned that his uncle had called police. He quickly drove off and abandoned the car. (V19, R2970-71).

Fletcher and Brown returned to Florida because they could get money from people they knew. (V19, R2975-76; V20, R3096). On April 15, 2009, the two arrived in Putnam County. (V20, R2984). Fletcher said he eluded police several times throughout the day. (V20, R2988). Subsequent to being captured, he expected he would be charged with escape. (V20, R2990). Fletcher said, "I didn't kill her." (V20, R2991).

Fletcher's Second Version of Events at Googe's House

Schwall told Fletcher that he had observed scratches on his arms but that Brown did not have any marks. Fletcher insisted the scratches on his arms were not from fingernails. Schwall noted that some of the scratches were "scabbing over." (V20, R2994). After being asked if there was a reason why his DNA would be under Googe's fingernails, Fletcher stated "I kind of lied to you a little bit." Fletcher stated that he "helped hold her down one time" when Googe was on the floor in the living room. (V20, R2995).

Fletcher admitted that Googe did not let them into her home. They entered through the firewood chute entrance. (V20, R2998, 3006; V20, R3086). Fletcher removed his grandfather's unloaded gun[9] from the wall and gave it to Brown because he "knew she was going to recognize me." (V20, R, 3007, 3087). They both changed clothes in the closet.[10] Fletcher showed Brown where the safe was located. Brown then went into Googe's bedroom and woke her. (V20, R3007-08, 3019, 3020; V20, R3086). Fletcher had tied a shirt around his face and wore a hat. Brown had a baseball cap pulled low on his head. (V20, R3009-10; V20, R3087). Brown went into Googe's bedroom and said, "Hey, lady, wake up." Fletcher said

[9] Fletcher said the gun was a collector's item - - a .22 revolver made around 1850. (V20, R3008).

[10] Fletcher and Brown changed into Fletcher's grandfather's clothes. (V19, R2971-72; V20, R3086).

Brown told him not come in until he said, "John, come in," cause he was going to tie her up. Fletcher and Brown thought Googe would not recognize him if he used an alias. (V20, R3012). Brown pointed the gun at Googe. She sat up and started screaming. Brown told Googe, "This is a stick up. Roll over and you'll be all right." (V20, R3013, 3088). Googe said she was frightened at least four times. (V20, R3013, 3021, 3089). When Googe asked, "Why are you doing this?" Brown told her, "Because I have to feed my kids." (V20, R3014, 3093). Brown called to Fletcher and told him to come into the room. Fletcher pushed Googe down on the bed and attempted to tie her hands with a cord he found in the closet. (V20, R3014, 3023). Brow pulled the phone off a table and out of the wall. Brown told Googe to cooperate with them and nothing would happen to her. (V20, R3015, 3021).

Fletcher tied Googe's hands behind her back with a telephone cord. (V20, R3016, 3017). Fletcher's intention was to rob Googe and leave her tied up. (V20, R3019). Googe asked them who they were. (V20, R3021, 3022). Brown asked Googe where the money was but Googe said she did not have any. (V20, R3024). As Googe tried to get out of the bed, her hands came untied. (V20, R3025). Brown put the gun to Googe's head. Both Fletcher and Googe told her "you better . . . listen." (V20, R3025). Although Fletcher did not think Googe recognized him, he noticed Googe looking at his tattoos. (V20, R3026, 3093). He asked Googe for her PIN for her credit card but she said she did not have one. (V20, R3026). Googe

said she needed her glasses and attempted to get off the bed. Brown put the handgun down on the dresser. Fletcher said Brown forced Googe down onto the bed with one hand on her neck and the other on her chest. (V20, R3031, 3033). Fletcher retrieved the handgun from the dresser. (V20, R3033). As Googe started kicking, Fletcher pushed the gun "against her leg real hard" and told her to stop moving or he would shoot her. (V20, R3034).

Fletcher and Brown took Googe to the safe but she said she needed her glasses. Brown brought her back to her bedroom where she said she needed to use the bathroom. Fletcher said Googe hit Brown with the blow dryer. Brown screamed for Fletcher to come help him. Googe "was fighting and kicking the whole time." (V20, R3035). Brown pinned Googe to the bed and covered her face with a pillow. Fletcher said Googe "was fighting . . . she never did quit fighting." (V20, R3037). After Googe retrieved the combination to the safe, Fletcher and Brown brought Googe back to the safe. Googe opened it up and removed some paperwork. (V20, R3038, 3039). Fletcher and Brown took all the paperwork. Brown asked Googe, "Where's the money?" (V20, R3040). Googe attempted to stand up but Brown pushed her to the floor. Fletcher said Brown mouthed the words to him, "I'm going to kill her." (V20, R3041). Fletcher said Brown grabbed Googe by her neck and started choking her as she lay in a fetal position. (V20, R3042, 3043). Brown mouthed the words to Fletcher that "he was going to break

her neck." (V20, R3067). Fletcher said he stood by as Brown choked Googe. (V20, R3045). However, Brown let go of Googe and let her get up off the floor. As the three started walking toward the den, Googe started "fussing and fighting." At this point, Fletcher claimed he hit Googe three times with his open hand once on the cheek and twice on the side of her head. (V20, R3042-43, 3046). Fletcher then grabbed Googe by the neck and held her. Brown grabbed Googe's feet and pulled them out from underneath her. As he did, Googe "was clawing" at Fletcher and scratched him. (V(V20, R3048). Fletcher said he got the other scratches on his arms from running through the bushes during his escape. (V20, R3048). After Googe scratched him, Fletcher let her go and laid her on the floor. He then said it was at this point that he hit Googe three times in the head as she tried to stand up. (V20, R3042-43, 3049, 3053, 3068-69). Fletcher was "mad" because Googe had scratched him and tried to stand up. But, "I wasn't going to kill her . . . I wouldn't kill my grandfather's wife." (V20, R3050).

Fletcher claimed that while Googe was lying on her back on the floor, Brown put his knees on her forearms and choked her with both hands. (V20, R3053, 3055). Fletcher claimed Brown "just . . . had her by her neck with both hands." (V20, R3057). Fletcher said he held Googe's legs down as she kicked. (V20, R3055). Googe "was trying to say something" but "you couldn't tell . . . she was being choked." (V20, R3055-56). Fletcher "put all my weight on her" with his

hands. (V20, R3056). Fletcher said Brown later told him "after everything happened" that he pushed his thumbs into Googe's windpipe, "trying to crush it" but that "he couldn't choke her out." (V20, R3058). As Fletcher held Googe's legs down, "she kind of stopped moving a little bit. She quit fighting." (V20, R3058). Fletcher claimed it was at this point that he retrieved Googe's jewelry from her bedroom. When he returned to the living room a few minutes later, Brown "was still choking her." (V20, R3058). Fletcher said "It sounded like she was snoring." Fletcher said Brown took his hands off Googe's throat and said that "he couldn't kill her like that." (V20, R3059). Googe was lying on her side with her eyes closed. Fletcher said, "She was sleep [ing]." (V20, R3060).

Fletcher watched Googe while Brown went into the kitchen. (V20, R3062). Brown returned with a gallon-size Ziploc baggie and a phone cord. (V20, R3065). Brown placed the baggie over Googe's head. Fletcher claimed Brown then tied the phone cord around Googe's neck. The inside of the bag started to fog. (V20, R3062-63). Fletcher went back into Googe's bedroom. Brown came in a few minutes later, and told Fletcher that "she was dead." (V20, R3064).

Fletcher helped Brown untie the phone cord from Googe's neck. (V20, R3065). Brown removed the bag from Googe's head. Fletcher claimed Brown wanted to place Googe in her bed so "somebody would think she died in her sleep or something." (V20, R3064). The baggie was later discarded in a retention pond

somewhere in Georgia. (V20, R3064, 3099-3100). Fletcher said the phone cord that Brown tied around Googe's neck was the same cord that had been used earlier to bind her wrists. (V20, R3066). In addition to discarding the baggie in the pond, Fletcher said Brown also discarded the telephone cord, Googe's purse and wallet, and their jail clothes. (V20, R3102, 3110). Fletcher said Brown discarded Fletcher's grandfather's gun in some bushes near a church in Kentucky. (V20, R3107, 3112, 3115-16). Fletcher learned Googe was dead after he heard a radio broadcast that two escapees from Florida were wanted for first degree murder. (V20, R3095). When Fletcher was taken into custody after his escape attempt, he was wearing a walking boot and a blue nylon shoe. (V20, R3121).

Investigation/Forensic Evidence Subsequent to Fletcher's Arrest

Several of Googe's belongings[11] were located along the road near her house, as well as some jail clothing and a woman's housecoat. (V20, R3132). The items Fletcher claimed we discarded in a retention pond in Georgia were also located. (V20, R3127, 3129). An FDLE footwear and tire-track examiner determined the footwear impressions left at the crime scene matched those of Fletcher's walking boot and right shoe. (V21, R3197-98, 3201-02). There were no fingerprints found at the crime scene or on the pieces of evidence that matched Fletcher or Brown.

[11] Sanders collected Googe's birth certificate, her credit card, insurance policies, passport, bank statements, check stubs, personal checks, and social security information. (V20, R3132, 3133-34).

(V21, R3216-17, 3223-25).

FDLE performed DNA analysis, comparing the DNA profiles of Fletcher, Brown, and Googe[12] to several pieces of evidence. (V21, R3230, 3234). Fletcher's DNA was found on the headlight switch, driver's side interior door strap handle, and the seat controls of Googe’s car. (V21, R3236, 3246). Fletcher and Brown's DNA was found on soda bottles in Googe's car. (V21, R3239-40, 3249) (State Exh. 39). FDLE processed the right and left-hand fingernail scrapings obtained from Googe for DNA. There was no foreign DNA from Googe's right-hand scraping. (V21, R3242). There was no foreign DNA on Googe's neck. (V21, R3257). The left-hand scraping contained a partial DNA profile that matched Fletcher's. (V21, R3241, 3246, 3247).

On May 25, 2012, the jury found Timothy Wayne Fletcher guilty of all counts as charged in the indictment and the information. (V22, R3364-67). The penalty phase began on June 11, 2012. (V23, R3372).

Prior Convictions

The State presented evidence that Fletcher was previous convicted of burglaries in Clay County. (V23, R3399, 3401-02). The State also argued Fletcher’s contemporaneous home invasion robbery conviction, pecuniary gain, and HAC as aggravation.

[12] Lam received a bloodstain card containing blood from Googe and buccal swabs obtained from Fletcher and Brown. (V21, R3234).

Victim Impact

Randall Key, Googe's brother, read a statement prepared by his niece, Deborah Black, Googe's daughter. (V23, R3407-09).

Mental Health Mitigation

Dr. Harry Krop, psychologist, evaluated Fletcher.[13] Krop administered psychological tests and a neuropsychological evaluation. (V23, R3410, 3412-13). Krop administered the Minnesota Multiphasic Personality Inventory Test, "MMPI," in his evaluation of Fletcher’s clinical profile; to include assessing whether Fletcher was depressed or schizophrenic. (V23, R3443, 3471). In Krop's opinion, Fletcher's results were invalid because Fletcher was under a "high level of distress" at the time the test was administered. (V23, R3443-44, 3446, 3472).

Krop reviewed following records: Fletcher's police interviews; discovery records; police reports; depositions; Fletcher's letter to his grandfather; medical records; Department of Juvenile Justice records; criminal histories of Fletcher's father; mother; and brother; Fletcher's jail records and Department of Corrections records; an October 2007 mental health evaluation conducted on Fletcher at Putnam Behavioral Healthcare; and Dr. Prichard's evaluation report of Fletcher. In addition, Krop reviewed interviews conducted by Krop's assistant Deb Reid, a license mental health counselor, with Fletcher's brother Jeffrey and his aunt,

[13] Dr. Krop interviewed Fletcher on December 11, 2009, May 19, 2009, and June 10, 2012. (V23, R3412-13).

Melissa Googe. (V23, R3414-15).

Fletcher's history indicated numerous head injuries and a lot of drinking and recreational drug use. Fletcher had impulse control problems from an early age and "acted out." Fletcher has an "average IQ, so he's functioning pretty much in the top 40 percent of the population." (V23, R3416, 3447). Fletcher is intelligent but was an under-achiever in school due to "emotional problems and family and environmental issues." (V23, R3417, 3447). Krop said there were no signs that Fletcher was malingering. "He put forth good effort." (V23, R3447-48).

Fletcher's history reflected symptoms of bipolar disorder although Krop did not presently see any symptoms.[14] (V23, R3418-19, 3449, 3550). Fletcher "does not meet the diagnostic criteria" for bipolar disorder. (V23, R3451). Fletcher had previously been diagnosed with posttraumatic stress disorder ("PTSD"), although there was no evidence he currently suffers from PTSD—"I wouldn't say that he has that diagnosis." (V23, R3419). Fletcher's primary diagnosis is polysubstance abuse, "definitely . . . number one." In Krop's opinion, Fletcher suffers from polysubstance dependence due to "behaviors which have been motivated to get money to support a drug habit or because he was on drugs and used extremely poor judgment." (V23, R3419). Fletcher began drinking alcohol and using marijuana

[14] Putnam County jail records indicated Fletcher was diagnosed with PTSD, bipolar disorder, depressive disorder NOS, cocaine abuse, and antisocial personality disorder. (V23, R3449).

and "many other drugs" at 12 years old. (V23, R3419). In Krop's opinion, Fletcher's alcohol and drug use "without a doubt" were contributing factors to his criminal behavior. (V23, R3473). Fletcher abused cocaine, marijuana "extensively," methamphetamine, and prescription drugs. He also has a history of chronic insomnia. Fletcher also suffers from depressive disorder. In Krop's opinion, Fletcher used drugs and alcohol to self-medicate for his depression. However, Fletcher's depression is "situational." (V23, R3420). Krop said Fletcher also met the criteria for antisocial personality disorder (“ASPD”).[15] (V23, R3421, 3451).

