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IN THE SUPREME COURT OF FLORIDA

DALE GLENN MIDDLETON,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC12-2469
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

INITIAL BRIEF OF APPELLANT

On appeal from the Circuit Court of the Nineteenth Judicial Circuit,
In and For Okeechobee County, Florida
[Criminal Division]

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and for Okeechobee County, Florida. In this brief, the parties will be referred to as they appear before the Court, although Appellee may also be referred to as the state.

The record appeal consists of 7 volumes. Volumes I through VII contain the Record portion of the record on appeal and are numbered consecutively 1-1304. This portion of the record will be referred to by the symbol "R" followed by the page number.

Volumes VIII-XXVI contains the transcripts of hearings and the trial. Volumes VIII-XXVI are numbered consecutively 1-2872. The transcript portion of the record will be referred to by the symbol "T" followed by the page number.

There is one volume of supplemental record on appeal. The supplemental record will be referred to by "SR" followed by the volume and page number.

There is one volume of evidence documents. It will be referred to by the symbol "E" followed by the page number.

STATEMENT OF THE CASE AND FACTS

Appellant, Dale Glenn Middleton, was charged with first degree murder; burglary ; grand theft; and dealing in stolen property R38-39.The case was before the Honorable Robert Belanger. A jury trial commenced on August of 2012.

After close of the State's case in chief Appellant moved for judgments of acquittal T2293, 2295. The motions were denied T2295, 2297. Appellant was found guilty of murder, burglary, grand theft, and dealing in stolen property R1056-1058, 1181-1182. The grand theft conviction was vacated. The jury recommended death by a 12-0 vote.

Appellant was sentenced to death for the murder conviction IV R561, 576-96, and to life in prison for the burglary and to fifteen years in prison for dealing in stolen property R1188-1223, 1183-1185. Appellant filed his notice of appeal R1227, 1232. This appeal follows.

Motion To Suppress Hearing

Appellant moved to suppress his statements to police R508-511 . A hearing was held on the motion.

Steve Britnell testified that Appellant consumed Xanax and crystal meth twice on the day of the incident T352, 359. Appellant also took cocaine T364. Britnell described Appellant as real shaky, real nervous, real upset T340. That afternoon when Appellant was on the phone he was crying T341.

Some officers who observed Appellant that night testified that Appellant did not appear to be under the influence of drugs or alcohol T381, 391.

Assistant public defender Stanley Glenn testified that the first appearance was held at 9:30 AM on July 30, 2009 T401. The public defender's office was appointed to Appellant's case at the first appearance T407. The trial court took judicial notice that Appellant's invocation of constitutional rights form was filed on July 30 at 11:50 AM T416.

Detective Marty Faulkner testified that Appellant signed a Miranda rights card on July 28, 2009 at 11:56 PM T425 -- 426. Appellant was nervous and stressed, but did not appear impaired T427. A total of five interviews were held with Appellant. The fourth interview stopped at 12:25 PM on July 29 T448. The next day Faulkner decided to check on Appellant T455. Faulkner was concerned about Appellant T469. Faulkner did not tell anyone at the jail that he was concerned about Appellant T474. As Faulkner walked up to Appellant's cell, Appellant told Faulkner he wanted to talk T457-458. According to the jail records Faulkner left with Appellant at 9:21 AM and Appellant was returned to his cell at 10:19 AM T466. Faulkner had been informed that Appellant had spoken with an attorney T471. Faulkner attempted to have Appellant waive his right to an attorney 6 times but was not successful T473. The 7th time Appellant did waive his right to an attorney T474.

Dr. Gregory Landrum testified that he assessed Appellant's competency to stand trial T491. Appellant had an overall IQ score of 72 T493. Landrum did not perform a test for determining Appellant's understanding of Miranda T501.

Dr. James Barnard, a licensed psychologist, testified that he was asked to do an evaluation of Appellant's understanding of the Miranda rights T519. Barnard reviewed medical records, arrest reports, school board records, substance abuse/ drug rehabilitation records, and interviewed Appellant and arresting officers T522. Testing showed Appellant with a full IQ of 83 and a verbal comprehension of 78 T524. Testing indicated that Appellant was not malingering T531. Appellant's reading ability is at a 4th grade level T535. Appellant reported abuse of alcohol, cannabis, cocaine, tranquilizers, opiates including heroin, oxycodone, roxycodone, and crystal methamphetamine T539. Appellant had ADHD (attention deficit hyperactivity disorder) T524. Appellant reported that the drugs made him less able to control his impulses T543. Barnard testified that people with impulse disorders have a higher likelihood of substance abuse T543. The evidence of Appellant being in jail for 24 to 36 hours was consistent with withdrawal where Appellant had used oxycodone, Roxicodone, Xanax, and crystal meth within the 24 hours period prior to the offense T545. Withdrawal symptoms include confusion T545. Appellant took the Grisso test for comprehension of Miranda rights T547. Appellant's total score was 13 of 30 which is more than 2 standard deviations below the mean T554.

The mean is 26.3 of 30 T555. The tests assess the ability to intelligently apply knowledge regarding Miranda rights T555. There is no direct correlation between being given rights and actually understanding them T559. Appellant indicated he understood his Miranda rights but never gave any definition of what his understanding was T650. Appellant's responses indicate more of an acquiescence to assist police and be controlled by police rather than asserting his rights T655.

Chris Jenkins testified that on July 28, 2000 he gave Appellant roxies T684. Appellant snorted two of them and kept another T684. Appellant called Jenkins because he was "dope sick" meaning he was going through withdrawal from drugs T686, 689.

Dr. Michael Riordan, a licensed psychologist, performed neuropsychological evaluations of Appellant T695, 702. Appellant had an IQ of 75 T707. Riordan opined that Appellant was incompetent to waive Miranda at the time of the interrogation because a person of borderline intellectual functioning is less likely to understand the Miranda compared to a person with average intelligence and Appellant had a cognitive disorder which impairs the ability to function and Appellant used drugs which could negatively impact cognitive abilities T707-708. Tests showed that Appellant was not malingering on the tests Riordan gave T712. One can malinger on one set of tests while not malingering on other tests T714. Riordan did not utilize the Grisso test but did have extended findings with regard to

Miranda comprehension T754 – 755. Riordan opined that Appellant may or may not have been competent to waive Miranda at the beginning of the process but that he was not competent later on T790.

Deborah Leporowski, a licensed psychologist, testified that when she examined Appellant she was not looking at a neuropsychological perspective T802. Leporowski noted the discrepancies in IQ testing of Appellant of 72, 83, and 75 T802. The most reasonable explanation for the discrepancy was either that Appellant was not interested, not paying attention, or deliberately underperforming T803. Leporowski noted that while Appellant was in the impaired range and this could be accounted for by his lack of education T805. Leporowski testified that nothing from a neuropsychological test gave her concern that Appellant had difficulty comprehending Miranda T808. Leporowski did not use the Grisso test because it used words that Appellant was not given by police T814. Leporowski did not see anything in the video of Appellant's statement showing that he did not understand the warnings T817. Leporowski disagrees with Dr. Barnard as to when withdrawal peaks from drugs occur T820.

The trial court denied the motion to suppress Appellant's statements R875-898.

The Trial

The body of Rebecca Christensen was found in her home T1598.

Christensen had received numerous stab and incise wounds. A TV was missing from her residence. Appellant lived across the street from Christensen T1672. Appellant was in possession of Christensen's TV T1700. After initially denying involvement in Christensen's death, Appellant felt he could no longer live with what he had done and confessed to the killing:

> And when we left here we went and started smoking meth. And I ain't never done it before. Ate a couple Roxies, some Oxy 80's, smoking a lot of meth, all hyped up and shit. I didn't even know who the hell I was. Went to the house so we could change real quick and Wade -- and then the other guy -- . . .
>
> . . . They hauled ass to Wal-Mart real quick and I was all hyped up, fucked up out of my gourd. And I walked next door to talk to her, I knocked on her door, she opened it and I asked her did she have a little bit of money I could borrow. And she said 'No.' And I told her 'Please, I need some money.' And then I guess she got scared and we started an altercation and it just went crazy. The next thing I know, here I am.

T2257-2258. Appellant acknowledged he took a TV from the residence and again recounted what occurred:

> "Q: Did -- did you take anything else out of the home?
>
> "A: No, sir.
>
> "Q: Did she have any money?
>
> "A: No, sir.
>
> "Q: Did you check?
>
> "A: No, sir.
>
> "Q: You never checked?

"A: There was so much going on. It happened so fast.

"Q: Did you look in her purse?

"A: I don't think so. I don't even think I seen the purse. I know it happened so fast and it's still kind of foggy.

"Q: Did she say anything to you?

"A: No, sir, just 'Come in.' And I asked her to borrow some money and she said 'Dale, I ain't got no money, I paid the bills.' I told her 'Please.' And I told her why and then we got upset and things got out of hand and I did what I did and here I am. . . .

T2260-2261. When asked if he went to Christensen's residence intending to kill her Appellant acknowledged that he had been thinking about committing robberies but that he did not know he was going to kill her when he went over to her residence:

"Q: Let me ask you something, Dale. With your cooperation, as you are, and not (inaudible) impressed that you're -- in your state of mind it's what you want to do. I understand you're feeling like you -- you've done evil and it's not you and you're trying to correct this. Did you know you were going to kill her when you went over there?

"A: No, sir. No, sir.

"Q: The reason why I asked that, you mentioned that you talked about it several days.

"A: No, we talked -- me and Wade talked about robbing a few places, never harming no one, never nothing like that. We're not that kind of people.

"Q: Is it -- what prompted you to go ahead and take her life? Is it when she told you she had no money or you didn't believe her? How -- how did that all start?

"A: I was so fucked up and tore up and hyped up like I've never been in my life. And after she -- she said she ain't got no money

and everything and I kept begging her and she tried to push me out the door and shit, that's when shit went crazy, it just fucking went crazy.

"Q: What was she doing in her home when you walked in? Did you -- you knocked, you said?

"A: Yes, sir.

"Q: And she said 'Come in'?

"A: Yes, sir.

"Q: What was she actually doing when you walked in?

"A: I'm not sure.

"Q: Okay. So when y'all had your argument over I guess the money --

"A: Yes, sir.

"Q: -- she started, you said, pushing you away to get out, get out of her home?

"A: Yes, sir.

"Q: And then what happened?

"A: I did what I did. I was so hyped up and fucked up and scared and 'Ahhhhh.'

"Q: What type of knife was it?

"A: Just a regular knife.

T2261-2263. Appellant described the knife as a little kitchen knife – the type used to peel potatoes T2282. Appellant had it in his back pocket because he used it to clean his nails T2258. Appellant would later put the knife in a bag with his clothes and throw them in a dumpster T2258.

Witnesses testified about Appellant trying to sell Christensen's TV T1629, 1634,1686-1687. Appellant indicated a guy gave him the TV because he owed Appellant money T1646. Appellant sold the TV to Roland Ammons for $200 T1701-1702. When Ammons talked to Appellant about the TV, Appellant sounded like he was crying and his voice was really breaking T1710. Ammons' wife even asked him if Appellant was crying T1710.

Appellant had been given Roxicodone by Chris Jenkins earlier that day T1654. Appellant took two of them by crushing them and saved one for later T1654.

Christopher Lein testified that Appellant came over to his residence that afternoon to fix Lein's toilet T1628. Later, Appellant wanted to know if anyone wanted to by a TV T1629.

Steve Britnell testified he picked up Appellant at 8 or 9:00 AM that day T1715. They rode around looking for drugs T1715. They did Xanax together T1739. Around 1:00 PM they found some methamphetamine T1715. They went to Appellant's trailer and did the drugs T1716. Appellant was "pretty ripped" since 3:00 PM that afternoon T1748 – 1749. At around 4:30 PM Britnell went to Wal-Mart with Wade Fowler T1717, 1720. Appellant didn't go and said he had some business to take care of T1720. When Britnell returned he saw a TV T1724. Appellant asked Britnell to drive him around to sell the TV T1725. Appellant

eventually found a buyer T1727 -- 28. Britnell and Appellant did drugs on the way back to Appellant's residence T1729. Britnell had car problems and Appellant walked off T1729 – 31. When Appellant later called for a ride he was crying and really upset T1731. When Britnell was driving in the trailer park he could see a lot of police cars T1731. Appellant directed Britnell in another direction T1732. Britnell heard Appellant talking on the phone to his girlfriend crying and expressing he was sorry T1750.

Deputy William Maerki testified that Appellant was first interviewed at 11:56 that night T1780. Maerki testified that Appellant's mannerisms and bloodshot watery eyes led him to believe that Appellant was under the influence of something T1783. There was no slurred speech which surprised Maerki T1784. Maerki was not surprised that subjects of interviews do not divulge information regarding their criminal activity T1796.

Garrett Wade Fowler testified that Appellant had previously mentioned performing a “link” -- meaning a robbery T1804. Fowler did not know who Appellant intended to rob T1843. Fowler also testified that two weeks earlier Appellant indicated that Roberta Christensen was a target T1805. Appellant believed her husband was out of town T1805. Appellant had seen her put away large amounts of money T1805. Fowler had smoked meth with Appellant on the day of the killing T1807. Fowler testified it was obvious that Appellant was

smoking meth that day and was obviously high T1836-1837. Fowler noticed what looked like blood on one of Appellant's boots T1818.

Appellant's boots were found in Steve Britnell's car T2018. Rebecca Christensen's DNA was found on one of Appellant's boots T2075 -- 76.

There was testimony as to forensic evidence found in Roberta Christensen's residence. There was blood on the kitchen floor T1974. A trail of blood went around the dining room table and down the hallway toward the master bedroom T1975. The blood evidence showed a struggle T1984. There were items that appear to be pulled down around Christensen during the struggle T1988. Blood on the bottom of Christensen's foot indicated that she had stepped in blood T2112. Christensen's body had defensive wounds T1985. There was evidence consistent with drag marks in the hallway T1983. Christensen's body was found lying in a bedroom T1981. She had a gaping wound to her throat T1982. There was an impression found a piece of paper under her arm T1988. The impression was consistent with the size and shape of Appellant's boot T2135 – 2137. The blood evidence was consistent with Christensen receiving a neck injury not while laying down T2116. The blood was consistent with the struggle all the way from the kitchen to the bedroom T2119.

