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IN THE SUPREME COURT OF FLORIDA

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

REPLY 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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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.

Appellee claims that the state proved the aggravating circumstances of CCP, avoid arrest, and that the death penalty is proportionate in this case. Appellee's claims will be discussed in separate sections below.

CCP

Appellee claims the killing was CCP based on Appellant having a careful plan to kill Christensen by specifically procuring a weapon for the purpose of killing and then performing an execution style murder. See *Franklin v. State,* 965 So.2d 79 (Fla. 2007) (CCP where one arms self in advance, there is an execution style murder, one plans the killing, and the killing is cold).

However, the facts did not show an execution style murder. Here, the facts showed Christensen was killed during a struggle/resistance with Appellant. Defensive wounds were incurred during the struggle T2177, 2178, 2182, 2183. The physical evidence showed that the struggle started in the kitchen, continued into the hallway, and still continued into the bedroom. The entire struggle was in the confines of a small trailer. Appellee hypothesizes that Appellant immobilized

Christensen in the kitchen and then dragged her a few feet to the bedroom and executed her. This is contrary to the physical evidence. There was a drag pattern in the hallway. The bloodstain pattern analyst testified that the drag pattern was consistent with someone struggling T2105, lines 24-25. The drag pattern was not linear but was erratic and moving T2109. In fact, there were drops of blood on the drag pattern indicating the source of the blood came from above T2110. In the bedroom the source of the blood came from above indicating that Christensen was standing and she that she had stepped in the blood in the bedroom T2112. There was blood on the mirror and vanity in the bedroom and items were pulled down in the bedroom during the struggle T1988. Even the prosecutor emphasized in his hypothetical that everything occurred during a "continuing struggle" T2119-2120. The wounds to the throat **could be consistent** with a knife cutting the throat. However, the expert witnesses did not eliminate that the wounds could also be consistent with having actually occurred during a struggle. In addition, Appellant's statement that he began to struggle with Christensen when she began pushing him and ordering him out of the residence was consistent with this physical evidence of a struggle. This simply was not Christensen being immobilized and executed as Appellee claims. This was not CCP. See *Mahn v. State*, 714 So.2d 391, 398 (Fla. 1998) (no heightened premeditation where killing did not evidence analytical thinking and a well-developed plan).

Appellee claims *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 not relevant to CCP in this case because in those cases the plan was to rob and there was a possible confrontation/resistance.

Appellee overlooks that the state's evidence showed that Appellant went to the trailer to either borrow or steal money and that Christensen refused, told him to leave, and began pushing him and then Appellant attacked her resulting in a struggle/resistance and death. Like in *Perry*, *Davis*, and *Green* – the evidence at best showed a plan to rob.

Appellee does not dispute 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). "A plan to kill cannot be inferred solely from a plan to commit or the commission of another felony". *Barwick v. State*, 660 So.2d 685, 694 (Fla. 1995).

However, Appellee argues because Appellant was "planning to rob his neighbor" AB30 – and "announced his intent to rob the victim" AB30 – there was heightened planning required for CCP. Again, a plan to rob is not the same as a plan to kill for CCP. *Perry; Davis; Green.*

Appellee also infers the killing had to be preplanned because Appellant made a statement that he would later be taking a shower. However, Appellee ignores the fact that Chris Lein testified he had called Appellant to fix a toilet that was leaking all over the floor that day T1628. Such work can be unsanitary. Appellant would have anticipated the need to shower and this was not evidence of a plan to kill. In fact, Lein testified that Appellant did come over at 4 pm that day but instead decided not to work on the toilet T1628. Moreover, it is not logical to conclude that people who say they are going to take showers are planning to kill someone. Many just take showers to get clean.

