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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-2469

DALE GLENN MIDDLETON

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR OKEECHOBEE COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Dale Glenn Middleton, Defendant below, will be referred to as "Middleton" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record will be by "R", to the postconviction record will be "PCR", and supplemental materials will be designated by the symbol "S" preceding the type of record referenced, Middleton's initial brief will be notated as "IB" followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On September 9, 2009 the State indicted Dale Middleton on one count of first degree murder with a weapon, one count of burglary of an occupied Dwelling while armed, one count of third degree grand theft, and one count in dealing in stolen property. (ROA 1:38, 43) Middleton filed a motion to suppress and a hearing on it was held on April 20 and June 29, 2012. The court denied that motion in a written order. (ROA 3:508, 4, 5, 10, 11 & 12) The jury trial began on July 23, 2012 and the jury convicted Middleton of first degree murder, armed burglary, and dealing in stolen property on August 6, 2012. (ROA 22:2392-96) The penalty phase trial began on August 8, 2012 and concluded the next day with an unanimous jury recommendation for death. The trial court held the hearing pursuant to Spencer v. State, 133 So. 2d 729 (Fla. 1961), on August 24, 2012. On

October 19, 2012 the trial court sentenced Middleton to death after finding eleven non-statutory mitigators and 4 aggravating factors. The trial court found the following aggravating circumstances: 1) the murder was committed during a burglary merged with the factor that it was committed for pecuniary gain (great weight); 2) the murder was committed to avoid arrest (great weight); 3) the murder was especially heinous, atrocious, and cruel (great weight); and the murder was committed in a cold, calculated, and premeditated manner (great weight). The non-statutory factors in mitigation the court found were: 1) Middleton suffers from below average intelligence and attention deficit hyperactivity disorder (little weight); 2) he has a long history of chronic substance abuse (some weight); 3) he was neglected as a child and had a dysfunctional family life (little weight); 4) he was steadily employed until his substance abuse and incarcerations made that difficult to maintain (little weight); 5) he had little formal education (little weight); 6) he had two children (little weight); 7) he had remorse for the crime (little weight); and 8) he behaved appropriately in court (little weight).

Dale Middleton lived across the street from Roberta Christensen ("Roberta") and her husband Eric Christensen Sr. ("Christensen Sr."). Middleton knew Roberta because he would go over to her trailer to have coffee, bum cigarettes, and borrow small amounts of money. Christensen Sr. had left town to help his son on July 1 and Middleton was aware of that. (T 17/1578-81) Christensen Sr. and Roberta had

a very close relationship and would speak to each other multiple times a day. (T 17/1578-81) On July 27 Roberta told him that she was at the bank depositing her tip money. The conversation continued until she returned home and saw the screen by the front door was pulled out a bit but she told him everything looked fine. (T 17:1582-84) He spoke to her again on the 28th around three in the afternoon but could not reach her after that. (T 17:1585-88) He called his son to check on her, which he did. Eric Christensen Jr. ("Christensen Jr.") went to his parents' home after leaving Wal-Mart with his wife following him. (T 17:1592-96) He saw his mother's car in front next to the door. When he entered the house, the door was open and the lights were off. There was a large pool of blood in the kitchen with a blood trail leading to the master bedroom. He found her dead in the bedroom and called the police and his father. (T 15:1597-1605)

Detective Marty Faulkner ("Faulkner") supervised the investigation of this murder. When he entered the home he noticed that a television was missing from the living room. (T 17:1621) Jackie Moore was the crime scene technician working this investigation. When she arrived in the evening of July 28 to process the scene she noted that the car was parked in the driveway, clearly visible from the road, and one had to walk right past it to enter the house. (T 20: 1967-68) There were no signs of forced entry and no signs of blood or struggle in the living room. (Id. 1969, 1972) The television, along with its power cord and remote, was missing

from the living room. (Id. 1973) She described the pattern of blood she found on the furniture, floor, and walls throughout the kitchen, hallway, and bedroom. The trail began close to the front door where the kitchen began, continued around the kitchen table and continued with drag marks alone the hall floor. The bedroom's carpet was saturated with blood. Roberta's body had blood all over her chest and stomach and the waist band of her pants was saturated. He shirt was pulled up from her stomach consistent with having been dragged backwards. Roberta had wounds to her arms, wrists, and hands which were defensive in nature. There were a number of items around her which might have been grabbed by her during a struggle. (Id. 1974-85) She found a number of foot prints in the house which she photographed. She later documented the shoes worn by everyone interviewed as a witness as well as others who had been in the house. (Id. 1990-91) She found a shoe print on Middleton's kitchen floor which was consistent with the ones in Roberta's home. (Id. 2004)

Fred Bradley was a crime scene detective who found and collected blood evidence from Middleton's house. (T 20:2010-11) He found blood on Middleton's bedroom floor as well as a boot imprint. One of the blood samples collected from that floor was a combination of two DNA sources with the major profile being consistent with Roberta's DNA. (T 21:2068-74) In the trunk of Britnell's car he found a pair of Wolverine boots which also had blood on them. (T 20: 2013-21)

The blood on those boots had a full DNA profile and was conclusively Roberta's. (T 21:2075-77) The tread design on those boots was consistent with the impressions left in Roberta's house as well as the one in Middleton's kitchen. (T 21:2135-45)

Stuart James was a consulting blood stain expert. He reviewed the police reports, photographs, autopsy report, and the physical evidence collected in this case. (T 21:2082, 2103) Based upon his detailed analysis he opined that Roberta was attacked near the front door and fought with the knife wielding man. She was then dragged back toward the bedroom while she struggled. Her throat was cut numerous times from behind while she struggled. (Id. 2118-20)

Linda O'Neill was the medical examiner who performed the autopsy. (Id. 2166) She described numerous cut and stab wounds to her face, including one on the side of her nose next to her eye. She also had a number of bruises and abrasions on her face, including a shoe print on her right cheek. The shoe print bruise was consistent with the tread design from the Wolervine boots and was consistent with someone stomping on her face before she died. (Id. 2168-71, 2146-47, 2180) She also found numerous stab wounds to her chest, the base of her neck, her arms, and palm. The wounds on her arms and hands were defensive and Roberta was conscious when they were inflicted, as she was with the wounds to her face, back, and chest. (Id. 2173-79, 2191) The bruising in her forehead was consistent with her

being restrained from behind. (Id. 2180) There was extensive bruising in her jaw, her ear, and cheeks. There was a large gaping wound to her neck which went all the way through to her spine which was also damaged by the knife. That major fatal wound was caused by multiple passes of a knife similar to a sawing motion. She would have been conscious for 10-20 seconds after that neck wound and would have died within minutes. (Id. 2191-96)

Steve Britnell ("Britnell") picked Middleton up on the morning of July 28. The two spent the day doing errands and doing some drugs. They were at Middleton's trailer in the afternoon with two of Middleton's roommates, Wade and his girlfriend. (T 18:1714-17) Around four in the afternoon, Britnell went to Wal-Mart with Garrett Wade Fowler ("Fowler"), another roommate of Middleton's, after Middleton had refused to go, saying that someone owed him money and he had business to do. (Id. 1717-20) Middleton showed up at Christopher Lein's home around 5 and asked if he wanted to buy a big screen television. Middleton was nervous and tried to leave very quickly. (T 17:1628-32) When Britnell and Wade returned between 5:30 and 6, there was a large screen television in the kitchen which had not been there when they left. Middleton was freshly showered. (T 18:1724-26)

Middleton called Christopher Jenkins ("Jenkins") between 4 to 5:30 on the

28th and asked him to come to his trailer. (T 17:1642-44) Once he had arrived, Middleton showed him a large television and explained that someone gave him it in exchange for a debt. Jenkins took a photograph of it with his phone at 5:59 PM in order to show his girlfriend. He left and Middleton called him later to say that the pawn shops were closed.

Britnell took Middleton to pawn the television but all the shops were closed. (T 18:1726-27) The two made some phone calls trying to find someone to buy it. Eventually, he drove Middleton to Randy Ammons's house between 6:30 to 7 that evening. Middleton had called him to sell the television. Middleton showed him the set and was acting very hyper. Randy took Britnell and Middleton to his brother Rolland's house. Rolland bought the set and had Middleton take it in and set it up; he was emotional and crying while inside the house. (T 18:1684-1711)

After Middleton sold the television, he and Britnell bought some drugs. While they were driving home, Britnell's car broke down. Middleton went to a bar while Britnell repaired the car. On the ride to his home, Middleton is very emotional while on the telephone. (Id. 1728-32) The two see lots of police lights and activity as they approach Middleton's trailer so Middleton directed Britnell to take him over to a friend's house. While they were standing in the yard, a couple of officers stopped and asked all of them to go to the station to give statements. Everyone, including Middleton, agreed. Britnell gave the police permission to

search his car. The boots found in the trunk were not his. (Id. 1731-35)

A couple of weeks before the murder, Middleton told Fowler about a plan to commit a robbery and again mentioned it on July 28. Middleton told him that Roberta put away lots of cash in her home and her husband was gone. (T 19:1804-5) In the afternoon of the 28th, Middleton came home with Britnell and the two went into the bedroom for a while. Later, Fowler and Britnell went to Wal-Mart around 4:15. Britnell stole some locks and Fowler returned them for store credit at 5:16. They returned home a little after 6. (Id. 1806-14) When he returned Fowler sat on the trailer steps since there were so many people inside. Middleton came out and stood on the top step near Fowler's head. He had showered and changed. Fowler said Middleton was wearing Wolverine boots and said something to him about the red substance on them. Once Fowler went inside, he saw a large television on the kitchen floor which had not been there previously. Middleton said someone owed him money and gave it to him in exchange. (Id. 1817-21) After Middleton left to pawn the set, Fowler heard a commotion across the street. He went to comfort a screaming woman and then went in Roberta's home where he saw blood all over the place and her body in the door of the bedroom. (Id. 1822-26)

Middleton spoke to Faulkner five times, eventually confessing in the last interview. Middleton said that he had spoken to Fowler about robbing Roberta for

a few days. When Britnell and Fowler left to go to Wal-Mart, he went over and knocked on her door. He asked for money and she refused. He went crazy and attacked her with a kitchen knife he had in his back pocket. (T 22:2257-59) He said he took the television but did not take or look for any money. (Id. 2260) He put the clothes and the knife in a bag and threw it in a dumpster. (Id. 2259, 2277) He was wearing the Wolverine boot and did not throw those away. He put them in Britnell's trunk after he saw the police activity. (Id. 2265, 2281) He sold the television to Randy's brother. (Id. 2268)

Both Christensen Sr. and his son, along with Ashley Christensen, gave victim impact statements in the penalty phase. Dr. James Barnard ("Dr. Barnard"), a psychologist, evaluated Middleton and reviewed his records. He testified to Middleton's chaotic family life, lack of supervision, failure to attend school, and behavioral problems. Middleton's IQ was 83 and reads at a very low level. He diagnosed him with anti-social personality disorder ("ASPD") and chronic polysubstance abuse. Dr. Barnard opined that the two statutory mental health mitigators of an inability of appreciate the criminality of his conduct or to conform his conduct to the requirements of the law applied to this crime. (T 24:2500-31)

In rebuttal, the State present Dr. Deborah Leporowski, also a psychologist. While she also scored Middleton's IQ between 83-85 she found that he tested quite high on the malingering exams. (Id. 2595-14) She also diagnosed him with ASPD

and polysubstance abuse, finding that he scored very high on the checklist to test for ASPD. (Id. 2615-21, 2631) She opined that he had deliberately not tried on other IQ tests and was trying to manipulate the other doctors. She said his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not impaired the night of the murder. (Id. 2622-23).

SUMMARY OF THE ARGUMENT

Point I – There was competent, substantial evidence to support the trial court's finding that the avoid arrest and CCP aggravators.

Point II – The trial court did not abuse its discretion in requiring the defense to start its case on time given the defense had failed to prepare properly and suffered no prejudice in the change in the witness testimony.

Point III – The trial court did not abuse its discretion for not appointing a mitigation specialist when the defense failed to make a proper showing. The issue is also not preserved since the defense never again brought the motion.

Point IV – The trial court did perform an individualized sentencing and did not abuse its discretion in determining the credibility of the witnesses.

Point V – There was competent substantial evidence for the trial court's denial of the motion to suppress and it made the proper findings.

Point VI – There was sufficient evidence for convictions of both premeditated and felony murder.

Point VII – The CCP aggravator is constitutional on its face.

Point VIII – The standard jury instructions and the death penalty sentencing statute are constitutional in directing the jury on how to approach mitigation.

Point IX – Ring v. Arizon, 122 S. Ct. 2428 does not apply in Florida and does not offer Middleton any relief given his burglary conviction.

Point X – The felony murder aggravator is constitutional.

ARGUMENT

POINT I
THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THET TRIAL COURT'S FINDING OF THE AVOID ARREST AND COLD CALCULATED AND PREMENDITATED AGGRAVATORS. (restated)

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test with a determination whether the right rule of law was applied. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt-that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997); McGirth v. State, 48 So.3d 777 (Fla. 2010). "This Court has concluded that 'competent substantial evidence' is tantamount to 'legally sufficient evidence' and "[i]n criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt.'" Williams v. State, 967 So.2d 735, 761 (Fla. 2007)

(citations omitted).