Although Krop noted that Fletcher was not formally diagnosed with conduct disorder—an ASPD criterion—Fletcher was in trouble at an early age. In addition, Fletcher was administered Prozac at 11 years old, a medication used to treat depression. (V23, R3423). Fletcher only took Prozac for a short period of time because Fletcher's father thought he did not need it and he was not willing to pay for it. (V23, R3424).

While Fletcher had been proscribed psychotropic medications at time, in Krop's opinion, Fletcher is not psychotic and does not suffer from schizophrenia. (V23, R3428). Fletcher has not been on a consistent medication regimen. (V23,

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[15] Krop utilized the Diagnostic and Statistical Manual-IV to make his diagnoses. (V23, R3421-22).

R3430). Although Fletcher was depressed and being administered medication, in Krop's opinion, Fletcher was "doing well" given the circumstances. Fletcher was one of the most cooperative individuals that Krop had ever evaluated. (V23, R3431).[16]

Krop said Fletcher was raised in an extremely dysfunctional family environment that included physical abuse, emotional abuse, and domestic violence. (V23, R3433, 3474-75). Fletcher's parents fought often, and, on one occasion, a gun was involved. (V23, R3433). Fletcher felt abandoned by his mother when his parents separated when he was 11-years-old. Fletcher lived with his father and his brother went to live with their mother. Although Fletcher's father abused him, Fletcher was a "daddy's boy." (v23, R3434). Fletcher said his father punched him, used a belt on him, had Fletcher make a paddle in order to punish him, and pulled a gun on him on two occasions. Nonetheless, Fletcher is "still very protective of his father." (V23, R3435, 3465, 3467). Krop's attempts to speak with Fletcher's father did not pan out. (V23, R3436).

Krop acknowledged that during Fletcher's initial interview with police, he rationalized his behavior regarding Googe's murder. Krop said Fletcher's responses indicated "to some degree . . . she contributed to her own demise." (V23, R3457-58). However, in Krop's opinion, he could not "totally conclusively rule out" that

[16] Fletcher was cooperative with counseling he was provided while awaiting trial. (V23, R3477, 3479).

Fletcher's actions were not part of a manic episode, "but, certainly, not schizophrenia." (V23, R3459). Fletcher also exhibits psychopathic traits that include manipulation, selfishness, insensitivity, impulsivity, getting into trouble, and engaging in illegal acts. (V23, R3464). Krop said Fletcher told him that he resented Googe and had no reservations about stealing from her. His motive in going to her house after his jail escape was for financial gain. (V23, R3469-70). Fletcher claimed he was abused methamphetamine for about 4 days before escaping from the Putnam County jail. (V23, R3439).

Family Members

Jeffrey Fletcher is Fletcher's younger brother by four years. (V24, R3506-07, 3511). Jeffrey and Timothy initially lived with their father after their parents' divorce. Jeffrey moved in with their mother after living with their father for about a year. (V24, R3508-09, 3510, 3518). Jeffrey saw Timothy on weekends a few times a month because Timothy stayed with their father. (V24, R3511, 3519). When Jeffrey visited, his father did not abuse him. He or Timothy were spanked "if we'd done wrong." He never saw their father abuse Timothy. (V24, R3520). Their father drank heavily when they were growing up. However, after he turned 11-years-old, Jeffrey chose to play with friends rather than go to his father's whenever he was asked to. (V24, R3521). Their mother spoke with Timothy "every chance she got" prior to her death. (V24, R3512, 3517). Their relationship was "always good."

(V24, R 3513). Jeffrey and Timothy had infrequent contact over the years but they had a close relationship. (V24, R3513).

Ricky Fletcher, Fletcher's father, said domestic violence started between Fletcher's mother and himself when Timothy was about six years old. Alcohol was involved every time. (V24, R3523, 3527-28, 3531). They argued and a "couple of times I took it too far." On one occasion, Ricky threatened his wife with his gun. When he saw Timothy was watching him, he put it away. (V24, R3528, 3530). As a result of these events, Ricky Fletcher was arrested several times in the children's presence. (V24, R3528-29). Although, the Fletcher's separated when Timothy was eleven-years-old, they never divorced. Timothy lived with Ricky and Jeffrey stayed with their mother. Before her death, Timothy stayed in touch with his mother on a regular basis.(V24, R3532). Ricky currently talks to Timothy as much as possible. (V24, R3536).

State's Rebuttal

Dr. Gregory Prichard, psychologist, conducted a forensic psychological evaluation of Fletcher on May 30, 2012. (V24, R3547, 3554). Prichard reviewed documents that included DOC records, police reports, Fletcher's interviews with police, Fletcher's letter to his grandfather, a 2006 *pro se* motion for reduction in sentence, and Dr. Krop's evaluation and letters written to defense counsel. Prichard also interviewed Dr. Martin, DOC psychologist, and Donna Bailey, DOC mental

health specialist. (V24, R3554-57). In Prichard's opinion, Fletcher does not suffer from any neurological issues. Fletcher had "good word use. He comprehended well, engaged in very good dialogue. He told fairly extensive stories." (V24, R3558). In Prichard's opinion, Fletcher has ASPD, polysubstance dependence, and depressive disorder NOS. (V24, R3559, 3566, 3614). In Prichard's opinion, there was no evidence of bipolar disorder. (V24, R3562).

Prichard said that ASPD is not "neurochemically driven." (V24, R3566). Personality disorders tend to be present for a person's entire life. These individuals do not respond to medications. Prichard said, "A lot of people call it the criminal personality, which is one of the main features of the antisocial personality disorder." A person with ASPD "continuously gets into trouble, breaks the rules, gets into criminal trouble, says I'm going to change things but doesn't, gets into fights, steals things." This disorder typically manifests in early to mid-adolescence. (V24, R3568).

Prichard utilized the DSM-IV-TR[17] in diagnosing Fletcher. (V24, R3569). There are four criterion (A through D) used in diagnosing Antisocial Personality disorder. (V24, R3570). Under criterion A, there are seven patterns of behavior that are typically seen in somebody who has ASPD. Of the seven, only three of

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[17] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

them have to be present to make this diagnosis. (V24, R3570). In Prichard's opinion, all seven applied to Fletcher. [18] (V24, R3570, 3598-99).[19] Prichard was aware of Fletcher prescription history for depressants, including his father refusing to pay for the medication when Fletcher was 11-years-old. (V24, R3617, 3618).

Prichard was aware of the domestic violence between Fletcher's parents. (V24, R3618-19). Prichard also knew that Fletcher had previously been diagnosed with PTSD that was unrelated to combat. (V24, R3621). Medical records also indicated that as a child, Fletcher had been diagnosed with ADHD. However,

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[18] Prichard said Fletcher told him during their interview that he had ten juvenile arrests. In addition, he stole cars at age 14, was suspended from school at least ten times, was expelled in the ninth grade, and was sent to prison as a youthful offender in 2000. At this point, Fletcher objected to Prichard's testimony. however, the State said Fletcher "opened the door to this issue through the notice of mental mitigation." (V24, R3571). After the jury was removed, the court instructed the State not to discuss all of Fletcher's arrests. (V24, R3571, 3592-93). The court stated that Fletcher's expert Dr. Krop also diagnosed Fletcher with antisocial personality disorder and also testified as to Fletcher's prior criminal history. (V24, R3571, 3574).

[19] Prichard administered the Psychopathy Checklist Revised (PCL-R) to Fletcher. (V24, R3602, 3604). Prichard said "A psychopath is a criminal variant that has a number of personality and behavioral characteristics that make them fairly unique."(V24, R3603-04). The test is scored with a 0, 1, or a 2 for each item, for a possible total score of 40. A 2 indicates the presence of that particular characteristic for the person; a 1 indicates the characteristic is kind of present; and a 0 indicates it is not present at all. A score of 30 or above is considered psychopathic. At this point, Fletcher objected to any further testimony from Prichard that Fletcher scored a 30 on the PCLR which is in the psychopathic range. (V24, R3605, 3608). The court agreed and ruled the jury would not hear any further testimony from Prichard that discussed that Fletcher was a psychopath. (V24, R3611).

records did not indicate Fletcher's age at that time or that any medication was administered for ADHD. (V24, R3623). Nevertheless, in Prichard's opinion, Fletcher does not suffer from ADHD. (V24, R3624).

On June 12, 2012, the jury recommended the death sentence by a vote of eight to four. (V25, R3708).

Spencer Hearing

On July 25, 2012, the trial court conducted a *Spencer* Hearing. (V9, R1385-1409). *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). Fletcher read a statement to the court and apologized to the victim's family. (V9, R1398). Fletcher also stated, "My childhood was not the greatest, nor was it the worst." (V9, R1398-99). Fletcher said that, as a child, he had "mild ADD and bipolar symptoms." He was administered Prozac and received counseling. Financial problems prohibited continuing the medication. (V9, R1399). After his parents separated, Fletcher lived with his father. Fletcher's mother re-married. There was tension between Fletcher and his stepfather due to Fletcher's "loyalty to my dad." Fletcher helped take care of his younger brother, Jeffrey. (V9, R1400). Fletcher visited his mother every week and spoke to her daily. (V9, R1401). Fletcher started abusing drugs and got into trouble at school. He was rebellious toward authority, and always looking for a attention."

Fletcher was in prison when he mother died in 2002. (V9, R1401). In 2005,

Fletcher was stabbed several times while incarcerated. In 2006, his father was in a severe motorcycle accident. Fletcher said these events "traumatized" him and he began to have recurring nightmares. In May 2006, he was placed on suicide watch and administered an anti-depressant. (V9, R1402). Fletcher was released from prison in September 2007. Although he "did good for a while," he "was a severe alcoholic" and his drug habit quickly took control his life. In June 2008, he had an ATV accident and suffered severe injuries. He became addicted to drugs. (V9, R1402). He and his life-long friend Brown got together in August 2008. They both were addicted to cocaine. Fletcher began stealing to support his drug habit. (V9, R1403). In November 2008, Fletcher was arrested for several burglaries he had committed and, in March 2009, was sentenced to ten years in prison. (V9, R1404). Since his arrest for Googe's murder, Fletcher got sober and "made a lot of changes" in his life. (V9, R1403).

Sentencing

After giving the jury's recommendation great weight, the trial court found the following aggravation: Fletcher committed the murder under sentence of imprisonment (great weight); Fletcher committed the murder during course of a home invasion robbery (great weight); Fletcher committed the murder for pecuniary gain (no additional weight, merged with robbery); the murder was especially heinous, atrocious, and cruel. The court found age as a statutory

mitigation but afforded it little weight. The trial court also found the following non-statutory mitigation:

> 1) The Defendant suffered from physical abuse from his alcoholic father in the past (little weight); 2) The Defendant has suffered from a chronic addiction to drugs in the past (moderate weight); 3) The Defendant has been treated for and suffers from depression (little weight); 4) The Defendant has been treated for post-traumatic stress disorder in the past (slight weight); 5) The Defendant has previously witnessed his mother being physically abused by his father as a child (some weight); 6) The Defendant has attempted suicide in the past (little weight); 7) The Defendant has been treated in the past for Bipolar Disorder (no established, no weight); 8) The Defendant has responded well to counseling while at the Suwannee Correctional Institution (little weight); 9) The Defendant had reported to law enforcement that he had been up all night before the escape consuming methamphetamines in the jail (very little weight); 10) The Defendant obtained his GED while incarcerated (some weight); 11) The Defendant comes from a dysfunctional family (some weight); 12) The Defendant's mother died when he was 18 years of age and the Defendant had a close relationship with her (little weight); 13) The Defendant has artistic ability. (slight weight); 14) The existence of any other factor, Expression of remorse (some weight); Good courtroom behavior (some weight); Cooperation with police after his arrest (moderate weight); Codefendant, Donnie Brown, received life sentence after a plea of guilty (great weight). (V6, R940-950).

SUMMARY OF ARGUMENT

The evidence that Fletcher was serving a ten-year sentence was a "blip" in the trial and did not require a mistrial. The prosecutors arguments did not deprive Fletcher of a fair trial. Fletcher never invoked his right to remain silent and made equivocal and conditional remarks to law enforcement. Defense counsel's concession of guilt to the collateral offenses was a reasonable strategy with which Fletcher agreed. Ineffective assistance of counsel should not be reviewed on direct

appeal.

All of the offenses Fletcher committed in the morning of April 15, 2009, were connected episodically. They were all part of one continuous, uninterrupted crime spree. The non-statutory aggravation was not presented nor argued in Fletcher's penalty phase and the trial court's order did not contain error. The trial court issued a detailed sentencing order that accurately applied the facts to this Court's precedent. The death sentence is proportionate. The evidence indicates that Fletcher is the killer. Fletcher is also the mastermind of the entire criminal episode and more culpable than his codefendant. There is no cumulative error and Florida's capital punishment statutes do not violate the state and federal constitutions.

ARGUMENT

ISSUE I: WHETHER TESTIMONY THAT THE DEFENDANT HAD BEEN SENTENCED IN ANOTHER CASE DENIED THE DEFENDANT A FAIR TRIAL

At trial Officer Steven Faulkner testified, ". . . And I believe Mr. Fletcher told me that he had been sentenced for . . . ." The trial court sustained the defense's objection and excused the jury. The court denied the defense's motion for mistrial and offered to instruct the jury to disregard the statement—defense counsel declined, the jury returned, and the examination moved on. (V16, R2543, R2546, 2547-48). Later, the State introduced a video of the Defendant's post-arrest

statement.[20] (V19, R2872-2873, V20, R3076). One hundred and eighty-three pages into the transcript[21] and half way into the video,[22] the Defendant briefly commented "And I had just got sentenced to the ten years. My grandma just died, my -- my real grandma, my grandpa's first wife . . . ten years is a long-ass time. I thought it was before, but . . . ." (V20, R3073-3074). After the jury was excused, the Court heard argument from both sides and reserved ruling on the Defendant's motion for a mistrial. (V20, R3079). The Court ordered the transcripts collected and ordered that the video be fast-forwarded. (V20, R3079-3080). When he jury returned, the video continued, and the jury watched and listened without the transcripts. (V20, R3080). Later, outside the presence of the jury, the court ordered that the video of the Defendant's statement mentioning the sentence would not go back to the jury. (V21, R3173). The court also found that what the Defendant said "was just a blip," and reiterated that collecting the transcripts prevented the jurors from going back and looking at the statement. (V21, R3174). The court also noted that she did not see any jurors going back in the transcript before they were collected. (V21, R3174). The trial court did not want to give a curative instruction to avoid drawing any attention to the issue. (V21, R3174). The trial court later

[20] Along with redacted transcripts that had been provided to the defense two days prior.