The cases Appellee cites in support of CCP are far different than the facts in the present case – they involve true execution style killings. *McGirth v. State*, 48 So.3d 777 (Fla. 2010) (victim offered no resistance, defendant shot victim and spent considerable time collecting property, instructed co-defendant to wipe down area to remove prints, left then returned to scene then in execution style shot victims in back of head as they laid on floor, defendant also made statement he ordered victims killed because they could identify them); *Looney v. State*, 803 So.2d656 (Fla. 2001) (Looney and co-defendant discussed killing the victim and did so in execution style – and evidence showed that after binding victims the defendants had an extended time to make the plan to kill); *Guardado v. State*, 965 So.2d 108 (Fla. 2007) (Gaurdado admitted he planned the killing and the killing

was at a secluded location); *Wright v. State*, 19 So.3d 277 (Fla. 2009) (drove victim 10 miles to an isolated area and performed an execution style murder-shot in head with shotgun); *Baker v. State*, 71 So.3d 802 (Fla. 2011) (defendant shot and then released victim – then after speaking with codefendant chased down and killed victim in a remote location); *Mason v. State*, 438 So.2d 374 (Fla. 1983) (defendant stabbed victim as she was sleeping in bed – there was no struggle/resistance); *Lott v. State*, 695 So.2d 1239 (Fla. 1997) (victim bound and gagged and then escaped – victim ordered killed because she knew the defendant and could send him to prison); *Stein v. State*, 632 So.2d 1361, 1366 (Fla. 1994) (CCP because of lack of resistance and fact that murder was carried out as a matter of course – 4 shots to the head from 4 or 5 inches away and "Stein and his co-defendant specifically discussed and planned" that any and all witnesses would be killed); *Alston v. State*, 723 So.2d 148 (Fla. 1998) (after substantial reflection, Alston acted on plan he conceived during extended period in which events occurred – drove to woods and shot victim to death); *Thompson v. State*, 648 So.2d 692 (Fla. 1994) (drove victims to isolated area, forced them on the ground and then killed); *Duest v. State*, 462 So.2d 446 (Fla. 1985) (no real discussion regarding CCP—but unique facts present where defendant went out of his way to take the victim with him for the sole purpose to obtain murder weapon and then take victim to his residence to kill him).

As these cases show, CCP typically involves execution style murders which also commonly involve the defendant leaving the scene and returning to kill -- or taking the victim to an isolated area – or there is an extended period of time for reflection after the crime begins – or there are specific statements indicating a plan to kill as opposed to a plan to rob.

Appellee does not dispute that the mere fact a weapon is brought to the scene is not sufficient to prove 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).

Contrary to Appellee's speculation, the knife was not shown to be the kind of weapon that one would plan to use to commit a murder. The weapon was a little kitchen knife -- the kind that is used to peel potatoes T2282. Appellant indicated that he kept 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 state did not present any testimony from

friends or relatives to establish that Appellant didn't at times keep in his pocket for such a purpose. There was not substantial competent evidence capable of proving CCP beyond a reasonable doubt. Appellee has not disputed that the trial court misapplied case law in finding CCP. See Initial Brief at 34-36. Appellant relies on his Initial Brief for further argument on CCP.

Avoid Arrest

Appellee has not disputed that the facts 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 not **materially** different than in the instant case but cites to non-existent and non-material differences to claim the avoid arrest aggravator was stricken for other reasons such as there being a confession or cooperation with police.[1] However, in all these cases avoid arrest was stricken because the primary motive involved appeared to be for pecuniary gain.

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*,

[1] Contrary to Appellee's claim, in *Davis* the victim knew the defendant. 604 So.2d at 798 . Also, neither Davis, Perry, nor Green turned themselves in a fashion to show they were never thinking of avoiding arrest as Appellee claims. Davis was arrested two days after the crime and initially denied involvement. **Several days** after the murder Perry went to the station **at the request of police**. Green surrendered himself 10 days after the murder and a warrant had been issued – Green initially blamed another individual for the murder. Whereas, Appellant agreed to speak with police on the very day of the murder.