This Court has stated that: "[I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt, that is the trial court's job." Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). Rather, "[i]n reviewing an aggravating factor challenged on appeal, this Court's task '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.'" Hernandez v. State, 4 So. 3d 642, 667 (Fla. 2009) (quoting Douglas v. State, 878 So. 2d 1246, 1260-61 (Fla. 2004)).

Avoid arrest

Because any killing could arguably be to avoid lawful arrest, this Court has held that:

> [t]he aggravator of killing with the intent to avoid lawful arrest applies to witness elimination. . . . In such cases, the mere fact of a death is not enough to invoke this factor . . . . Proof of the requisite intent to avoid arrest and detection must be very strong . . . . The evidence must prove that the sole or dominant motive for the killing was to eliminate a witness.

Trease v. State, 768 So. 2d 1050, 1055-1056 (Fla. 2000) (internal citations; quotation marks omitted). In order to establish the avoid arrest aggravator "where the victim is not a law enforcement officer, the State must show beyond a

reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness." Hernandez, 4 So. 3d at 667 (quoting Connor v. State, 803 So. 2d 598, 610 (Fla. 2001)). "In such cases, proof of the intent to avoid arrest or detection must be very strong." Id. (citing Riley v. State, 366 So. 2d 19, 22 (Fla. 1978)).

In some cases, this Court has upheld the avoid arrest aggravator where a defendant made statements indicating his fear of arrest or his desire to eliminate a witness. Id. (citing Bevel v. State, 983 So. 2d 505, 519 (Fla. 2008)); Trease, 768 So. 2d at 1056 (upholding aggravator where defendant said he killed the victim because the victim could identify him); Walls v. State, 641 So. 2d 381, 390 (Fla. 1994) (upholding aggravator where defendant confessed he killed the victim because he wanted no witnesses). "[I]n other cases this Court has approved the finding based on circumstantial evidence, without any direct statements by the defendant indicating a motive to eliminate witnesses." Hernandez, 4 So. 3d at 667 (citing Swafford v. State, 533 So. 2d 270, 276 (Fla. 1988)). "[E]ven without direct evidence of the offender's thought processes, the arrest avoidance aggravator can be supported by circumstantial evidence through inference from the facts shown." Id. (quoting Swafford, 533 So. 2d at 276 n.6). Circumstantial evidence generally relied upon to prove this aggravator includes "whether the victim knew and could identify the killer and 'whether the defendant used gloves, wore a mask, or made

incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant.'" Id. (quoting Farina v. State, 801 So. 2d 44, 54 (Fla. 2001)).

The trial court made the following factual findings in determining that this aggravator applied to the murder:

> The following facts establish this aggravator:
> 1) The defendant personally knew the victim, and went to her home without any type of disguise.
>
> 2) The defendant told Garrett Wade that he was going to rob Roberta Christensen, after seeing a large amount of money inside her home the day before.
>
> 3) The defendant walked 130 feet to the victim's home in broad daylight.
>
> 4) The defendant knew that the victim was home because he could see her red car from his own home, and the car was parked directly in front of the entrance to her home.
>
> 5) The defendant knew that the victim's husband was out of town and she was home alone.
>
> 6) The victim did not pose any physical threat to the defendant.
>
> 7) The defendant armed himself with a knife from his residence, and before going over to the victim's home.
>
> 8) The victim was defendant's neighbor, who lived almost directly across the street.
>
> The defendant could have waited for the red car to leave, and

> then go over to take the flat screen television. But the TV was not the primary objective of his criminal endeavor; he wanted the easily concealable tip money. Also, the defendant is significantly bigger, stronger and younger than the victim. He could easily overpower her, incapacitate her, and take whatever he wanted. However, if left alive, the defendant would have been quickly arrested.
> ...
> Additionally the manner in which the defendant murdered Roberta Christensen shows that this was not just a reaction, but a intentional act to eliminate her as a witness.

(ROA 6:1145-46). As the court noted, Middleton deliberately committed the burglary while Roberta was home, presumably with her purse and cash. There was no indication that Middleton tried to steal from her without killing her since the attack began within steps of the front door as shown by the blood drops and stains. He went to the scene armed with a knife taken from his kitchen. He made no attempt to tie her up or even wait until night to take the money and television by stealth. Roberta posed no threat to him; she did not attack him but only asked him to leave. Middleton points to the defensive wounds on her as evidence that she resisted. There is no evidence that she resisted him taking property, only to him taking her life. Middleton had no wounds, bruise, or even little cuts on him. Competent, substantial evidence supported the trial court's finding of this aggravator.

This Court has upheld the avoid arrest aggravator in similar cases. In Hernandez v. State, 4 So.3d 642, 667 (Fla. 2009) the defendant went to meet his

drug dealer but only his mother was home. Hernandez then demanded money from her, saying it was a debt her son owed. When she said she only had $20, he attacked her in increasingly violent ways in order to kill her. Later, he mentioned that she had seen his face. In McGirth this court upheld the avoid arrest aggravator when defendant entered the house, demanded money from an older woman, shot her in the chest, immobilized her husband, took their property, and then shot both in the head. This Court noted that defendant could have left without shooting the couple who posed no danger to them and that the evidence indicated that a dominant reason for the killing was to avoid arrest. McGirth, 48 So.3d at 793. See Serrano v. State, 64 So.3d 93, 114 (Fla. 2011) (Avoid arrest upheld when victim knew defendant, was a witness to a crime, and did not pose a threat to him so only reason to kill her was to eliminate her a witness.); Looney v. State, 803 So.2d 656, 677–78 (Fla.2001) (finding that once the defendants immobilized the victims, obtained their property, and secured a getaway, there was no reason to kill the victims except to eliminate them as witnesses); Buzia v. State, 926 So.2d 1203, 1210 (Fla.2006)(Buzia knew his victims, he easily subdued the victims, and the victims posed no immediate threat to Buzia so there was little reason to kill the victims other than to avoid arrest.); Hoskins v. State, 965 So.2d 1, 20 (Fla.2007) (holding that avoid-arrest aggravator was supported by fact that defendant could have left elderly victim, who had been bound and gagged, without killing her);

Thompson v. State, 648 So.2d 692, 695 (Fla.1994) (upholding the avoid-arrest aggravating factor where *608 defendant had little reason to kill the victims-other than to eliminate witnesses-after obtaining the victims' money). This Court has also held that the manner of killing can be indicative of avoid arrest if was not of a nature that could be considered reactionary or instinctive. The killing here where Middleton slashed Roberta's throat repeatedly, sawing through her neck, rather than locking her in the bedroom or tying her up supports the finding that the dominant motive for killing her was to avoid identification. Jennings v. State, 718 So.2d 144, 150-151 (Fla. 1998) (Avoid arrest upheld when defendant had a mask but did not use it, wore gloves, and the bound victims knew him.).

Middleton cites to three cases all of which are old and distinguishable from this one. In Green v State, 583 So. 2d 647 (Fla. 1991) the defendant had a big argument with the victim during which he stabbed her, much unlike the killing in Jennings above. Green also turned himself in to the police, an indication that he was not trying to avoid arrest. The situation in Perry v. State, 522 So.2d 817 (Fla. 1988) is also different. There was evidence that Perry panicked during the confrontation with the victim. He voluntarily went to the station and confessed before the police could read him his Miranda rights. It is also interesting to note that the jury voted to give Perry a life sentence but the judge overrode their recommendation. Finally, in Davis v. State, 604 SO.2d 794 (Fla. 1992) the facts

are similar to those here but there was no indication that Davis knew the victim was home when he went to steal from her and the Court found the sole motive was pecuniary gain.

Finally, any error in giving or finding this aggravator was harmless given the other three weighty aggravators of felony murder, the murder was cold, calculated, and premeditated, and it was committed while the defendant was engaged in the commission of a burglary. Even if the avoid arrest aggravator is stricken, this Court's confidence in the sentence would remain. Chamberlain v. State, 881 So.2d 1087, 1109 (Fla.2004) (stating "CCP and prior violent felony conviction are considered among the more serious aggravating circumstances."); Rivera v. State, 859 So.2d 495, 505 (Fla.,2003); Porter v. State, 788 So.2d 917, 925 (Fla. 2001). This Court should deny relief.

CCP

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." McWatters v. State, 36 So.3d 613, 642 (Fla.) (quoting Lynch v. State, 841 So.2d 362, 368 (Fla.2003)), cert. denied, —— U.S. ——, 131 S.Ct. 510 (2010). Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial

evidence test with a determination whether the right rule of law was applied.

Alston, 723 So. 2d at 160. (Court should not reweigh evidence but determine if trial court cited correct law and whether competent substantial evidence supported its finding.). Competent substantial evidence is tantamount to legally sufficient evidence. Williams, 967 So.2d at 761.

> With respect to CCP, this Court has stated:
> In order to establish the CCP aggravator, the evidence must show that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.
>
> ... While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." ... The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." ... However, CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.

Philmore v. State, 820 So.2d 919, 933 (Fla. 2002) (quoting Farina v. State, 801 So.2d 44, 53-54 (Fla. 2001). "[T]he facts supporting CCP must focus on the manner in which the crime was executed, e.g., advance procurement of weapon, lack of provocation, killing carried out as a matter of course." Lynch v. State, 841

So.2d 362, 372 (Fla. 2003).

A court must consider the totality of the circumstances of a crime to ascertain whether CCP is present. Hudson v. State, 992 So. 2d 96 (Fla. 2008), cert. denied, 129 S. Ct. 1360 (2009); Wike v. State, 698 So.2d 817, 823 (Fla.1997); see also Lynch v. State, 841 So.2d 362, 372 (Fla.2003); Rodriguez v. State, 753 So.2d 29, 46 (Fla.2000); Occhicone v. State, 570 So.2d 902, 905 (Fla.1990). When this Court evaluates a trial court's decision finding an aggravating circumstance:

> [I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine [1] whether the trial court applied the right rule of law for each aggravating circumstance and, if so [2] whether competent substantial evidence supports its finding.

Baker v. State, 71 So.3d 802, 818 (Fla.2011) (quoting Willacy v. State, 696 So.2d 693, 695 (Fla.1997)).

In its sentencing order the court made the following findings in regard to this aggravator:

> The facts surrounding the murder of Roberta Christensen reveal that this was a planned event, not a sudden, impulsive act. The defendant seen Roberta Christensen with a large amount of money, and told Garrett Fowler that he was going to rob her. The day before the murder, Ms. Christensen told her husband that the defendant had come to the house the day before to borrow a cigarette, and she was concerned that she [sic] saw her tip money. The following day he waited until his roommate was leaving, declining an offer to go with him and another person to Wal-Mart, telling them that, “he had business to take care of, and that he was going to shower.” It is" notable that he predicted the need to shower before they returned from

> the store. When the defendant's roommate left, he armed himself with a knife and walked across the street to where he knew that the victim was home alone. The defendant did [sic] attempt to disguise himself or conceal his identity, even though he was well known neighbor who would be easily recognized. He claims to have gained entry to her home by asking to borrow money, and when she refused and tried to get him to leave, he pulled out his knife and began to attack her. Even after the initial struggle, he remained in the home stabbing her, and dragging her to the back bedroom, where he deliberately cut at her throat with a sawing motion several times almost decapitating her. While there is evidence of drug use, his actions following the homicide negate any claim that he was so high on drugs that this was an emotional frenzy, panic or a fit of rage. The defendant searched the home for money; but Ms. Christensen had deposited the money in the bank because of her concern regarding the defendant's intentions. Instead, he stole her large flat screen television, carried it across the street and covered it with a blanket. Then, he cleaned up, changed clothes, lied to his friends about where he obtained the television, and threw away the murder weapon and bloody clothing. The officers who initially contacted him after the homicide also testified that he showed no sign of alcohol or drug impairment or intoxication.
>
> ...
> … Significantly, this defendant armed himself in advance with knife from his kitchen, prior to walking 130 feet to the victim's home, with the fully formed intent to rob her. This is not a situation where the defendant grabbed a knife at the crime scene, or where the defendant always carried a pocket knife or a knife for fishing. …
>
> Here, the defendant discussed robbing the victim the day before, obtained a weapon prior to going to the victim's home, and confronted her in the privacy of her home knowing that she was alone. He then took efforts to clean up and to get rid of incriminating evidence. Then, he engaged in purposeful, directed behavior in an effort to sell the victim's television to obtain $200, money for his own use.

(ROA 6:1151-54) As noted in the order, Middleton went to Roberta's home armed with a knife. He got that knife from his kitchen and it was not something he

normally carried.

Q: What kind of weapon did you use?

A: It was a knife.

Q: Do you -- where did -- where did you get the knife?

A: The kitchen sink.

Q: Her kitchen or yours?

A: Mine.

Q: So you already had the knife when you went over there?

A: Yes, sir. It was in my back pocket.

(T 22:2258) Tellingly, Middleton hid the knife from Roberta when he was at her door. Again, Roberta did not provoke him and she was attacked just inside her home. (T 20:1970, 1973-75) He chased her into the kitchen and around the table. Additionally, he did not stop with stabbing her nor did he try to get her to comply. After stabbing her he dragged her bodily under her arms to the bedroom so he could kill her in a more private place. All of this is evidence of premeditation and CCP. This element exists where a defendant has the opportunity to leave the crime scene with the victims alive but, instead, commits the murders. See Alston v. State, 723 So.2d 148, 162 (Fla.1998) (quoting Jackson v. State, 704 So.2d 500, 505 (Fla.1997)).