The medical examiner conducted an autopsy on Christensen on July 29, 2009 T2166. There were numerous wounds on the body. The medical examiner

could not determine the order of wounds that Christensen received T2165. Christensen received numerous defense wounds T2177, 2178, 2182, 2183. There were abrasions and contusions to her face T2169. There were stab wounds to her chest and neck T2175. There was a wound consistent with someone stomping her face T2184. There were numerous wounds to the neck and head area T2180 – 2183. There was a large gaping wound to the neck which was 15 cm in length and 3 cm in width T2184. The depth of the wound went to the vertebral coloum T2186. It was consistent with several passes of a sharp instrument T186. The examiner couldn't tell how many passes T2186. There were a number of other stab wounds to the neck T2185. The wounds to her neck would come toward the final injuries T2192. The gaping wound was consistent with movement T2192. There was nothing indicating that Christensen was unconscious before the gaping wound occurred T2195.

The Penalty Phase

Crime scene technician Jackie Moore testified that there was a vanity inside the bedroom of Roberta Christensen T2486. There was blood spatter on the exterior of the door of the vanity but inside there was none T2427. There was a purse inside the vanity T2427. There was blood on the purse and on the inside of the purse T2429. Moore opined that the door was closed during the altercation because there was no blood spatter inside the vanity but that the purse had been in

the room because there was blood on it T2428 – 2429. Moore had no idea whether anything was in the purse at the time of the altercation T2429.

Eric Christensen testified the day before the killing Roberta Christensen said that Dale had been over and bummed a cigarette and that she had some money out T2438. She said she thought Dale had seen the money and that she was going to deposit it T2438.

Dr. James Barnard testified that he reviewed arrest affidavits, investigation reports, the defendant's statements, school records, drug treatment program records, Raulerson Hospital records, police reports, and interviewed people and family familiar with the defendant and his psychological evaluation T2451 – 2453. There was some discrepancies in report of drug use T2455. It is common for someone to under report substance abuse T2456. There were reports of maternal alcohol abuse T2457. Dr. Barnard administered tests which showed that Appellant had learning disability T2457 – 2458. Appellant did not have a psycoeducational evaluation during his school years T2458. Appellant was well below average in achievement tests in Georgia when growing up T2459. Appellant was one or two on a scale of 10 T2459. Appellant was in school until the 4th or 5th grade T2460. Appellant tested at a 4th grade level and had a sentence comprehension in the 5th grade level T2460. Reports indicated there was traumatic family background and lack of parental guidance T2462. Appellant had difficulty focusing attention and in

controlling behavior T2462. Appellant had ADHD (attention deficit hyperactivity disorder) T2462. The hallmark symptom of ADHD is difficulty with impulse control and difficulty in conforming behavior to norms T2463. Appellant at a high rate of motor activity (restlessness, fidgety) which is another symptom of ADHD T2463. ADHD is characterized by problems with rules governing behavior T2463. There is no indication that Appellant's family had any training to deal with this factor T2465. When Appellant was growing up the Department of Youth Services caseworkers came to Appellant's house and administered psychostimulant medication like Ritalin, Adderall,etc. that have been used with ADHD T2466. Once this medication is not used regularly the person reverts back T2466. Barnard testified Appellant had IQ of 83 but his functional reading achievement was significantly lower T2468. His verbal comprehension is at 78 T2474. He has a borderline range of 73 to 85 T2474. 93 out of 100 people score higher T2474. Appellant has splintered or uneven patterns of abilities T2484. Appellant is able to do things with his hands but has problems solving verbal tasks T2484. Appellant has a history of multiple substance abuse which began after injuring his back in an accidental fall T2514. Substance abuse is directly related to antisocial or criminal behavior T2515. Appellant's abuse of marijuana began at ages 10 to 13 and cocaine at the age of 25 T2516. Untreated ADHD is known risk factor for later substance abuse T2519. Appellant had chronic school difficulty and a lack of social support

T2519. It was reported that Appellant and his siblings stole to feed themselves T2523. Appellant's mother liked to party and was absent T2525. There was no supervision, structure, or guidance at home T2525. The home was void of ingredients for socialization T2525. 60 to 65% of ADHD also exhibit conduct disorder T2526. Problems with impulse control are magnified by substance abuse problems T2527. The low IQ increases the difficulty in coping with problems T2528. Problem-solving involves verbal rehearsal and the lower the IQ the less verbal comprehension of abilities T2528. Appellant had impaired psychological controls and historical difficulty with impulse control T2530. That combination along with abuse of substances are factors that impaired Appellant's ability to conform his conduct to the requirements of law T2531. The fact that defendants can respond differently to different examiners does not make the examiner's findings invalid T2532. Crystal meth does not result in clear thinking and is a drug associated with violent behavior T2590.

Dr. Deborah Leporowski, a licensed psychologist, opined that 83 IQ score was an accurate score for Appellant and indicated borderline intellectual functioning T2604. Appellant's IQ scores were consistent with his lack of education T2606. Appellant's scores on his MMPI gave suspect malingering T2614. Leporowski not find a major depressive disorder T2621. However, the evaluation is at a point in time and mental status can change or fluctuate rapidly

T2621. Leporowski disagreed with Dr. Barnard that Appellant was substantially impaired so that he could not conform his conduct or law because that would mean that Appellant was suffering from a mental disorder T2622. Leporowski diagnosed Appellant with substance abuse problems T2631. But he did not meet the criteria for dependency T2632. There was psychoactive substance abuse T2632.

Joe Parrish, a private investigator, testified he investigated Appellant's background T2659. Michelle Hoanshelt was the mother of Appellant's two daughters T2663. Hoanshelt severed her relationship with Appellant in 2004 T2664. Appellant's children are 18 and 11 T2664. Appellant had very poor role models growing up T2665. His biological father was absent T2665. He lacked proper nurturing by his biological mother T2665. There was no concern about having Appellant go to school T2665. The mother had been divorced and remarried T2666. She drank alcohol and other siblings cared for Appellant T2666. Appellant was always a hard worker and trustworthy T2669. He had the ability to work with his hands T2670. Growing up Appellant abused marijuana and alcohol and this led to abuse of methamphetamines and cocaine T2671. Appellant also had problems with oxycodone T2671. Appellant's daughter noticed that his appearance had changed and she could tell he was under the influence T2672. She indicated Appellant was using crystal meth the night before July 28, 2009 T2673. When Appellant abused narcotics it lead to domestic issues T2674. When sober he was a

good father T2674. Appellant's family saw physical changes to him in the summer of 2009 T2675. One employer called him a model employee T2676. Parrish is not a mitigation specialist he is only a fact finder T2679. Appellant had left Georgia at the age of 15 or 16 and then worked for dairies T2680 – 2681.

Devenna Pearson testified that Appellant is her half brother T2692. She had the same mother as Appellant T2695. The children rode with cattle when the family moved to Georgia T2698. Appellant and Pearson grew up with a bunch of drunks T2699. They did not bond with their mother T2699. She didn't give a damn about the kids and her sister took care of them T2699. The family constantly moved because bills were not paid T2701. At times there was no food or clothing T2701. Pearson was sexually molested by her stepfather T2703. The mother knew about the abuse but didn't stop it T2703. Another sister confronted the stepfather and he beat her T2703. Appellant was 17 when he left Georgia T2705. Pearson saw Appellant at trial but did not recognize him T2706. Pearson testified the boy she grew up with would not have done this T2708.

Dewanna Sprowse was another sister of Appellant. Sprowse testified her mother shacked up with men for a couple months and they would go away and someone else would move in T2715. Sprowse got married at the age of 13 when Appellant was 3 years old T2716. They family moved to Georgia in the back of a cattle truck T2716. Sprowse was beaten when pregnant at the age of 17 T2718. A

younger sister took care of Appellant T2718. Sprowse was able to adopt out her child after the stepfather had beaten her so badly that she couldn't walk T2718. The mother got support from food stamps but would sell them to buy alcohol and drugs T2720. The mother wouldn't wash or clean clothes T2721. Even when the clothes were clean they did not fit properly and the children did not have proper foot wear T2721. The mother just ignored the children T2721. Sprowse summed up life with the stepfather:

> A He was just mean and he was cruel, he only thought about hisself, he didn't think about none of us. I mean, he didn't care about none of us. He told Mom, he said that we all needed to be drowned, that he needed to take us all out and drown us.
>
> Q And this was the man that was living in the house while Dale was growing up in Sylvester?
>
> A Yes, sir, he would belittle him, belittle Devenna. He would cuss them, slap them, for no apparent reason. And my mom would be there and wouldn't do nothing about it. Because her motto is you take care of your man and then you take care of your children, your children come second, but your man comes first if you want to keep him.

Sprowse received injuries from the stepfather T2725, but the mother took the stepfather's side because she was taking care of her man T2725. The stepfather ultimately spent 6 months in jail and then returned home T2727. The other children and moved out of the house but Appellant was still there T2728. Sprowse had seen Appellant with an injured eye and an injured arm- but couldn't say how he received the injuries T2729. Appellant lost sight in one eye T2729. The mother did not

believe in Christmas, Thanksgiving, or birthdays and believed that books were waste of money T2729. Prowse summed up that Appellant lived through hell:

> A He has lived through hell. He was put through hell. You know, not only by my mom, but by her boyfriends, the ones that she drug in and stuff. And I mean the little guy I knew, he was a sweetheart. I mean he was talented, he could draw anything he wanted to, you just tell him and he could draw it. And I mean, he had a good heart on him, you know. I want that little boy back, you know, I want the little boy that I helped raise.

T2731.

SUMMARY OF THE ARGUMENT

1. After elimination of the aggravating circumstances of avoid arrest and CCP the death penalty is disproportionate in this case or alternatively this case should be remanded for a new penalty phase.

2. The trial court failed to exercise its discretion in requiring appellant to present its penalty phase witnesses in a particular order over a two day period.

3. Appellant was denied a fair and reliable sentencing where the trial court denied the request for a mitigation specialist.

4. Appellant was denied due process and a fair and reliable sentencing where the trial court did not give the individual sentencing required for the death penalty.

5. Appellant was denied due process and a fair trial by introduction of Appellant's statement where police interrogated Appellant after counsel had been appointed in this case and where Appellant did not voluntarily and intelligently waive his rights under the 5th and 6th amendments to the United States Constitution.

6. The evidence was insufficient for murder in the first degree.

7. The trial court erred by denying appellant's motion to declare section 921.141(5)(i),Florida statutes, and the corresponding standard jury instruction unconstitutional facially and as applied.

8. The jury instruction stating that the jury is to only consider mitigation after it is reasonably convinced of its existence is improper.

9. Florida's death penalty which does not require: the findings under ring v. arizona, 122 s. ct. 2428 (2002); the jury to be properly advised of their responsibility; a unanimous jury finding for death; a unanimous jury finding of aggravating circumstances; a finding beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances violates the fifth, sixth, eighth and fourteenth amendments to the united states constitution.

10. Florida statute 921.141 (d), the felony murder aggravator is unconstitutional on its face and as applied in this case.

ARGUMENT

POINT I

AFTER ELIMINATION OF THE AGGRAVATING CIRCUMSTANCES OF AVOID ARREST AND CCP THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE OR ALTERNATIVELY THIS CASE SHOULD BE REMANDED FOR A NEW PENALTY PHASE.

Circumstances Of This Case

The body of Rebecca Christensen was found in her home. Christensen had received numerous stab and incise wounds. A TV was missing from her residence. There were no signs of forced entry. Appellant lived across the street from Christensen. Appellant was in possession of Christensen's TV. After initially denying involvement in Christensen's death, Appellant felt he could no longer live with what he had done and confessed to the killing:

> They hauled ass to Wal-Mart real quick and I was all hyped up, fucked up out of my gourd. And I walked next door to talk to her, I knocked on her door, she opened it and I asked her did she have a little bit of money I could borrow. And she said 'No.' And I told her 'Please, I need some money.' And then I guess she got scared and we started an altercation and it just went crazy. The next thing I know, here I am.

T1257-1258. The State presented evidence through Steven Britnell that he and Appellant had consumed Xanax and methamphetamine. Appellant was "pretty ripped" since 3:00 PM that afternoon T1748 – 1749. Britnell went to Wal-Mart

leaving Appellant who indicated that he had “some business to take care of.” Later when Britnell and others returned Appellant was in possession of Christensen’s TV which Appellant eventually sold. Appellant bought cocaine from the proceeds.

When Appellant was asked if he went to Christensen's residence intending to kill her, Appellant acknowledged that he and Wade Fowler had been thinking about committing robberies but that he did not know he was going to kill Christensen when he went over to her residence:

> "Q: Let me ask you something, Dale. With your cooperation, as you are, and not (inaudible) impressed that you're -- in your state of mind it's what you want to do. I understand you're feeling like you -- you've done evil and it's not you and you're trying to correct this. Did you know you were going to kill her when you went over there?
>
> "A: No, sir. No, sir.
>
> "Q: The reason why I asked that, you mentioned that you talked about it several days.
>
> "A: No, we talked -- me and Wade talked about robbing a few places, never harming no one, never nothing like that. We're not that kind of people.
>
> "Q: Is it -- what prompted you to go ahead and take her life? Is it when she told you she had no money or you didn't believe her? How -- how did that all start?
>
> "A: I was so fucked up and tore up and hyped up like I've never been in my life. And after she -- she said she ain't got no money and everything and I kept begging her and she tried to push me out the door and shit, that's when shit went crazy, it just fucking went crazy.

T2261-2262. Appellant took the TV to his trailer, cleaned up, and changed his

clothes. Later he would sell the TV and throw the clothes and knife in a dumpster. The trial court found the aggravating circumstances of CCP, avoid arrest, pecuniary gain, felony murder, and HAC. In mitigation the trial court found

The cases of *Perry v. State*, 522 So.2d 817 (Fla. 1988); *Davis v. State,* 604 So.2d 794 (Fla. 1992); and *Green v. State*, 583 So.2d 647 (Fla. 1991) are relevant to this Point and will be detailed below.