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 this case 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). 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).

Appellee has not disputed that pecuniary gain was the primary motive in this case. The evidence in this showed the killing occurred during a continuous struggle/resistance. However, Appellee cites to cases where the victim was bound and then after an extended time killed, or was removed to an isolated area and killed, or where the defendant made direct statements that he killed the victim to avoid arrest. *McGirth v. State*, 48 So.3d 777 (Fla. 2010) (no resistance by victim and defendant specifically ordered killing because witness could identify him); *Looney v. State*, 803 So.2d656 (Fla. 2001) (victims bound then killed after extended time – statement made that witnesses could not be left behind -- Looney and co-defendant discussed killing the victim and did so in execution style – and evidence showed that after binding victims the defendants had an extended time to make the plan to kill); *Hoskins v. State*, 965 So.2d 1 (Fla. 2007) (victim taken from one location, bound then killed in another location); *Trease v. State*, 768 So.2d 1050 (Fla. 2000) (defendant specifically said he killed because victim could identify him); *Stein v. State*, 632 So.2d 1361,1366 (Fla. 1994) ("Stein and his co-defendant specifically discussed and planned" that any and all witnesses would be killed); *Thompson v. State*, 648 So.2d 692 (Fla. 1994) (defendant obtained property he sought then went out of the way to take the victim to an isolated area and executed him); *Buzia v. State*, 926 So.2d 1203 (Fla. 2006) (had fully subdued

victim then twice left to search and retrieve axe to kill victim); *Jean-Phillipe v. State*, 38 Fla. L. Weekly S409 (Fla. June 13, 2013) (lay in wait killing where defendant had bound victim's daughter and then proceeded to stab victim as she entered residence – killing had been planned).

Moreover, the struggle/killing occurred **before** Appellant had accomplished his task of getting money –this evidence supported that Appellant's motive related to taking rather than to eliminate the witness to the taking. Compare *Thompson*, supra (defendant accomplished taking and then took victim to isolated area and killed).

In attempting to expand the avoid arrest aggravator, Appellee ignores the strict standard that the sole or dominate motive must be to eliminate a witness. See *Jones v. State*, 963 So.2d 180 (Fla. 2008) (rejecting speculation of avoid arrest "where there was no direct evidence of what occurred immediately preceding Jones shooting the victim" but shots fired during struggle with victim).

There was not substantial competent evidence capable of proving avoid arrest beyond a reasonable doubt. Appellee has not disputed that the trial court misapplied case law in finding avoid arrest. See Initial Brief at 30 and 32. Appellant relies on his Initial Brief for further argument on avoid arrest.

Proportionality/other remedies

On pages 33 -- 34 of its answer brief, Appellee relies on numerous cases to claim the death penalty is proportionate in this case. Initially it must be noted that Appellee is performing a quantitative rather than qualitative analysis of proportionality. Furthermore, even this analysis has missed the mark. Almost all the cases cited by Appellee involve the aggravator of prior violent felony which makes those cases far different than the present case which does not. The remaining cases are very dissimilar to the instant case. See *Nelson v. State*, 748 So.2d 237 (Fla. 1999) (plan to kill the victim by taking to remote location and binding victim – then admitted killed to avoid being caught); *Cave v. State*, 727 So.2d 227 (Fla. 1998) (kidnapped convenience store clerk -- drove to remote area -- stabbed and shot in the head in execution style); *Sliney v. State*, 699 So.2d 662, 666 (Fla. 1998) (robbery of pawn shop were killing was planned as shown by codefendant's statement "we have to kill" victim); *Geralds v. State*, 674 So.2d 96, 102 (Fla. 1996) (Gerald's planned robbery and in the course of the robbery bound the victim with plastic ties and wrapped towel around her mouth which was intentionally positioned to be used to choke the victim and during 20 minute period Geralds severely beat and stabbed the victim who would ultimately drown on her own blood).