Middleton contends that he was so impaired by drugs that the killing could

not have been "cold." The court, however, addressed this issue elsewhere in its order and made factual findings. (ROA 6:1163-35) This killing was "cold." The evidence at trial indicated that Middleton was not impaired at the time of the crime. Britnell testified that he and Middleton did some Xanax (about 1 each) the morning of the murder and did only a very small amount of meth around 1 P.M. in the afternoon. (T 18:1716-17, 1739-41) They consumed more drugs after the murder doing the eight ball of cocaine they bought on the proceeds of the television. (Id. 1746) Neither Britnell nor Fowler said that Middleton was impaired when he told them he wanted to take a shower and collect on a debt. Dr. Barnard testified that Middleton said that he had a very high tolerance for drugs and that meth actually helped him think better. (T 24:2573-77) Although not referred to in this section of the sentencing order, the court was also aware of the testimony of Captain Rhoden that Middleton was not under the influence when he encountered him in the yard that night. (ROA 6:1163-64) There was no argument or fight between Middleton and Roberta nor did she provoke him in anyway. Middleton had no injuries at all from this attack, indicating that Roberta never fought him, but only defended herself and struggled to get away. This court has explained that a chronic drug abuser can still act in accordance with a deliberate plan where the evidence indicates that he "was fully cognizant of his actions on the night of the murder." Guardado v. State, 965 So.2d 108, 117 (Fla. 2007) (quoting Robinson v. State, 761

So.2d 269, 278 (Fla. 1999)). There is clearly competent, substantial evidence to support the court's finding of the "cold" element of the CCP aggravator.

The killing was also calculated as the trial court found. Defendant makes too much of his confession where he said that his intent was only to rob Roberta. His preparation speaks to a coldly planned murder, even though he conveniently neglects to admit to that fact. Middleton knew Roberta was alone and had commented on that at least twice to Fowler when discussing targeting her. The day of the murder, he told Fowler that he was going to rob her that day and made up a story to be alone in his house when his roommates and friends left. He wanted her to be home when he stole to ensure that he had access to the cash and that she did not remove it from the house. Also, if he wanted the cash only and had been considering robbing her a couple of weeks before, he could have robbed the day before the murder when he saw the cash in her home. He picked up a knife from his kitchen, hid it in his pocket, and gained access to Roberta's house under the guise of coming for coffee as he had been over there more than once for coffee or a cigarette. There is clearly competent, substantial evidence to support the court's finding of the "calculated" element of the CCP aggravator.

From this evidence, that trial court properly found CCP. Wright v. State, 19 So.3d 277, 300 (Fla. 2009)(explaining heightened premeditation usually involves prearranged plan to kill but can also be shown "where a defendant has the

opportunity to leave the crime scene with the victims alive but, instead, commits the murders.") (internal citations omitted); Buzia, 926 So.2d at 1214-15 (upholding CCP where defendant had opportunity to leave victims' residence without causing further harm); Stein v. State, 632 So.2d 1361 (Fla. 1994)(reasoning CCP focuses on manner crime is executed, including advanced procurement of weapon, lack of provocation, killing as matter of course); Stano v. State, 460 So.2d 890, 893 (Fla. 1984)(explaining CCP primarily goes to state of mind, intent, motivation).

This Court has upheld the CCP aggravator in similar circumstances. In Duest v. State, 462 So.2d 446, 450 (Fla. 1985) the defendant told others that he made his money by bringing homosexuals back to their apartments, beating them up, and taking their money or jewelry. On the day of the murder he announced that he was going to "roll a fag" and walked off with a knife in his waistband. This Court upheld the CCP aggravator. Id. at 449. In Baker v. State, 71 So.3d 802, 820 (Fla. 2011) the defendant chose the victim's house because it looked nice and thought there might be money inside. He ransacked the house without finding money so he took the victim to her bank to withdraw money with no success. He drove her to an isolated spot and told her to get out and that she was going to live. She ran and he shot her when she fell. He maintained throughout that he never planned on killing the victim but that he freaked out. This Court found that the trial court could disregard that statement and upheld the CCP aggravator based on the facts.

In Lott v. State, 695 So.2d 1239, (Fla. 1997) this Court also upheld this aggravator when the defendant robbed a woman he knew in her house because he thought she had money. He bound her, beat her in the head, and then slashed her throat and stabbed her. This Court found:

> Although this crime began as a caprice, it escalated over the period of time it took for all the activity described above to take place, From the moment Rose Conners saw Ken Lott, her fate was sealed. Although it appears the original plan was to take money or valuables, once the victim saw the Defendant the decision was made that she would have to die. It was too much of a chance she would send him to prison if left alive. The evidence shows a heightened level of premeditation indicating a plan to kill the victim. A sufficient amount of time was necessary to account for things that were done to Ms. Conners-more than enough time to formulate a plan to kill. The duct taping, the search for valuables, ascertaining the PIN to withdraw money from the ATM, removing her clothes. This murder was not just incidental to the burglary and theft. It was the result of a deliberate, separate, conscious decision.
>
> This aggravating circumstance [CCP] was proved beyond a reasonable doubt.

Id. at 1244-45. See also Mason v. State, 438 So.2d 374, 379 (Fla. 1983)(appellant broke into Mrs. Chapman's home, armed himself in her kitchen, and attacked her as she lay sleeping in bed. Nothing indicates that she provoked the attack in any way or that appellant had any reason for committing the murder. There was sufficient evidence for the trial court to find this circumstance applicable.)

The Court should affirm the CCP aggravator.

Middleton relies on several cases to support his argument against CCP. Perry

v. State, 522 So.2d 817 (Fla. 1988) is distinguishable. First it was an override case whereas here, Middleton received a unanimous death recommendation. Moreover, unlike Perry, Middleton came to the scene armed with a kitchen knife, not something he carried normally, and attacked the victim as she greeted him at her front door. When Roberta ran, Middleton chased her to the kitchen, around the kitchen table, and then dragged her into the bedroom where he continued to stab her and nearly decapitated her.

Similarly, Green v. State, 583 So.2d 647 (Fla. 1991) does not help Middleton as in Green the killing was found to be prompted by the victims refusing to return rent money which Green had demanded, so that he, already having taken cocaine that night, could buy more cocaine. The murders in Green were found to be prompted by the denial of a return of funds, not from a pre-planned desire to kill. Here, Middleton, having announced his intent to rob Roberta, went to her home armed with a knife and stabbed her near the doorway to the home. He continued the attack throughout the home.

Hall v State, 107 So.3d 262 (Fla. 2012) likewise is distinguishable. Hall, a prison inmate was unarmed and in search of narcotics. When discovered in an "outbuilding"/paint room by a corrections officer before he could find any more drugs, he became enraged and stabbed her with a piece of metal he had picked up in the shed in an effort to escape. Such is different from Middleton's situation

where he armed himself in advance and went in search of a specific victim attacking her at her front door. There was absolutely no evidence that Middleton became enraged nor was he provoked. He acted as a matter of course. Middleton then chased her through the home and once she was dead, he took a television in place of cash. Middleton was much bigger and stronger than Roberta and could have overpowered her physically, yet he chose to bring a knife and use it immediately.

Kaczmar v. State, 104 So3d 990, 1007 (Fla. 2012) is not at all similar to the facts of the instant case. Kaczmar, who was living in the same home as his victim, was soliciting sex from her. Only after she rejected his overtures by arming herself with a knife and in the struggle cutting Kaczmar did he become angry and used a knife he always carried with him. While premeditation was found as a result of the multiple stab wounds, CCP was rejected as there was no evidence of prior planning of the murder. However, in the instant case as noted previously, Middleton, planning to rob his neighbor, armed himself with a kitchen knife and went to his victim's home. When she opened her, he stabbed her and relentlessly pursued her around the house until finally killing her is a back room.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), defendant's purpose in entering the store was to commit a robbery and it was only after the victim was perceived as acting like a hero did the defendant shoot and kill him. There was no

pre-crime heightened plan or intent to kill. Similarly, in McKinney v. State, 579 So.2d 80, 84-85 (Fla. 1991) there was no evidence of pre-planning the homicide presented. In fact, this Court stated "There is no evidence in the record that the defendant planned to commit any crime at all until the opportunity presented itself." Conversely, as noted previously, Middleton announced his intent to rob the victim, armed himself before he went to her home which was across the street from him, and attacked her just inside her front door. Such shows heightened planning and intent as Middleton pressed his attack at the front door and carried through with his premeditated intent to kill as he chased Roberta through her home.

Middleton points to Rogers; Wyatt v. State, 641 So.2d 1336 (Fla. 1994); Hall; and Kaczmar to suggest that his going to Roberta's home armed does not support a finding of CCP. However, as noted previously, the victim in Rogers provoked the homicidal response when he tried to act like a hero, Hall was in search of drugs when surprised by a corrections officer, and Kaczmar always carried a knife and used only after his unwanted sexual advances were thwarted by the victim cutting Kaczmar, thereby enraging him. Wyatt is also distinguishable as there Wyatt's clear intent was robbery which turned into rape and then the killing of three victims with whom he had no prior relationship. However, here, Roberta knew Middleton, who was a neighbor. Although he could have overpowered her

given their size differential, he went to her home armed with a kitchen knife, not something a person typically carries, and attacked her at the front door and pursued her through the home until he is able to kill her is a back room. This Court should affirm.

Proportionality

Middleton next argues that his death sentence is not proportional if this Court strike the two aggravators above. The State disagrees and submits that the penalty is proportional in either instance.

This Court stated: "[t]o determine whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases where a death sentence was imposed. Pearce v. State, 880 So.2d 561, 577 (Fla. 2004)." Boyd v. State, 910 So.2d 167, 193 (Fla. 2005). See Hodges v. State, 55 So.3d 515, 542 (Fla. 2010); Fitzpatrick v. State, 900 So.2d 495, 526 (Fla. 2005); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). This Court's function is not to re-weigh the factors, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So.2d 6 (Fla. 1999).

Middleton argues that the court improperly weighed the evidence in mitigation. The State respectfully incorporates here the arguments made in Point IV. Furthermore, it is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to be given it. See Douglas v.

State, 878 So.2d 1246, 1260 (Fla. 2004); Morton v. State, 789 So. 2d 324, 332 (Fla. 2004).

In support of proportionality with the aggravators the trial court found, the State relies on Jean-Philippe v. State, --- So.3d ----, 2013 WL 2631159 (Fla. 2013) (finding sentence proportionate for murder of defendant's wife following an argument where prior violent felony, HAC and CCP found); Pham v State, 70 So.3d 485, 500–01 (upholding death sentence for stabbing murder based on prior violent felony conviction, HAC, CCP, and felony murder (burglary/kidnapping) and mitigation—under influence of mental or emotional disturbance, somewhat impaired capacity to appreciate criminality or conform to requirements of law, traumatic childhood, and stable employment history); Zommer v. State, 31 So.3d 733 (Fla. 2010) (finding sentence proportionate based on prior violate felony, CCP, HAC and avoid arrest outweighing ten non-statutory mitigators); Banks v State, 46 So.3d 989, 1000 (Fla. 2010) (holding death sentence proportionate for stabbing murder where trial court found HAC, CCP, and prior violent felony aggravators, and five mitigating factors—low IQ, brain deficit, antisocial personality traits, not the only participant, and difficult youth); Nelson v. State, 748 So.2d 237, 246 (Fla. 1999) (finding sentence proportional for bludgeoning/stabbing death based on three aggravators (HAC, CCP, and committed in the course of a robbery), one statutory mitigator (age of eighteen), and a number of nonstatutory mitigators);

Cave v. State, 727 So.2d 227, 229 (Fla. 1998) (affirming death sentence with murder in the course of a felony (robbery-kidnapping), CCP, HAC, and avoid arrest aggravators and one statutory and eight nonstatutory mitigators where the defendant was the ring leader of a plan to rob a convenience store, led the victim at gunpoint, and controlled her during the long ride to a remote location where she was killed by accomplices); Jimenez v. State, 703 So. 2d 437 (Fla. 1997) (stabbing death with four aggravators, one statutory and two non-statutory mitigators); Sliney v. State, 699 So.2d 662 (Fla.), cert. denied, 522 U.S. 1129, 118 S.Ct. 1079, 140 L.Ed.2d 137 (1998) (upholding the death penalty where the victim was beaten in the face with a hammer and stabbed with a pair of scissors and where there were two aggravators (commission during a robbery and avoiding arrest), two statutory mitigators (age and lack of criminal history), and a number of nonstatutory mitigators); Hayes v. State, 581 So.2d 121 (Fla.1991) (upholding the death penalty where there were two aggravators (CCP and commission during a robbery), one statutory mitigator (age), and other nonstatutory mitigators); Pope v. State, 679 So.2d 710, 716 (Fla. 1996) (holding death penalty proportional where murder committed for pecuniary gain and prior violent felony, outweighed two statutory mitigating circumstances, commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct, and several nonstatutory mitigating circumstances) Johnson v. State, 660 So.2d

637, 648 (Fla.1995) (upholding death sentence for stabbing death of elderly female inside her home during a burglary where court found three aggravators—prior violent felony, committed for financial gain, and HAC—outweighed fifteen nonstatutory mitigators).