Circumstances in *Perry v. State*, 522 So.2d 817 (Fla. 1988)

The body of Kathryn Miller was found in the hallway of her home. Miller had been stabbed repeatedly and suffered blows to her head -- and died by strangulation. Miller's purse was taken from the murder scene. Johnny Perry was a former neighbor of Miller. Perry confessed to killing Miller during a robbery attempt. Perry indicated he had demanded gold from Miller prior to killing her and had taken her purse from the murder scene. 522 So.2d at 820. As to the actual killing there was stabbing, beating, and strangulation:

> The evidence reflects that Johnny Perry tried and tried again to kill Kathryn Miller. She was brutally beaten in the head and face. She was choked and repeatedly stabbed in the chest and breasts as she attempted to ward off the knife. She died of strangulation associated with stab wounds, comparable, in the medical examiner's testimony, to drowning in her own blood.

522 So.2d at 821. The trial court found the aggravating circumstances including

CCP, avoid arrest, HAC, felony murder and there was no statutory mitigation. This Court struck avoid arrest and CCP. There was nonstatutory mitigation -- good to family, ambitious but unemployed, and cooperated with officials. This Court reduced the death sentence to life.

Circumstances in *Davis v. State*, 604 So.2d 794 (Fla. 1992)

The body of 73 year old Joyce Ezell was discovered in her house. She had suffered 21 stab wounds. Items were missing from her house. Davis was acquainted with Ezell and there were no signs of forced entry. Davis was seen walking up to Ezell's door on the day her body was found. Later that day Davis pawned the items that were missing from Ezell's house. Davis denied committing the murder and initially told police he had been picking watermelons on the day of the murder -- but changed his story to that he had been babysitting. Davis stated that the day prior to the murder that black man who looked exactly like him displayed an ice pick and said he was going to rob Ezell. Davis also said he had helped Ezell with her groceries that day. The jury recommended death 12 to 0 and the trial court imposed the death penalty. The trial court found four aggravating certain circumstances --avoid arrest, pecuniary gain, HAC, and during a felony.. On appeal this court struck the aggravating circumstances avoid arrest and upheld the trial court's rejection of statutory mental mitigation. This court vacated the

death sentence and remanded the case for resentencing. Ultimately Davis was sentenced to life.

The circumstances of *Green v. State*, 583 So.2d 647 (Fla. 1991)

The bodies of Robert and Dora Nichols were found lying dead inside their home. Dora had been stabbed 14 times and Robert had 28 stab wounds. Green and his girlfriend, Cassandra Jones, rented from the Nicholses and went to the Nicholses' home to pay $250 in rent. Appellant's neighbor heard loud knocking on the Nicholses' home and saw a black man. The neighbor armed himself and upon returning heard drawers opening and closing. Green initially blamed a man named "Bobby" for the murders but he ultimately confessed to the murders:

> Finally, Green admitted there was no Bobby, that he was by himself, and that he could not believe what he had done... . Green admitted that he came home, put on a clean work shirt, and took the largest butcher knife from the house; that he went to the Nicholses' home and was admitted by Mr. Nichols; that Mrs. Nichols was adamant about keeping Green's check; that the next thing he knew was that Mrs. Nichols was on the floor stabbed and bleeding; that he followed Mr. Nichols to the back bedroom; that the next thing he knew that was Mr. Nichols was on the floor stabbed, bleeding and moaning; that he stuffed a blanket into Mr. Nichols' mouth; that he wiped the blood from his hands onto his shirt, which he stuck into his back pocket, that, as he started to leave . . .

583 So.2d at 649. Green was given a death sentence. The trial court found numerous aggravating circumstances—CCP, avoid arrest, pecuniary gain, HAC, prior violent felony and felony murder. This Court struck CCP and avoid arrest but

affirmed the death sentence where prior violent felony, HAC and other aggravating circumstances were present.

The above circumstances of the above cases are useful in analyzing aggravating circumstances and proportionality. The aggravating circumstance of avoid arrest and CCP will first be addressed.

This court reviews the finding of an aggravator to see if the trial court "applied the right rule of law … and, if so, whether competent substantial evidence supports its finding." *Diaz v. State*, 860 So.2d 960, 965 (Fla. 2003). In doing so, it examines the trial judge's specific factual findings. Id. at 967.

Avoid arrest

In *Perry*, *Davis*, and *Green* this court held the evidence insufficient for the avoid arrest aggravating circumstance. In all three cases the defendant knew the victim and went to the door of victim's home. None of the defendants were disguised. All were known to the victim. Perry and Davis went to the residence to rob the victim. Green went to the residence with a knife to request the return of a check. However, after the victim refused to give Green the check, Green took out his knife and proceeded to stab both victims multiple times. In none of these cases was there a personal vendetta or animus between the defendants and the victims. Robbery and pecuniary gain was a motive in these cases. Consequently, this Court

struck avoid arrest because the sole or dominant motive was not witness elimination.

In the present case there were two scenarios that were advanced in the lower court. One, Appellant went to Christensen's home and asked to borrow money and killed her after she refused and began pushing him. The second, was that Appellant went over to the residence to rob Christensen. The trial court specifically found pecuniary gain because Appellant went to Christensen's residence in order to rob her—"The State has established beyond a reasonable doubt the defendant entered Roberta Christensen's home and **murdered her for the purpose of pecuniary gain**" R1193(emphasis added).

Speculation on the fact that witness elimination "might" have been the motive for the murder is not sufficient for this aggravator to apply. See e.g. *Floyd v. State,* 497 So.2d 1211 (Fla. 1986); *Riley v. State,* 366 So.2d 19 (Fla. 1978); *Bates v. State,* 465 So. 2d 490 (Fla. 1985).

In *Robertson v. State,* 611 So.2d 1228 (Fla. 1993), where a witness (C.J. Williams) testified that the defendant told him "that he had shot the woman because she was screaming," this court held that the trial court may not draw "logical inferences" to support the aggravator and the evidence did not prove avoid arrest beyond a reasonable doubt.

In *Geralds v. State,* 601 So. 2d 1157 (Fla. 1992), the defendant was a carpenter

who had worked on remodeling the victim's home. A week before the murder the defendant encountered the victim and her children at a mall and learned that her husband was out of town and when her children were at school. The defendant went to the victim's home at a time when she was alone, beat her and stabbed her to death, and took her jewelry and Mercedes automobile. This Court held that the evidence was insufficient to prove that witness elimination was the dominant motive for the murder. Id. at 1164.

The aggravating circumstance under Section 921.141(5)(e), Florida Statutes, is typically found in the situation where the defendant killed a law enforcement officer in an effort to avoid arrest or effectuate his escape.See e.g. *Mikenas v. State*, 367 So.2d 606 (Fla. 1978). This Court has held, however, that when the victim is not a police officer, the aggravating circumstance cannot be found unless the evidence clearly shows that elimination of the witness was the sole or dominant motive for the murder. See *Scull v. State*, 533 So.2d 1137 (Fla. 1988); *Perry v. State*, 522 So.2d 817 (Fla. 1988); *Riley v. State*, 366 So.2d 19 (Fla. 1978). Even where the victim may know the defendant, this factor is not applicable unless the evidence proves that witness elimination was the only or dominant motive. See *Geralds v. State*, 601 So.2d 1157 (Fla. 1992); *Perry v. State*, supra. The mere fact that the victim knew or could identify the defendant, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt. Id.

In *Davis* this Court has recognized that the fact that witness elimination may have been **one of the reasons to commit the murder is not sufficient** for this aggravator when the person killed is not a law enforcement officer:

> We agree with Davis that the trial court erred in finding that the murder was committed for the purpose of avoiding arrest. In the sentencing order, the court stated:
>
> It was shown the victim and the Defendant were acquainted with each other, and that she therefore, unless prevented from doing so, could specifically identify the Defendant as the person who burglarized her home and robbed her of her possessions. The Court therefore finds that one of the Defendant's motives for killing the victim was to prevent his identification.
>
> We have long held that in order to find this aggravating factor when the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness. See *Perry v. State*, 522 So.2d 817, 820 (Fla.1988); *Bates v. State*, 465 So.2d 490, 492 (Fla.1985). **The fact that witness elimination may have been one of the defendant's motives is not sufficient to find this aggravating circumstance**. Further, the mere fact that the victim knew the assailant and could have identified him is insufficient to prove the existence of this factor. . .

Davis v. State, 604 So.2d 794, 798 (Fla. 1992) (emphasis added).

The trial court found avoid arrest because Appellant went to the house with a knife T1191 -- 1192. However, this does not show the motive to kill a witness. The bringing of a weapon to a robbery is consistent with use of the weapon to threaten or use force for the taking of the property and does not prove the sole or dominant motive was to eliminate a witness. See *Green; Menendez v. State,* 368 So.2d 1278 (Fla. 1979). In *Menendez* the defendant brought a pistol fitted with a silencer to a

robbery. Although this court recognized there was a logical inference of a motive to avoid arrest it still struck the aggravator because such mechanical application would be improper and the sole or dominant motive must be witness elimination when a police officer is not involved:

> There is also considerable doubt that this murder was committed for the purpose of avoiding arrest within the contemplation of our statute. The state urges (with some logic) that any murder committed by means of a pistol fitted with a silencer indicates a motivation to avoid arrest and detection. The presumption accorded the instrument of murder by this reasoning, however, carries us too far. Were this argument accepted, then the perpetration of murder with a knife would similarly add an aggravating circumstance to the life-or-death equation, since it is less detectable than a firearm. **This mechanical application of the statute would divert the life-and-death choice away from the nature of the defendant and the deed, as the statute seems to require**.[FN19] In *Riley v. State*, 366 So.2d 19 (Fla.1978), we held that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses. Here, unlike Riley, we do not know what events preceded the actual killing; we only know that a weapon was brought to the scene which, if used, would minimize detection. We cannot assume Menendez's motive; the burden was on the state to prove it.

368 So.2d at 1282 (emphasis added). Moreover, the weapon was a little kitchen knife -- the kind that is used to peel potatoes T2282. It is not the type of object, like a gun or machete etc., that one would procure if one was planning to kill. It was used to peel potatoes and was so small that Appellant would have it in his pocket to clean his nails T2258, 2282. See *Kaczmar v. State*, 104 So.3d 990 (Fla. 2012)

(CCP stricken, Kaczmar said he kept knife, used in killing, in his pocket to cut fishing line).

The trial court cited to *Consalvo v. State*, 697 So.2d 805 (Fla. 1997) for avoid arrest. However, in that case Consalvo had committed a prior crime against the victim and the victim "was going to press charges against Consalvo for prior theft" and thus Consalvo's sole or dominate motive was not to rob but was to eliminate the victim as a witness to that prior crime. In the present case, and in *Green*, *Perry*, and *Davis*, there was no prior crime which the victim was going to report.

The trial court also relied on *Jennings v. State*, 718 So.2d 144 (Fla. 1998) to claim the sole or dominate motive was to eliminate Christenson as a witness. However, *Jennings* is very different from the instant case. Jennings stated that if he ever committed a robbery, **he would not leave any witnesses,**" he confined the victims to a freezer there was no resistance and he proceeded to slash the throats of all three victims 718 So.2d at 151. Whereas, in this case Appellant did not only not make a statement that he was eliminating Christensen as a witness but indicated to the contrary – that he never planned to harm:

> No, we talked -- me and Wade talked about robbing a few places, never harming no one, never nothing like that. We're not that kind of people.

T2262. Also, the trial court's order noted that a lack of resistance can show witness elimination. In this case there was evidence consistent with defensive wounds and

a struggle as in *Perry* where the avoid arrest aggravator was stricken by this Court.

CCP

In the similar cases of *Green* and *Perry* evidence was insufficient to show the CCP aggravator.

In *Perry* the defendant killed the victim by attacking her by stabbing, striking, and strangulation. During the attack the victim was repeatedly stabbed "as she attempted to ward off the attack". 522 So.2d at 821.

In *Green* the defendant brought a knife to the victim's home when seeking to have a check returned. When the victims refused to return the check, Green stabbed the victims numerous times. The trial court found the killing was for pecuniary gain and robbery, but this Court held the evidence was insufficient for CCP. See also, *Hall v. State*, 107 So.3d 262 (Fla. 2012) (CCP stricken where Hall armed himself with a shank while searching for pills but evidence did not show he had a heightened plan to kill the victim); *Kaczmar v. State,* 104 So.3d 990 (Fla. 2012) (CCP stricken where Kaczmar stabbed victim multiple times with knife he kept in his pocket and also changed/disposed of clothes after the killing).

In this case, regardless of whether Appellant stabbed Christensen when she refused to give him money -- or even if he had planned to rob her -- the evidence was insufficient for CCP as in the above cases.

It is well-settled that the planning or calculation of a felony (such as robbery,

burglary, etc.) is not sufficient for CCP -- there must be an intent to kill before the crime began. See e.g., *Rogers v. State*, 511 So.2d 526 (Fla. 1987); *McKinney v. State* , 579 So.2d 80, 84-85 (Fla. 1991).

The trial court applied the CCP aggravator because Appellant had a knife citing *Bell v. State,* 699 So.2d 677 (Fla. 1997). However, in *Bell* the defendant was not robbing the victim -- but he made a statement after he purchased the gun **that he intended to kill the victim**.

Weapons are often procured for crimes such as robbery or burglary to threaten or use force -- but in such cases the procurement will not constitute CCP. See e.g., *Rogers v. State*, 511 So.2d 526 (Fla. 1987) (CCP stricken where two .45 automatic handguns were brought to the scene); *Wyatt v. State,* 641 So.2d 1336 (Fla. 1994) (CCP stricken where weapon was brought to robbery scene); *Hall v. State*, 107 So.3d 262 (Fla. 2012) (CCP stricken where Hall armed himself with a shank while searching for pills but evidence did not show he had a heightened plan to kill the victim); *Kaczmar v. State,* 104 So.3d 990 (Fla. 2012) (CCP stricken where Kaczmar stabbed victim multiple times with knife he kept in his pocket and also changed/disposed of clothes after the killing). Moreover, the weapon was a little kitchen knife -- the kind that is used to peel potatoes T2282. It is not the type of object, like a gun or machete etc., one would procure if one was planning to kill. It was so small that Appellant would have it in his pocket to clean his nails T2258.