[21] V28, R4359.

[22] SRV1, Court Exhibit 2.

offered to give a curative instruction but the defense conceded that a curative instruction was not needed, stating, "There are some times where a curative instruction is helpful and needed if a mistrial is not granted. This is not one of them." (V21, R3182).

A. The Standard of Appellate Review

The Appellant argues Officer Faulkner's and the Defendant's statements alluding to the Defendant's sentence were unfairly prejudicial. (*Initial Brief* at 59). Unfairly prejudice is reviewed under the abuse of discretion standard. *Abdool v. State*, 53 So. 3d 208 (Fla. 2010). In this case, however, the trial court did not allow the evidence of Defendant's sentence to be admitted. Any allusion to the term of imprisonment was uninvited and the trial court took curative measures to address the "inadmissible"[23] evidence rather than granting the Defendant's motions for a mistrial. Under those circumstances, this Court should review this issue under the heightened abuse of discretion standard of whether absolute necessity required the trial court to grant the motions for a mistrial. “A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial. A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of

[23] For the purposes of this argument, the State identifies the complained-of evidence as inadmissible. It is not clear whether the evidence would have been inadmissible or admissible to prove the escape charge. The issue raised is not whether the trial court was correct in excluding evidence of the Defendant's sentence.

review.” *Silvia v. State*, 60 So. 3d 959, 975-76 (Fla. 2011).

B. Case Law Supporting the Trial Court's Finding

“A motion for mistrial is addressed to the sound discretion of the trial judge and should only be granted in cases of absolute necessity when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile." *Braddy v. State*, 111 So. 3d 810, 837 (Fla. 2012). A passing reference to a defendant's prison sentence "may be erroneously admitted yet not be so prejudicial as to require reversal." *Ferguson v. State*, 417 So. 2d 639, 642 (Fla. 1982), *cited in Ruger v. State*, 941 So. 2d 1182, 1185 (Fla. 4th DCA 2006) (No abuse of discretion in denying defendant's motion for mistrial in murder trial after codefendant testified that she had met defendant after he had “just recently got out of prison”). *See also Cox v. State*, 819 So. 2d 705 (defense witness stated in capital murder trial that defendant was serving two life sentences, violating the court's order; statement did not entitled the defendant to mistrial, jury already knew defendant was an inmate). Following this Court's precedent in *Ferguson*, the *Ruger* court reasoned that the motion for mistrial was properly denied because the comment was less prejudicial than other evidence of prostitution and drug abuse and cumulative to other un-objected-to evidence about Ruger having been in jail. *Id*.

In this case, there was no absolute necessity for the trial court to grant the

motions for mistrial. Officer Faulkner did not mention the length of the Defendant's sentence. His testimony was abruptly cut-off by defense counsel's sustained objection and the State moved-on in the direct examination without further mention of the sentence. Although the prosecutor and defense counsel both reviewed the video and the transcript before they were introduced to the jury, neither counsel appears to have caught the Defendant's reference to his prison sentence. Nonetheless, the Defendant's comment about his prison sentence was buried in the midst of a two-hour video and over two hundred pages of transcript. As the trial court found, the comment was a "blip" in the trial and did not become a feature before the jury. Furthermore, the evidence that Fletcher was serving a sentence was cumulative to the admissible proof that Fletcher was in lawful custody at the time of his escape. Any mention of the Fletcher's sentence being ten-years in length would be less prejudicial in the eyes of the jury than the admissible proof that Fletcher hatched a plan to escape from jail, burglarized and stole vehicles, then robbed and killed an elderly and frightened Helen Googe in her home in the middle of the night. The inadvertent comments about Fletcher's prison sentence were not so prejudicial as to require reversal.

C. Appellant's Case Law, Not Applicable

The Appellant relies on *Brown v. State*, 719 So. 2d 882 (Fla. 1998), *Sanders v. State*, 517 So. 2d 134 (Fla. 4th DCA 1987), and *Cannon v. State*, 529 So. 2d 814

(Fla. 1st DCA 1988) to support his argument. These cases are distinguishable from Fletcher's case. In *Brown*, the Defendant was convicted for possession of a firearm by a convicted felon. 719 So. 2d at 884. The issue litigated was over a stipulation to the convicted felon element of the charged offense and the prejudicial effect of admitting the nature of the prior felony to the jury for consideration. *Id*. The Court held that the nature of the prior felony creates an unnecessary risk of prejudice to the Defendant. *Id*. at 888. Different from Brown, however, in Fletcher's trial, the nature of the offense for which he was sentences was never introduced to the jury.

In *Sanders*, the defendant was tried and convicted of attempted escape. 517 So. 2d at 135. The *Sanders* court addressed an issue where the trial court permitted the introduction of the nature of the crimes for which the defendant was serving a sentence. *Id*. Also, the prosecutor in *Sanders* appeared to have deliberately acted inappropriately and attempted to secure a conviction by any means necessary. *Id*. at 136 (WEBSTER, J. Concurring). Like the distinction in *Brown*, in Fletcher's case, the nature of his offenses did not come into evidence before the jury, only an inadvertent and fleeting reference to the length of his sentence.

In *Cannon*, the defendant was convicted of attempted escape from the mental health institution in Chattahoochee. 529 So. 2d at 815. The trial court informed the jury, over the defense's objection, that the defendant was serving a life sentence at the time of his attempted escape. The *Cannon* Court found that

although it was error for the trial court to have informed the jury of the life sentence, the error was harmless beyond a reasonable doubt. *Id*. Unlike *Cannon*, the trial court did not allow the evidence of Fletcher's ten year sentence into the trial and when it was inadvertently mentioned, the court took appropriate curative measures.

D. Harmless Error

Any error in the inadvertent admission of the Defendant's sentence to the jury was harmless beyond a reasonable doubt. *Gregory v. State*, 38 Fla. L. Weekly S471 (Fla. June 27, 2013). As the trial court stated, the evidence of the Defendant's guilt was overwhelming. The comments alluding to the Defendant's term of imprisonment were a "blip" on the radar screen of the Defendant's trial. Officer Faulkner's comment occurred at the beginning of trial, did not mention the actual length of the sentence, and was followed by a day and half of trial, fourteen witnesses, and over one hundred exhibits. The Defendant's comments during the video of his statement was brief and followed by additional witness testimony and exhibits that drew the jury's attention away from the comment. The trial judge took appropriate curative measures to address the situation by ordering the transcripts collected, stopping the video, preventing the jury from reviewing the video again during deliberations, and—with the agreement of the defense—not drawing further attention to the comment through a curative instruction. Surely if the *Cannon* trial

court's deliberate instruction to the jury about the defendant's life sentence was harmless error, then the inadvertent reference to Fletcher's ten year sentence could not have contributed to his convictions. *See* 529 So. 2d at 815.

ISSUE II: WHETHER THE PROSECUTOR'S GUILT PHASE CLOSING ARGUMENT DEPRIVED THE DEFENDANT OF A FAIR TRIAL

During the State's closing, the prosecutor argued without objection,

> MR. JOHNSON: . . . when the defendant was confronted with the possibility that he left DNA behind, all of a sudden . . . [h]e went from that story to . . . I kind of lied to you . . . . he said I don't really want to talk about it. And then he says . . . I admit, I kind of lied to you. . . . I did grab her one time. **I grabbed her around the neck** . . . and she scratched me to kind of explain away that evidence.

(V22, R3276) (emphasis added). The Appellant claims that this argument constitutes an improper comment on the Defendant's post-arrest silence. (*Initial Brief* at 60). During the rebuttal closing, the prosecutor argued without objection,

> MR. LEWIS: When you go back in the jury room, you're going to take the evidence, the testimony and, most importantly, your common sense. And I ask you, ladies and gentlemen, send the message to this defendant that his behavior is not acceptable. Send the message to him and tell him, it's not okay to kill people. You send that message and you find him guilty as charged. And you tell him Helen Googe was not supposed to be murdered that night, and his activities are responsible for it.

(V22, R3302). The Appellant claims that this argument was an improper request for the jurors to send a message to the community with their verdict. (*Initial Brief* at 61).

A. The Standard of Appellate Review

Failing to raise a[n] objection waives any claim for appellate review. *Mosley v. State*, 46 So. 3d 510, 519 (Fla. 2009). "The sole exception . . . is where the unobjected-to comments rise to the level of fundamental error." *Id*. *See also Crump v. State*, 622 So. 2d 963, 972 (Fla. 1993) ("Absent fundamental error, we find that the defense counsel failed to preserve the issue for review, thus precluding appellate review").

B. Case Law Supporting the State

Fundamental error as an 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." *Mosley*, 46 So. 3d at 519. If the statement by the prosecutor did not vitiate the Defendant's right to a fair trial, this Court should deny relief. *Braddy*, 111 So. 3d at 843. *See also Patrick v. State*, 104 So. 3d 1046, 1062 (Fla. 2012) (arguments from the prosecutor attacking the defendant's character, urging the jury to convict because the defendant lacked remorse, and appealing to the jurors' fears and prejudices were not considered so egregious as to constitute fundamental error).

Fletcher's "I really don't even want to tell you," Comment

It is undoubtedly improper for the State to comment on a defendant's post *Miranda*[24] silence. *Davis v. State*, 38 Fla. L. Weekly S523 (Fla. July 3, 2013). Commenting, however, on a defendant's reluctance to answer a single question during an interrogation after having freely and voluntarily waived *Miranda* is not improper because the constitutional right was not invoked. *Valle v. State*, 474 So. 2d 796, 801 (Fla. 1985), *remanded on other grounds Valle v. Florida*, 476 U.S. 1102 (1986). This Court reiterated its point from *Valle*, when it held, "[W]here a defendant refuses to answer one question out of many during a lengthy interrogation following the defendant's waiver of his constitutional rights, the State is not precluded from subsequently admitting evidence of the defendant's silence at trial." *Downs v. Moore*, 801 So. 2d 906, 911 (Fla. 2001).

In *Valle*, the defendant was arrested two days after having murdered a police officer and seriously wounding another at a routine traffic stop. 474 So. 2d at 798. After having been read and voluntarily waived *Miranda*, in the middle of the interrogation the interrogator asked Valle the name of his employer, to which Valle responded "I'd rather not say." *Id*. at 799. In *Downs*, the defendant testified that he was part of the murder conspiracy, but that he was not the killer nor was he present at the murder. 801 So. 2d at 910. During cross-examination, Downs replied that he

[24] *Miranda v. Arizona*, 384 U.S. 436 (1966).

had not provided his statements from direct examination to the police when he was arrested. *Id*. The prosecutor later argued the point in closing with no objection. *Id*.

The Appellant cites *State v. Hoggins*, 718 So. 2d 761, 769 (Fla. 1998), to support his argument that the prosecutor improperly commented on the Defendant's "post-arrest silence." (*Initial Brief* at 60). H*oggins* is distinguishable from Fletcher's case. In *Hoggins*, the issue was whether the defendant's post-arrest, pre-*Miranda* silence can be used against him as impeachment at trial. *Id*. at 762. Hoggins was arrested after having robbed a convenience store, fled with the cash register drawer and a cigar box on a bicycle, and left a trail of lottery tickets and food stamps leading into the apartment complex where he was discovered. *Id*. at 762-763. The apartment to which Hoggins fled belong to the mother of his child. *Id*. Hoggins offered no explanation to the police as he was being arrested; he was later read his *Miranda* warnings when police took him down stairs and placed him in a patrol car. *Id*. During his trial testimony, Hoggins offered an exculpatory explanation—claiming that he was visiting his child, someone had stolen his bike, and that he found the cash register drawer and cigar box in the playground of the apartment complex after having seen someone hide them there. *Id*. In cross-examination, the prosecutor established that Hoggins had not provided his exculpatory explanation to the police when he was arrested and later argued the point in closing. *Id*. at 764. This Court held that the Florida Constitution prevents

the use of a defendant's post-arrest, pre-*Miranda* silence—whether directly in the State's case or for impeachment—if the question or comment "is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his right to remain silent." *Id*. at 769.[25]

The circumstances in *Hoggins* are not present in the Appellant's case. The This case is more akin to *Valle* and *Downs*. The comment at issue came after Fletcher was arrested and after Fletcher was read and voluntarily waived his *Miranda* rights—rather than post-arrest, pre-*Miranda* like in *Hoggins*. Fletcher never invoked his right to remain silent. After Fletcher was read his warnings he knowingly and intelligently waived *Miranda* and volunteered to speak to the detectives. Fletcher's comment, "I really don't even want to tell you everything that happened, to be honest with you," paraphrased by the prosecutor in argument was an isolated reluctance to answer a question once Fletcher was confronted with inculpatory DNA evidence. Subsequent to the comment at issue, Fletcher continued to talk to the police and answer their questions—indicating that he had lied to them previously. He never unequivocally invoked his right to remain silent. During his interrogation, Fletcher never implied that he might want to cease answering questions. Like the circumstances in *Valle* and *Downs*, there was no

[25] This Court also reasoned that, "We avoid treating differently defendants who are aware of their *Miranda* rights and those who are not. Moreover, we do not provide police officer with an incentive to delay the giving of *Miranda* warnings." *Hoggins*, 718 So. 2d at 770.

violation of his constitutional rights because the constitutional right was never invoked. The prosecutor in this case argued about Fletcher's credibility based on him providing the detectives with two different versions on the murder during his interview. Accordingly, there was no error in the prosecutor's argument and certainly not fundamental error.