In support of proportionality with the aggravators of felony murder and HAC, the State relies on Boyd v State, 910 So.2d 167, 193 (Fla. 2005) (stabbing death with felony murder/sexual battery, HAC, one statutory and five non-statutory mitigators); Cox v. State, 819 So.2d 705 (Fla. 2002) (stabbing death based on CCP, HAC, and "nineteen of the thirty-two nonstatutory mitigating factors were accorded slight or little to some weight"); Mansfield v. State, 758 So.2d 636 (Fla. 2000)(HAC, felony murder, and five non-statutory mitigators); Geralds v. State, 674 So.2d 96 (Fla. 1996) (HAC, felony murder and both statutory and nonstatutory mitigation afforded little weight); Spencer v. State, 691 So.2d 1062 (Fla. 1996) (prior violent felony, HAC, two statutory mental mitigators and several nonstatutory mitigators); Hudson v. State, 538 So.2d 829 (Fla. 1989) (prior violent felony and felony murder (burglary).

Finally, any error in the finding of the aggravators is harmless. The trial court said in its order: "The court gives the four primary aggravating circumstances great weight. Moreover, 'any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total

presented regarding the murder of Roberta Christenson].' *Carter v. State*, 980 So. 2d 473, 483 (Fla. 2008); Green v. State, 641 So. 2d 391, 396 (Fla. 1994). Johnson v. State, 660 So.2d 637 (Fla.1995) (death penalty proportionate for stabbing murder where trial court found prior violent felony, commission of a murder for financial gain, and HAC aggravators and determined that each aggravator, alone, outweighed the mitigators, including: defendant was raised in a single-parent household; defendant had an excellent relationship with other family members; defendant showed love and affection to his children; and defendant had demonstrated artistic talent); Pietri v. State, 644 So.2d 1347, 1353–54 (Fla.1994) (concluding that trial court's erroneous finding of CCP aggravator was harmless error because three other aggravators supported the death penalty and there were no mitigating factors). This Court should affirm.

POINT II
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION FOR HAVING THE DEFENSE BEGIN ITS PRESENTATION IN THE PENALTY PHASE AS ORIGINALLY SCHEDULED. (Restated)

Middleton next argues that the trial court abused its discretion when it ordered him to begin his penalty phase presentation immediately following the conclusion of the State's case as originally scheduled. He claims that the order of the witnesses was important since the lay witnesses would lay the groundwork for

his expert's testimony although he does not articulate in what way that was necessary given that the doctor himself explained what Middleton's childhood and homelife was like, information then verified by the family members. Middleton focuses on the fact that the trial was "ahead of schedule" as the basis for saying the court had to exercise its discretion in the manner the defense requested and had no valid reason for not so doing. The court did not abuse its discretion and this claim should be denied.

The trial court gave both sides a day between the ending of the guilt phase and the beginning of the penalty trial. The defense had two family members of Middleton's who lived in Georgia and who were to testify in the penalty phase trial. Defense counsel did not put them under valid subpoenas nor was transportation arranged for them prior to the trial. Counsel learned late the day before the trial began that they could not afford to come on their own and then waited until court began to ask to continue the defense case. They did not try to have the witnesses get on a bus or have someone drive them down the day before court began. (T 23:2406-21) The trial court gave counsel a number of options to assist the defense in getting these witnesses to court by offering to pay to have them driven down and put in a hotel or to get their testimony through a video connection or even telephone. The trial court explained that the state that it did not want to continue the case. (Id. 2409) It pointed out that the State's presentation

would take only an hour or so and the rest of the day would not be used. Rather than having the jury spend only a hour and then have to return the next two days to do the defense and the rebuttal, he wanted to utilize the time available in an efficient manner. It also pointed out that the witnesses were not wildly out of order given that the psychologist would go on today and the lay witnesses would follow tomorrow morning. (Id. 2412, 2415, 2417) Defense counsel eventually chose to have their investigator drive them down. ((Id. 2421)

As is clearly apparent from the record, it was choices made by the defense that resulted in their witnesses not being physically present the day the trial was to begin. They had failed to subpoena them or to have them transported down. When they found out about the financial situation, something which surely should have been considered sometime earlier in the four years the trial was pending, they could have sent someone up to get them so that they would be present the next day, at least in the afternoon. They did none of those things. The court did not abuse its discretion in having the defense do a minor realignment in its witness presentation.

Under Geralds v. State, 674 So.2d 96, 99 (Fla. 1996) Middleton had to show the following four things in order to prevail on his motion for continuance: "(1) prior due diligence to obtain the witness's presence; (2) that substantially favorable testimony would have been forthcoming; (3) that the witness was available and willing to testify; and (4) that the denial of the continuance caused material

prejudice." *citing* United States v. O'Neill, 767 F.2d 780, 784 (11th Cir.1985). As noted above, Middleton could not show the necessary due diligence. Since the witnesses actually did testify the following morning, the jury heard anything favorable they had to say. Finally, Middleton does not demonstrate how he was materially prejudiced by the minor rearrangement of his witnesses. Whether to grant a continuance is within the discretion of the trial court. Id.; Israel v. State, 837 So.2d 381, 388 (Fla.2002). A trial court's ruling on a motion for mistrial is reviewed under an abuse of discretion standard. Salazar v. State, 991 So.2d 364, 371 (Fla.2008). "A court's ruling will be sustained absent an abuse of discretion—it will be sustained unless no reasonable person would take the view adopted by the trial court." Kelley v. State, 974 So.2 1047, 1051 (Fla. 2007). Such a motion should be granted "only when it is necessary to ensure that the defendant receives a fair trial." Salazar, 991 So.2d at 372 (quoting Cole v. State, 701 So.2d 845, 853 (Fla.1997)). Here, the jury heard the evidence so the fairness of the trial was not undermined and the court did not abuse its discretion by its ruling. This claim should be denied.

POINT III
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE REQUEST FOR A MITIGATION EXPERT.

Middleton next argues that the his death sentence is unconstitutional because

the trial court did not grant him a mitigation expert to assist in the preparation of the penalty phase mitigation. He further argues that the court improperly applied Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015 (Fla 4th DCA 1982) when it refused to grant the motion to appoint based on counsel's statement alone that he wanted such an expert. Contrary to those arguments, the trial court's actions were proper. Furthermore, the issue was unpreserved since Middleton waived it.

The trial court granted a number of requests to appoint experts for the defense in this case. It appointed an investigation to help in the preparation of the defense and also appointed three mental health experts, in addition to the one paid for by the Public Defender. (ROA 1:100,, 147, 164, 3:447, 8:28) When the motion to appoint the mitigation expert was presented, defense counsel stated that he felt he needed her to assist with the mental health experts, synthesize the investigator's work with the expert opinions, and because such an expert was recommended being used by the American Bar Association. (8:29-30) When the court commented that her work seemed duplicative of the other investigator's work and he needed more reason than counsel's feelings he needed her, counsel responded that another judge had appointed her. (Id. 31-32) Ultimately, the court denied the motion without prejudice and would grant it if counsel could present evidence of a "particularized need and necessity" to have this expert. (Id. 34) Counsel did not

attempt to provide the court with that evidence by any means and never brought up the motion again before trial.

The test for overturning a trial court's ruling on appointing an expert is whether there has been an abuse of discretion. Martin v. State, 455 So.2d 370, 372 (Fla. 1984). The test to determine if the trial court abused its discretion is to determine if there was a necessity for the expert and if the defense suffered prejudice by not having one.

> *Ake* and *Caldwell*, taken together, hold that a defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. ... In each instance, the defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary.

Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987)(footnotes omitted). In San Martin v. State, 705 So.2d 1337 (Fla. 1997) this Court held that a trial court's refusal to provide funds for the appointment of experts for an indigent defendant will not be disturbed unless there has been an abuse of discretion. "In evaluating whether there was an abuse of discretion, courts have applied a two-part test: (1)

whether the defendant made a particularized showing of need; and (2) whether the defendant was prejudiced by the court's denial of the motion requesting the expert assistance. *Dingle v. State*, 654 So.2d 164, 166 (Fla. 3d DCA 1995)." Id. 1347. The trial court here specifically requested that same showing rather than the statement that counsel felt he needed such an expert. "Counsel should be able to articulate a basis for requiring an expert beyond telling the judge that the subject is 'complicated'." Cade v. State, 658 So.2d 550, 555 (Fla. 5th DCA 1995).

In Moore the defense asked for a criminologist expert but failed to provide enough information in motion to allow the trial court the necessary basis to appoint one. The reviewing court held that given the record before the judge when he made the ruling, the defense motion "failed to create a reasonable probability that expert assistance was necessary to the defense and that without such assistance petitioner's trial would be rendered unfair". Moore, 809 F.2d at 718. Here, the trial court specifically did the same and actually invited the defense to return with more information. Middleton argues that was not possible since he could not have the mitigation expert testify if she was not appointed. He failed, however, to try to get the information necessary for the judge in by any other means such as a stipulation with the prosecution or having his fact investigator testify that he was not trained to provide the services of a mitigation expert.

As to the second test, Middleton has failed to show any prejudice by not

having the expert appointed. He points to no evidence or testimony that he was prevented from presenting as a result of not having the services of the mitigation expert. He had the opinions of four separate mental health experts and had access to them to explain their findings and how Middleton's life experiences influenced or were influenced by any mental health issues. Dr. Barnard testified about the impact Middleton's background had on him as an adult as well as the interaction of mental health, intelligence, and behavior. Parrish, the defense investigator, testified about Middleton's upbringing, schooling, and other aspects of his life. Middleton cannot meet the prejudice requirement to show that the trial court abused its discretion.

The defense in San Martin requested funds to travel to question a State expert which the court denied by saying that if the defense still believed it was necessary after it conducted a telephone interview it would re-consider the request. The defense never renewed the request after the deposition of the expert. This Court held that the issue was waived by not renewing the motion. San Martin, 705 So.2d at 1347. Similarly here, the trial court did the same and invited the defense to renew the motion with a showing of necessity which was never done. Middleton has waived this issue by so doing. This Court should affirm.

POINT IV
THE TRIAL COURT DID PERFORM AN INDIVIDUALIZED SENTENCING AS REQUIRED FOR A DEATH SENTENCE.

(Restated)

Middleton next argues that the trial court did not perform its duty to conduct an individualized sentencing because it denigrated the entire field of psychiatry and psychology and arbitrarily rejected findings of the mental health experts. He also contends that the trial court should have considered Middleton's impaired capacity as a non-statutory mitigator once it rejected it as a statutory mitigator. In the last issue of this point he argues that the trial court misevaluated the mitigation evidence is assigning weight to it. There was competent substantial evidence to support the court's findings and the court did not abuse its discretion in making those findings.

The trial court did not reject the mental health experts' opinions in their entirety nor did it dismiss the entire filed. In analyzing the statutory mitigator of whether Middleton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, the trial court initially noted the conflicting opinions of the four experts and looked at the various areas of disagreement.. (ROA 6:1157-58) It was after that analysis that the court commented that he saw some support in the contention that psychiatry was an inexact science since that inexactness was on display in this case. The court then went on to explain why it found Dr. Leporowski more credible and convincing than Dr. Riordan and Dr. Barnard. Id. 1158-60.

The court looked at the varying test results and found Dr. Leporowski's explanation that Middleton was unmotivated or deliberately underperforming, an opinion supported by the by the tests for malingering which Middleton utterly failed. (T 24:2602-3, 2611-14) The court examined Dr. Barnard rather wavering and vague assessment of Middleton level of impairment with the much more solid opinion given my Dr. Leporowski in deciding whether this mitigator existed. (R6:1160) Middleton points to the testimony of various witnesses in the guilt phase as support for this mitigator. Maerki testified that he smelled alcohol on Middleton and that his eyes were bloodshot, a common symptom of drinking. Despite that, Maerki said that Middleton's coordination was fine, he had no slurred speech, and he answered questions directly and without difficulty. (T 19:1783-84) The testimony was that Middleton had been drinking for an hour while Britnell repaired his car. It was just after Britnell picked him up that the two men went past Middleton's neighborhood and on to a friend's house where the police found them. (T 18:1730-35) Britnell testified that he and Middleton did some Xanax the morning of the murder and did only a little amount of meth around 1 in the afternoon. (Id. 1716-17, 1739-41) The majority of the drugs they consumed that day was the eight ball of cocaine they bought on the proceeds of the television. (Id. 1746) Neither Britnell nor Fowler said that Middleton was impaired when he told them he wanted to take a shower and collect on a debt. Dr. Barnard testified that

Middleton said that he had a very high tolerance for drugs and that meth actually helped him think better. (T 24:2573-77) Although not referred to in this section of the sentencing order, the court was also aware of the testimony of Captain Rhoden that Middleton was not under the influence when he encountered him in the yard that night. (ROA 6:1163-64) Finally, any diminished capacity Middleton suffered from was solely from his drug use that day, not from a mental health problem. There was competent, substantial evidence supporting the trial court's rejection of this statutory mitigator.

The trial court did not use a straw man argument to denigrate the defense's mitigation. At the motion to suppress the trial court heard the testimony of Dr. Riordan, Dr. Barnard, Dr. Landrum, and Dr. Leporowski. That body of testimony was substantially the same as that presented at the penalty phase. While only Dr. Barnard and Dr. Leporowski testified at the penalty phase, both were extensively questioned about the opinions and test results of the non-testifying experts. (T 24:2550-53**,** 2595-2605) Hence, all the experts' test results and opinions were before the court and the trial court properly used all the evidence in assessing which expert was the most credible.