On page 35 of the answer brief, Appellee claims that death is proportional based on other similar cases that have the HAC aggravator. However, again some of these cases involved a prior violent felony aggravator which is not present in this case. *Spencer v. State*, 691 So.2d 1062 (Fla. 1996); *Hudson v. State*, 538 So.2d 829 (Fla. 1989). The remaining cases are very dissimilar to this case. See *Boyd v. State*, 910 So.2d 167 (Fla. 2005) (victim kidnapped and raped after car ran out of gas – kidnapping was with the intent to terrorize); *Mansfield v. State*, 758 So.2d 636 (Fla. 2000) (HAC strangulation and extreme sexual battery, parts of victim's genetalia were excised with knife); *Cox v. State*, 819 So.2d 705 (2002) (prison killing which involved prior violent felony and under sentence of imprisonment in addition to CCP); *Geralds v. State*, 674 So.2d 96 (Fla. 1996) (extreme amount of planning prior to crimes of burglary and killing and Geralds bound the victim with plastic ties and wrapped towel around her mouth which was intentionally positioned to be used to choke the victim and during 20 minute period Geralds severely beat and stabbed the victim who would ultimately drown on her own blood).

Appellee's analysis is based on a quantitative analysis rather than a qualitative analysis of the underlying circumstances[2].

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[2] In deciding whether death is a proportionate penalty, "we make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring

Appellee's argument is essentially that the existence of HAC automatically makes any death since proportionate. This is not true. See *Kramer v. State*, 619 So.2d 274 (Fla. 1993) (death disproportionate despite HAC and PVF where killing was result of spontaneous confrontation involving Kramer a disturbed alcoholic).

It is true that some aggravating circumstances tend to be more serious than others -- compare prior violent felony to during the course of the felony.

This does not mean that all categories of aggravating circumstance (whether they be PVF, HAC, CCP etc.) are all equal in seriousness.

One must look to the underlying basis for each aggravator. *Scott v. State*, 66 So.3d 923, 934 (Fla. 2011). For example, some PVFs are less serious than other PVFs.

In *Scott v. State*, 66 So.3d 923, 935 (Fla. 2011) this court recognized that PVF is a serious aggravating circumstance and the trial court had given it great weight. *Scott* was not a case with substantial mitigation. *Id*. This court evaluated the

uniformity in the application of the sentence." *Anderson v. State*, 841 So.2d 390, 407–08 (Fla.2003) (citation omitted). We consider the totality of the circumstances of the case and compare the case to other capital cases. See *Urbin v. State*, 714 So.2d 411, 417 (Fla.1998). This entails "a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." Id. at 416. In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." *Sexton v. State*, 775 So.2d 923, 935 (Fla.2000) (quoting *Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990)).

Offord v. State, 959 So. 2d 187, 191 (Fla. 2007).

circumstance qualitatively and noted that PVF in *Scott* (a contemporaneous felony) was not as serious as a PVF (occurring at a time separate from the murder) as in other cases and reduced the sentence to life based on proportionality.

Likewise, not all HAC cases are the same. It has been said that all murders are heinous. But, of course, not all murders qualify as HAC. The fact that the HAC aggravator is more egregious in some cases than in others was recognized by this Court in *Perry*. There, in affirming the trial court's finding of HAC, this Court stated, "there are undoubtedly killings more outrageous, wicked and vile than that shown here." 522 So. 2d at 821. Thus, the Court concluded that the HAC aggravator in *Perry* was not of the same quality as the HAC aggravator in other cases. The Court's conclusion demonstrates its reliance on a qualitative analysis. This Court's qualitative review requires that it look at the underlying basis for each aggravator; that qualitative analysis reveals that the HAC aggravator in this case was not as strong as the HAC aggravator in other cases. Consequently, even where the Court affirms the trial court's finding of HAC, this Court may still find the death sentence disproportionate, as it is in this case.