See *Kaczmar v. State*, 104 So.3d 990 (Fla. 2012) (CCP stricken, Kaczmar said he kept knife, used in killing, in his pocket to cut fishing line).

The trial court also relied on *Davis v. State,* 2 So.3d 952 (Fla. 2008) to support CCP. However, the facts in *Davis* are considerably different than in the present case. Davis specifically went to the house to kill the victim is shown by the fact that before the attack "**he wore extra clothing because he wanted to be able to change out of the bloody clothing before leaving**." 2 So.3d at 960 (emphasis added). Compare cases where the efforts to change clothes/clean after the killing did not show CCP. E.g., *Hall v. State,* 107 So.3d 262, 278 (Fla. 2012) ("Hall's actions after the murder moving Fitzgerald's body, changing his clothes, cleaning up the blood" did not prove that Hall preplanned the murder); *Williams v. State,* 37 So.3d 187, 196 (Fla. 2010) ("[A]lthough there was extensive evidence of actions that Williams took after the murder, there is no evidence that Williams procured any of the items he wanted to dispose of the body prior to the murder"); *Kaczmar v. State*, 104 So.3d 990 (Fla. 2012) (CCP stricken where Kaczmar stabbed victim multiple times with knife he kept in his pocket and also changed/disposed of clothes after the killing). In addition, in *Davis* the defendant "sat on the victim's front steps" contemplating his actions before going and killing. *Davis* was not a robbery case where demands were made of the victim and the victim resisted -- CCP has been stricken in those cases. See *Green*; *Hall*; *Rogers*; *Wyatt*;

The trial court also relied on *Durocher v. State*, 596 So.2d 997 (Fla. 1992). However, in *Durocher* the defendant specifically admitted to an express and calculated plan to kill – "after thinking about it I decided it would probably be better to go ahead and kill him then that way the police could not pin it on me". There is no such admission by Appellant. In fact the opposite is true -- Appellant admitted that he planned to rob people -- but is careful not to hurt anyone:

> "Q: . . . Did you know you were going to kill her when you went over there?
>
> "A: No, sir. No, sir.
>
> "Q: The reason why I asked that, you mentioned that you talked about it several days.
>
> "A: No, we talked -- me and Wade talked about robbing a few places, never harming no one, never nothing like that. We're not that kind of people.

T2262. Unlike in *Davis* and *Durocher*, the evidence did not support CCP in this case.

In addition, an additional and separate element must be proven beyond a reasonable doubt for CCP -- it must be cold. *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992) (although killing was clearly calculated it was not the result of "calm and cool reflection" and thus not cold). In this case Deputy Maerki testified that Appellant's mannerisms and bloodshot watery eyes led him to believe that Appellant was under the influence of something T1783. Steve Britnell testified

Appellant was "pretty ripped" since 3:00 PM that afternoon T1748 – 1749. Wade Fowler testified it was obvious that Appellant was smoking meth that day and was obviously high T1836-1837. See *White v. State*, 616 So.2d 21, 25 (Fla. 1993) (CCP stricken even though record clearly established premeditation - evidence also showed excessive drugs use and the defendant was high). A defendant's nervousness is inconsistent with the cold prong of CCP. See *Richardson v. State*, 604 So.2d 1107, 1109 (Fla. 1992). Appellant was described as being nervous and shaky T340, 427. Thus, there exists a reasonable hypothesis that the killing does not include the "cold" requirement. See *Geralds v. State*, 601 So. 2d 1157, 1163-64 (Fla. 1992) (Where evidence susceptible to ... divergent interpretations" aggravator should not have been found).

Remedy After CCP and Avoid Arrest Stricken

Proportionality

"Any review of the proportionally of the death penalty in a particular case must begin with the premise that death is different." *Fitzpatrick v. State*, 527 So. 2d 809, 811 (Fla. 1988).

With the elimination of the CCP and avoid arrest aggravator, Appellant submits that death is disproportionate compared to cases such as *Perry v. State*, 522 So.2d 817 (Fla. 1988) and *Davis v. State*, 604 So.2d 794 (Fla. 1993).

The factual circumstances of the instant case and *Perry* are very similar. The

defendants went to the victim's house to commit a robbery and the victim was killed by stabbing (HAC in both cases) – during a demand or request for money which was denied. In both cases the CCP and avoid arrest aggravators were eliminated by this Court and the felony murder and HAC aggravators remained. Appellant had a pecuniary gain aggravator merge with the felony muder aggravator for his taking of a TV. In *Perry* the pecuniary gain aggravator was not formally found, but all the bases for pecuniary gain were present -- Perry was guilty of felony murder based on a robbery.

In both *Perry* and in this case statutory mitigating circumstances were rejected by the trial court. The remaining mitigation was actually stronger in this case. In *Perry* the mitigation was that Perry was good to his family; helpful around the home; ambitious and motivated but life had gone downhill; had psychological stress; and was 21 years old. 522 So.2d at 821.

The mitigation in this case was much stronger. The trial court agreed with the following mitigation, but (remembering that proportionality review is to cut through subjective judgments) unlike in other cases gave them little weight.

ADHD (attention deficit hyperactivity disorder)

There was evidence to support this and relate this to Appellant's behavioral problems. Appellant had ADHD (attention deficit hyperactivity disorder) T2462. The hallmark symptom of ADHD is difficulty with impulse control and difficulty

in conforming behavior to norms T2463. Appellant at a high rate of motor activity (restlessness, fidgety) which is another symptom of ADHD T2463 ADHD is characterized by problems with rules governing behavior T2463. There is no indication that Appellant's family had any training to deal with this factor T2465. When Appellant was growing up the Department of Youth Services caseworkers came to Appellant's house and administered psychostimulant medication like Ritalin, Adderall, etc. that have been used with ADHD T2466. Once this medication is not used regularly the person reverts back T2466.

Below average or borderline intelligence

It is undisputed Appellant had a low IQ of 83. Low IQ impacts one's ability to make sound judgments. An IQ between 70 and 84 is considered as borderline intellectual functioning. See American Psychiatric Association, Diagnostic and Statistical Manual) (text rev. 4th ed. 2000) at 48 ("Borderline Intellectual Functioning (see p. 740) describes an IQ range that is higher than that for Mental retardation (generally 71-84."), at 740 ("This category [Borderline Intellectual Functioning] can be used when the focus of clinical attention is associated with borderline intellectual functioning, that is an IQ in the 71-84 range.").

Indeed, this Court, after summarizing an expert's testimony in this area, said '[b]orderline intellectual functioning is defined as a score between 70 and 84…" *Johnston v. State,* 960 So. 2d 757, 759 (Fla. 2006): see also *Burger v. Kemp*, 483

U.S. 776, 779 (1987) (noting that petitioner "had an IQ of 82"). See also *Wiggins v. Smith,* 539 U.S. 510, 535 (2003) (noting that where the defendant had an IQ of 79, "his diminished mental capacities… augment his mitigation case").

History of alcohol and drug abuse

The evidence presented showed a history of alcohol and drug abuse. In fact, it was shown Appellant's drug abuse began at 10 to 13 T2516. This substance abuse is an attempt to self-medicate from one's emotional, mental and physical problems. Moreover, this abuse has been recognized as impairing one's development. See *Mann v. Lynaugh,* 690 F. Supp. 562, 567 (N.D. Tex. 1988) (psychologist noted that drug abuse beginning at age 10 may have adversity affected development).

Chronic neglect as a child and no adult role model as a child

In *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982), the court made it clear that a defendant's difficult background did not have to remove criminal responsibility in order to be "a relevant mitigation factor of great weight". 102 S.Ct. at 877.

The lack of nurturing and protection as a child may impair psychological development so as to impair the ability throughout life to make proper judgments.

Having a difficult, tumultuous childhood is significant mitigation. See *Hegwood v. State*, 575 So. 2d 170, 173 (Fla. 1991) (Hegwood's "ill-fated life

appears to be attributable to his mother"). Children develop different ways of coping with hurtful experiences. Childhood abuse disrupts a child's emotional and cognitive development. See Dorothy Otnow Lewis et. al., toward a theory of the Genesis of Violence: A follow-up study of delinquents, 28 *J. Am Acad. Child & Adolescent Psychiatry* 431, 436 (1989) (childhood abuse increases "risk and severity of adult violent criminality").

Good worker until chronic substance abuse made it difficult to maintain employment

This was the same type of mitigation recognized in *Perry*.

Good Courtroom behavior

This supports that Appellant can successfully adjust to prison. This has been noted as extremely important mitigation. *Skipper v. South Carolina*, 106 S. Ct. 1669, 1671 (1986) ("a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison" may be a basis for life in prison); *Cooper v. Dugger*, 526 So. 2d. 900 (Fla. 1988).

Little education

The lack of education may be due to the mother's neglect in keeping Appellant out of school and/or his low intelligence. The bottom line is that the more education one has the better coping skills and better judgment.

Father of two young girls and remorse

Impairment

In addition, despite the rejection of statutory mental mitigation by the trial court (See Point IV) there was strong evidence of impairment. In this case Deputy Maerki testified that Appellant's mannerisms and bloodshot watery eyes (nine hours after the killing) led him to believe that Appellant was under the influence of something T1783. Steve Britnell testified Appellant was "pretty ripped" since 3:00 PM that afternoon T1748 – 1749. Wade Fowler testified it was obvious that Appellant was smoking meth that day and was obviously high T1836-1837.

The bottom-line is that the mitigation in this case was more significant than in *Perry*.

Both the instant case and *Perry* are capital cases. Like in this case, in *Perry* there was guilt phase and a penalty phase and a death sentence was imposed after the trial court entered a sentencing order and this court reviewed the case on appeal. All the things necessary to compare *Perry* in the instant case are present. This court reduced Perry's sentence from death to life. This case is very similar to *Perry*. Appellant's sentence should be reduced to a life sentence.

In *Tillman v. State*, 591 So.2d 167 (Fla. 1991) this Court explained that proportionality review involves **comparing circumstances to other capital cases** and is not a mere comparsion of aggravating and mitigating circumstances:

> We have described the "proportionality review" conducted by this Court in every death case as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the **totality of circumstances in a case, and to compare it with other capital cases**. It is not a comparison between the number of aggravating and mitigating circumstances.
>
> *Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990) (citation omitted) (emphasis added), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). Accord Hudson, 538 So.2d at 831; *Menendez v. State*, 419 So.2d 312, 315 (Fla.1982). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments.FN2 Art. I, § 17, Fla. Const. **It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper.** Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.

591 So.2d at 169 (emphasis added).

In *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), it was made clear that similar results would be reached for similar circumstances and results would not vary based on discretion:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die this court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia*, Supra, can be controlled and channeled until the sentencing process becomes a **matter of reasoned judgement rather than an exercise in discretion at all.**

283 So. 2d at 10 (Emphasis added). See also *Proffitt v. Florida*, 428 U.S. 242, 250 and 252-53 (1976).

In other words, proportionality is not left to the individual tastes of the jurors or judges but this Court reviews each case to ensure that similar individuals are treated similarly.

It could be claimed that the instant case should not be compared to *Perry* because *Perry* involved a jury recommendation of life. However, the fact that there was a jury life recommendation is the very reason the cases should be compared. Proportionality review is designed to result in fairness and consistency. It is designed to have similar results in similar cases despite the fact that different juries or different judges may have exercised judgment or discretions differently. Based on a comparison with *Perry,* Appellant's should sentence should be reduced to life.

In addition, Appellant's sentence of death is disproportionate when compared to *Davis v. State,* 604 So.2d 794 (Fla. 1993). The factual circumstances of the instant case and *Davis* are very similar. The defendants went to the victim's house to commit a robbery and the victim was killed (HAC in both cases) -- items were stolen from the house -- defendants tried to sell the stolen items. In both cases the avoid arrest aggravators was eliminated by this Court and the felony murder and HAC aggravators remained. Appellant had a pecuniary gain aggravator merge

with the felony murder aggravator for his taking of a TV. Likewise, in *Davis* the pecuniary gain aggravator merged with felony murder. Davis' death sentence was reversed by this Court. Ultimately, Davis was sentenced to life in prison.

New Penalty Phase

Assuming *arguendo* that this Court does not find this case is comparable to *Perry* or *Davis*, this case should be remanded for a new penalty phase due to the sentencing errors. See *Kaczmar v. State*, 104 So.3d 990 (Fla. 2012) (trial court's findings on aggravating circumstances was error – "Based on the number of errors during the penalty phase as reflected in the sentencing order, we cannot say beyond a reasonable doubt that the errors were harmless. . . Accordingly, we remand for a new penalty phase").

POINT II

THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION IN REQUIRING APPELLANT TO PRESENT ITS PENALTY PHASE WITNESSES IN A PARTICULAR ORDER OVER A TWO DAY PERIOD

The jury reached its guilty verdict on August 6 and the trial court began the penalty phase on August 8. The case was running days ahead of schedule. Appellant informed the trial court he was not ready to present his lay witnesses that day T2407. Appellant explained that he had only been in contact with family members in Georgia the afternoon before (their phone had been shut off) and they could not travel to Florida for financial reasons T2407.

Appellant indicated that he wanted the jury to hear all of his witnesses at the same time and this would be feasible since the case was days ahead of schedule T2411.

The trial court indicated it was not abusing its discretion unless in the "universe of 599 circuit judges, none of them, none of them would rule the way I did" T2412, and ruled that "we're going to get as far as we can with the witnesses that we have available and then tomorrow morning at 9:00 a.m, and "we'll" finish tomorrow T2412.

After a discussion regarding how to present the Georgia witnesses the next day (video or live)—Appellant again explained he was prejudiced by having to present his case piecemeal T2414-2415. The trial court responded that it was a minor disruption of the defense because a large volume of the defense witnesses would be called tomorrow T2415.

The trial court then explained—"And what I did is I said I would – **between the guilt phase and the penalty phase I would give you a whole day off** so that these things could be resolved" T2415 (emphasis added).

Appellant again objected to the trial court ordering him how to present its witnesses T2418. The trial court stated it was within the discretion standard in *Geralds* versus *State* T2418.