The court did not abuse its discretion in assigning weight to various non-statutory mitigation. Middleton contends that the court did no analysis in assigning weight to his drug use. To the contrary, the court did a full analysis and

incorporated its analysis from the order on the motion to suppress. The court wrote:

> There is record evidence to support this mitigating circumstance. The defendant told Investigator Parrish that he abused alcohol, marijuana, and cocaine throughout his life. However, the defendant had been through drug rehabilitation programs, and even successfully graduated from the Break-'I'hrough Recovery Program. Additionally, with regard to the day of the homicide, this Court noted in its "Order on Defendant's Motion to Suppress Confession or Admission:
>
> > The first witness called at the heating was Steven Britnell. Mr. Britnell was with the defendant during the day of June 28, 2009. He testified that he met with the defendant that morning as "got some drugs, a couple of 'Xanies' maybe one apiece." (referring to Xanax or Alprazolam). In the early afternoon, around 1 or 2 pm., they got, "a little bit of 'meth"' (referring to Methamphetamine). He said they shared a, "small dose" about $20 worth which they smoked at his home. After that, Mr. Britnell and, "a skinny guy" went to Walmart to "boost" some items (steal then and then return the items for credit to get gas). The defendant did not go to Walmart. Mr. Britnell said there was no large TV in the Defendant's house when he left for Walmart. When Mr. Britnell returned to the defendant's home, he saw, "a real' big TV on the floor covered up with a blanket." Mr. Britnell explained the defendant's efforts to sell the television in order to obtain money. While Mr. Britnell's testimony establishes some modest drug and alcohol usage over an extended period of time, it also establishes purposeful and directed behavior by the defendant in an effort to sell the victims television to obtain money for his own use.
> >
> > Moreover, the officers who initially contacted him and the lead detective conducting the interview, testified that he showed no signs of impairment and that he was coherent and responsive. Captain John Rhoden of the Okeechobee County Sheriff's office was the overall supervisor of the investigation. Capt. Rhoden testified

> that when he arrived at the crime scene Brandon Jenkins and the defendant Dale Middleton voluntarily walked over to them of their own volition. Because the defendant lived across the street from the victim and might have seen something he was asked if he would come down to the station to give a statement. He agreed. He was not placed under arrest. Moreover, there were no threats, no promises, no inducements no coercion. More importantly Capt. Rhoden testified that in his 28 years as a law enforcement officer he is seen thousands of people under the influence of drugs and alcohol. Capt. Rhoden testified that he was in close proximity to the defendant, and said that he had no trouble maintaining his balance and that he did not appear to be under the influence of drugs or alcohol. Capt. Rhoden testified that the defendant had no problem understanding him and that he had no problem understanding the defendant. Capt. Rhoden testified that his speech was clear and coherent and it did not appear that he was under the influence of drugs or alcohol. Additionally Lieutenant Brad Stark, also of the Okeechobee County Sheriff's Office, testified that he was present during this initial encounter with the defendant at the scene of the crime. He too testified that he was in close proximity with the defendant and that he did not believe that the defendant was under the influence of drugs or alcohol that time. There was, quite simply, no credible evidence presented by the Defendant that he was so under the influence at the time of his initial interviews, that he was unable to comprehend and waive his Miranda rights.

See, "Order on Defendant's Motion to Suppress Confession or Admission." dated July 20, 2012. And filed with the clerk on July 23, 2012, at p. 8, and 9-10 (Essentially the same evidence and testimony was adduced during the trial, either during the guilt phase or the penalty phase.) Additionally, in her examination of the defendant, Dr. Leporowski found it significant that the defendant was able to accurately describe the events of that day in a logical and coherent manner and relate information in chronological order without any difficulty. Moreover in reviewing all the evidence including the

> videotape she indicated that she did not see any evidence that the defendant was impaired in any way. Significantly she actually looked at the jail medical records in intake forms and spoke with the jail nurse who related the defendant was calm and cooperative and exhibited no evidence of detoxification or drug withdrawal.

(ROA 6:1163-65)

Nor did the court use the wrong standard in evaluating Middleton's abusive childhood nor did it abuse its discretion in assigning weight.

> It is mere speculation whether the trial court would have accorded the circumstance more weight had it used a different standard. The trial court concluded that: "Although there may have been some abuse by his father when he was younger it does not appear to this Court that this murder stems from that abuse or childhood trauma, rather, it appears to have been prompted by purely selfish motives." Mitigating circumstances are defined as "factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crimes committed." *Jones v. State*, 652 So.2d 346, 351 (Fla.), cert. denied, 516 U.S. 875, 116 S.Ct. 202, 133 L.Ed.2d 136 (1995); *see also Brown v. State*, 526 So.2d 903, 908 (Fla.) ("Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant."), cert. denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988). The trial court's decision to find this circumstance but accord it very little weight was within its discretion.

Consalvo v. State, 697 So.2d 805, 818-819 (Fla. 1996). The court went through the evidence noting that Middleton's sister was very close to him while at home and that he left the house at 14 or 15 years old. Middleton found work and supported himself, eventually working for Willard Mayes who became a substitute father for him. Another long-term employer, Frank DeCarlo, also became a role model for

Middleton. (ROA 6:1166) He noted that Middleton's sister had a harsher childhood but became a normal, productive adult. The court also noted that the murder was decades after defendant left home. The court did a proper analysis and did not abuse its discretion in assigning little weight. See Douglas v. State, 878 So.2d 1246, 1260 (Fla. 2004); Morton v. State, 789 So. 2d 324, 332 (Fla. 2004).

As can be seen from the discussion above, the trial court did do an individualized sentencing and was not arbitrary in its evaluation of the mitigation evidence. The death sentence should be affirmed.

POINT V
THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS AFTER FINDING THAT MIDDLETON WAS NOT IMPAIRED AT THE TIME OF HIS STATEMENT AND THAT HE VALIDLY WAIVED HIS RIGHT TO COUNSEL BEFORE HE SPOKE. (Restated)

In the next issue, Middleton asserts that his waiver of his rights under Miranda v. Arizona, 384 U.S. 436 (1966) was not a voluntary and intelligent waiver because he was too impaired from his drug use at assert those rights. He also argues that the waiver was invalid because the police interrogated him after his appointed counsel had asserted his right to remain silent. Contrary to Middleton's stance, the court did not abuse its discretion in denying the motion to suppress because the evidence clearly supported the court's factual findings.

The review standard is that "a presumption of correctness" applies to a

court's determination of historical facts, but a de novo standard applies to legal issues and mixed questions of law and fact which ultimately determine constitutional issues. Smithers v. State, 826 So.2d 916 (Fla. 2002); Connor v. State , 803 So.2d 598 (Fla. 2001); Parker v. State, 873 So.2d 270, 279 (Fla. 2004). The trial court's ruling on the voluntariness of a confession should not be disturbed unless it is clearly erroneous. Escobar v. State, 699 So. 2d 988, 993-994 (Fla. 1997); Davis v. State, 594 So. 2d 264, 266 (Fla. 1992). Where the evidence is conflicting, the trial court's finding will not be disturbed. Thomas v. State, 456 So. 2d 454 (Fla. 1984); Calvert v. State, 730 So. 2d 316, 318 (Fla. 5th DCA 1999). See Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) (finding even though defendant's former lover encouraged defendant to confess, partly out of fear of prosecution as accomplice, as a whole, defendant's will not overborne by any official misconduct). The trial court's ruling on a motion to suppress comes clothed in a presumption of correctness and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. Owen v. State, 560 So.2d 207, 211 (Fla.1990), San Martin v. State, 705 So.2d 1337, 1345 (Fla.1997).

A hearing on the motion to suppress was held on April 20 and June 29, 2012 with a total of eleven witnesses testifying and the court reviewing the videotape of Middleton’s fifth and final statement. After the hearing the court issued a written

order. (ROA 5:875-98) In that order the court made the following findings of fact based on the evidence from the hearing and directly addressed the issue of whether the police initiated contact with Middleton after his counsel was appointed and whether Faulkner violated his right to counsel by talking to him.

> In reviewing the videotape, the court noted that while the interviews were conducted at the sheriff's office, it appears not to have been done in the stereotypical interrogation room, like a holding cell with bare walls. The interview was conducted in the detective's office, a carpeted room with upholstered chairs, bookcases and pictures on the wall. The detective was not in a law enforcement uniform, but was wearing civilian clothes. It was not a particularly threatening or intimidating venue. The defendant did not appear to be under the influence of drugs or alcohol. His speech was clear and coherent. His answers are fairly responsive to the questioned asked. He was capable of articulating thoughts, giving directions and describing events. More importantly, the video tape confirms and corroborates fully the testimony of Captain John Rhoden, Lieutenant Brad Stark, Detective Marty Faulkner and Dr. Deborah Leporowski. It is more difficult to reconcile the videotape with the testimony of Drs James Bernard and Michael Riordan. The defendant's "conduct, speech, and appearance at the time of interrogation indicate that his waiver was knowing and intelligent." He exhibited, "no outward signs of intoxication or mental defect." *Garner v. Mitchell,* 557 F.3d 257 (6th Cir. 2009) (en banc), cert. denied; *Garner v. Mitchell,* 130 S. Ct. 125; 175 L. Ed. 2d 82 (2009).

Id. at 878-79.

> Assistant Public Defender Stanley Glenn testified regarding the defendant's written invocation of rights. The Public Defender's Office was provisionally appointed to represent the defendant at first appearance that morning. Mr. Glenn testified that the defendant signed a standard form prepared by the public defender's office captioned, "Defendant's Invocation of Constitutional Rights" It was made clear at the hearing that the "Defendant's Invocation of Constitutional Rights," had not even been executed or served on law enforcement prior to the Defendant's last interview. The written invocation of

rights was filed in the court file on July 30, 2009 at 1 l :28 AM. Mr. Glenn testified that the written invocation of rights was not served on either the Office of the State Attorney or on the Okeechobee County Sheriff's office in until after lunch, around l2 noon. The defendant's last statement was at approximately 9:24 AM on July 30 and was made well before the notice had been filed or provided to the state or law enforcement. In fact, defense counsel Stanley Glenn had not even been to the jail to see the Defendant prior to the fifth interview. Finally Mr. Glenn candidly acknowledged that it is not unheard of for a client having been advised of his rights, to reinitiate contact with law enforcement if he chooses to do so. *See also Rimpel v. State*, 607 So.2d S02 (Fla. 3rd DCA 1992), rev. denied, 614 So.2d S03 (Fla.l993); *Addison v. State*, 653 So. 2d 482, 483 (Fla. 3rd DCA 1995).

The re-initiation of contact by the Defendant occurred after he invoked his Miranda rights at the end of the fourth interview (clearly indicating that he understood his rights, and knew how to assert them). The Detective's testimony corroborated by the videotape. It shows that the officers scrupulously honored his request to stop talking at the end of the fourth interview by stating, "All right. The time is now 12:58 p.m. Concluding the interview with Dale Middleton." Video transcript p. 89, line 17. Detective Faulkner testified that the following day, he entered the jail to check on the Defendant's welfare based upon earlier statements he had made that his life was over. The Detective's un-refuted testimony shows that as he was walking up to the cell, the Defendant immediately initiated contact and asked to speak with the detective again about the homicide. This is confirmed by the Defendant on the video tape, and the defense presented absolutely no evidence to contradict that the Defendant initiated contact. Detective . Faulkner testified that he went to the door of defendant's jail cell but that he did not say anything to him nor did he interrogate them in any way. He did not say anything that could be construed as the functional equivalent of interrogation. He was merely in the defendant's presence and the defendant said, without any prompting from the law enforcement officer, "I need to talk to you." Detective Faulkner indicated that he was readvised of his Miranda rights and that it was probably a fourth or fifth time he been advised of Miranda by law enforcement. The defendant said, "now that I'm clearheaded I want to talk you." Detective Faulkner went to great

lengths to clarify that the defendant truly did want to speak with him. Detective Faulkner also confirms and corroborates the testimony of Capt. Rhoden and Lt. Stark that the defendant did not appear to be under the influence of drugs or alcohol when he made his statement.

The detective testified that he then arranged to have the Defendant brought back to his office and recorded the fifth and final interview. Again, the Detective spent several minutes clarifying on videotape that the Defendant initiated the request to speak to the Detective, that he did so knowingly and voluntarily, and that he wished to talk Without his attorney present. The Detective then read Miranda to the defendant and he again stated that he understood and waived them. The Defendant demonstrated that he understood that it could be against his own penal interests to when he stated:

> "Al1 right. I mean I understand me talking to you is probably going to, you know, make Ashley's case better against me. That's not my concern here. My concern is what the hell just took place and I just - I don't understand."

Video transcript at p. 91, line l6.