The longer the victim was terrorized which increases reflection about impending death, the more serious HAC will be. See *Geralds v. State*, 674 So.2d 96, 102 (Fla. 1996) (Gerald's planned robbery and in the course of the robbery bound the victim with plastic ties and wrapped towel around her mouth which was

intentionally positioned to be used to choke the victim and during 20 minute period Geralds severely beat and stabbed the victim who would ultimately drown on her own blood).

Although the focus is on the victim's reflection, another factor that will make more serious is whether the defendant intentionally terrorized or tortured the victim. See *Boyd v. State*, 910 So.2d 167 (Fla. 2005) (victim kidnapped and raped after car ran out of gas – kidnapping was with the intent to terrorize).

In this case there is no claim or evidence of Appellant trying to terrorize or torture. The fact is there was a struggle/resistance. There was no evidence that it happened in anything but a short time. In fact there was no evidence Christensen had time to reflect about impending death -- the evidence showed she was reacting during a struggle. Appellee's interpretation of HAC would result in a weighty HAC aggravator being found merely due to the fact the victim defends herself.

At best, there was minimal reflection as to impending death. The HAC in this case was not as strong as the HAC in any of the cases cited by Appellee.

The instant case even involves the same, or possibly less, HAC than in *Perry v. State,* 522 So.2d 817 (Fla. 1988) which involved the victim being repeatedly stabbed in the chest and breast as she attempted to ward off a knife but died of strangulation associated with stab wounds. As explained in the Initial Brief Perry's death sentence was reduced to life.

Also, Appellee claims that any relief (proportionality or new penalty phase) should be denied because of the weight the trial court gave to the aggravators. However this court is given relief in cases where the trial court gave great weight to the aggravators and where there was very little in mitigation. See e.g. *Scott v. State*, 66 So.3d 923 (Fla. 2011).

The subjective variations in the manner which trial judges consider aggravators and mitigators should not control proportionality review.

"[T]he uniform general treatment of similarly situated persons . . . is the essence of law itself." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 587-88, (1996) (Breyer, J., concurring) (e.s.).

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 judgment 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).

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.

Appellee claims the prosecution would be prejudiced – and the defense would not be prejudiced – by requiring the defense to present its witnesses in a particular order. Appellee provides no basis for such a claim. As explained in the Initial Brief there would only be prejudice to the defense. 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. The trial court did not consider this in its decision to force Appellant to have its expert testify before the lay witnesses. Appellant relies on his Initial Brief for further argument on this Point.

POINT III

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

Appellee claims the trial court did not abuse its discretion because the defense did not show a need for a mitigation specialist and the request was denied without prejudice. However, Appellee ignores that the trial court made it clear that actual testimony – not from the attorney – would be required to grant the motion. The trial court specifically cited to *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.

Appellant relies on his Initial Brief for further argument on this Point.

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.

Appellee has not addressed the specific arguments made in the Initial Brief. Appellant relies on the Initial Brief for argument on this Point.

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.

Appellee has not addressed the specific arguments made in the Initial Brief. Appellant relies on the Initial Brief for argument on this Point.

POINT VI

THE EVIDENCE WAS INSUFFICIENT FOR MURDER IN THE FIRST DEGREE.

Appellee makes several inferences as fact which are inconsistent with the record.

Appellee hypothesizes that Appellant immobilized Christensen in the kitchen and then dragged her a few feet to the bedroom and executed her. This is contrary to the physical evidence. There was a drag pattern in the hallway. The bloodstain pattern analyst testified that the drag pattern was consistent with someone struggling T2105, lines 24-25. The drag pattern was not linear but was erratic and moving T2109. In fact, there were drops of blood on the drag pattern indicating the source of the blood came from above T2110. In the bedroom the source of the blood came from above indicating that Christensen was standing and she that she

had stepped in the blood in the bedroom T2112. There was blood on the mirror and vanity in the bedroom and items were pulled down in the bedroom during the struggle T1988. Even the prosecutor emphasized in his hypothetical that everything occurred during a "continuing struggle" T2119-2120. The wounds to the throat **could be consistent** with a knife cutting the throat. However, the expert witnesses did not eliminate that the wounds could also be consistent with having actually occurred during a struggle. In addition, Appellant's statement that he began to struggle with Christensen when she began pushing him and ordering him out of the residence was consistent with this physical evidence of a struggle.