The "Send a Message to the Defendant" Argument

This Court has held that arguing to the jury to "send a message to the community" is an improper "appeal to the emotions and fears of the jurors." *Campbell v. State*, 679 So. 2d 720, 724 (Fla. 1996). Not all statements that call on the jurors to take action and vote for the death penalty in a particular case, however, are necessarily impermissible. *Orme v. State*, 896 So. 2d 725, 739 (Fla. 2005) (*comparing Campbell*, 679 So. 2d at 724)). *See also Cox v. State*, 819 So. 2d 705, 718 (Fla. 2002) (*comparing Campbell*, 679 So. 2d at 724)). In *Orme*, during closing argument the prosecutor encouraged the jurors to "do their duty for the community" and argued that "their decision was on behalf of all citizens." 896 So. 2d at 739. This Court held that the prosecutor's argument stopped short of what was objectionable in other cases. *Id*. (*citing Campbell*, 679 So. 2d at 724-725 and *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985) (finding error in the prosecutor's statement that "[a]nything less in this case would only confirm what we see running around on the bumper stickers of these cars, and that is that only

the victim gets the death penalty")). In *Cox*, during the penalty phases summation the prosecutor stated, "I stand before you again today on behalf of the decent law-abiding people of this community and this state, whom I represent." 819 So. 2d at 718. This Court held that the prosecutor's comments were, although a little pretentious, not the intolerable "send a message to the community" arguments in *Campbell* and *Bertolotti*. *Cox*, 819 So. 2d at 718.

The Appellant cites *Campbell* to support his argument at the prosecutor improperly asked the jurors to "send a message" with their verdict. 679 So. 2d at 724 (*Initial Brief* at 61). As discussed above, this Court has distinguished cases where prosecutors have made grandiose arguments asking the jurors to take action. Although not cited by the Appellant in his initial brief, it appears that this Court's opinion in *Urbin v. State*, 714 So. 2d 411, 418 (Fla. 1998), is also relevant. In *Urbin*, this Court affirmed the first-degree murder conviction but remanded for the imposition of a life sentence based on the Court's proportionality analysis. 714 So. 2d at 418-419. Although mooted by the proportionality review, the Court addressed numerous instances of prosecutorial misconduct[26] during the penalty

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[26] The prosecutor's argument in U*rbin* was riddled with improprieties: he invited the jury to disregard the law; asserted that the juror's vote for a life sentence would be irresponsible and a violation of the jurors' lawful duty; subtly made a "Golden Rule" argument by creating an imaginary script of the victim's words; created animosity towards the defendant by attacking his mother's character and calling her the "mistress of excuses"; argued that the jury should show Urbin the same mercy he showed the victim; and finally but arguing "What kind of a message would that

phase argument. *Id*. While this Court condemned the prosecutor's "send a message" argument in *Urbin*, it was the accumulation of improper arguments ranging from "golden rule" to asking the jury to disregard the law that drew the Court's scorn. Because the Court remanded the sentence on proportionality, the Court was silent as to whether the improper arguments in *Urbin* amounted to fundamental error.

Subsequent to *Campbell* and *Urbin*, this Court seemed to indicate that the concern with "send a message" arguments arises when prosecutors argue that the jury should send a message **to the community** or **other defendants**. *Zack v. State*, 911 So. 2d 1190, 1206 (Fla. 2005) ("The prosecutor did not tell the jury to send a message **to other defendants** . . . . Rather, he told the jury to act on behalf of the community"). In *Zack*, the Court ruled in a post-conviction appeal that appellate counsel was not deficient for failing to raise the meritless claim that the prosecutor's argument to "act on behalf of the community" constituted an improper "send a message" argument. *Id*.

While the prosecutor's argument in this case may be improper in light of *Urbin* and *Campbell*, unlike either of those cases, the prosecutor's argument in this case did not taint the jury's verdict in any way. They jury was properly instructed on a law, the argument did not shift the burden, and the defense had conceded that Fletcher had done everything charged except the actual killing of Helen Googe.

send—what kind of a message would a life sentence send to this defendant." *Id*. at 420-422.

The prosecutor's argument in this cases could not have vitiated the jury's guilt phase verdict in light of the evidence against the Defendant—including his DNA under the victim's fingernails—and the Defendant's confessions. Accordingly, there was no fundamental error.

C. Harmless Error

The state recognizes that a harmless error analysis is inapplicable to a fundamental error analysis. *Haygood v. State*, 109 So. 3d 735, 741 (Fla. 2013). Furthermore, should this Court find that the trial court's action and/or the prosecutor's statement constituted error, but not fundamental, then this issue is precluded from appellate review for lack of preservation. *Crump*, 622 So. 2d at 972.

ISSUE III: WHETHER DEFENSE COUNSEL OPENING STATEMENT DENIED THE DEFENDANT A FAIR TRIAL

During opening statements, Attorney Garry Wood stated, "As you know, there are seven charges against Timothy Fletcher, six of which we are not going to seriously dispute." (V16, R2469). Defense counsel stated once more that the other charges would not be in dispute but submitted to the jury there would be reasonable doubt as to the first degree murder charge. (V16, R2474).

After opening statements, the trial court inquired of the Defendant whether he had an opportunity to discuss with his attorney the opening statement strategy. (V16, R2509) (*Initial Brief* at 63, n. 36). Fletcher indicated that he had and that he

agreed with the strategy. (V16, R2509). In closing argument the State pointed out the fact that the defense was not seriously contesting the additional charges. (V22, R3275). Defense counsel even stated in his closing, "We told you at the beginning that Timothy Fletcher certainly is guilty of a lot of things." (V22, R3284).

A. The Standard of Appellate Review

The Appellant appears to be raising an ineffective assistance of counsel claim on direct appeal—arguing that defense counsel's strategy in essentially conceding guilt as to the collateral offenses "was not reasonable and resulted in prejudice to the Defendant." (*Initial Brief* at 64). Except in rare circumstances, ineffective assistance of counsel is not cognizable on direct appeal. *Robards v. State*, 112 So. 3d 1256, 1266 (Fla. 2013).

B. Case Law Supporting the Trial Court's Finding

Under normal circumstances, appellate review on direct appeal is confined to only those questions that were before the trial court and upon which a ruling adverse to the appealing party was made. *Ellerbee v. State,* 87 So. 3d 730, 739 (Fla. 2012) (internal quotations and citations omitted). "An ineffective assistance of counsel claim may be brought on direct appeal only in **rare** instance[s]." *Id*. To d so, a defendant bears the burden of establishing: (1) the ineffectiveness is apparent on the face of the record, and (2) it would be a waste of judicial resources to require the trial court to address the issue. *Id*. (internal quotations and citations

omitted). In *Ellerbee*, the appellant claimed on direct appeal that his trial counsel was ineffective for failing to present a meaningful challenge to the felony murder theory of first degree murder. 87 So. 3d at 739. This Court held that it was not apparent on the face of the record that counsel had acted ineffectively. *Id.* (*citing Martinez v. State*, 761 So. 2d 1074, 1078 n.2 (Fla. 2000) (where defense counsel's failure to request an alibi instruction did not present an ineffectiveness claim apparent on the record)).

In this case, the Appellant has failed to demonstrate how defense counsel's concession to the collateral offenses constituted ineffective assistance of counsel. Without the benefit of evidentiary development into counsel's strategy, this Court cannot properly evaluate the question under the appropriate standard. Furthermore, the trial court conducted a colloquy with the Defendant after opening statements, outside of the jury's presence, about counsel's concession of the collateral offenses. Fletcher stated that he was aware of his attorney's strategy and he approved.

C. Appellant's Case Law, Not Applicable

Neither of Appellant's cited cases suggest this Court should entertain an ineffective assistance of counsel claim on direct appeal in this case. Appellant asks this Court to compare Attorney Wood's concession to the trial counsel in *Kormondy v. State*, 983 So. 2d 418, 430 (Fla. 2007). In *Kormondy*, not only was defense counsel's concession of the collateral offenses a reasonable strategy, the

question of counsel's effectiveness came to this Court in a post-conviction appeal—the appropriate forum for ineffectiveness claims—and this Court had the benefit of post-conviction evidentiary development to aid in its analysis. *Id*.

In *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. 2nd DCA 2011), the court found counsel was ineffective on direct appeal where counsel conceded in argument and in cross-examination the defendant's guilt to a burglary with an assault or battery and robbery. *Id*. In *Benitez-Saldana*, however, trial counsel concessions were inconsistent with the defendant's version of events and the strategy was not supported by the defendant. Benitez-Saldana maintained that he was invited into the victims home and had taken her purse without a struggle.

Different from *Kormondy* and *Benitez-Saldana*, Attorney Wood's concession of guilt to the collateral crimes was consistent with Fletcher's version of events and Fletcher supported the strategy. Fletcher has failed to demonstrate why this Court should entertain his ineffective assistance of counsel claim on direct appeal.

ISSUE IV: WHETHER THE TRIAL COURT WAS CORRECT IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS POST-ARREST STATEMENT

After his arrest, the Defendant was brought to the Sheriff's Office and eventually questioned by law enforcement. Prior to his questioning, the Defendant asked for his shackles to be loosened. The deputy responded, "No . . . waist chains first then we can do the shackles." The Defendant responded, "No, It's too tight. I

don't want to talk to nobody then." Shortly thereafter the deputy, loosened his shackles. A short time later, the detectives came into the room and read the Defendant his Miranda rights. (V7, R1031-1033, 1038, 1041). After the Defendant stated that he would talk to the officers, he signed the *Miranda* rights waiver form. (V27, R4171; State's Exhibit 119). Later in the interview, when they began discussing what happened at the victim's house, the Defendant said, "I really don't even want to tell you everything that happened, to be honest with you," then the Defendant said, "I'll be honest with you, I kind of lied to you a little bit." (V7, R1145-47). The Defendant continued to answer questions. The trial court denied the Defendant's motion to suppress. (V3, R490-491; V9, R1442; V4, R687-689).

A. The Standard of Appellate Review

"A trial court's ruling on a motion to suppress is a mixed question of law and fact that ultimately determines constitutional rights and should be reviewed using a two-step approach—deferring to the trial court's findings of fact as long as they are supported by competent, substantial evidence, but reviewing de novo a trial court's application of law to the historical facts. *Delhall v. State*, 95 So. 3d 134, 150 (Fla. 2012).

B. The Trial Judge's Order

In its order on the motion to suppress, the trial court found:

> Defendant . . . argues that prior to any questioning . . . [he] invoked his right to remain silent . . . The statement in question occurred

> shortly after Defendant was placed in the interview room and prior to Detective Schwall and Investigator Brendel entering the room. . . . *Miranda* warnings had not been administered at that point and no interrogation had taken place. Defendant was in the room with three deputies and requested that one deputy loosen his shackle. The deputy answered "No. No.", and Defendant's response was "No? It's too tight. I don't want to talk to nobody then." Immediately after this statement, one of the deputies loosened Defendant's shackle. At this point, no interrogation had begun, and the statement was not made in response to a question. Shortly thereafter, [the detectives] entered the room. They were not informed about Defendant's statement that he did not want to talk to anybody. Once [the detectives] entered the room, the other deputies left, and there was a brief conversation . . . [and the] Defendant was then informed of his constitutional rights . . . . Defendant voluntarily, knowingly, and intelligently waived those rights and Defendant does not challenge that waiver . . . . Following express waiver of his constitutional rights, Defendant was interrogated by Detective Schwall and Investigator Brendel.
>
> The Court finds that Defendant's statements during the April 15, 2009, interrogation conducted by Detective Schwall and Investigator Brendel are admissible. . . . [The] Defendant was informed of his *Miranda* rights and validly waived those rights prior to any interrogation. The Court notes that the alleged invocation at issue, "I don't want to talk to nobody then," was conditional on the deputies loosening his cuff. It was not made in response to any questioning and was not made in relation to any inquiry about Defendant's desire to waive his constitutional rights. The Detective and Investigator who were to conduct the interrogation were not even present in the room and were not informed of the statement prior to interrogating the defendant. . . . Additionally, the Court notes that the alleged invocation was equivocal given the content in which it was made, and therefore, the deputies were not required to clarify Defendant's equivocal statement. (V4, R687-89).

C. Case Law Supporting the Trial Court's Finding

“A trial court's ruling on a motion to suppress comes to us clothed with a presumption of correctness and, as the reviewing court, we must interpret the

evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *Delhall v. State*, 95 So. 3d 134, 150 (Fla. 2012) (*quoting Connor v. State,* 803 So. 2d 598, 605 (Fla. 2001); *Murray v. State,* 692 So. 2d 157, 159 (Fla. 1997)).

"This Court and the U.S. Supreme Court have held that an invocation of one's right to remain silent must be made in clear and unequivocal terms if it follows a previous, knowing and voluntary waiver of one's *Miranda* rights." *Martin v. State*, 107 So. 3d 281, 296 (Fla. 2012) (*citing Davis v. United States*, 512 U.S. 452 (1994) and *State v. Owen*, 696 So. 2d 715 (Fla. 1997). *See also Braddy*, 111 So. 3d at 830 (holding that statements such as "I'd rather not talk about it" and "I really don't want to talk about it" to be equivocal). Even if a defendant invokes his right to remain silent, law enforcement does not violate the invocation by later requesting a statement and providing *Miranda* warnings again. *Globe v. State*, 877 So. 2d 663, 670 (Fla. 2004).