It is clear from the context of the conversations that the defendant initiated contact with the detective because he was troubled by a guilty conscious over his actions and had a desire to talk to someone about it. The significant legal factor for both the Fifth and Sixth Amendment rights is the re-initiation of contact by the Defendant. In a strikingly similar case, the Florida Supreme Court found that it was not improper re-initiation by law enforcement for a jail employee who knew the Defendant to approach him and express his disappointment. *Davis v. State,* 698 So.2d 1182 (Fla. 1997). The Court in *Davis* stated:

> Next we address the admissibility of the untapped confession Davis made to Major Judd and Lieutenant Schreiber while in the holding cell. Davis points out that because he had invoked his right to counsel upon being arrested (and the trial court found that he had), police were prohibited under *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), from

> interrogating Davis unless he reinitiated contact. According to Davis, Judd's expression of his disappointment in Davis constituted initiation‘ of contact by police in violation of Edwards. The trial court made a finding that Major Judd's statement did not constitute interrogation as defined in Innis and *Arizona v. Mauro*, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987). We agree with the trial court's analysis and result. First, Judd's statement was not an express questioning of Davis. Second, Judd's statement was not the functional equivalent of express questioning because there was no allegation or showing in the record that the statement was reasonably likely to elicit an incriminating response from Davis based on his emotional or mental state. *See Mauro*, 481 U.S.at 526-27, 107 S.Ct at 1935; *Innis*, 446 U.S. at 300-301, 100 S.Ct. at l689-90. Moreover, although Judd eventually did ask Davis to repeat himself, thereby asking a question, it was not intended to elicit an incriminating response. For all Judd knew, Davis could have been asking for a drink of water; surely Judd was permitted to ascertain what Davis had said.
>
> *Davis v. State*, 698 So. 2d ll82, ll88-89 (Fla. 1997).
>
> Here, Detective Faulkner testified that he never even asked the Defendant a question, and was just approaching his cell when the Defendant re-initiated contact and asked to speak with the Detective again. Additionally, the Detective read the Defendant Miranda again, and the Defendant waived both his Miranda rights and the right to have his attorney present. The Court clearly and unequivocally finds that the Defendant re-initiated contact, waived his rights, and knowingly and voluntarily agreed to speak with the detective.

Id. at 892-96. Middleton says that Faulkner overrode Middleton’s will by asking him numerous times if he was waiving his right to counsel and his Miranda rights. However, the tape clearly supports the trial court’s conclusions that it was Middleton who initiated the conversation and waived his rights knowingly and

voluntarily. Middleton confirmed that he asked to speak to the detective and acknowledged that his attorney had told him not to speak to the police. Faulkner immediately said he could not talk to him and it was Middleton's choice whether he wanted to give up his right to his attorney and his other rights. Middleton responded by saying he felt like he was going to explode and he wanted to talk. The conversation continued in this vein, with Middleton talking and Faulkner cautioning him, until Middleton responded to the issue and waived his attorney. Faulkner then re-advised him of his Miranda rights which Middleton waived. (T 10:460-64, 476)

An accused who invoked his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication..." Edwards v. Arizona, 451 U.S. 477, 484 (1981) Under Edwards, ". . .a valid waiver of this right can be found only if the individual is the one responsible for reinitiating contact with the police. The U. S. Supreme Court affirmed this in Maryland v. Shatzer; 130 S.Ct.1213, 1219 (2010), stating that, "a voluntary Miranda waiver is sufficient at the time of an initial attempted interrogation to protect a suspect's right to have counsel present, but is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel." This Court has said "if the accused initiates further conversation, is reminded of his rights, and knowingly and

voluntarily waives those rights, any incriminating statements made during this conversation may be properly admitted." Welch v. State, 992 So.2d 206 (Fla. 2008.)

The Florida Supreme Court held in Traylor v. State, 596 So.2d 957, 966 (Fla. 1992):

> Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present, although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the-absence of counsel."

Id. See also, Jones v. State, 748 So.2d 1012 (Fla. 1999). The evidence clearly shows, by Middleton's own statements as well as the testimony of the officers, that it was he who initiated the interview and voluntarily waived his rights. Furthermore, the court thought Faulkner credible when he explained that he went over to check on Middleton based on his statement the night before that his life was over. Faulkner merely walked in, saying nothing, before Middleton called out to him asking to talk. That is a credibility finding which must be given deference by this Court. The trial court's denial of the motion to suppress was proper.

Middleton also argues that the trial improperly ignored Dr. Bernard's testimony and failed to make a finding that the waiver for affirmed waived. However the court did address this issue, before it addressed the one above, and made credibility findings in its order. The court did make a finding that the waiver

was voluntarily made with Middleton understanding his rights, after it had discussed both issues raised here.

A waiver of Miranda rights is valid only if it is "made voluntarily, knowingly[,] and intelligently." Miranda, 384 U.S. at 444. There are two essential elements of a valid waiver:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal[s] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135 (1986) (quoting Fare v. Michael C., 442 U.S. 707, 725, 99 S. Ct. 2560 (1979)). "The 'totality of the circumstances' to be considered in determining whether a waiver of Miranda warnings is valid based on [this] two-pronged approach . . . may include factors that are also considered in determining whether the confession itself is voluntary." Ramirez v. State, 739 So. 2d 568, 575 (Fla. 1999).

Although it bears a "heavy burden" of demonstrating the validity of a waiver, Miranda, 384 U.S. at 475, "the State need prove waiver [of Miranda rights] only by a preponderance of the evidence," Colorado v. Connelly, 479 U.S. 157, 168, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). However, the State does not need to

put forward proof with respect to every factor that might have a bearing on the validity of the waiver. See Michael C., 442 U.S. 707, 724-28, 99 S. Ct. 2560 (holding that waiver by juvenile was valid where record contained no evidence regarding education or intelligence of juvenile).

The analysis of the waiver starts with a presumption that "a defendant did not waive his rights," North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755 (1979), but "litigation over voluntariness tends to end with the finding of a valid waiver," Missouri v. Seibert, 542 U.S. 600, 609, 124 S. Ct. 2601 (2004). "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare." Berkemer v. McCarty, 468 U.S. 420, 433 n.20, 104 S. Ct. 3138 (1984). The "voluntariness of a waiver" of Miranda rights "depend[s] on the absence of police overreaching." Connelly, 479 U.S. at 170. "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." Butler, 441 U.S. at 373.

"When, as here, a defendant challenges the voluntariness of his or her confession, the burden is on the State to establish by a preponderance of the evidence that the confession was freely and voluntarily given." DeConingh v. State

, 433 So.2d 501 (Fla. 1983). "In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there was coercive police conduct." State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), *citing* Colorado v. Connelly, 479 U.S. 157 (1986). "The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained." Sawyer, 561 So.2d at 281. As seen below, Middleton was not impaired by his drug use nor did the police coerce him in any way as can be seen from the discussion above.

> The trial court made the following findings:
>
> Here, there is no credible evidence to suggest that the consumption of drugs and alcohol, "caused the Defendant to become incompetent to proceed with the interview process, thus rendering any waiver of constitutional rights invalid."
>
> The first witness called at the hearing was Steven Britnell. Mr. Britnell was with the defendant during the day of June 28, 2009. He testified that he met with the defendant that morning as "got some drugs, a couple of 'xanies' maybe one apiece." (referring to Xanax or Alprazolam). In the early afternoon, around 1 or 2 pm., they got, "a little bit of 'meth (referring to Methamphetamine). He said they shared a, "small dose" about $20 worth which they smoked at his home. After that, Mr. Britnell and, "a skinny guy" went to Walmart to "boost" some items (steal then and then return the items for credit to get gas). The defendant did not go to Walmart. Mr. Britnell said there was no large TV in the Defendant's house when he left for Walmart. When Mr. Britnell returned to the defendant's home, he saw, "a real big TV on the floor covered up with a blanket." Mr. Britnell that explains the defendants efforts to sell the television in order to obtain money. While Mr. Britnell's testimony establishes some modest drug and alcohol usage over an extended period of time, it also establishes purposeful and directed behavior by the defendant in an effort to sell

the victim's television to obtain money for his own use.

...

Moreover, the officers who initially had contact with him, and the lead detective conducting the interview, all testified that he showed no signs of impairment and that he was coherent and responsive. Captain John Rhoden of the Okeechobee County Sheriff's office was the overall supervisor of the investigation. Capt. Rhoden testified that when he arrived at the crime scene Brandon Jenkins and the defendant Dale Middleton voluntarily walked over to them of their own volition. Because the defendant lived across the street from the victim and might have seen something he was asked if he would come down to the station to give a statement. He agreed. He was not placed under arrest. Moreover, there were no threats, no promises, no inducements no coercion. More importantly Capt. Rhoden testified that in his 28 years as a law enforcement officer he is seen thousands of people under the influence of drugs and alcohol. Capt. Rhoden testified that he was in close proximity to the defendant, and said that he had no trouble maintaining his balance and that he did not appear to be under the influence of drugs or alcohol. Capt. Rhoden testified that the defendant had no problem understanding him and that he had no problem understanding the defendant. Capt. Rhoden testified that his speech was clear and coherent and it did not appear that he was under the influence of drugs or alcohol. Additionally Lieutenant Brad Stark, also of the Okeechobee County Sheriff's Office, testified that he was present during this initial encounter with the defendant at the scene of the crime. He too testified that he was in close proximity with the defendant and that he did not believe that the defendant was under the influence of drugs or alcohol that time. There was, quite simply, no credible evidence presented by the Defendant that he was so under the influence at the time of his initial interviews, that he was unable to comprehend and waive his Miranda rights. Further, there was insufficient evidence as to the time frame of the exact drugs used or the amounts. The Defendant's emotional statements and conduct during the Mirandized interviews are not uncommon for someone just detained for first-degree murder. Significantly, the statements were videotaped, and the trial court had the benefit of reviewing these tapes, which clearly show that the defendant is rational, coherent, and exhibited no sign of impairment during the first three interviews leading up to his arrest. *See, Walker v. State*, 957 So.2d 560, 575 (Fla.

2007) (Defendant's emotional statements and conduct during the Mirandized interview are not uncommon for someone just detained on a first-degree murder charge. Further, there was insufficient evidence as to the exact drugs used or the amount).

...

Four separate psychologists examined the defendant, with findings that his intelligence quotient (I.Q.) falls somewhere between 72 and 83. Certainly, I.Q. is a relevant, "factor to be considered in determining the voluntariness of a confession." *Ross v. State*, 386 So.2d 1191, 1194 (Fla.1980). However, courts have repeatedly stated that the trial court must look to the totality of the circumstances in determining whether a defendant knowingly waived his or her Miranda rights. *Thompson v. State*, 548 So.2d 198, 204 (Fla.1989). Just as with alcohol impairment, there is no per se rule that equates a specific level of intelligence required to make a knowing and intelligent waiver of Miranda rights. *See Bevel v. Stale*, 983 So. 2d 505, 515-16 (Fla. 2008)(finding a valid waiver by a defendant with an I.Q. of65); *W.M v. State*, 585 So. 2d 979 (Fla. 4th DCA 1991)(district court affirmed the trial court's finding that a 10-year-old had understood and waived his Miranda rights); *Brookins v. State*, 704 So. 2d 576, 578 (Fla. 1st DCA 1997)((finding record supported trial court's determination that 16-year-old murder suspect, who had I.Q. of approximately 73 and was considered "borderline mentally retarded," knowingly waived his Miranda rights); *See, T.S.D. v. State*, 741 So. 2d 1142, 1143 (Fla. 3d DCA 1999)(Miranda rights are written at a sixth or seventh grade level). Thus, diminished mental capacity alone does not prevent a defendant from validly waiving his or her Miranda rights. *Rice v. Cooper, supra; Garner v. Mitchell, supra*; *See also, United States v. R0jas~Tapia*, 446 F.3d 1, 7-9 (lst Cir.2006); *Smith v. Mullin*, 3"/9 F.3d 919, 933-34 (10th Cir.2004); *Young v. Walls*, 311 F.3d 846, 849 (71:11 Cir.2002); *Henderson v. DeTella*, 97 F.3d 942, 948-49 (7th Cir.1996); *Correll v; Thompson*, 63 F.3d 1279, 1288 (4th Cir.l995); *Starr v. Lockhart*, 23 F.3d 1280, 1294 (8th Cir.1994); *Derrick v. Peterson*, 924 F.2d 813, 824 (9th Cir.l99l); *Toste v. Lopes*, 861 F.2d 782, 783 (2d Cir.l988); *Dunkins v. Thigpen*, 854 F.2d 394, 399-400(l1th Cir. 1988).

Indeed, the Defendant's actual I.Q. may be higher than the tests results indicate, since he understood that the results would be used by

his attorneys to attempt to suppress his confession. The Defendant admitted to Dr. James Barnard that when he was previously tested by Dr. Gregory Landrum, he "Christmas treed" or gave random answers on the test and that he wasn't trying his best. He also told Dr. Barnard that he had been read Miranda at least 5 times in the past. Yet, in a later interview Dr. Barnard asked how many times the Defendant had been read Miranda in the past and he stated, "l don't think ever." Dr. Barnard apparently never questioned the Defendant on his contradictory answers. In the suppression hearing, defense expert Dr. Barnard stated that in his opinion, the Defendant did not understand the Miranda warnings. He based this opinion, in part on a test developed by a psychologist, Thomas Grisso, Ph.D.4 Grisso, Instruments for Assessing Understanding & Appreciation of Miranda Rights 7 (1998). The "Grisso test" consists of four subtests, styled "instruments," and named as follows: Comprehension of Miranda Rights (CMR); Comprehension of Miranda Rights-Recognition (CMR-R); Comprehension of Miranda Vocabulary (CMV); and Function of Rights in Interrogation (FRI). The accuracy and reliability of the "Grisso test," has been questioned. For example, it has been criticized for failing to take into account significant differences between the actual words used in the Miranda warning given to defendants as compared to the language used in the "test." In this case, Dr. Barnard never even reviewed the actual language read to the defendant as compared to the "Grisso test" before rendering his opinion on the matter. Additionally, the "Grisso test" was administered more than two (2) years after the July 2009 interrogation.
...