Appellant only had one witness for that afternoon, but it was an important witness –his mental health expert Dr. Barnard. In requiring Appellant to bifurcate

its penalty phase case, with his expert testifying before the lay witnesses, the trial court failed to exercise its discretion which in itself is an abuse of discretion.

The sole reason the trial court gave for requiring Appellant to present its mental health expert on that afternoon instead of waiting the next day was that the jurors were present. However, the trial court did not even consider that the jury would still have to be present the next day and allowing the defense witness to testify the next day would not impact the jury. The penalty phase would be completed the next day regardless.

The case was still ahead of schedule. The only thing impacted was the order of witnesses and the bifurcation of the defense case. Due to the trial court's ruling, the defense was unable to first lay the groundwork of Appellant's childhood and background through its lay witnesses and then have its mental health expert explain the history to the jury.[1] The trial court did not consider this in its decision to force Appellant to have its expert testify before the lay witnesses.

The trial court's decision was not the product of a reasoned judgment, but was the product of the fact it would not be found to have abused its discretion unless all 599 circuit judges disagreed with its decision. This is not the exercise of discretion – it is a failure to reach a decision on a "reasoned judgment" and it is a decision made because it could be made. In addition, the trial court also misstates

1 The key connection between Appellant's background and his presentation of mental health would be best performed by a mitigation specialist. See Point III.

the test for discretion – it is not whether another judge would agree – it is whether no **reasonable** judge could differ. "[T]he exercise of discretion must be measured against articulable standards in order to arrive at a principled reason for decision." *Sekot Laboratories, Inc., v. Gleason*, 585 So.2d 286, 288 (Fla. 3d DCA 1990).

The power to exercise "judicial discretion" does not imply that a court may act according to mere whim or caprice. *Carolina Portland Cement Co. v. Baumgartner*, 99 Fla. 987, 128 So. 241, 247 (1930). As explained in *Parce v. Byrd*, 533 So.2d 812 (Fla. 5th DCA) *rev. denied*, 542 So.2d 988 (Fla. 1989) the valid exercise of discretion requires that there be a valid reason to support the choice between alternatives:

> [Judicial discretion] is **not a naked right** to choose between alternatives. There must be a sound and logical **valid reason for the choice made**. If a trial court's exercise of discretion is upheld whichever choice is made merely because it is not shown to be wrong, **and there is no valid reason to support the choice made**, then the choice made may just as well have been decided by a toss of a coin. In such case there would be no certainty in the law and no guidance to bench or bar.

533 So. 2d at 814 (emphasis added). See also *Thomason v. State*, 594 So.2d 310, 317 (Fla. 4th DCA 1992) (Farmer dissenting) *quashed* 620 So 2d 1234 (Fla. 1993) ("Judicial discretion is not the raw power to choose between alternatives", nor is it "unreviewable simply because the trial judge chose an alternative that was

theoretically available to him").

In this case the trial court did not give a valid reason for forcing the order of Appellant's case. The trial court did not exercise its discretion.

If the trial court had exercised discretion and considered whether the mental health expert could testify the next day -- courts have found an abuse of discretion if the non-moving side does not show prejudice. *Cf. State v. Humphreys* (only prejudice was to counsel who had driven from Tampa for hearing); *Citrin v. De Venny*, 833 So.2d 871 (Fla. 4th DCA 2003) (only prejudice was monetary); *Taylor v. State*, 958 So.2d 1069 (Fla. 4th DCA 2007) (record showed "no prejudice to the state"); *In re D.S.*, 849 So.2d 411, 413 (Fla. 2nd DCA 2003) (error to deny motion to continue termination of rights hearing where continuance "would not have caused any serious prejudice or inconvenience to the Department or the child").

In this case there would be no prejudice to the State. The State complained that its witness, Dr. Leporowski, was available to testify. There was nothing preventing the State witness from testifying. If the State wanted its witness to testify after the defense witness – the witness could simply return the next day. It was not a situation where the order of the State's presentation would be impacted. There was no prejudice to the State.

Appellant's sentence must be reversed and this cause remanded for a new penalty phase.

POINT III

APPELLANT WAS DENIED A FAIR AND RELIABLE SENTENCING WHERE THE TRIAL COURT DENIED THE REQUEST FOR A MITIGATION SPECIALIST

Appellant requested appointment/funds for mitigation specialist R90-95. The trial court denied the motion. This was error.

In *Britt v. North Carolina*, 404 U.S. 226 (1971) it was recognized the government must provide indigent defendants with the "basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." 404 U.S. at 227. In *Ake v. Oklahoma*, 470 U.S. 68, (1985) again it was emphasized that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense" was emphasized. Thus, it cannot be disputed that an indigent defendant must be afforded the basic tools of an adequate defense.

A mitigation specialist in a capital case has been described as one who obtains, analyzes, organizes information across many disciplines:

> "obtain, analyze, organize, and summarize huge amounts of information about an accused and his family the cuts across many disciplines, including medicine, psychology, forensics and law enforcement". . . "to identify the inherited impairments and patterns of dysfunction" of an accused's life that reveal the cumulative effect of such influences" and to assist counsel in determining the best way

> to explain to the court an accused's impairments and their effects on him"

U.S. v. Kreutzer, 59 M.J. 773,800 (Army Cr. Ct. App. 2004) (holding it was reversible error not to appoint a mitigation specialist).

In this case the trial court essentially denied the motion because there was no such thing as a mitigation specialist -- it is merely duplicative to a fact investigator-"I've appointed John Milano as an investigator, but now we're getting into not only someone else who seems to be duplicative of Mr. Milano, I have heard no evidence or testimony regarding anything" T31. However, it has been recognized that a mitigation specialist is different than a fact investigator and is recognized by the ABA guidelines as one of the necessary members of a capital defense team:

> However, relevant legal authorities establish that "mitigation coordinator" or "mitigation specialist" is the title of a legitimate job related to the defense of criminal defendants who are eligible for the death penalty. The United States Supreme Court has determined that the **ABA standards are "guides to determining what is reasonable" in terms of an attorney's performance**. *Wiggins v. Smith,* 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) ("ABA Guidelines") suggest that the **"defense team" in a capital case include "at least one mitigation specialist and one fact investigator**." § 10.4(C)(3)(a), ABA Guidelines; see also § 4.1(A)(1). The commentary to section 4.1 of the ABA Guidelines explains the role of a **mitigation specialist, calling this person "an indispensable member of the defense team throughout all capital proceedings**"

> and stating that "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have." Additionally, the use of a mitigation specialist or a mitigation coordinator is not unusual in Florida. See, e.g., *Turner v. State*, 37 So.3d 212, 219 (Fla.2010) (noting that a mitigation specialist testified in the penalty phase of a capital case); *Twilegar v. State*, 42 So.3d 177, 203 (Fla.2010) (noting the use of a mitigation specialist); *Deparvine v. State*, 995 So.2d 351, 360 (Fla.2008) (noting a mitigation specialist's testimony). In fact, the common use of a mitigation coordinator was acknowledged by the trial court when it opined that the requests for and approval of their fees had gone too far as a general rule.
>
> Based on the apparent widespread use of mitigation specialists or coordinators and the recommendation of the ABA Guidelines that capital defense attorneys consult them, the trial court was incorrect in its suggestion that there was no such position recognized under applicable law.

Capital Specialist Investigations Inc. v. State, 58 So.3d 833, 836 (Fla. 3d DCA 2011)(emphasis added).

Moreover, the trial court's concern that it had not heard any evidence or testimony for a mitigation specialist puts the cart before the horse. The evidence or testimony for a mitigation specialist would come from a mitigation specialist. Yet, one cannot present a mitigation specialist until he or she is appointed.

The trial court made it clear that actual testimony – not from the attorney –[2] would be required to grant the motion. The trial court specifically cited to

Holley, 48 So.3d 916, 921-922 (Fla. 4th DCA 2010).

2 The same trial judge has noted in other cases that he does not even hear arguments from attorneys sometimes with regard to certain issues. See *State v.*

Leon Shaffer Golnick Advertising, Inc., v. Cedar, 423 So.2d 1015 (Fla. 4th DCA 1982)

for the proposition that trial courts cannot make determinations based on representations by attorneys T31. Defense counsel explained that a mitigation specialist was needed and that an attorney could not testify and that a cap of $3,250 would be used regardless of whether $40 or $65 per hour was used – noting that JAC did not object to the appointment of a mitigation specialist but only to the hourly rate. T32-33.

The trial court stuck with its ruling that under *Leon Shaffer Golnick Advertising, Inc.* testimony was required to support its motion and denied the motion without prejudice for the defense to present such testimony T34-35.

It would have been futile for counsel to reassert his motion. The trial court had already indicated in its mind that a mitigation specialist was duplicative of a fact investigator. More importantly, the trial court would only rely on testimony- not from the attorney- as to the need. It is like a dog chasing its tail-- where testimony is needed but to get such testimony one needs the mitigation specialist who will not be appointed until the testimony is first heard. Appellant submits that the use of *Leon Shaffer Golnick Advertising, Inc.* in this situation was not proper.

Moreover, while counsel may know that he or she needs help, counsel may not have the expertise to bring forth the required evidence to explain. Under such circumstances the trial court should at the very least conduct an inquiry.

In addition, it should be noted that there was indication of potential mental

health mitigation in the court file where a motion had been filed regarding Appellant's competency particularly noting that Appellant may have been insane R30, 32.

The prosecutor lured the trial court in believing that attorneys should perform the exact same function as a mitigation specialist. But it has been recognized that attorneys don't have the same skills that a mitigation specialist has. See *Capital Specialist Investigations Inc. v. State,* 58 So.3d 833, 836 (Fla. 3d DCA 2011) ("[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have.").

Mitigation specialist Maloney's CD was attached to Appellant's motion and shows the training and special skills that she provides:

> PROFESSIONAL EXPERIENCE
>
> 1975-1983 Forensic Mental Health Specialist and Program Director Peace River Center for Personal Development Inc. a Community Mental Health Center Bartow, Florida
>
> 1983-1984 Forensic Mental Health Resource Consultant Office of the State Attorney Tenth Circuit Bartow, Florida
>
> 1985-1998 Forensic Mental Health Specialists and Capital Case Consultant Office of the Public Defender, Tenth Circuit Bartow, Florida
>
> 1998 to date Licensed Private Investigator and Capital Case Consultant Toni W. Maloney dba Forensic Research, Consultant and Investigation, a sole proprietorship . . .
>
> AREAS OF PROFESSIONAL SPECIALIZATION

Criminal Defense Investigation Pretrial and Post-conviction

Social History Investigation

Mitigation and Analysis

Preparation of Chronology and Other Summary Documents

Preparation of Courtroom Exhibits

Expert Recruitment and Liaison

Medical-Legal Research Regarding Investigation of Death Assessment of Rehabilitation needs and Location of Treatment Providers

Assessment of Rehabilitation Needs and Location of treatment providers

Forensic Mental Health Investigation Including the Insanity Defense

Witness Management Including Maintaining Contact Information, Trial Preparation, and Coordination During Trial

* * * * *

CONTINUING PROFESSIONAL EDUCATION

Forensic Evaluator Training for Competency And Sanity Assessments (1989)

Florida Mental Health Institute University of South Florida, Tampa, FL

* * *

R93-94. This is not the same as an ex-police officer who is acting as a fact investigator.

Also without a mitigation specialist providing useful information to the psychology/psychiatric defense experts there may not be complete and competent

evaluations. See *Ake v. Oklahoma,* 470 U.S. 68, (1985) (defense is entitled to competent psychiatric assistance).

The denial of a mitigation specialist deprived renders Appellant's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 12, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellant's death sentence must be reversed and this cause remanded for a new penalty phase.

POINT IV

APPELLANT WAS DENIED DUE PROCESS AND A FAIR AND RELIABLE SENTENCING WHERE THE TRIAL COURT DID NOT PERFORM THE INDIVIDUAL SENTENCING REQUIRED FOR THE DEATH PENALTY.

The trial court did not give the individualized sentencing required for death penalty cases. This included attacking the entire field of psychology/psychiatry, use of wrong standards, and failure to exercise discretion.

The trial court denigrated the entire field of psychology/psychiatry.

Appellant offered mental health mitigation through psychiatrists/psychologists. The trial court rejected the mental health mitigation in large part based on the denigration of the field of psychiatry/ psychology. The trial court denigrated the field of psychiatry as not really being a science and cited articles about precluding psychological experts from testifying for defendants:

> 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. 1984)(Bazelon, J., dissenting).6
>
> ---
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> In his article, *Precluding Psychological Experts from Testifying for the Defense in the Penalty Phase of Capital Trials: The Constitutionality of Florida Rule of Criminal Procedure 3.202(e)*, 23 Fla. St. U. Law Rev. 933 (Spring 1996), Professor Stephen Everhart explains the problems inherent in psychological testimony which is

> instructive and analogous in the instant case. See generally, Stephen T. Ziliak and Deirdre N. McCloskey, *The Cult of Statistical Significance: How the Standard of Error Costs Us Jobs, Justice, and Lives*, (University of Michigan Press 2008); *See, e.g. Nesbitt v. Community Health of South Dade, Inc*., 467 So.2d 711, 717 (Fla. 3d DCA 1985) (Jorgenson,J., concurring in part and dissenting in part) (physicians' diagnoses can be readily verified where a psychiatrists' cannot (quoting Almy, *Psychiatric Testimony: Controlling the 'Ultimate Wizardry' in Personal Injury Actions*, 19 Forum 233, 243-44 (1984)).

R1204(emphasis added).

While it is proper to reject or accept an expert's opinion over another expert based on an evaluation of credibility -- it is not legitimate to denigrate the entire field of psychiatry. See *Nowitzke v. State*, 572 So.2d 1346, 1355 (Fla. 1990) (condemning tactic of attacking entire field of psychiatry – "the prosecution's strategy throughout the entire trial was to discredit the whole notion of psychiatry in general and the insanity defense specifically. We have addressed the impropriety of such an attack in the past…"). Such denigration deprives Appellant of a fair evaluation of the individualized issues presented by the mental health experts.