The Defendant did not unequivocally invoke his right to remain silent. Questioning had not even begun when the Defendant made his sarcastic remark to the deputies. The deputies—not the detectives who conducted the interview—were simply bringing Fletcher into the interview room when the Defendant asked to have his shackles loosened. One deputy told the Defendant they needed to take care of the waist chains first, then they could address the shackles. The deputies

were not denying his request to loosen the shackles. Fletcher's response of, "I don't want to talk to nobody then," was conditional to his request to loosen his shackles. Most importantly, before any substantive questioning, Detective Schwall read Fletcher his *Miranda* rights, Fletcher said, "Yeah, I'll talk to you," and he signed the rights waiver. No one made any threats or promises to Fletcher to get him to waive his rights.

Later in the questioning when Fletcher was confronted with the possibility that his DNA would implicate him as the killer, he began to back-peddle and remarked that he "really [didn't] even want to tell [the detectives] everything." First, the Appellant presents this statement in a footnote rather than the body of the argument. Therefore, if the Appellant is claiming the second statement was also an unequivocal invocation of his right to remain silent, he has improperly briefed the issue. Secondly, this statement is equivocal—he is saying he wants to talk, but he wants to leave some things out. Fletcher's statement was a single instance of equivocal reluctance in the middle of a lengthy interview.

E. Appellant's Case Law, Not Applicable

The Appellant cites *Michigan v. Mosley*, 423 U.S. 96 (1975), and its progeny[27] to support his argument that he invoked his right to remain silent.

[27] Other relevant cases cited by Appellant: *Cuervo v. State*, 967 So. 2d 155 (Fla. 2007), *Bowen v. State*, 404 So. 2d 145 (Fla. 2nd DCA 1981), concern defendants whose post-*Miranda*, unequivocal invocations were not honored.

Mosley, of course, is the United States Supreme Court's landmark decision that resolved the admissibly of a defendant's custodial statements after having invoked his or her right to remain silent and whether law enforcement "scrupulously honored" the request. *Id*. at 105-106. *See also Globe*, 877 So. 2d at 669-670 (where this Court discusses the applicability of *Mosley* under Florida law). As this Court pointed out in *Globe*, the concern arises when law enforcement, refus[es] to discontinue the interrogation upon request or . . . persist[s] in repeated efforts to wear down his resistance and make him change his mind." 877 So. 2d at 669-670 (*quoting Mosley*, 423 U.S. at 105-106).

Appellant cites *Miles v. State*, 60 So. 3d 447, 452 (Fla. 1st DCA 2011), which held that police were required to clarify the suspect's intent, even after an equivocal request to remain silent, because the suspect had not yet waived *Miranda*. 60 So. 3d at 452 (*citing Almeida v. State*, 737 So. 2d 520, 523 n.7 (Fla. 1999). What the *Miles* opinion did not clarify, however, was whether a subsequent waiver of *Miranda* and voluntary statement qualifies as adequate clarification of the defendant's intent.[28] Appellant also cites *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992), claiming that if a defendant indicates "in any manner" that he does not

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[28] This Court cited *Miles* in a string cite in the *Martin* opinion to support the holding that subsequent to a valid *Miranda* waiver, any attempt to revoke the waiver must be unambiguous. 107 So. 3d at 294-295. It is not clear that the First District Court of Appeal's "pre-*Miranda* clarification requirement" for equivocal requests to remain silent comports with this Court's precedent. It is also unclear that the footnote citation from *Almeida* supports the First District's holding.

wish to be interrogated, the interrogation must not begin, or if it has already begun, must cease immediately. (*Initial Brief* at 69). This Court, however, held that Traylor's rights under Florida law were not violated when police read him his *Miranda* rights and he voluntarily waived them. *Id*. at 970-971. Law enforcement was permitted to read the defendant his rights and ask if he would like to provide a statement.

Mosley and its progeny are concerned with situations where a suspect unequivocally invokes his right to remain silent **in the middle of an interrogation** and the police fail to honor the request. In this case, questioning had not yet begun. Fletcher's exchange with the custodial deputies was a conditional statement, not a response to questioning. Once the interrogating detectives entered the room, they provided Fletcher with his *Miranda* warnings. Fletcher waived his *Miranda* rights and began his statements without any persuasion or goading by the detectives. Fletcher never invoked his right to remain silent. Even if Fletcher's remark prior to his *Miranda* waiver was an equivocal request to remain silent to which the detectives were required to seek clarification—as in *Miles*—surely the subsequent reading of *Miranda* and the Fletcher's voluntary waiver of *Miranda* was adequate clarification.

F. Harmless Error.

Even if the trial court erred in denying Fletcher's motion to suppress, the

error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). If there is no reasonable possibility that the error contributed to the conviction, the error was harmless beyond a reasonable doubt. *Deviney v. State*, 112 So. 3d 57, 79 (Fla. 2013). In this case, Fletcher did not contest the vast majority of the charges and evidence against him. Fletcher only maintains that he did not strangle the victim to death. Fletcher's statements to law enforcement are no different than the defense strategy perused at trial. The evidence that more conclusively points to Fletcher as the killer is mutually exclusive of the statements to law enforcement—Fletcher's DNA was under the victim's fingernails. Accordingly, any error in denying Fletcher's motion to suppress was harmless beyond a reasonable doubt.

ISSUE V: WHETHER THE TRIAL COURT WAS CORRECT TO DENY THE DEFENDANT'S MOTION TO SEVER THE CONSOLIDATED OFFENSES

The Defendant was charged by indictment with one count of escape, two counts of grand theft of a motor vehicle, one count of home invasion robbery, and one count of first degree murder on April 29, 2009. (V1, R7). The State also charged the Defendant by criminal information with two counts of burglary of a structure or conveyance (two additional vehicles) on June 4, 2009, which were consolidated with the indictment. (V1, R49-50). Almost twenty-six months later,

the defense[29] moved to sever the burglary of a conveyance charges, arguing they were "temporally and physically separate" from the charges in the indictment. (V3, R493-494). Defense counsel also moved to sever the escape charge and the grand theft of a motor vehicle charge in Counts I and II of the indictment, arguing that those offenses were temporally and physically separate from the remaining charges in the indictment. (V3, R499). The trial court denied the Defendant's motion to sever. (V4, R684-686).

A. The Standard of Appellate Review.

Granting a severance is largely a matter within the trial courts discretion. *Id. See also Crossley v. State,* 596 So. 2d 447, 450 (Fla. 1992) (noting that the standard of review for cases involving the consolidation or severance of charges is one of abuse of discretion).

B. The Trial Judge's Order

In its order denying the motion to sever, he trial court found:

> The indictment contains five counts: Escape (Count I), Grand Theft Motor Vehicle (Count II), First Degree Murder (Count III), Home Invasion Robbery (County IV), and Grand Theft Motor Vehicle (Count V). Additionally, cases CF09-806 and CF09-807 were consolidated with the instant case on June 11, 2009. Both of these cases charge the defendant with burglaries that happened in the vicinity of the grand theft alleged in Count II of the Indictment. The defendant argues that he should be tried separately for the Escape

[29] The public defender and criminal conflict counsel were allowed to withdraw from the case in November and December of 2009 respectively. Attorney Garry Wood was appointed on December 7, 2009. (V1, R145, 151).

charge because the events concerning the Escape are temporally and physically separate from the other four counts, that he should be tried separately for the Grand Theft Motor Vehicle (Count II) because the facts and circumstances concerning the theft of a vehicle belonging to Todd Lewis are temporally and physically separate from the remaining charges in the Indictment, that he should be tried separately for the burglaries alleged in CF09-806 and CF09- 807. Defendant also argues that an order of severance is appropriate to promote a fair determination of the guilt or innocence of the Defendant with respect to each offense.

The Court finds that the seven different charges were all part of the same episode, and therefore, they were properly charged in the same indictment or properly consolidated upon motion by the state. . . . All of the crimes happened within approximately ten miles of one another. At the hearing, Defense Counsel stated that the location of the grand theft alleged in Count II and the burglaries in CF09-806 and CF09-807 occurred approximately one mile from the jail. He stated that the victims discovered the theft and burglaries on the morning of April 15. Defense Counsel stated that the escape happened very early in the morning on April 15, and the vehicle theft and burglary discoveries, as well as the murder (Count III), home invasion robbery (Count IV), and grand theft (Count V) involving Helen Googe occurred later the morning of April 15. In his interview following arrest, Defendant admitted to breaking into the vehicles that are the subject of CF09-806 and CF09-807 and to stealing the truck that is the subject of Count II of the Indictment, immediately after his escape from the Putnam County jail. Defendant also admitted that they drove the stolen truck to Helen Googe's house, and that their plan was to rob her and take the money to finance their flight from jurisdiction. Each crime alleged in the Indictment and in cases CF09-806 and CF09-807 are relevant because each crime was part of one episode, and all were committed in order to evade re-arrest after the escape.

. . . The Court finds that severance is not necessary on this basis. Even in Counts I and II and the burglary cases were severed, the acts alleged in those counts would be admissible in a trial of Counts III, IV, and V as collateral crime evidence because they establish the entire context out of which the crimes charged in Counts III, IV, and V arose, and they adequately describe the events leading up to the

> crimes charged in Counts III, IV, and V. . . . Because this evidence would be admissible as collateral crime evidence even if the counts were severed, the defendant is not prejudiced by the court's denial of his request for severance of these counts. (V4, R684-86).

C. Case Law Supporting the Trial Court's Finding

Criminal charges joined for trial must "be considered in an episodic sense." *Lugo v. State*, 845 So. 2d 74, 93 (Fla. 2003). "Moreover, there must be a 'meaningful relationship' between or among the charges before they can be tried together . . . . the crimes in question must be linked in some significant way." *Id.* "Courts may consider 'the temporal and geographical association, the nature of the crimes, and the manner in which they were committed . . . . interests in practicality, efficiency, expense, convenience, and judicial economy, do not outweigh the defendant's right to a fair determination of guilt or innocence." *Gudinas v. State*, 693 So. 2d 953, 959 (Fla. 1997). "There is always . . . some prejudice in any trial where more than one offense . . . [is] tried together—but such 'garden variety' prejudice, in and of itself, will not suffice to justify severance of the charges." *Lugo*, 845 So. 2d at 96 n.39 (*quoting United States v. Baltas*, 236 F.3d 27, 34 (1st Cir. 2001)).

In *Gudinas*, the Court discussed the "classic" examples of an "uninterrupted crime spree" and "sufficient causal link" that justify joinder of offenses,

> [I]n *Bundy v. State,* 455 So.2d 330 (Fla.1984) . . . the defendant first attacked four women, killing two, in a Florida State University sorority house. Roughly an hour later, Bundy attacked a fifth woman in an apartment house several blocks away. In *Bundy,* we found that

> the criminal acts [were] connected by the close proximity in time and location, by their nature, and by the manner in which they were perpetrated." We later characterized the Bundy crimes as "a classic example of an uninterrupted crime spree in which no significant period of respite separated the multiple crimes. . . . In *Fotopoulos v. State,* 608 So.2d 784 (Fla.1992) . . . the defendant induced a woman to murder another man while he videotaped the shooting. He then used the video to blackmail the woman into hiring a hit man to murder his wife a month later. We found that since one crime induced the other crime, a sufficient causal link existed to permit joinder. From our review of those cases, we concluded:
>
>> First, for joinder to be appropriate the crimes in question must be linked in some significant way. This can include the fact that they occurred during a "spree" interrupted by no significant period of respite, *Bundy,* or the fact that one crime is causally related to the other, even though there may have been a significant lapse of time. *Fotopoulos.* But the mere fact of a general temporal and geographic proximity is not sufficient in itself to justify joinder except to the extent that it helps prove a proper and significant link between the crimes.

Gudinas, 693 So. 2d 953, 960 (Fla. 1997) (internal quotations and citations omitted).

In this case, Fletcher's crimes not only have a sufficient causal link like *Fotopoulos*, they demonstrate an uninterrupted crime spree like *Bundy*. Fletcher escaped from the Putnam County Jail in the midnight hours of April 15, 2009 (Count I). Moments later and a mile down the road, Fletcher burglarized two vehicles (CF09-806 and CF09-807 joined to the indictment) attempting to steal them and then succeeded in stealing a third vehicle (Count II) to effectuate his escape. Within ten miles of the escape, Fletcher drove the stolen vehicle Helen

Googe's home where he intended to steal money and other valuables from her to fund his escape from Florida and eventually the country. Fletcher then invaded Helen Googe's home, still in the early morning hours of April 15, 2009, killed Googe (Count III), robbed her of her money and valuables (Count IV) and stole her vehicle (Count V) all in an effort to further his escape from jail and, after having killed Helen Googe, his flight from the murder scene. All five counts of the indictment and the two joined burglary charges occurred within ten miles of on another inside a window of a few shorts hours before sunrise on the same morning. Fletcher committed the burglaries and the first grand theft to expedite his escape. Fletcher invaded and robbed Googe's home to generate funds for his flight from Putnam County. Fletcher murdered Googe during the home invasion robbery, in furtherance of the robbery. Finally, Fletcher sole Helen Googe's vehicle to facilitate his escape and to flee from the murder scene he had just created.

Additionally, the trial court properly instructed the that "each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each . . . a finding of guilty or not guilty as to one crime must not affect your verdict as the other crimes charged." (V22, R3352). Under these circumstances, joinder of the seven offenses was appropriate. Severance was not necessary to achieve a fair determination of Fletcher's guilt because the joined offenses would have been admissible as collateral crime evidence to the other

charges in the indictment to establish the context from which this crime spree arose.