As noted above, four separate psychologists examined the defendant, with findings that his intelligence quotient (I.Q.) falls somewhere between 72 and 83. The fact that four separate psychologists examining the same patient could come to such wide and varied conclusions, tends to support Judge David Bazelon's assessment of psychiatric testimony. Judge Bazelon wrote, "Psychiatry is at best an inexact science, if, indeed, it is a science, lacking the coherent set of proven underlying values necessary for ultimate decisions on knowledge or competence." *United States v. Byers,* 740 F.2d 1104, 1167 (D.C. Cir.l984)(Bazelon, 1., dissenting).

Dr. Michael Riordan's testimony was particularly troubling. Dr. Riordan testified that the defendant's original t-score on the MMPI

(Minnesota Multiphasic Personality Inventory) was 28, within a "moderately" impaired range and consistent with someone with "brain damage". After he was required to turn over the raw test data, he amended the score to 38 within a "mildly" impaired range and attributed the change to, "a miscalculation. I must have hit the wrong key on my calculator." Riordan Transcript at pp. 13-14, 51-57. Additionally, when questioned about a February 1 1, 2012 letter to the defense attorney he indicated that the defendant was initially competent to waive Miranda but subsequently became incompetent to proceed with the interrogation. This opinion was, he claimed, based upon his review of the video. However it became apparent that he had not reviewed the video until after he had written the letter, so that the video could not have provided a basis for that opinion. Riordan Transcript at pp. 72-78. Dr. Riordan also testified that the defendant was able to understand and waive the psychotherapist-patient privilege; he apparently misses the irony that the defendant could comprehend, understand and waive something as complex as the psychotherapist-patient privilege, but he was apparently unable to understand and waive his right to remain silent. Riordan Transcript at pp. 26-28.

The testimony of Dr. Deborah Leporowski was far more plausible, credible and convincing. Significantly, and unlike Dr. Riordan, Dr. Leporowski actually took the time to review reports, test results, depositions, discovery, videotape confession, witness statements, Department of Corrections records, jail records, as well as interviewing the defendant on May 10, 2012. She had the most complete, comprehensive, global review of all the experts and evidence. When asked regarding the discrepancies in the various l.Q. tests, she said the most reasonable explanation would be poor motivation or deliberately underperforming. She indicated that the defendant's SIMS (Structured Inventory of Malingered Symptomatology) score, "well exceeded the cut off for people who are feigning or malingering." She found no evidence to support Dr. Riordan's diagnosis that the defendant was "brain damaged." In her opinion, the l.Q. score of 83 was the most reliable score.

She testified that there was nothing in the psychological test data that would support the conclusion that he was unable to understand his Miranda rights. She found it significant that the

> defendant was able to accurately describe the events of that day in a logical and coherent manner and relate information in chronological order without any difficulty. Moreover in reviewing all the evidence including the videotape she indicated that she did not see any evidence that the defendant was impaired in any way. Significantly she actually looked at the jail medical records in intake forms and spoke with the jail nurse who related the defendant was calm and cooperative and exhibited no evidence of detoxification or drug withdrawal. In her opinion, the defendant clearly had the capacity to understand and waive his Miranda rights.
>
> A review of the testimony presented at the hearing, the statements the Defendant made to the Doctors, and the videotaped confessions clearly indicate that the Defendant understood the Miranda warnings and **knowingly and voluntarily** waived his rights. A striking example that the defendant knew and understood his rights, including the right not to speak with officers, can be found at the end of the fourth interview, where the Defendant invoked his right to remain silent. The Defendant stated "I want to go back to my cell. I don't want to talk no more." Video transcript p. 89, line 15. The officers honored his request and ended the interview.
>
> ...
>
> Here, the defendant was able to answer the questions coherently and relate the facts in a fairly articulate manner. His final statement is detailed and consistent with the objective facts of the case, thereby eliminating the concern of a so-called "false confession." The purpose of the exclusionary rule is to prevent forced statements, especially forced false statements. *State v. Crosby,* 599 So. 2d 138, 142 (Fla. 5th DCA l992) . As in *Mclntosh,* the defendant does not claim a defect in the Miranda warnings, only his understanding of them.

(ROA 5:882-92)(emphasis supplied) The court took into consideration *all* of the witnesses who testified about Middleton's drug use and his behavior that night and the next day, it did not simply reject Dr. Bernard's opinions but looked at them in light of the other witnesses as well as the state's expert. It made sound credibility

determinations and its findings were clearly supported by the record. Middleton was not impaired by drugs or alcohol and understood his rights. This Court should affirm the trial court's denial of the motion to suppress.

POINT VI
THERE WAS SUFFICIENT EVIDENCE FOR A CONVICTION OF MURDER IN THE FIRST DEGREE. (Restated)

Middleton next argues that there was insufficient evidence to convict him of either premeditated murder or felony murder. The record, however, contains more than enough evidence to support the jury's verdict that he was guilty of both.

An appellate court may not retry a case or reweigh the evidence. Barwick v. State, 660 So. 2d 685, 695 (Fla. 1995); State v. Law, 559 So. 2d 187, 188 (Fla. 1989); Clark v. State, 379 So. 2d 97, 101 (Fla. 1979). A judgement of conviction comes to an appellate court clothed with the presumption of correctness, and an appellant's claim of insufficiency of the evidence cannot prevail where there is competent substantial evidence to support the verdict and judgement. Terry v. State, 668 So. 2d 954 (Fla. 1996). Competent evidence is evidence which is probative of the fact or facts to be proven. Brumley v. State, 500 So. 2d 233 (Fla. 4th DCA 1986). Evidence is substantial if a reasonable mind might accept it as an adequate support for the conclusion reached. Id. Competent substantial evidence,

therefore, is such evidence, in character, weight or amount as will legally justify the judicial or official action demanded. Terry v. State, 668 So. 2d 954 (Fla. 1996).

This Court has an obligation to independently review the record to determine whether sufficient evidence exists to support Middleton's convictions. See Phillips v. State, 39 So.3d 296, 308 (Fla.), cert. denied, —— U.S. ——, 131 S.Ct. 520, 178 L.Ed.2d 384 (2010). Bevel v. State, 983 So.2d 505, 516 (Fla.2008); *see also* Fla. R.App. P. 9.142(a)(6) ("In death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."). The evidence in a capital case is judged to be sufficient when it is both competent and substantial. See Phillips, 39 So.3d at 308. This Court must "view the evidence in the light most favorable to the State to determine whether 'a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.' " Rodgers v. State, 948 So.2d 655, 674 (Fla.2006) (citing Bradley v. State, 787 So.2d 732, 738 (Fla.2001)). The jury was instructed on both premeditated and felony murder, and the jury found Middleton guilty on a special verdict form listing both felony murder and premeditated murder; the jury found him guilty of both.

When evidence supports two conflicting theories, the appellate court's duty is to review the record in the light most favorable to the prevailing party. Johnson v. State, 660 So. 2d 637 (Fla. 1995). The relevant question on appeal is, after all

conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict, whether there is competent, substantial evidence to support the jury's verdict and judgment. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211 (1982).

Premeditated murder

Under Florida law, premeditation can be formed in a moment and need only exist "for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So.2d 610, 612 (Fla.), cert. denied, ---U.S.---, 112 S.Ct. 265, 116 L.Ed. 218 (1991). The jury must determine whether a premeditated design to kill was formed before the killing. Id.

The record showed that Middleton lived right across the street from Roberta, thirty-three seconds away, and knew her. (T 17:1625-27, 20:1966) Middleton told Fowler that he was going to rob her a couple of weeks before the murder and then again on the day of the murder, that day saying that her husband was out of town and he had seen her with lots of money. (T 19:1804-5, 1845-46, 22:2257-59) He refused to go to Wal-Mart instead saying that he was going to collect a debt and shower, which, as the trial court noted, predicted the necessity he would have to shower. (18:1717-20, 19:1806-14) He armed himself with a knife from his kitchen, hid it in his back pocket, and went over to her house knowing that she was at

home. (20:1967-68, 22:2257-59) Once she answered the door he attacked while she was still in the door area, stabbed her in the kitchen while she tried to flee, and then dragged her backwards down the hall into the bedroom where he held her up to saw through her neck, actually cutting into her vertebrae. (20:1983-85, 21:2118-20) "Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Sochor v. State, 619 So.2d 285, 288 (Fla.1993) (quoting Larry v. State, 104 So.2d 352, 354 (Fla.1958)). All of this is competent, substantial evidence of premeditation which the jury found in its verdict.

This Court has found sufficient evidence for premeditation in a similar case. In Morrison v. State, 818 So.2d 432 (Fla. 2002) the defendant was charged with first degree murder, burglary, and robbery for the killing of the man in the apartment across from his girlfriend's. He killed the elderly man by stabbing him in the throat and then slashing his neck so deeply that his spinal cord was cut after he had battered him in the face and head, similar to what Middleton did to Roberta. This Court found premeditation, saying:

> Given the nature of the weapon used and the manner in which the homicide was committed, as well as the nature and manner in which the wounds were inflicted, the jury was amply justified in concluding that it demonstrated Morrison's intent to kill. *See Jimenez*

> *v. State*, 703 So.2d 437, 440 (Fla.1997) (deliberate use of a knife to stab a victim multiple times in vital organs, alone, is evidence that can support a finding of premeditation).
>
> ...[E]ven if Morrison had not intended to kill when he first entered the apartment, the jury was entitled to conclude that he "deliberately determined to kill before inflicting the mortal wound," *Lowe v. State*, 90 Fla. 255, 105 So. 829, 831 (1925), and that this intent existed for such time as to have allowed Morrison "to be conscious of the nature of the act [he was] about to commit and the probable result of the act." *Buckner v. State*, 714 So.2d 384, 387 (Fla.1998). As the trial court noted in its sentencing order, Morrison was a regular visitor to the apartment adjacent to the victim's; had the victim survived, he could have identified Morrison. This circumstance, coupled with the nature of the wounds inflicted plus the victim's inability to defend himself, belies any claim that the killing was unintentional or that Morrison was not conscious of the nature of his act or its probable result. Because reasonable jurors could reject Morrison's theory of non-premeditation and conclude that he committed premeditated murder, we find that the trial court did not err in denying Morrison's motion for judgment of acquittal as to premeditated murder.

Id. at 452-453 (Footnote omitted). This Court should affirm the conviction for premeditated murder. Middleton's case is very similar to Morrison and the same factors present there to uphold premeditated murder are present in this case.

Middleton relies on Kirkland v. State, 684 So.2d 732 (Fla. 1996) to support his contention that there was not enough evidence to convict him of premeditated murder; however, that case is distinguishable. Kirkland was mildly retarded and was living with the victim and her family at the time of the murder. There was no evidence of any animosity between the two prior to the crime. Kirkland did not transport a weapon to the crime scene, unlike Middleton. Additionally, Kirkland

committed no felony that accompanied the murder, unlike Middleton. This Court should affirm the conviction for premeditated murder.

Felony murder

Middleton also asserts that there was a reasonable hypothesis that his entry was invited and, thus, there could be no burglary. The evidence does not, however, support such a conclusion. In the quote Middleton relied on in his brief is the fact that belies that contention.

> Q: – she started, you say, pushing you away to get out, get out of her house?
>
> A: Yes, sir.

(T 22:2261-62) Any invitation, if there ever had been one, was revoked. See Morrison 818 So.2d at 453-454; see also Robertson v. State, 699 So.2d 1343, 1347 (Fla. 1997)(explaining that the jury could have concluded that consent to remain was withdrawn when defendant bound and blindfolded the victim and stuffed a brassiere down her throat); Jimenez v. State. 703 So.2d 437, 441 (Fla. 1997)(concluding that trier of fact could reasonably have found that after defendant brutally beat and stabbed victim, she withdrew her consent for the defendant to remain in her residence and, thus, the defendant's continued presence constituted burglary); Raleigh v. State, 705 So.2d 1324, 1329 (Fla. 1997)(holding that whatever consent the victim might have given to defendant to remain in victim's

home was withdrawn when defendant shot him several times and beat him viciously). Additionally, as noted above, Middleton admitted that he planned on robbing her and said so on that very day to Fowler. His conviction and sentence for murder in the first degree and burglary should be affirmed.

POINT VII
THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATOR IS CONSTITUTIONAL. (Restated)

Middleton argues that the CCP aggravator is unconstitutionally vague and overbroad, is incapable of a constitutionally adequate narrowing construction, and has been and are being applied in an arbitrary and inconsistent manner. He also argues that the CCP jury instruction is unconstitutional because it fails to require the state to prove beyond a reasonable doubt an intent to kill before the crime began. The instant issue is one of a matter of law. As such, it is reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994). The State notes that CCP is a constitutional aggravator on its face. Donaldson v. State, 722 So.2d 177, 187 n. 12 (Fla.1998); Walker v. State, 707 So.2d 300, 316 (Fla. 1997). In Klokoe v. State, 589 So.2d 219 (Fla. 1991) and in Hunter v. State, 660 So.2d 244, 253 (1995), the Supreme Court rejected the specific constitutional challenge to Florida 921.1-4l(5)(i) being made here.