The trial court arbitrarily rejected findings of psychiatry/psychological experts

The trial court found that the testimony of the state's expert, Dr. Leporowski, was far more convincing and global because she reviewed all the depositions and witness's statements R1205. Yet, the trial court indicated that Dr. Leporowski, "after reviewing all the evidence" indicated "she did not see **any**

evidence that the defendant was impaired in any way" R1211. However, there was testimony and statements from Deputy William Maerki, who was the first officer to take Appellant's statement, indicating that Appellant was first interviewed at 11:56 on the night of the killing T1780 Maerki testified that **Appellant's mannerisms and bloodshot watery eyes led him to believe that Appellant was under the influence of something** T1783. There was no slurred speech which surprised Maerki T1784.

There are also statements and testimony from Steve Britnell who indicated that he and Appellant did Xanax together on the day of the killing T1739. Around 1:00 PM they found some methamphetamine T1715. They went to Appellant's trailer and did the drugs T1716. **Appellant was "pretty ripped" since 3:00 PM that afternoon** T1748 – 1749.

Garrett Wade Fowler had smoked meth with Appellant on the day of the killing T1807. Fowler testified it was obvious that Appellant was smoking meth that day and was obviously high T1836-1837.

Thus, contrary to the trial court and Dr. Leporowski's conclusion --

therewas evidence presented of some impairment of Appellant on the day of the murder.

The trial court was free to make findings that Deputy Maerki and/or Britnell and/or Fowler were not credible to explain why their observations should not be taken into account – but one could not totally ignore their testimony regarding impairment. [3]

The trial court ignoring such evidence of impairment reinforces that it had disdain for expert defense witnesses. Despite the fact that Dr. Leporowski was totally unaware of the testimony of Deputy Maerki, Steve Britnell, and Wade Fowler as to evidence of Appellant's impairment -- the trial court found Dr. Leporowski more convincing because she had a better review of the information in this case than Dr. Riordan. This is amazing given that Dr. Riordan was not even offered as a penalty phase witness to mitigation -- his only testimony came pretrial with regard to waiver of Miranda. Moreover, how could Leporowski be more convincing when unaware of Deputy Maerki, Britnell and Fowler? Under these circumstances the trial court's ruling that Leporowski was more convincing seems to be an effort to nullify psychological/psychiatry testimony rather than a rational logical conclusion.

Trial court used straw man arguments in order not to find Appellant was impaired

3 The trial court selectively considered the testimony of other officers who were only with Appellant for a very short time and were only giving him a short ride to the police station. They were not involved with informing Appellant of his rights and interrogating him. There is nothing in their testimony to indicate that they had a better opportunity to observe Appellant's condition than Deputy Maerki or Britnell.

The trial court noted that mitigation may be rejected due to conflicting opinions of experts.

Dr. Riordan did not testify as to mitigation at the penalty phase -- yet the trial court discussed Dr. Riordan in its order rejecting mental mitigation:

> There were other areas of disagreement among the psychologists. For example, at one point, Dr. Riordan found defendant scored in a "moderately" impaired range and consistent with someone with "brain damage." He later retreated from that opinion. Dr. Deborah Leporowski found no evidence to support Dr. Riordan's diagnosis that the defendant was "brain damaged." She indicated that the defendant's SIMS (Structured Inventory of Malingering Symptomatology) score "well exceeded the cutoff for people who are feigning or malingering."
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> *****
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> Significantly, and unlike Dr. Riordan, Dr. Leporowski actually took the time to review all reports, test results, depositions, discovery, videotaped confession, witness statements…

R1204-1205 (emphasis added). Thus, the trial court had used Dr. Riordan as a straw man in order to denigrate the defense mitigation. See *Nowitzke v. State*, 572 So.2d 1346, 1355 (Fla. 1990) (in condemning the denigration of a psychiatrist this Court stated "Dr. Padar had only examined Nowitzke to determine whether he suffered organic brain damage. Although the defense experts never claimed that Nowitzke suffered organic brain damage, the state improperly called this neurosurgeon for "rebuttal.""").

In addition, it was during a pretrial hearing that Dr. Riordan testified to

Appellant's ability to understand and assert Miranda rights. The trial court noted that Dr. Riordan testified the results of the IQ test showed Appellant was "moderately impaired" which was consistent with "brain damage." The trial court then attacked Dr. Riordan's alleged diagnosis on two grounds-- Leporowski did not support Riordan's diagnosis and that Leporowski testified that the SIMS score showed malingering T204. This is a multiple straw man argument. Not only did Dr. Riordan not present penalty phase evidence -- he did not diagnose "brain damage" [a test score consistent with brain damage is not a diagnosis of brain damage]. The SIMS score was part of an MMPI test and was not part of Appellant's separate IQ tests. Finally, the IQ scores, even the one found reliable by Dr. Leporowski and the trial court, all fall within the same moderately impaired range.

Rejection of mitigation of impaired capacity

The trial court rejected the statutory substantially impaired capacity mitigating circumstance on the basis that Dr. Barnard had difficulty quantifying whether the impairment was significant or substantial while Dr. Leporowski was clear that the impairment was not substantial T1206. Thus, there was a basis for rejecting the statutory mitigator based on Dr. Leporowski's testimony (but see above where Leporowski was unaware of testimony regarding Appellant's impairment). However, Dr. Leporowski did not eliminate that Appellant's capacity

was impaired -- she only eliminated **substantial** impaired capacity.

Appellant submits that impaired capacity should have been recognized by the trial court.

In *Cheshire v. State*, 568 So.2d 908, 912 (Fla. 1990) this Court held it was error to restrict the mitigating circumstance of emotional or mental disturbance by use of a modifier such as extreme despite its presence in the statutory language:

> Florida's capital sentencing scheme does in fact were acquired that emotional disturbance be "extreme". However, **it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to extreme emotional disturbances**. Under the case law, **any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statute says**. *Lockett*; *Rogers*. Any other rule would render Florida's death penalty statute unconstitutional. *Lockett.*

568 So.2d at 912(emphasis added).

In *Jackson v. State*, 704 So.2d 500 (Fla. 1997) this court further explained that because the trial court rejected the statutory mental mitigating circumstances its "order should explain why the evidence offered by the experts does not amount to nonstatutory mental mitigation". 704 So.2d at 507.

In the present case the trial court rejected that Appellant's capacity was **substantially** impaired, however the trial court never addressed the evidence as nonstatutory mental mitigation as it is required to do as exemplified by *Jackson*. The trial court's order denied Appellant's rights under the Fifth, Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution and Article 1 Sections 2, 9, 16 and 17 of the Florida Constitution.

The trial court used wrong standards in evaluating mitigating evidence

Throughout its sentencing order the trial court uses the wrong standards in evaluating mitigating circumstances.

For example, the trial court diminished the weight given to ADHD because the killing was "not the result of his suffering from ADHD as a child" R1209.

The trial court diminished the weight given to abusive childhood because it was not shown it impacted Appellant's ability to "know right from wrong or to know seriousness and grave consequences of his acts" R1213, 1215.

This court has recognized it is reversible error to misevaluate mitigating circumstances on the bases of utilization of wrong standard. See *Mines v. State*, 390 So.2d 332, 337 (Fla.1980) (trial court improperly used sanity standard in evaluating mental mitigator of being under extreme mental or emotional disturbance); *Campbell v. State*, 571 So.2d 415, 418 -- 19 (Fla. 1990) (trial court improperly used sanity standard in evaluating impaired capacity as mitigation); *Ferguson v. State*, 417 So.2d 639, 644 -- 45 (Fla. 1982).

An awareness of the criminality of conduct, i.e. knowing right from wrong, does not preclude a finding of this mental mitigating factor; knowing right from wrong does not negate a defendant's capacity to appreciate the criminality of

his/her conduct and to conform it to the law. *Huckaby v. State*, 343 So.2d 29, 34 (Fla. 1977) (finding impaired capacity even though defendant "comprehended the difference between right and wrong").

Use of the right from wrong standard created improper hurdles to clear. Appellant was not required to prove he was insane for mental mitigation to be fully recognized. If Appellant did not know right from wrong he would have been not guilty by reason of insanity. It was improper to use such a standard in evaluating mitigation.

Failure to exercise discretion

The trial court failed to exercise discretion in analyzing the mitigation. Instead, of giving independent evaluation as required for capital sentencing -- the trial court arbitrarily gave "little" weight by use of incorrect standards or based on mere whim or caprice—but not by use of reasoned judgment.

For example, the trial court found appellant had a law IQ and recognized that it was mitigating but merely stated he was giving it little weight without any explanation R1209. In other words, the trial court was merely giving a little weight because it could.

The trial court also decided to give history of chronic substance or drug abuse "some weight" because "courts have been critical of declining to give some weight to this mitigating circumstance" R1211,1212. The problem is there is no

analysis or discretion in weighing this mitigation.

Trial court's duty to provide an individualized sentencing and to exercise its discretion as a reasoned judgment

In capital cases, it is well-settled that heightened standards of due process apply that require reliability of sentencing decisions. *See Elledge v. State*, 346 So.2d 998, 1002 (Fla. 1977) ("special scope of review ... in death cases"). In the present case the trial court failed to observe the safeguards of due process by failing to exercise a reasonable discretion in weighing the mitigating circumstances. Appellant was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

This Court has stressed the importance of issuing specific written findings of fact in support of mitigation in capital cases. *Van Royal v. State,* 497 So. 2d 625 (Fla. 1986); *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). The sentencing order must reflect that the determination as to which mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. *State v. Dixon, supra* at 10.

Of course, the power to exercise "judicial discretion" does not imply that a court may act according to mere whim or caprice. *Carolina Portland Cement Co. v. Baumgartner*, 99 Fla. 987, 128 So. 241, 247 (1930). As explained in *Parce v.*

Byrd, 533 So.2d 812 (Fla. 5th DCA) *rev. denied*, 542 So. 2d 988 (Fla. 1989) the valid exercise of discretion requires that there be a valid reason to support the choice between alternatives:

> [Judicial discretion] is **not a naked right** to choose between alternatives. There must be a sound and logical **valid reason for the choice made**. If a trial court's exercise of discretion is upheld whichever choice is made merely because it is not shown to be wrong, **and there is no valid reason to support the choice made**, then the choice made may just as well have been decided by a toss of a coin. In such case there would be no certainty in the law and no guidance to bench or bar.

533 So. 2d at 814 (emphasis added). See also *Thomason v. State*, 594 So. 2d 310, 317 (Fla. 4th DCA 1992) (Farmer dissenting) *quashed* 620 So. 2d 1234 (Fla. 1993) ("Judicial discretion is not the raw power to choose between alternatives", nor is it "unreviewable simply because the trial judge chose an alternative that was theoretically available to him").

In dealing with mitigating circumstances, the trial court has found that a mitigating circumstance exists, but has arbitrarily given it little weight. This violates the principle of individual decision making that is required in death penalty cases.

In a line of cases commencing with *Lockett v. Ohio*, 438 U.S. 586 (1978), the United States Supreme Court held that a trial court may not refuse to consider, or be precluded from considering, any relevant mitigating evidence

offered by a defendant.

While the *Lockett* doctrine is clearly violated by the explicit refusal to consider mitigating evidence, it is no less subverted when the same result is achieved tacitly, as in this case. By refusing to give Appellant's uncontroverted, mitigating evidence any real weight, the trial court has vaulted this state's capital jurisprudence back to the unconstitutional days prior to *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

Prior to *Hitchcock*, this Court adopted a "mere presentation" standard wherein a defendant's death sentence would be upheld where the trial court permitted the defendant to present and argue a variety of nonstatutory mitigating evidence. *Hitchcock v. State*, 432 So. 2d 42, 44 (Fla. 1983). The United States Supreme Court rejected this "mere presentation" standard, and held that the sentencer not only must hear, but also must not refuse to weigh or be precluded from weighing the mitigating evidence presented. *Hitchcock v. Dugger, supra*. Since *Hitchcock*, this Court has repeatedly reversed death sentences imposed under the "mere presentation" standard where the explicit evidence that consideration of mitigating factors was restricted. *E.g., Riley v. Wainwright,* 517 So.2d 656 (Fla. 1987); *Thompson v. Dugger*, 515 So.2d 173 (Fla. 1987).

Arbitrarily attaching no real weight to uncontested mitigating evidence results in a *de facto* return to the "mere presentation" practice condemned

in *Hitchcock v. Dugger*.

By giving "little weight" to valid, substantial mitigation, trial judges can effectively ignore *Lockett, supra*, and the constitutional requirement that capital sentencings must be individualized. The trial court's refusal to give any significant weight to valid mitigating evidence calls into question the constitutionality of Florida's death penalty scheme. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const.

POINT V

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY INTRODUCTION OF APPELLANT'S STATEMENT WHERE POLICE INTERROGATED APPELLANT AFTER COUNSEL HAD BEEN APPOINTED IN THIS CASE AND WHERE APPELLANT DID NOT VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHTS UNDER THE 5TH AND 6TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant moved to suppress his statements because he did not voluntary of and intelligently waive his rights under the 5th and 6th amendments to the U.S. Constitution and because police interrogated him after counsel had been appointed in this case. The motion was denied. Because of a number of irregularities, Appellant was denied of his rights under the 5th and 6th amendment to the United States Constitution.

After appointment of counsel Appellant asserted his right to remain silent – but police continued to request him to speak

Prior to taking the statement from Appellant on July 30, 2009, Appellant told Detective Faulkner that he had been to first appearance and his attorney told him "not to talk to nobody.." T2252.

In *Traylor v. State*, 596 So.2d 957 (Fla. 1992) this court made it clear that if there is an invocation of the right to counsel **in any manner** questioning must stop **immediately:**

> Under section 9, if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin, or, if it has already begun, must immediately stop. If the suspect **indicates in any manner** that he or she wants the help of a lawyer, interrogation must not begin until a lawyer has been appointed and is present, or, if it has already begun, **must immediately stop** until a lawyer is present. 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 an lawyer is present.

Traylor v. State, 596 So. 2d at 966 (emphasis added). *See also Dooley v. State*, 743 So. 2d 65 (Fla. 4th DCA 1999).

After Appellant indicated he had been to his first appearance and his attorney told him "not to talk to nobody" – Faulkner knew and accepted that counsel had been appointed in this case and the right to counsel was invoked, Faulkner reacted by asking Appellant 6 or 7 times to waive his right to have his attorney present

T473-474. Thus, Faulkner did not immediately stop questioning Appellant's statement should have been suppressed.