D. Appellant's Case Law is Distinguishable

The cases cited by Appellant to support his argument are inapposite to the controlling cases cited above that support a denial of severance. *See generally Garcia v. State*, 568 So. 2d 896, 898 (Fla. 1990) (four pairs of murders were improperly consolidated where they occurred over a three month period and evidence was insufficient to establish a common scheme); *Crossley v. State*, 596 So. 2d 447, 450 (Fla. 1992) (two separate and independent robberies that did not have a meaningful relationship to one anther were improperly joined). Furthermore, *Sosa v. State*, 639 So. 2d 173, 174 (Fla. 3rd DCA 1994) is inapplicable because the trial court specifically ruled that the felony conviction for which Fletcher was in lawful custody would not be admissible. Accordingly, Appellant's case law is inapplicable and distinguishable.

E. Harmless Error

Even if the burglaries should not have been joined, any error was harmless beyond a reasonable doubt, *DiGuilio*, 491 So. 2d at 1129, for the same reasons the trial court found that the defendant was not prejudiced by the denial of severance. All of the offenses that occurred during the Defendant's course of criminal conduct on the morning on April 15, 2009 would have been admissible as collateral crime

evidence of the principal crimes in the indictment—the murder and home invasion robbery.

ISSUE VI: WHETHER THE PROSECUTOR'S PENALTY PHASE ARGUMENTS DEPRIVED THE DEFENDANT OF A FAIR SENTENCING PROCEDURE

During the State's penalty phase closing argument, the prosecutor argued without objection, "What is the appropriate sentence for someone who, just three days after her murder, refers to her with -- by terms such as bitch, ignorant, dumb-ass?" (V22, R3651). Later, addressing the weight the jury should give to the proffered mitigation, the prosecutor argued without objection,

> I submit to you a lot of people have drug addictions. Most of them do not murder other people. . . . A lot of people are depressed, but they don't go and murder other people. . . . Now, there's a lot of people who come from tough circumstances, abusive families, but they, too, most of them, do not go and murder other people. . . . A lot of people have artistic ability, but they don't murder other people.(V22, R3663, 3664, 3669).

The Appellant claims that the prosecutor's first argument was an improper reference to the Defendant's lack of remorse. (*Initial Brief* at 77). The Appellant argues that the prosecutor's second argument improperly denigrates the Defendant's mitigation. (*Initial Brief* at 78).

A. The Standard of Appellate Review

Failing to raise a[n] objection waives any claim for appellate review. *Mosley*, 46 So. 3d at 519 (Fla. 2009). Absent fundamental error, appellate review is

precluded. *Crump*, 622 So. 2d at 972.

B. Case Law Supporting the State

"Lack of remorse is unquestionably an improper aggravator." *Silvia v. State*, 60 So. 3d 959, 976 (Fla. 2011). Counsel, however, is permitted wide latitude in arguing about the evidence before the jury. *Moore v. State*, 701 So. 2d 545, 551 (Fla. 2001) (where the state argued that much of the defendant's mitigation—supportive family, good grades, active athlete, had a normal life—was actually aggravating). *See also Braddy*, 111 So. 3d at 854 (prosecutor's argument that defense counsel was "screaming about the aggravation" to "detract from what was written in stone" was improper denigration of defense but not fundamental error). For prosecutorial comments that are improper, reversal is not automatic. *Hayward v. State*, 24 So. 3d 17, 42-43 (Fla. 2009) (finding no fundamental error in prosecutor's improper penalty phase argument comparing the defendant's life choices to the victim's).

First, the prosecutor's argument that discussed Fletcher referring to the victim in derogatory terms was not an implied "lack of remorse" argument. The record—even as cited by the Appellant—flatly refutes the Appellant's claim. The prosecutor recounted what the Defendant said about the victim as he rhetorically discussed what the appropriate sentence should be. The prosecutor's argument did not place an aggravating label on mitigating evidence. The prosecutor provided a

basis for the jury to give the mitigation less weight based on the circumstances.

C. Appellant's Case Law, Not Applicable

The case Appellant cites are distinguishable from this case. In *Walker v. State*, 707 So. 2d 300, 314 (Fla. 1997), the prosecutor called the defense experts "hired guns" and violated the "golden rule" in argument—inviting the jury to place themselves in the victim's position and imagine their suffering. This Court found, however, that the arguments did not constitute fundamental error. *Id*. *Cf*. *Brooks v. State*, 762 So. 2d 879, 904 (Fla. 2000) (new penalty phase required when prosecutor committed numerous instances of misconduct that were objected to, including a golden rule violation, personal attacks on defense counsel, prosecutorial expertise argument, and inflammatory descriptions of the victim's death). *See also Delhall*, 95 So. 3d at 167-168 (prosecutor called the mitigation "excuses" and argued that the defendant "can't be fixed" and the defense objected, the comments required reversal).

Different from the cases cited by the Appellant, the prosecutor's arguments in this case were either not improper or they do not rise to the level of fundamental error. Unlike many of the Appellant's cited cases where the defense objected, Fletcher's claims are unpreserved and must rise to the level of vitiating the entire trial. Like in *Hayward*, this Court has held that arguments comparing the victim's and defendant's life choices may be improper, but not fundamental error.

Furthermore, arguing to the jury the defendant's statements about the victim has not been held to be improper.

G. Harmless Error

The state recognizes that a harmless error analysis is inapplicable to a fundamental error analysis. *Haygood v. State*, 109 So. 3d 735, 741 (Fla. 2013). Furthermore, should this Court find that the trial court's action and/or the prosecutor's statement constituted error, but not fundamental, then this issue is precluded from appellate review for lack of preservation. *Crump*, 622 So. 2d at 972.

ISSUE VII: WHETHER NON-STATUTORY AGGRAVATING EVIDENCE WAS ADMITTED AT THE PENALTY PHASE AND IF SO, WHETHER THE DEFENDANT IS ENTITLED TO A NEW PENALTY PHASE

Dr. Harry Krop testified for the defense in the penalty phase.[30] At the invitation of defense counsel, Krop discussed the criteria of Antisocial Personality Disorder ("ASPD"). Krop discussed Fletcher's conduct disorder as a youth, suspensions from school, and "getting into the criminal system in his adolescent years," as factors that supported the ASPD diagnosis. (V23, R3423). Krop also

[30] Dr. Krop diagnosed the Defendant with the following: Polysubstance dependence; Chronic insomnia; depressive disorder (situational); and Antisocial Personality Disorder. (V23, R3419-3422). Dr. Krop also noticed in the Defendant's history there being mention of symptoms of Bi-Polar Disorder, though no symptoms presently (V23, R3418) and prior history of Posttraumatic Stress Disorder, though he does not suffer from it presently (V23, R3419).

discussed at length Fletcher's extensive use of illicit drugs, the fact the Fletcher was incarcerated when his mother passed away, and obtaining his GED while he was incarcerated. (V23, R3424-3427, 3439, 3440). On cross-examination, Krop also testified that the Defendant, "had a number of arrests . . . mostly grand theft, burglary, or breaking-and-entering . . . ." (V23, R3453).

Dr. Gregory Pritchard testified for the State in rebuttal. Pritchard discussed, without objection, the numerous times that Fletcher had been incarcerated as they related to his evaluation an diagnosis.[31] (V24, R3554, 3559, 3562). Pritchard also discussed the numerous Department of Corrections ("DOC") records that he reviewed and the DOC mental health providers that had treated the Defendant. (V24, R3555-57). The defense objected when Pritchard began to discuss the specific criminal offenses Fletcher had committed, as early as his teenage years, that supported the ASPD criteria. (V24, R3570-3571).

Out of the presence of the jury, the remainder of Pritchard's testimony was proffered. Pritchard testified about Fletcher's juvenile convictions and the dates of arrest, conviction, sentencing, and release for all of his criminal offenses, without discussing the nature of the specific crimes. (V24, 3576-3578). During the proffer, Pritchard discussed Fletcher's drug use, an armed robbery charge, and his disciplinary record while incarcerated to include gang membership, and a domestic

[31] Dr. Pritchard diagnosed the Defendant with ASPD, polysubstance dependence, and a depressive disorder (not otherwise specified). (V24, R3559).

violence incident with a girlfriend. (V24, R3581, 3584-3586). During the proffer, Pritchard also discussed the lack of remorse as an ASPD criterion, supported by Fletcher's attitude towards the victim. (V24, R3588). The trial court ruled that Fletcher's pattern of criminal conduct can be discussed without specific references to offenses, lack of remorse can only be mentioned as a criteria of ASPD, and gang membership will not be mentioned. (V24, R3592-3594).[32] When Pritchard testified to the jury that lack of remorse was a criteria of APSD, the court overruled the defense's objection. (V24, R3598).

Pritchard also testified about the Psychopathy Check List-Revised (PLC-R) and after an objection and a proffer, the court permitted testimony as to why the test is important in an evaluation and whether the defense expert should have administered it. (V24, R3612). The State decided to forgo any further questions about the PLC-R and tendered the witness when the jury returned. (V24, R3613). Defense counsel questioned Pritchard numerous times about Fletcher's illicit drug use. (V24, R3614, 3619-3620).

A. The Standard of Appellate Review

A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *Dessaure v. State*, 891 So. 2d 455, 466 (Fla. 2004). "A motion for a mistrial should only be granted when an error is so prejudicial as

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[32] The trial court specifically instructed the State that it cannot try to turn a mitigator into an aggravator. (V24, R3596).

to vitiate the entire trial. A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review." *Silvia*, 60 So. 3d at 975-76.

B. Case Law Supporting the Trial Court's Finding

Lack of Remorse

Questioning a mental health expert about "lack of remorse" as a part of the diagnostic criteria for a mental health diagnosis, does not require reversal, especially when it was not argued to the jury. *Silvia*, 60 So. 3d at 976. Confronting an issue similar to what is raised here, in *Silvia* this Court found that the trial court did not abuse its discretion in allowing the State's expert, Dr. Danziger, to testify about lack of remorse as a criteria of ASPD. *Id*. at 975. This Court also pointed out that the prosecutor did not argue lack of remorse to the jury like in other cases where remand was proper. *Id*. at 976.

In this case, the Defendant opened the door to mental health evidence—good and bad. Dr. Krop testified about the defendant's criminal history and the criteria for ASPD. Dr. Pritchard's testimony was offered in rebuttal and was very similar to what the defense had already presented through Dr. Krop. The prosecutor did not argued lack of remorse and the trial court did not mention it in the sentencing order. The trial court directed the State to limit the lack of remorse questions to the diagnostic criteria and nothing more and that is all the State did in questioning both Dr. Krop and Dr. Pritchard.

Defendant's Criminal Record and Future Dangerousness

Mental health experts can testify about a defendant's past criminal conduct during a penalty phase as it relates to the evaluation of the defendant or in rebuttal. *Hilton v. State*, 117 So. 3d 742, 751 (Fla. 2013). In *Hilton*, the trial court allowed the State's expert, Dr. Pritchard, to testify about specific instances of the defendant's prior criminal conduct. *Id*. The testimony was permitted in such specific detail to rebut the theory that the defendant had not gotten into trouble prior to the offense at hand. Importantly, however, this Court ruled that "it must be remembered that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the defendant's character." *Hilton*, 117 So. 3d at 751 (*quoting Hildwin v. State*, 531 So. 2d 124, 127 (Fla. 1988) (emphasis added). *Cf*. *Hitchock v. State*, 673 So. 2d 859, 861 (Fla. 1996) (references to defendant's prior felonies without relevant connection to the penalty phase was improper) (*Initial Brief* at 85).

In this case, Dr. Pritchard testified similarly to Dr. Krop, the defense expert, about the Defendant's prior criminal record. After the defense opened the door to mental health evidence, Dr. Pritchard mentioned the criminal record on more occasions as he provided a more thorough explanation of the Defendant's various diagnoses. The trial court ultimately ruled that the State could question Dr.

Pritchard about the criminal record as it related to the diagnoses without going into the specific instances. The State and Dr. Pritchard complied. As this Court stated in *Hilton*, the penalty phase focuses on the Defendant's character and that is exactly what Dr. Pritchard's testimony accomplished.

It is improper to present future dangerousness as aggravation. *Allen v. State*, 38 Fla. L. Weekly S592 (Fla. July 11, 2013). Isolated references, however, do not require reversal. *Id*. (where the prosecutor asked two separate cross-examination questions of the defense expert about future dangerousness but the State did not argue it and the trial court instructed the jury on proper aggravation, reversal was not required). While the issue was unpreserved in *Allen*, this Court noted that the isolated questioning about future dangerousness was "less egregious than those warranting reversal when the issue was preserved." *Id*. *Cf*. *Delhall v. State*, 95 So. 3d 134, 168 (Fla. 2012) (new penalty phase required where prosecutor argued numerous times with and without objection that the defendant was "dangerous" and "can't be fixed") (*Initial Brief* at 86).

In this case, the State did not ask, and Dr. Pritchard did not testify, about Fletcher's future dangerousness. The State did not offer argument about future dangerousness. Defense counsel thought that Dr. Pritchard's testimony about the PCL-R **may** go in the direction of future dangerousness and quickly asked for a proffer outside of the jury's presence. After hearing the proffer and argument, the

Court ruled that the PCL-R could be discussed only as a means of evaluating the Defendant and whether the defense expert should have used it. Nonetheless, the State decided to forgo any further questioning to avoid even an ambiguous reference to something improper and tendered the witness to cross-examination when the jury returned. There was no testimony or argument about future dangerousness and therefore, no error.

C. Harmless Error

Error, if any, in the prosecutor's argument or Dr. Pritchard's testimony was harmless beyond a reasonable doubt. *Walker v. State*, 707 So. 2d 300, 314 (Fla. 1997) (finding it harmless error when the prosecutor improperly asked expert whether defendant may kill again [future dangerousness] but the trial court properly instructed the jury and the incident was isolated).

ISSUE VIII: WHETHER THE DEATH PENALTY IN THIS CASE IS PROPORTIONATE

In his eighth claim, the Appellant challenges the proportionality of his death sentence. This Court has a "mandatory obligation to independently review and address the proportionality of the death sentence" in Florida. *Oyola v. State*, 99 So. 3d 431, 449 (Fla. 2012). In doing so, this Court "engage[s] in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." *Barnes v. State*, 29 So. 3d 1010, 1025 (Fla. 2010).