This Court has also repeatedly found Florida Standard Criminal Jury Instruction 7.11(9) to be constitutional. See, e.g., Id.; Walker v. State, 707 So.2d 300, 316 (Fla.1997); McWatters v. State, 36 So.3d 613, 643 (Fla.2010). Furthermore, Middleton's' argument that the standard jury instruction fails to require that the State prove intent to kill before the crime began is directly contrary to the instruction given. The trial court instructed that "[t]he premeditated intent to kill must be formed before the killing" and that "[e]ach aggravating circumstance must be established beyond a reasonable doubt before it may be considered." This issue should be denied.

POINT VIII

THE INSTRUCTION REQUIRING THE JURY TO BE "REASONABLY CONVINCED" OF A MITIGATING FACTOR DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE AND DOES NOT RENDER FLORIDA'S CAPITAL SENTENCING UNCONSTITUTIONAL UNDER EITHER THE UNITED STATES OR FLORIDA CONSTITUTIONS. (restated)

Here, Middleton asserts that the standard jury instruction advises the jury that it may consider mitigating factors of which it is "reasonably convinced" exist is unconstitutional under the Florida and United States Constitution, but section 921.141 provides no such standard of proof. He insists that jury instruction's standard of proof renders it unconstitutional as it: (a) invades the province of the Legislature violating the Separation of Powers clause; (2) is an incorrect statement

of Florida law; and (3) unconstitutionally limits the jury's consideration of mitigation. (IB at 84). The State disagrees as this Court has rejected these same challenges repeatedly and Middleton has failed to offer a basis for this Court to revisit the issue. The claim should be found meritless.

The instant issue is one of a matter of law. As such, it is reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994).

Middleton claims the use of the phrase "reasonably convinced" in defining the standard of proof is a violation of the separation of powers doctrine. Separation of powers is intended to preserve the system of checks and balances built into the government as a safeguard against the encroachment-aggrandizement of one branch at the expense of the other. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). The judiciary has the power to promulgate standard instructions putting into effect the legislative intent.

Under section 921.141(1), both parties are permitted to put on evidence relevant to the nature of the crime and character of the defendant including evidence related to aggravating and mitigating circumstances. Section 921.141(2), requires the jury determine: "(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5); (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) Based on these considerations, whether the defendant should be sentenced

to life imprisonment or death." Thus, in order to give guidance as to whether aggravators and/or mitigators exist, this Court has determined the State must prove the aggravator beyond a reasonable doubt, but the defendant need only reasonably convince the jury of the existence of mitigators. See Robertson v. State, 611 So.2d 1228, 1232 (1993); Walls v. State, 641 So.2d 381, 390 (Fla. 1994). The state's burden is higher than the defendant's burden and it is only logical that the jurors must be reasonably convinced of a fact before they may use it as a basis for advising the court of the appropriate penalty. The promulgation of this instruction does not violate the separation of powers doctrine, nor render the statute unconstitutional. It merely gives effect to the legislative intent. For these same reasons, the jury instruction does not implicate the cruel and unusual punishment clause of the United States and Florida constitutions.

The State submits the standard instructions for mitigation are proper and reflect the law accurately. Walls, 641 So.2d at 389-90 (reaffirming validity of instruction on penalty phase mitigation in capital murder case and finding it has been upheld, repeatedly upheld by this and federal courts). This Court found the standard penalty phase jury instructions describe Florida law properly. See Jackson v. State, 502 So.2d 409, 410 (Fla. 1986). The "reasonably convinced" standard advises the jury correctly and is a proper instruction. Walls, 641 So.2d 389-90. This Court has upheld the jury instruction against a similar challenge. See

Salazar v. State, 991 So.2d 364, 378 (Fla. 2008) (finding instruction requiring jury "reasonably convinced" of the existence of a mitigating factor to be constitutional); Johnson v. State, 969 So.2d 938, 961–62 (Fla. 2007) (rejecting challenges to standard jury instruction on mitigation; rejecting arguments that standard instructions unconstitutionally place burden of proof on defendant to prove death sentence is inappropriate and improperly restrict evidence that jury may consider in mitigation and reiterating that instruction does not limit the jury's consideration of all relevant evidence)

The State disagrees with the suggestion the instruction precludes the jury from considering "all" the mitigating evidence. Rather, the instruction requires the jury to look at all the evidence, both aggravating and mitigating, to determine the established facts. If the jurors are convinced a mitigator exists, they are to assume it has been established. The jury is not precluded from considering all mitigation presented. See Bogle v. State, 655 So.2d 1103, 1108 (Fla. 1995) (rejecting challenge that language "[i]f you are reasonably convinced that a mitigating circumstance exists, you may consider it established," restricted the evidence the jury could consider in mitigation.) It is only logical the mitigating facts which have been established should be considered in rendering an advisory opinion, and those that do not exist should have no bearing upon the sentence. Without some burden of proof for mitigation, the advisory sentence would be meaningless. The

jury instruction describes the law accurately. This Court should find the statute unconstitutional.

POINT IX
FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL. (restated)

Middleton argues that Florida's capital sentencing scheme is unconstitutional, thereby mandating a reversal of his death sentence and an imposition of a life sentence. Specifically, he challenges the that the jury is informed its role is advisory, the lack of specific findings by the jury regarding aggravating factors, the lack of unanimity of the jury's penalty phase recommendation, and argues that Florida's sentencing scheme requires more than one aggravating factor to support a death sentence. All of these claims are without merit and should be denied.

Initially, this Court has rejected both the Sixth and Eighth Amendment challenges to the death penalty statute. While questions of law are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994), Middleton has offered nothing new to call into question the well settled principles that death is the statutory maximum sentence, death eligibility occurs at time of conviction, and that the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence.

Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001); Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death is maximum penalty and repeated rejection of arguments aggravators had to be charged in indictment, submitted to jury and individually found by unanimous jury). See Perez v. State, 919 So.2d 347, 377 (Fla. 2005) (rejecting challenges to capital sentencing under Ring and Furman); King v. Moore, 831 So.2d 143 (Fla. 2002). Florida's capital sentencing is constitutional. See Proffitt v. Florida, 428 U.S. 242, 245-46, 251 (1976) (finding Florida's capital sentencing constitutional under Furman); Hildwin v. Florida, 490 U.S. 638 (1989)(noting Sixth Amendment does not require case "jury to specify the aggravating factors that permit the imposition of capital punishment in Florida"); Spaziano v. Florida, 468 U.S. 447 (1984); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003).

Middleton claims § 921.141 does not provide for single aggravator cases and focuses on the plural word circumstances in the phrase "sufficient aggravating circumstances" found in § 921.141(2)(a) and (3)(a). He argues that the language is not the equivalent to “one or more” and clearly intends for the jury to find more than one in order to recommend death. He alleges that the statute clearly did not envision single aggravator cases or it would have explicit language to that effect. § 921.141 is not ambiguous and this Court has found previously that single aggravator cases are constitutional.

In 1973, this Court was called upon to determine if Florida's death penalty statute was constitutional. State v. Dixon, 283 So.2d 1, 2-3 (Fla. 1973), superseded by statute as stated in State v. Dene, 533 So.2d 265 (Fla. 1988). Before this Court in Dixon was the exact language at issue here. Interpreting the statute, in light of a challenge that the aggravators were vague and did not "provide meaningful restraints and guidelines for the discretion of judge and jury," this Court stated: "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided...." Dixon, 283 So.2d 1, 8-9. Based upon this interpretation, a single HAC aggravator sentence was affirmed in LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978). Since then, this Court has affirmed several single aggravator cases. See Rodgers v. State, 948 So.2d 655 (Fla.2006); Butler v. State, 842 So.2d 817, 832-34 (Fla. 2003); Blackwood v. State, 777 So.2d 399 (Fla. 2000); Cardona v. State, 641 So.2d 361 (Fla. 1994), denial of postconviction relief reversed, 826 So.2d 968 (Fla. 2002). In Burdick v. State, 594 So. 2d 267, 271 (Fla. 1992), the Court held that "It is a well-established rule of statutory construction that when a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment." Here, the this Court has long interpreted the statute as it was written post Furman that a single aggravator is all that is needed. The Legislature readopted the statutes after those

decisions, thus adopting the Florida Supreme Court's case law. Consequently, they have now adopted the one aggravator standard as if it was written into the statute.

Middleton asserts that under Ring and Caldwell v. Mississippi, 472 U.S. 320 (1985) it was error to inform the jury that its sentencing determination was advisory, when, according to him, it was a necessary predicate for a death sentence. This stance is without merit.

The statute as outlined in the instructions advises the jury correctly as to its role. "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). This Court has recognized repeatedly that the jury's sentencing role is advisory, and the standard instructions adequately, correctly, and constitutionally advise the jury of its responsibility. See Cook v. State, 792 So.2d 1197, 1201 (Fla. 2001); Brown v. State, 721 So. 2d 274, 283 (Fla. 1998); Burns v. State, 699 So. 2d 646, 654 (Fla. 1997); Turner v. Dugger, 614 So.2d 1075, 1079 (Fla. 1992); Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988). There is no question the jury was instructed adequately; the judge here gave the standard instructions. This satisfied constitutional dictates, not implicated by Ring.

Middleton argues that the jury must unanimously make find specific findings required under § 921.141(3), Fla. Stat. His claims that the death penalty is

unconstitutional for failing to require juror unanimity, findings of fact in the jury's recommendation, or specific findings of aggravating factors are without merit. These issues are not addressed in Ring, and in the absence of any Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 822 So.2d 1269 (Fla. 2002); Cox v. State, 819 So.2d 705, 724 n.17 (Fla. 2002) (noting prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)). Moreover, this Court has already rejected these arguments post-Ring. Porter, 840 So.2d at 986 (rejecting argument that aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Doorbal, 837 So.2d 940 (Fla. 2003)(same).

This Court has rejected Middleton's argument that the standard instruction to jurors that their role is advisory does not render capital sentencing unconstitutional. See Globe v. State, 877 So.2d 663, 673–74 (Fla.2004); Johnson v. State, 969 So.2d 938, 961 (Fla. 2007).

> [Middleton] cites no precedent holding that a specific threshold number or proportion of juror votes for either aggravating or mitigating circumstances is constitutionally required. A capital sentencing scheme passes constitutional muster if it rationally narrows the class of death-eligible defendants and permits the sentencer to consider any mitigating evidence relevant to its determination. *Marsh*, 126 S.Ct. at 2525–26. In *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court determined that the channeled discretion required by the Eighth Amendment is provided by Florida's scheme requiring statutory and

> mitigating circumstances to be found and weighed first by the advisory jury and then independently by the trial court. *Id.* at 248–52, 96 S.Ct. 2960.

Id. This Court has also held that "a capital jury may recommend a death sentence by a bare majority vote." Card v. State, 803 So.2d 613, 628 n. 13 (Fla. 2001) citing Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994).

Middleton's argument that the issues raised and addressed in Doorbal are different that his is incorrect. This Court's use of "aggravating factors" clearly means that the specific aggravating factors "sought" by the State, the specific aggravating and mitigating factors found by the jury, and the jury's weighing of them. Doorbal wanted those specifics included in the indictment and specific jury findings by a unanimous jury detailed. Those are exactly what Middleton is arguing here. This Court has already denied these arguments. Both the Apprendi and Ring decisions are inapplicable and there is no basis for relief.

Courts are not required to have juries specify in their penalty recommendations which aggravating or mitigating factors exist. This Court stated, "[this] presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v.

Florida, 468 U.S. 447 (1984).

It is Middleton's position that § 921.141 does not contemplate the imposition of a death sentence based upon a single aggravator. This Court has rejected such claims and Middleton has not offered a basis for rejecting such precedent.

Finally, since the trial court found the contemporaneous felony aggravator based on Middleton's conviction of burglary, he is not entitled to relief under Ring. Zack v. State, 911 So.2d 1190, 1202 (Fla.2005); Reese v. State, 14 So.3d 913, 920 (Fla.2009); Braddy v. State, 111 So.3d 810, 860 (Fla.,2012). This Court should affirm the death sentence.

POINT X
THE FELONY MURDER AGGRAVATOR IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED. (restated)

Defendant claims that the felony murder aggravating circumstance is unconstitutional. Both this Court and the federal courts have repeatedly rejected claims that the "felony-murder" aggravator is unconstitutional because it constitutes an "automatic" aggravating factor. See Banks v. State, 700 So.2d 363, 367 (Fla. 1997); Mills v. State, 476 So.2d 172, 178 (1985) (concluding that the legislature's determination that a first-degree murder committed in the course of another dangerous felony was an aggravated capital felony was a reasonable determination); Lowenfeld v. Phelps, 484 U.S. 231 (1988); Blystone v.

Pennsylvania, 494 U.S. 299 (1990); Johnson v. Dugger, 932 F.2d 1360 (11th Cir. 1991).

Relying upon the North Carolina, Wyoming and Tennessee state supreme courts, Defendant raises essentially the same argument, which should be rejected. Even if Defendant's argument is read as based upon the constitutional guarantees of the Eighth and Fourteenth Amendments, this Court has already rejected those arguments in Clark v. State, 443 So.2d 973 (1983), cert. denied, 104 S.Ct. 2400, 467 U.S. 1210 ("felony-murder" aggravator comports fully with the constitutional requirements of equal protection and due process as well as the prohibition against cruel and unusual punishment). There is no merit to this claim.

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by either U.S. Mail or U.P.S. to Jeffrey L. Anderson, Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on September 3, 2013.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately on September 3, 2013.

_____

LISA-MARIE LERNER