Subsequent waiver is invalid

Moreover, as this Court has indicated once the right to counsel has been invoked the subsequent waiver in the absence of counsel is invalid:

> Once the right to counsel has been invoked, any subsequent waiver during a police-initiated encounter in the absence of counsel during the same period of custody is invalid, whether or not the accused has consulted with counsel earlier. *Cf. Minnick; Roberson; Edwards* (comparable rule under federal law).

Traylor 596 So.2d note 14.

Counsel was appointed to Appellant's case at first appearance

The right to counsel was invoked through the appointment of counsel at first appearance, at which time an invocation of rights from was executed, and Appellant informing Faulkner about counsel. In seeking to suppress Appellant's statement Appellant specifically cited to *Michigan v. Jackson*, 475 U.S. 625 (1986) and *Patterson v. Illinois*, 487 U.S. 285 (1988) T831-- which indicates that once the right has attached and been invoked, any subsequent waiver during a police-initiated confrontation in the absence of counsel is per se invalid.

Police initiated contact with Appellant after counsel had been appointed in this case

Police made contact with Appellant without counsel present after counsel had been appointed on this case at first appearance.

Detective Faulkner went to see Appellant inside the jail after counsel had been appointed on this case. Faulkner signed in the jail log to see Appellant at 9:17. After Faulkner made contact by walking toward Appellant's cell-- Appellant asked to speak with him. Faulkner's contact with Appellant was not authorized. Faulkner claimed he made contact with Appellant because he was concerned about Appellant. However, many hours had passed since Faulkner had seen Appellant. Faulkner never indicated to anyone at the jail facility that Appellant needed to be looked at.

Most importantly, as explained in *Traylor*, once Appellant had an attorney appointed to his case -- neither the State nor its agents were authorized to contact Appellant:

> Once the right to counsel has attached and a lawyer has been requested or retained, the State may not initiate any crucial confrontation with the defendant on that charge in the absence of counsel throughout the period of prosecution, FN30
>
> FN30. Once the right has attached and been invoked, any subsequent waiver during a police-initiated confrontation in the absence of counsel is per se invalid. *Cf. Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) (comparable rule under Sixth Amendment).

596 So.2d at 968.

In *Traylor* this Court held that a statement on one charge was inadmissible where counsel had been appointed on that charge and thus police were barred from

contacting the defendant:

> Traylor was arrested and charged with the Alabama offense on August 6, and had counsel appointed at a preliminary hearing on August 18. Under Florida law, the Section 16 right attaches at charging. Because Traylor subsequently requested counsel at the preliminary hearing and a lawyer was appointed, Florida police were constitutionally barred from initiating any crucial confrontation with him on that charge in the absence of his lawyer for use in a Florida court. The confession to the Alabama murder that was obtained by Florida police through police-initiated questioning after counsel was appointed was thus obtained in violation of Section 16 and was inadmissible in the Florida proceeding.

569 So.2d at 969 (emphasis added): see also, *Michigan v. Jackson*; *Maine v. Moulton*, 474 U.S. 159 (1985) (state had "knowingly circumvented Moulton's right to have counsel present at a confrontation between Moulton and a police agent," condemning exploitation ... "of an opportunity to confront the accused without counsel being present").

Appellant's attorney testified after the first appearance of his concern that Appellant would acquiesce in talking if contacted by police T404. Counsel should not have had to worry where he had been appointed to represent Appellant on this charge – police contact by Faulkner should have been barred. *Traylor*; *Michigan v. Jackson*.

Statement not voluntary and intelligently waived

Appellant's statement was not voluntary and intelligently made where his

ability to assert his rights was impaired. As this Court has stated, "A waiver of a suspect's constitutional rights must be voluntary, knowing, and intelligent" *Traylor* at 968.

The trial court denied Appellant's motion to suppress because the State's expert Dr. Leporowski's opinion conflicted with the defense experts as to Appellant's ability to understand his Miranda rights.

However Dr. Bernard testified for the defense and his testimony not only covered the ability to understand Miranda warnings -- is also focused on Appellant's ability to voluntarily and intelligently waive his Miranda rights. This evidence was not refuted by Dr. Leporowski. Nor did the trial court rule that Appellant's waiver was voluntary and intelligently made. Instead, the trial court ruled Appellant understood his Miranda rights.

Repeatedly asking for Appellant's waiver of his right to appointed counsel

Detective Faulkner repeatedly asking Appellant to waive his right to an attorney-- after Appellant informed Faulkner that his attorney told him not to talk-- did not result in a valid knowing and intelligent waiver.

Detective Faulkner had to ask Appellant to waive his right to attorney 6 or 7 times before Appellant finally said he was agreeing to talk without his attorney present.

Waiver of counsel only after repeated attempts by police to elicit a waiver is not truly voluntary but is an acquiescence to the repeated attempts. This not only is contrary to a truly voluntary waiver to have counsel present but also flies in the face of requiring police to immediately stop questioning when they know counsel was appointed.

It was error not to suppress the statements. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT VI

THE EVIDENCE WAS INSUFFICIENT FOR MURDER IN THE FIRST DEGREE.

The State proceeded under two hypothesis for first degree murder – premeditation and felony murder. The evidence was insufficient under either hypothesis.

In capital cases this Court reviews the sufficiency of the evidence for the first degree murder conviction. See *Philmore v. State,* 820 So.2d 919, 926 (Fla. 2002) (court has obligation to review sufficiency of the evidence).

The standard review for sufficiency of the evidence is *de novo* review. *Jones v. State,* 790 So.2d 1194, 1196 (Fla. 1st DCA 2001).

When the evidence regarding first degree murder is circumstantial it must be inconsistent with the reasonable hypothesis that the homicide occurred other than

by a premeditation design or by felony murder. Eg., *Randall v. State*, 760 So.2d 892 (Fla. 2000); *Coolen v. State*, 696 So.2d 738 (Fla. 1997). In the present case, the evidence of premeditation/felony murder was not inconsistent with Appellant's reasonable hypothesis of innocence.

Premeditation

Premeditation is more than an intent to kill, it is a fully formed conscious purpose to kill done with reflection:

> More than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Coolen v. State, 696 So.2d 738, 741 (Fla. 1997) (quoting *Wilson v. State*, 493 So.2d 1019, 1021 (Fla. 1986)).

In *McCutchen v. State*, 96 So.2d 152 (Fla. 1957) this Court explained that a premeditated design includes reflection **and deliberation** before and at the time of the killing:

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection **and deliberation** on the part of the party entertaining it, and the party at

> the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

96 So. 2d at 153 (emphasis added).

In this case there were no witnesses or events prior to the killing which showed premeditation. See *Kirkland v. State*, 684 So.2d 732, 735 (Fla. 1996). Appellant never stated or indicated any plan to kill. There were no prior difficulties. A weapon was not procured. Appellant described what happened as far as his thought process as follows:

> "Q: Is it -- what prompted you to go ahead and take her life? Is it when she told you she had no money or you didn't believe her? How -- how did that all start?
>
> "A: I was so fucked up and tore up and hyped up like I've never been in my life. And after she -- she said she ain't got no money and everything and I kept begging her and she tried to push me out the door and shit, that's when shit went crazy, it just fucking went crazy.

T2262. Thus, the hypothesis was of an unpremeditated killing.

In *Kirkland v. State*, 684 So.2d 732 (Fla. 1996), the state asserted that evidence of numerous stab wounds including a very deep neck wound that was caused by many slashes, blunt trauma, use of both a cane and a knife, and the defendant being sexually tempted by the victim was sufficient for premeditation.

Kirkland, at 734-735. This court found this was insufficient evidence of premeditation. First, the court noted that "there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide." Id. at 735. The same is true in the present case. Second, the court stated, "there were no witnesses to the events immediately preceding the homicide." Id. The same is true here. Third, "there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide." Id (Kirkland had always owned the knife and cane). The same is true in the present case. Fourth, "the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan." Id. This is also true in the present case. This court reversed Kirkland's first degree murder conviction with instructions to enter judgment and sentence for second degree murder.

In the court below the prosecution hypothesized that Appellant went to Christenson's residence to murder her to eliminate her as a witness. However, such a hypothesis is unsupported by the evidence. There was no evidence that Christensen was a witness to any crime to compel Appellant to go to her residence to kill her. The evidence is consistent with Appellant's explanation that he went to her residence to ask for money but when she refused they struggled and he reacted and ended up killing her. This is consistent with a reasonable hypothesis of a lack

of premeditation.

Felony Murder

The prosecution's hypothesis for felony murder was based on the underlying felony being burglary. However, there was a reasonable hypothesis that no burglary occurred. There were no signs of forced entry and Appellant testified that he was invited in the house:

> "Q: What was she doing in her home when you walked in? Did you -- you knocked, you said?
>
> "A: Yes, sir.
>
> "Q: And she said 'Come in'?
>
> "A: Yes, sir.
>
> "Q: What was she actually doing when you walked in?
>
> "A: I'm not sure.
>
> "Q: Okay. So when y'all had your argument over I guess the money --
>
> "A: Yes, sir.
>
> "Q: -- she started, you said, pushing you away to get out, get out of her home?
>
> "A: Yes, sir.
>
> "Q: And then what happened?
>
> "A: I did what I did. I was so hyped up and fucked up and scared and 'Ahhhhh.'

T2261-2262 (emphasis added). The evidence was not inconsistent with an invited

entry.

Appellant's convictions and sentence for murder in the first degree and burglary must be reversed.

POINT VII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DECLARE SECTION 921.141(5)(I), FLORIDA STATUTES, AND THE CORRESPONDING STANDARD JURY INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED.

Prior to trial, Appellant sought a judicial determination that the CCP aggravating factor and its corresponding standard jury instruction were unconstitutional both facially and as applied to the instant case R345-347,213-222. The trial court denied Appellant's motion R421, 424. The sentencing judge subsequently determined this circumstance to have been established and ascribed "great" weight to it.

The CCP aggravating factor and its standard jury instruction are unconstitutionally vague and overbroad, are incapable of a constitutionally-adequate narrowing construction, and have been and are being applied in an arbitrary and inconsistent manner. Moreover, inasmuch as this factor has been and continues to be used as a basis for imposing death sentences in

Florida, and because its terms are all that is required to be read to sentencing juries, section 921.141, Florida Statutes is unconstitutional in its entirety.

The standards guiding the construction of capital aggravating circumstances are stricter than those governing the interpretation of other criminal statutes. See *Maynard v. Cartwright*, 108 S.Ct. 1853, 1857-1858 (1988)(eighth amendment requires greater care in defining aggravating circumstances than does due process). This Court has held that the review of statutes that impair fundamental rights explicitly guaranteed by the federal or state constitutions is to be governed by a strict scrutiny standard on appeal. *T.M. v. State*, 784 So.2d 442 (Fla. 2000). Appellant asserts and asserted below that section 921.141(5)(h), Florida Statutes, the standard jury instruction on it, and the death penalty as applied in Florida violate Article I, sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), and 22 (trial by jury) of the Florida Constitution, and the Fifth (due process), Sixth (jury trial), Eighth (cruel and unusual punishment), and Fourteenth (due process and incorporation) Amendments to the United State Constitution. More specifically, the absence of a consistently-applied standard for an aggravating circumstance violates the eighth amendment if it either: fails to narrow the class of persons eligible for the death penalty, *Godfrey v. Georgia*, 446 U.S. 420, 422 (1980); fails to guide the discretion of the sentencers, *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988); or undermines the meaningfulness

of appellate review, *Godfrey v. Georgia*, 446 U.S. at 432-433.

Under the rule established in *Rogers v. State*, 511 So. 2d 526 (Fla. 1987) the state must prove beyond a reasonable doubt that the defendant had a careful plan or prearranged design **to kill before** the criminal episode began. See also *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994) (CCP struck during shooting spree of 3 people); *Foster v. State*, 778 So. 2d 906, 921 (Fla. 2000) (the defendant must have a careful plan to commit murder, "before the fatal incident"). This was not shown in this case.

The CCP circumstance violates the fifth, sixth, eighth, and fourteenth amendments to the Federal Constitution and Article I, section 9, 16, 17, 21, and 22 of the state constitution. Among other things, the standard jury instruction failed to require that the state prove beyond a reasonable doubt an intent to kill before the crime began.

This court has acknowledged that CCP must have the narrowing and limiting explanation in the jury instruction.

> "[a] vagueness challenge to an aggravating circumstance will be upheld if the provision fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed. 2d 346 (1972). *Maynard v. Cartwright*, 486 U.S. at 361-62 108 S. Ct. at 1857.

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). In the same opinion this court

further acknowledged that the CCP jury instruction was defective for failing to adequately define the content (established by case law) of CCP:

"… call for more expansive instructions to give content to the CCP aggravating factor. (Footnote omitted.) Otherwise the jury is likely to apply CCP in an arbitrary manner, which is the defect cited by the United States Supreme Court in striking down HAC (the heinous, atrocious and cruel aggravator) instructions. (Citation omitted.)

***

For all these reasons, Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in *Espinosa*, *Maynard*, and *Godfrey* – the description of the CCP aggravator is 'so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor'. *Espinosa*, 505 U.S. at 1079, 1172 S. Ct. at 2918. (Emphasis added).

Jackson, supra at 90.

CCP when properly construed and constitutionally limited, requires that the defendant have intended to kill before the criminal episode began. See *Rogers v.*

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4 The judge instructed the jury (T2793-2794):Number five, the capital felony was a homicide and was committed in a cold and calculated and premeditated manner, without any pretense or moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "Calculated" means having a careful plan or prearranged design to commit murder. A killing is premeditated if it occurs after the Defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of the time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing. However, in order for this aggravating circumstance to apply, a heightened level of premeditation demonstrated by a substantial period of reflection is required. A pretense of moral or legal justification is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated or premeditated nature of the murder.

State, 511 So.2d 526 (Fla. 1987) (careful plan must be made before the criminal episode began for CCP); *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994). The "jury must first determine - that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)." See e.g. *Foster v. State*, 778 So. 2d 906, 921 (Fla. 2000) (emphasis supplied). The standard jury instruction which was given at bar[4] did not require such proof and relieved the state of its burden. Hence, it was unconstitutional. This error tainted the resulting penalty verdict and appellant's sentence. *Cf. Espinosa v. Florida*, 505 U.S. 1079 (1992) (unconstitutional jury instruction on heinousness circumstance rendered sentence unconstitutional).