A. The Standard of Appellate Review

This Court “will not disturb the sentencing judge's determination as to the relative weight to give to each established mitigator where that ruling is supported by competent substantial evidence. *Barnes v. State*, 29 So. 3d 1010, 1028 (Fla. 2010) (internal quotations omitted). The proportionality review “is not a comparison between the number of aggravating and mitigating circumstances.” *Id*. (*citing Porter v. State,* 564 So.2d 1060, 1064 (Fla.1990). "[T]he review is a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Barnes*, 29 So. 3d at 1028 (emphasis in original) (internal quotations omitted).

B. Case Law Supporting the Death Penalty

Disparate Sentence of Codefendant

In evaluating the proportionality of Fletcher's death sentence the trial court gave great weigh to the fact that the Defendant's accomplice, Donnie Brown, pled guilty and received a life sentence. Judge Berger, however, entered detailed findings as to the relative culpability between the Fletcher and Brown. The evidence supports the trial court's conclusion that the Defendant, not Donnie Brown, strangled Helen Googe to death and was therefore more culpable.

When the circumstances indicate that the Defendant is more culpable than a co-defendant, "disparate treatment is not impermissible despite the fact that the

codefendant received a lighter sentence for participation in the same crime." *Hernandez v. State*, 4 So. 3d 642, 671 (Fla. 2009). In *Hernandez*, the defendant and his accomplice were looking to purchase crack-cocaine and went to their usual dealer's house. *Hernandez*, 4 So. 3d at 647-648. The dealer was not home but his mother was, so the defendants decided to get money from her. *Id*. At various times, both defendant's had a hand in physically striking or holding the victim down. *Id*. Although buying crack and getting money from the dealer's mother had been the codefendant Arnold's idea, ultimately, it was the defendant Hernandez who broke the victim's neck and stabbed her in the throat with a pocket knife. *Id*. This Court found that the disparate sentences between the defendants in that case was justified under those circumstances.

In *Brooks v. State*, 918 So. 2d 181, 208 (Fla. 2005) (*receded from on other grounds by State v. Sturdivant*, 94 So. 3d 434 (Fla. 2012)), the Defendant claimed that his codefendant had actually killed their victim, but the evidence suggested otherwise. The victims in the *Brooks* case were found stabbed to death in a car. The fatal blows had been inflicted by the person sitting in the rear seat on the driver's side of the car—Brooks was the individual in that particular seat. *Id*. at 209. This Court found that Brooks' disparate treatment from his codefendant—who received a life sentence and did not testify at Brooks' trial—was not disproportionate. *Id*.

Like the defendants in *Hernandez* and *Brooks*, Fletcher is more culpable than his accomplice. Like the defendant in *Brooks*, Fletcher claims that his codefendant is the actual killer. As the trial court found, however, the evidence supports the conclusion that the Defendant strangled the victim. The Defendant had scratches on his arms and the Defendant's DNA was consistent with the DNA recovered from underneath the victim's fingernails. Even more compelling than the circumstances in *Hernandez*, the evidence not only indicates that Fletcher strangled the victim to death, but Fletcher was also the mastermind behind the plot to escape, burglarize the victim, steal her car, flee to Kentucky, and return to Putnam County. Over two separate occasions, the Defendant stole the car-jack and crank-rod from the Sheriff's transport van. The Defendant, not Donnie Brown, knew the victim and had the special knowledge of her financial circumstances—Fletcher, not Donnie Brown, believed that the victim had a safe with a large sum of money in it. The Defendant knew about the firewood door that provided access to the victim's house, not Donnie Brown. The Defendant hated victim, not Donnie Brown. The evidence supports the conclusion that the Defendant was the mastermind of the entire criminal episode from breaking out of jail to strangling Helen Googe with his bare hands while she fought for her life. Accordingly, Donnie Brown's disparate sentence does not render Fletcher's death sentence disproportionate.

Proportionality

In this case, the jury recommended death by a vote of eight to four and the trial court gave the recommendation great weight. The court also found the following four aggravators to include HAC and under sentence of imprisonment. The court also found one statutory mitigator and fourteen non-statutory mitigators.

This Court has found the death penalty to be proportionate in cases similar to Fletcher's. In *Baker v. State*, 71 So. 3d 802, 822 (Fla. 2011), the defendant and codefendant robbed and kidnapped their victim before murdering her. The jury recommended death by a nine to three vote and the trial court found three aggravators: 1) home invasion robbery, kidnapping, and pecuniary gain (merged as single aggravator); 2) HAC; and 3) the murder was cold, calculated, and premeditated (CCP). The *Baker* trial court found one statutory mitigator (age 20) and several non-statutory mitigators to include: brain damage, low intellectual functioning, drug abuse, fetal alcohol exposure, abusive family, and neglect as a child. The codefendant in *Baker* received a life sentence. *Id*. This Court found the death sentence to be proportionate. *Id*.

In *Gamble v. State*, 659 So. 2d 242 (Fla. 1995), the defendant and codefendant robbed and killed their landlord. The jury recommended death by a ten to two vote but the trial court only found two aggravators (CCP and pecuniary gain), one statutory mitigator (age) and several non-statutory mitigator, and his

codefendant was sentenced to life. *Id*. at 245. This Court found the death penalty to be proportionate. *Id*.

C. Appellant's Case Law is Distinguishable

The Appellant cites several cases in which this Court has vacated a death sentence, "where multiple aggravators weighed against substantial mitigation." (*Initial Brief* at 88-89). A closer look at the Appellant's cases will demonstrate that they are distinguishable from or inapplicable to Fletcher's case.

In *Cooper v. State*, this Court vacated the death sentence of a defendant who committed a murder during an armed robbery. 739 So. 2d 82, 85 (Fla. 1999).[33] The *Cooper* trial court found a prior violent felony (robbery), the contemporaneous robbery, and CCP as aggravation. *Id*. The mitigation, however, demonstrated that the defendant suffered from a brutal childhood, brain damage, boarder-line intellectual functioning, and paranoid schizophrenia. *Id*. **Cooper was only 18 years old and had no criminal record prior the murder**. *Id*. In *Urbin v. State*, 714 So. 2d 411 (Fla. 1998), the victim was killed during an armed robbery. Urbin was only 17 years old[34] at the time of the murder and the codefendants were 18 years old. *Id*. The "robbery" and "pecuniary gain" aggravators were merged. *Id*.

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[33] (WELLS, J. dissenting, where the majority "erroneously assume[d] a sentencing role" and summarily dismissed the trial court's "in-the-courtroom evaluation of the penalty phase evidence.")

[34] At that time under Florida law, sixteen and seventeen year olds were eligible for the death penalty. *See Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994).

The mitigation established that the Urbin's mother neglected the defendant, was a drug dealer and a prostitute, and was in prison when Urbin was between the ages of eleven and thirteen. *Id*. at 418. The defendant's age was the most compelling circumstance in the Court's analysis. *Id*. at 417-418.

In *Curtis v. State*, 685 So. 2d 1234 (Fla. 1996), the defendants robbed a convenience store during which two victims were shot and one died. The codefendant plead guilty and received a life sentence. *Id*. at 1235. The evidence indicated that the codefendant was the actual killer. *Id*. Like Urbin, Curtis was only seventeen. *Id*. at 1237. In *Morgan v. State*, 639 So. 2d 6 (Fla. 1994), **the sixteen year old defendant** was working for his father's law service mowing the victim's law the day of the murder. *Id*. at 9. The defendant had been drinking and huffing gasoline earlier in the day and believe that the victim was calling his parents when he went into a fit of rage and crushed the victim's skull with a wrench and stabbed her numerous times. *Id*. The trial judge found that the murder was committed during an enumerated felony and that it was HAC. *Id*. Morgan's age, however, marginal intelligence, illiteracy, history of abusing alcohol and huffing gasoline outweighed the aggravation. *Id*.

In *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988), after robbing a house earlier in the day, the defendant robbed a convenience store and killed the store clerk in the process. *Id*. at 1289. The trial court found three aggravators: prior

violent felony, during a robbery, and avoid arrest. The Supreme Court struck the avoid arrest aggravator and weighed the remaining two against the mitigation—severe child abuse, maternal neglect, marginal intelligence (from child abuse), and cocaine addiction as a teenager—and find the death penalty disproportionate. *Id*. at 1292. Of significant persuasion to the Court was Livingston's youth, inexperience, and immaturity—Livingston was only seventeen years old at the time of the murder. *Id*.

Unlike all of the cases cited by the Appellant in support of his proportionality argument, age was not mitigating in Fletcher's favor. Fletcher was twenty-five years old at the time of the murder, above average intelligence, experienced in life and had a significant criminal record. As the trial court observed, this Court has frequently upheld the rejection of age as mitigation when the defendant was in his early twenties with no other demonstration of mental or emotions immaturity. *Caballero v. State*, 851 So. 2d 655, 661-662 (Fla. 2003). Additionally, Fletcher was the mastermind of the entire criminal episode leading up to, during, and after the murder. Unlike *Curtis*, the evidence indicates that Fletcher was the killer rather than his codefendant.

While Fletcher's mitigation demonstrated that he suffered from depression, substance abuse, an corporal punishment from his father, the sum of Fletcher's mitigation pales in comparison to the cases where this Court has vacated the death

sentence. Qualitatively, the mitigation that in Fletcher's case does not come close to the severe abuse, low intellectual functioning, and tender age that combined to render the death sentence disproportionate in *Cooper*, *Urbin*, *Curtis*, *Morgan*, and *Livingston*. Furthermore, *Roper v. Simmons*, 543 U.S. 551 (2005), makes *Urbin*, *Curtis*, *Morgan*, and *Livingston* inapplicable and completely unpersuasive to Fletcher's proportionality analysis. The age of the defendants in those cases makes them all legally ineligible for the death penalty. Fletcher's death sentence is proportionate.

ISSUE IX: WHETHER THE TRIAL COURT'S SENTENCING ORDER CONTAINS ERRORS, INDIVIDUALLY AND CUMMULATIVELY, THAT REQUIRE REMAND FOR A NEW PENALTY PHASE

The Appellant claims the trial court should not have given great weight to the "under sentence of imprisonment" aggravator and that the court "failed to assess all of Defendant's mitigating circumstances and failed to give established mitigating circumstances sufficient weight." (*Initial Brief* at 92[35]). Also, the

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[35] The Appellant also mentions in a footnote that "Mitigating evidence must be considered and weighed when it is contained *anywhere in the record* to the extent it is uncontroverted and believable." (emphasis in *initial brief*) (*citing Spann v. State*, 857 So. 2d 845, 857 (Fla. 2003)). Appellant claims that the trial court did not mention or consider the mitigating factors that Defendant had ADD and ADHD or that he had a mood disorder. However, defense counsel did not proffer ADD, ADHD, or mood disorder as mitigation for the court to consider in his penalty phase argument, sentencing memorandum, or *Spencer* hearing argument. The Defendant briefly mentioned ADD in his *Spencer* hearing statement. (V9, R1399). Dr. Krop did not discuss or conclude that the Defendant had ADD or ADHD. Dr.

Appellant claims that the "contemporaneous conviction aggravator operates as an impermissible automatic aggravator because it is duplicative of felony murder." (*Initial Brief* at 90). Additionally, the Appellant claims that the heinous, atrocious, and cruel aggravator ("HAC") is not supported by competent substantial evidence. (*Initial Brief* at 91).

A. The Standard of Appellate Review

The weight a trial court assigns to mitigation is within its discretion and will not be disturbed on appeal absent an abuse of that discretion. *Allen v. State*, 38 Fla. L. Weekly S592 (Fla. July 11, 2013) (*citing Douglas v. State,* 878 So. 2d 1246, 1257 (Fla. 2004). Whether a statutory aggravating circumstances unconstitutionally creates an automatic aggravator and a presumption of death is a question of law reviewed by this Court de novo. *See Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006) (*citing Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1997). In reviewing the trial court's finding of an aggravating circumstance, this Court's "task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." *Allen*, 38 Fla. L. Weekly S592.

Pritchard briefly discussed it and concluded that the Defendant did not have ADHD. (V24, R3624). Lastly the trial court considered and concluded that the evidence did not support that the Defendant had Bi-Polar Disorder. Whether the Defendant had ADD, ADHD, or a mood disorder was clearly contested, considered, and not established. Furthermore, the Appellant's mention of this issue in a footnote is insufficient for this Court to consider it for relief.

C. The Trial Judge's Sentencing Order

In its detailed sentencing order, the trial court made findings as to the aggravation and mitigation in this case. The trial court addressed all of the mitigation requested by the Defendant. The court entered findings as to whether the Defendant had established the mitigation and, if so, the weight assigned (see **Issue VIII**, **B**, ***Proportionality*** above).

Specific Findings as to the HAC Aggravator

After identify the correct law form this Court, the trial court found and applied the following facts to support the HAC aggravator:

> During the course of this brutal murder, the Defendant and Donnie Brown woke Helen Googe from her sleep, threatened her with a firearm, bound her hands, struck her in the face, pushed her on the bed, held her down, grabbed her around the neck, put a pillow case over her head, held her by the neck and feet, and took turns attempting to strangle her on multiple occasions, all while the victim verbally expressed her fear and continuously fought for her life. At the very end, the Defendant described holding the victim down on the floor with his full body weight, for at least a minute, to stop her from kicking while Donnie Brown sat on top of her and strangled the life out of her, The Defendant said he continued to hold the victim down until her body went limp. Then, to ensure she was dead, the two placed a plastic bag over her head and tied it shut.
>
> Of great significance to this aggravating factor is the opinion of Dr. Bulic that Ms. Googe was conscious at the time the strangulation began. He based his opinion on the fact that there was no significant trauma to Helen Googe's head that would cause her to lose consciousness. This finding was also consistent with the Defendant's own statements regarding how the victim fought against *him* and Donnie Brown by "kicking and clawing and

> screaming." Dr. Bulic testified that it would take an average of 10 seconds of continuous pressure for someone to lose consciousness while being strangled and between two and five minutes of constant pressure for irreversible brain death to occur. He described the body's physiological reaction to manual strangulation. Dr. Bulic testified the body becomes highly alert with increased heartbeat, respiration and blood pressure, meaning there is a flight or fight reaction. Adrenaline begins circulating through the body. There is anxiety, apprehension and a sense of impending doom, after which a person loses consciousness. There is also a degree of pain associated with manual strangulation.
>
> . . . Based on the evidence presented during the trial, there can be no doubt that Helen Googe, in the moments leading up to her death, had the opportunity to contemplate her death and suffer extreme anxiety and fear as a result. Helen Googe fought for her life. The scratches on the Defendant's arms, coupled with his DNA under her fingernails proves this fact. And, notably, the Defendant's statement, "She knew—she was fighting and kicking the whole time," and "she was shaking real bad," supports the inference that Helen Googe was afraid and knew she was going to die. . . . Helen Googe was, without question, alive and conscious during this vicious attack. (V6, R937-939).

E. Case Law Supporting the Trial Court's Finding

The Weight of the Aggravation and Mitigation

When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature . . . . *Allen*, 38 Fla. L. Weekly S592 (Fla. July 11, 2013) (*citing Brown v. Wainwright,* 392 So. 2d 1327, 1331 (Fla. 1981). The weight a trial court assigns to aggravation and

mitigation is within its discretion and will not be disturbed on appeal absent an abuse of that discretion. *Allen*, 38 Fla. L. Weekly S592. *See also Snelgrove v. State*, 107 So. 3d 242, 257 (Fla. 2012). There are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight. *Trease v. State,* 768 So. 2d 1050, 1055 (Fla. 2000). In *Trease*, this Court also held, "[T]he sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case." 768 So. 2d at 1055. The weight a trial court affords particular aggravation or mitigation is akin to this Court's proportionality review, which "entails a qualitative review . . . of the underlying basis for each aggravator and mitigator rather than a quantitative analysis," based on the " totality of the circumstances." *Gregory v. State*, 38 Fla. L. Weekly S471 (Fla. June 27, 2013). If the trial court rejects a mitigating factor requested by the Defendant, this Court will sustain the trial court's ruling if the record "contains competent, substantial evidence to support the trial court's rejection of these mitigating circumstances." *Martin v. State*, 107 So. 3d 281, 318 (Fla. 2012).

While the proffered mitigation need not have any nexus to the murder, the trial court is permitted to place context around the mitigating circumstances of the defendant. *Id.* at 319. Having a nexus to the murder certainly could make the mitigation more persuasive, thus deserving more weight, depending on the totality

of the circumstances. In this case, the trial court considered each of the mitigating circumstances presented by Fletcher, and the trial court provided detailed factual findings as to the reasons or circumstances upon which it based its evaluation of each mitigating circumstance. All of the trial court's findings are clearly supported by the record. Review of the sentencing order shows that Fletcher's assertion is without merit. The trial court identified each mitigating circumstance presented by the defense and stated its conclusion as to each mitigator, supplying facts and reasoning for its conclusions. The trial court adequately reviewed each of the proposed aggravators and mitigators and applied the relevant facts of the case to each. The trial court gave careful consideration to the aggravating and mitigating circumstances, carefully weighed them, and found that the aggravation outweighed the mitigation.

The HAC Aggravator

The HAC aggravator focuses on "the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death." *Barnhill v. State*, 834 So. 2d 836, 849-850 (Fla. 2002). Death by strangulation constitutes prima facie evidence of HAC. *Id*. "[I]t is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this

method of killing is one to which the factor of heinousness is applicable." *McWatters v. State*, 36 So. 3d 613, 643 (Fla. 2010). "This Court has consistently held that HAC applies to murders by strangulation of a conscious victim because a killing by this method is inherently torturous." *Frances v. State*, 970 So. 2d 806, 815 (Fla. 2007).

In this case, reasonable jurists could agree that competent, substantial evidence supports the trial court's finding of this aggravator. The medical examiner testified that the victim was conscious when she was strangled—impliedly HAC according to this Court's precedent—because there were no injuries that would indicate she was unconscious at the time of strangulation. According to the medical examiner, during strangulation Helen Googe's body became highly alert with an increased heartbeat, respiration, and blood pressure. She experienced a fight or flight reaction and she had no means of escape. As her adrenaline circulated through her body, Helen Googe experienced anxiety, apprehension and a sense of impending doom before she would have lost consciousness. The victim also experienced physical pain during the strangulation.

Additionally, the victim was tormented by the Defendant and his accomplice prior to being murdered. After breaking into her house in the middle of the night and waking her from her sleep, the Defendant and Brown pushed, struck, and held the victim down, put a pillow case over her head, before the Defendant strangled

her. The victim expressed her fear to her attackers and she fought for her life. By the Defendant's own admission, Helen Googe was "kicking and clawing and screaming."

Contemporaneous Felony Aggravator

This Court has consistently held that the contemporaneous felony aggravator does not constitute automatic aggravation nor a presumption in favor of the death sentence. *Miller*, 926 So. 2d at 1260. In *Miller*, this Court observed and held,

> Miller argues that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony. This Court has rejected the argument that Florida's capital sentencing scheme is unconstitutional because it provides for an automatic aggravating circumstance and neither narrow[s] the class of persons eligible for the death penalty nor reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder. . . . Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony.

926 So. 2d at 1260. (internal citations and quotations omitted).

In this case, the trial court followed this Court's precedent and applied the correct law to the facts in the case. The Jury convicted the Defendant of home invasion robbery and the trial court articulated the facts that support the aggravator in its sentencing order. This Court has addressed this claim numerous times and each time found it to be without merit. Fletcher's claim does not warrant relief.

F. Appellant's Case Law Distinguishable

HAC

Appellant cites to the Court, *Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989) in support of his argument that not all strangulation murders are HAC. (*Initial Brief* at 91). *Rhodes*, however, is distinguishable from this case. First, the issue in *Rhodes* was not whether the HAC aggravator should apply to a strangulation murder. This issue was whether the State had met its burden of proving the existence of the aggravators beyond a reasonable doubt. *Id*. at 1208. In *Rhodes*, there were conflicting accounts as to whether the victim was conscious, semi-conscious, or "knocked-out drunk" during the murder. Furthermore, the *Rhodes* case was riddled with additional errors unrelated to the HAC aggravator and inapplicable to anything in this case: the trial court had improper communication with the jury, inadmissible evidence was presented to the jury, the prosecutor made improper comments[36] to the jury, only one of the three aggravators was supported by competent substantial evidence, and substantial psychiatric testimony in mitigation

[36] Comments by prosecuting attorney in closing argument of murder trial, asking jurors to place themselves in hotel where incident took place, stressing that victim's body had been transported from hotel in dump truck, suggesting that defendant might be paroled before he served 25-year mandatory term, claiming that defendant acted as vampire in committing crime, and urging that jury show defendants same mercy defendant showed to victim, all of which were objected to and none of which objections were sustained, constituted unnecessary appeal to sympathy of jury calculated to influence their sentence recommendation and was prejudicial error. *Rhodes*, 547 So. 2d at 1201.

all combined to require a new penalty phase. That combination of issues is not present in this case and *Rhodes* does not suggest that the HAC aggravator should not apply to the circumstances of this case.

Herzog v. State, 439 So. 2d 1372 (Fla. 1983), is distinguishable from Appellant's case. In *Herzog*, the victim was strangled to death with a telephone cord and the trial court applied the HAC aggravator to the murder. *Id*. at 1375, 1380. This Court found that HAC should not have applied to the *Herzog* murder because "victim was under heavy influence of methaqualone and unconscious prior to her death, she had self-inflicted injuries and it was unclear what amount of punishment was inflicted by defendant's hand before the murderous acts." *Id*. Furthermore, the *Herzog* trial court considered disposal of the body as a factor to support HAC, which this Court has held is irrelevant to the HAC analysis. *Id*. at 1380.

Unlike *Rhodes* and *Herzog*, in this case, the evidence supports the conclusion that the victim was conscious when she was strangled and therefore supports the inference that the murder was HAC. The medical examiner testified that the victim was conscious at the time of strangulation. There is no indication that the victim was under the influence of intoxicants that would have induced unconsciousness or semi-consciousness prior to strangulation. In fact, according to

the Defendant's own statements, Helen Googe fought "kicking and clawing and screaming."

G. Harmless Error

Regarding the weight assigned to the aggravation and mitigation and the finding of the HAC aggravator, should this Court find error in the trial court's sentencing order, the State contends that any error is harmless beyond a reasonable doubt. *Hall v. State*, 107 So. 3d 262, 278-279 (Fla. 2012) ("When an aggravator is stricken on appeal, the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence"). The State would also submit that if this Court finds, contrary to its long held precedent, that the contemporaneous felony aggravator is unconstitutional, the HAC and "under sentence of imprisonment" aggravators remain along with the jury's recommendation for death and combine to outweigh the mitigation in this case. Should this Court strike the HAC aggravator, the contemporaneous robbery aggravator and the under sentence of imprisonment aggravator remain.

ISSUE X: WHETHER FLORIDA'S CAPITAL PUNISHMENT STATUTES VIOLATE THE STATE AND FEDERAL CONSTITUTIONS

The Appellant claims that Florida's capital punishment statute violates the state and federal constitutions under *Ring v. Arizona*, 536 U.S. 584 (2002). The Appellant specifically challenges the provision of the law that allows "a *non-*

unanimous jury (as in this case) to render an advisory *recommendation*, and not a binding decision." (*Initial Brief* at 97) (Italics in original).

It was unclear whether the remaining body of this issue in the initial brief was argument in support of the *Ring* claim, or a subterfuge of insufficiently briefed sub-claims. In his argument under this issue, the Appellant also remarks on the following additional provisions of Florida capital sentencing: that the trial judge, rather than the jury, makes specific findings for the imposition of the death penalty; that the indictment failed to allege the aggravating factors;[37] that the jury instruction on finding and weighing aggravators is insufficient (the "floating majorities" argument in note 56 of the Initial Brief at 97); that the felony murder aggravator creates and automatic aggravator and a presumption for a death sentence; that victim impact evidence should not be considered by the jury; and that the heinous, atrocious, and cruel aggravator is unconstitutionally vague and overbroad. To the extent the Appellant is attempting to raise these comments as sub-claims of this issue, they are insufficiently briefed and should not be considered by this Court on appeal. *Simmons v. State*, 934 So. 2d 1100, 1111 (Fla. 2006) (*citing Duest v. Dugger,* 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of

[37] Ostensibly referring to the United States Supreme Court decision in *Apprendi v. New Jeresy*, 530 U.S. 466 (2000), which this Court has held inapplicable under Florida law. *Cox v. State,* 819 So. 2d 705, 724-725 (Fla. 2002) ("since all of the possible aggravating factors are detailed in . . . the Florida Statutes . . . "no reason [for] the State to notify defendants of the aggravating factors it intends to prove.").

an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.") Otherwise, the State will consider the additional remarks as argument in support of the Appellant's *Ring* claim challenging Florida's non-unanimous and non-binding jury recommendation. The Defendant unsuccessfully challenged Florida's capital punishment sentencing statute under *Ring v. Arizona* through pre-trial motion. (V2, R158-85; V9, R1520-23). Following this Court precedent, the trial court denied the Appellant's pre-trial motion under *Ring v. Arizona*. (V2, R341; V9, R1523).

A. The Standard of Appellate Review

Whether Florida's capital punishment sentencing statute violates the United States and Florida Constitutions is a questions of law reviewed by this Court de novo. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002).

B. Case Law Supporting the State

First, the United States Supreme Court has reviewed and upheld Florida's capital sentencing statute for what is now approaching thirty years since the reconstruction[38] of capital punishment in the United States. *Bottoson*, 833 So. 2d at 695. *See also Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468

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[38] *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983); *Proffitt v. Florida*, 428 U.S. 242 (1976).

Secondly, this Court has "repeatedly rejected the assertion that *Ring* requires aggravating circumstances be found individually by a unanimous vote." *Oyola v. State*, 99 So. 3d 431, 449 (Fla. 2012). Lastly, this Court has also held that *Ring* does not apply to cases that involve the prior violent felony and under sentence of imprisonment aggravators. *Victorino v. State*, 23 So. 3d. 87 (Fla. 2009). Appellant's death sentences are supported by a jury finding beyond a reasonable doubt of the home invasion robbery (Count IV) that serves as aggravator in this case. The Defendant also has a prior conviction for separate burglaries he committed in Clay County for which he was serving a ten-year sentence of imprisonment. Appellant's claim does not merit relief.

ISSUE XI: WHETHER THERE IS A CUMULATION OF ERRORS FROM THE GUILT AND PENALTY PHASES THAT REQUIRES A NEW TRIAL AND PENALTY PHASE

In his final issue, the Appellant asserts a cumulative error claim based errors he alleges occurred in both phases of the trial. The success of this claim is contingent upon the Appellant prevailing on some or all of issues raised above. The Appellant offers no additional case law to support this issue other than the fact this Court has considered cumulative error as a basis for relief. (*Initial Brief* at 99) (*citing Patrick v. State*, 104 So. 3d 1046, 1068-1069 (Fla. 2012). The State rests on

its arguments to issues above and submits that they are dispositive of those issues and that the Appellant's cumulative error claim does not merit relief—there is no sum of errors to cumulate.

CONCLUSION

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

Respectfully submitted and certified,
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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by U.S. MAIL/E-MAIL to the following: J. Rafael Rodriguez, jrafrod@bellsouth.net, on September 16, 2013.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

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