POINT VIII

THE JURY INSTRUCTION STATING THAT THE JURY IS TO ONLY CONSIDER MITIGATION AFTER IT IS REASONABLY CONVINCED OF ITS EXISTENCE IS IMPROPER.

Section 921.141 provides no standard for the proof of mitigating evidence. The jury instruction committee has promulgated an instruction that the jury is to consider only mitigation after being "reasonably convinced" of its existence. This instruction is improper for three reasons: (a) it invades the province of the Legislature; (b) it is an incorrect statement of Florida law; and (c) it unconstitutionally limits the consideration of mitigating evidence. It was error to

overrule Appellant's objections to this instruction R243-247,298-302; R418,423.

(a) Article 2, Section 3 of the Florida Constitution forbids the judiciary from exercising the powers of the Legislature.

The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. Section 921.001(1), *Florida Statutes*; *Smith v. State*, 537 So. 2d 982 (Fla. 1989) (sentencing guidelines).

Despite the fact that the Florida Legislature put no restrictions on the[5] consideration of mitigating evidence, the Standard Jury Instruction Committeeplaced such a restriction by the promulgation of the "reasonably convinced"standard. Hence the "reasonably convinced" standard is unconstitutional forviolating the Florida Constitution's separation

5 The promulgation of the "reasonably convinced" standard by the jury instruction committee also violates the Cruel and Unusual Punishment Clauses of the state and federal constitutions. A death penalty statute is constitutional only to the extent that it reflects the reasoned judgment by the people through their duly elected representatives in the Legislature. Gregg. Here, we have a major provision of Florida's death penalty scheme substantially rewritten by a little known committee of lawyers.

6 Adoption of standard instructions by the supreme court does not necessarily mean that the instructions correctly state the law. *Yohn v. State*, 476 So. 2d 123, 127 (Fla. 1985) (promulgation of standard instructions does not mean they are necessarily correct; standard jury instruction on insanity proper). See also *Pope v. State*, 441 So. 2d 1073 (Fla. 1984) (standard instruction on "heinous, atrocious or cruel").

of powers. Florida law places no[6] restriction on consideration of mitigation. By placing a "reasonably convinced"

restriction, the instruction is contrary to Florida law. Also, by placing a high degree of restriction where none exists by statute, the jury instruction is contrary to the constitutional requirement that all mitigating evidence be considered and it imposes an unconstitutionally high standard of proof.

The state and federal constitutions require that all mitigating evidence be considered. *Hitchcock v. Dugger*, 481 U.S. 393 (1987). Any jury instruction that prevents consideration of all mitigating evidence is unconstitutional. *Mills v. Maryland*, 486 U.S. 367 (1988). Full consideration of mitigating evidence is essential in a capital case; the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989).

POINT IX

FLORIDA'S DEATH PENALTY WHICH DOES NOT REQUIRE: THE FINDINGS UNDER RING V. ARIZONA, 122 S. CT. 2428 (2002); THE JURY TO BE PROPERLY ADVISED OF THEIR RESPON-SIBILITY; A UNANIMOUS JURY FINDING FOR DEATH; A UNANIMOUS JURY FINDING OF AGGRAVATING CIRCUMSTANCES; A FINDING BEYOND A REASONABLE DOUBT THAT AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This court has indicated it has not ruled on whether *Ring v. Arizona,* 122 S. Ct. 2428 (2002) applies in Florida. *State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005) ("...this court has not yet forged a majority view about whether *Ring* applies in Florida'); but see *Coday v. State*, 946 So. 2d 988, 1005 (Fla. 2006) (stating in *Steele* this court determined *Ring* did not apply in Florida). In *Steele* this court made it clear that in order "to obtain a death sentence, the state must prove beyond a reasonable doubt at least one aggravating circumstance." 921 So. 2d at 543. In other words, the fact finder must find at least one aggravating circumstance - otherwise the maximum sentence that can be imposed is life in prison. In *Cunningham v. California*, 127 S. Ct. 856 (2007) the court emphasized the Federal Constitution right to a jury trial requires juries to find facts noting "the relevant 'statutory maximum' ... is not the maximum sentence a judge may impose after finding of additional facts, but the maximum he may impose without any

additional facts". Thus, aggravating circumstances must be found by the jury otherwise the maximum punishment is life in prison. *Ring* clearly applies to Florida's death penalty scheme.

For all practical purposes Florida is a "judge sentencing" state within the meaning and constitutional analysis of *Ring*, and therefore its entire capital sentencing scheme violates the Sixth Amendment. As this Court recognized in *State v. Steele*, 921 So.2d 538,548 (Fla. 2006), Florida is now the only state in the country that does not require a unanimous jury verdict in order to decide that aggravators exist and to recommend a sentence of death. See *State v. Daniels*, 542 A.2d 306,314-15 (Conn. 1988), which this Court cited with approval in *Steele*, 921 So.2d at 549, and which. recognized a special need for jury unanimity in capital sentencing decisions. Even more tellingly, this Court has forthrightly reaffirmed, post-Ring, that Florida's procedure "emphasizes the role of the circuit judge over the trial jury in the decision to impose a sentence of death". *Troy v. State*, 948 So.2d 635,648 (Fla. 2006). The Court also quoted and highlighted the following statement from *Spencer v. State*, 615 So.2d 688,690-91 (Fla. 1993): "It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed." *Troy*, 948 So.2d at 648. The jury' s advisory role, coupled with the lack of a unanimity requirement for either the finding of aggravating factors or for a death recommendation, is insufficient to comply with

the minimum Sixth Amendment requirements of Ring. Moreover, since Florida is a weighing state in which each aggravating factor is critically important to the life-or-death determination, and in which the existence of a single aggravator is rarely sufficient to sustain a death sentence, the requirements of Ring apply to all aggravating factors relied on by the state to justify a death sentence.

Also, the Eighth Amendment requires "heightened reliability... in the determination whether the death penalty is appropriate..." *Sumner v. Shuman*, 483 U.S. 66, 72, 107 S. Ct. 2716, 97 L.Ed. 2d 56 (1987).

1. Due process was violated where the jury was not properly advised of their responsibility.

In this case the jury was constantly told its decision was "advisory" and the trial court would be making the sentencing decision. It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. See *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) (wherein the Court stated that the jury must be fully advised in the importance of its role and neither comments not instructions may minimize the jury's sense of responsibility for determining the appropriateness of death).

The comments and instructions which would leave the jury to believe that

their decision is advisory violates Appellant's right to receive due process of law and a fair proceeding under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I Sections 8, 16 and 17 of the Florida Constitution.

2. Due process and the right to a jury trial were violated without the jury finding "sufficient aggravating circumstances" exist.

The Florida Legislature has not proclaimed the finding of one aggravating circumstance is sufficient to exceed a life sentence. Rather, the Legislature requires that "sufficient aggravating circumstances" exist. §921.141. A finding of one aggravating circumstance is not enough. There must be a finding of sufficient aggravating circumstances. Thus, the fact Appellant was found guilty of felony murder does not waive his rights to have the jury determine whether "sufficient" aggravators exist. The felony murder aggravator may not be "sufficient "to justify the death sentence. In fact, the death penalty has not been upheld in Florida when felony-murder is the only aggravator. See *Jones v. State*, 705 So. 2d 1364 (Fla. 1998); *Williams v. State*, 707 So. 2d 683 (Fla. 1998).

3. Due process and the right to a jury trial is violated where Florida allows a jury to decide aggravators exist and to recommend a death sentence by a mere majority vote.

As this court noted in *Steele*, Florida is the only state that allows a jury to

decide aggravators exist and to recommend a sentence if death by a mere majority vote. 921 So. 2d at 548. This violates both *Ring* and the right to heightened reliability of the Eighth Amendment that other states require. In deciding cruel and unusual punishment claims, the practice of other states will be reviewed. See e.g., *Solem v. Helm*, 103 S. Ct. 3001 (1983); *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988).

This court explicitly recognized that the jury is free to mix and match aggravating circumstances without deciding unanimously, or even by a majority, the particular facts upon which it is choosing death:

> Under the law, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statue, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, see § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, see §921.141(5)(f), because seven jurors believe that at least one aggravator applies.

921 So. 2d at 545. Again, this violates both *Ring* and the Eighth Amendment right to heightened reliability.

> **4. Due process is violated where the jury does not have to find aggravators outweigh mitigators beyond a reasonable doubt.**

In *State v. Wood*, 648 P.2d 71 (Utah 1981), cert. denied, 459 U.S. 980 (1982), the Utah Supreme Court held that the certitude required for deciding whether the aggravating factors outweighed the mitigating factors was beyond a reasonable doubt:

> The sentencing body, in making the judgment that aggravating factors "outweigh,: or are compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances.

648 P. 2d at 83-84.

In *State v. Rizo,* 833 A. 2d 363 (Conn. 2003), the Connecticut Supreme Court recognized that the reasonable doubt standard was appropriate for the weighing process:

> Imposing the reasonable doubt standard on the weighing process, moreover, fulfills all of the functions of burdens of persuasion. By instructing the jury that its level of certitude must meet the demanding standard of beyond a reasonable doubt, we minimize the risk of error, and we communicate both to the jury and to society at large the importance that we place on the awesome decision of whether a convicted capital felony shall live or die.

833 A. 2d at 407 (emphasis added). The court recognized that the greater certitude lessened the risk of error that is practically unreviewable on appeal:

> ....in making the determination that the aggravating factors outweigh the mitigating factors and that the defendant shall therefore die, the jury may weigh the factors improperly, and may arrive at a decision of death

> that is simply wrong. Indeed, the reality that, once the jury has arrived at such a decision pursuant to proper instruction, that decision would be, for all practical purposes, unreviewable on appeal save for evidentiary insufficiency of the aggravating factor, argues for some constitutional floor based on the need for reliability and certainty in the ultimate decision-making process.

833. A.2d at 403 (emphasis added). Finally, the court reversed the death sentence for failure to instruct that the aggravators must outweigh the mitigators beyond a reasonable doubt:

> Consequently, the jury must be instructed that it must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that, therefore, it is persuaded beyond a reasonable doubt that death is the appropriate punishment in this case. In this regard, the meaning of the "beyond a reasonable doubt" standard, as describing a level of certitude, is no different from that usually given in connection with the questions of guilt or innocence and proof of the aggravating factor.
>
> The trial court's instructions in the present case did not conform to this demanding standard. We are constrained, therefore, to reverse the judgment of death and remand the case for a new penalty phase hearing.

833 A. 2d at 410-11. Likewise, the fact finder in this case must have been persuaded beyond a reasonable doubt that the aggravators outweighed the mitigators. Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution; Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant's sentences must be vacated.

POINT X

FLORIDA STATUTE 921.141 (d), THE FELONY MURDER AGGRAVATOR IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Florida Statute 921.141(5) violates both the Florida and United States Constitutions. The use of this aggravator renders Appellant's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 12, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant filed a motion to declare this aggravator unconstitutional. The trial court denied the motion. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator.

Aggravating circumstance (5) (d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual batter, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree statute. Fla. Stat. 784.04(1)(a)2.

The decisions of the United States Supreme Court have made clear that

under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutionals. (1) It "must genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 2743, 77 L. Ed.2d 235, 249 (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." *Zant, supra,* at 2742, 77 L.Ed.2d at 249-250.

It is clear that the felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation". See Fla. Stat. 921.141(5)(I). *Rogers v. State,* 511 So. 2d 526 (Fla. 1987). It is completely irrational to make a person who does not kill and/or intent to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. It is clear that this aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to *Zant, supra*.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979); *Engberg v. Meyer*, 820 P.2d 70, 87-92 (Wyo. 1991); *State v. Middlebrooks*, 840 S.W.2d 317, 341-347 (Tenn. 1992); *Tennessee v. Middlebrooks*, 113 S. Ct. 1840 (1993) (granting certiorari); *Tennessee v. Middlebrooks*, 114 S. Ct. 651 (1993) (dismissing writ of certiorari as improvidently granted).

In *State of North Carolina v. Cherry*, 257 S.E.2d 551, the Supreme Court of North Carolina held that when a defendant is convicted of First Degree Murder under the felony rule, the trial judge is not to submit to the jury at the penalty phase of the trial, the aggravating circumstance concerning the underlying felony. The Court in *Cherry* held that:

> We are of the opinion, that nothing else, appearing the possibility that the defendant convicted of felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to an "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the Statute we hold that when a defendant is convicted of First Degree Murder under the felony murder rule, the trial judge shall not submit to the jury, at the sentencing phase of the trial, the aggravating circumstances concerning the underlying felony.

The North Carolina Supreme Court state in *Cherry* that once the underlying felony has been used to obtain a conviction of First Degree Murder, it has become

an element of that crime and may not thereafter be the basis for additional prosecution of *Cherry*. 257 S.E.2d at 567.

This Court should follow these courts and declare this aggravator unconstitutional pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

CONCLUSION

Based on the foregoing arguments and authorities, cited in Point I, Appellant respectfully requests this Court vacate this death sentence and remand for imposition of a life sentence or alternatively to remand for a new penalty phase.

Based on the argument and authorities cited in Points, II, III, IV, VII, VIII, IX, and X, Appellant respectfully requests this Court to vacate his death sentence and to remand for a new penalty phase.

Based on the arguments and authorities citied in Point V, Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

Based on the argument and authorities citied in Point VI, Appellant's convictions and sentences for murder in the first degree and for burglary must be reversed.

CERTIFICATE OF SERVICE

I certify that a copy of this Initial Brief has been electronically filed with the Florida Supreme Court and furnished to Lisa Marie Lerner, Assistant Attorney General, by E-mail to CrimAppWPB@MyFloridaLegal.com this 18th day of June, 2013.

/s/Jeffrey L. Anderson
Of Counsel

CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a Fla. R. App. P. 9.210(a)(2).

/s/Jeffrey L. Anderson
Jeffrey L. Anderson
Assistant Public Defender