Appellee also infers the killing had to be preplanned because Appellant made a statement that he would later be taking a shower. However, Appellee ignores the fact that Chris Lein testified he had called Appellant to fix a toilet that was leaking all over the floor that day T1628. Such work can be unsanitary. Appellant would have anticipated the need to shower and this was not evidence of a plan to kill. In fact, Lein testified that Appellant did come over at 4 pm that day but instead decided not to work on the toilet T1628. Moreover, it is not logical to conclude that people who say they are going to take showers are planning to kill someone. Many just take showers to get clean.

Appellant relies on his Initial Brief for further argument on this Point.

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.

Appellee correctly states that this court in the past has upheld the constitutionality of CCP and the standard jury instruction on CCP.

However, as explained in the Initial Brief both are constitutionally infirm.

Appellee does not dispute Appellant's actual argument—that the jury must be properly instructed. In fact, Appellee acknowledges that the standard jury instruction fails to inform the jury that the state must prove intent to kill before the crime began. See e.g. *Rogers v. 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)("jury must first determine - that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)."); *Franklin v. State*, 965 So.2d 79, 98 (Fla.2007) ("In order to find the CCP aggravating factor, the ***jury must determine*** ... that the defendant had a careful plan or prearranged design to commit murder ***before the fatal incident*** (calculated)"); *Anderson v. State*, 863 So.2d 169, 176-77 (Fla.2003) ("to establish the CCP aggravating factor ... [T]he ***jury must determine*** ... that the defendant had a careful

plan or prearranged design to commit murder ***before the fatal incident*** (calculated)"); *Conahan v. State*, 844 So.2d 629, 637 (Fla.2003) ("This Court defined the CCP aggravator as follows: ... ***the jury must determine*** ... that the defendant had a careful plan or prearranged design to commit murder ***before the fatal incident*** (calculated)"); *Sireci v. Moore*, 825 So.2d 882, 886 (Fla.2002) (the "***jury must determine*** ... that the defendant had a careful plan or prearranged design to commit murder ***before the fatal incident***"); *Hertz v. State*, 803 So.2d 629, 649-50 (Fla.2001) ("***the jury must determine*** ... that the defendant had a careful plan or prearranged design to commit murder ***before the fatal incident*** (calculated)"); *Evans v. State*, 800 So.2d 182, 192 (Fla.2001) ("***the jury must determine*** ... that the defendant had a careful plan or prearranged design to commit murder ***before the fatal incident*** (calculated)"); *Woods v. State*, 733 So.2d 980, 991 (Fla.1999) ("***jury must*** ... ***determine*** that the defendant had a careful plan or prearranged design to commit murder ***before the fatal incident***); *Alston v. State*, 723 So.2d 148, 161-62 (Fla.1998) ("***jury must determine*** ... that the defendant had a careful plan or prearranged design to commit murder ***before the fatal incident*** (calculated)"); *Gordon v. State*, 704 So.2d 107, 114 (Fla.1997) ("***jury must determine*** ... that the defendant had a careful plan or prearranged design to commit murder ***before the fatal incident*** (calculated)"); *Lockhart v. State*, 655 So.2d 69, 73 (Fla.1995) ("[T]he ***jury must determine*** ... that the defendant had a careful plan or

prearranged design to commit murder ***before the fatal incident*** (calculated)"); *Jackson v. State*, 648 So.2d 85, 89 (Fla.1994) ("Thus, in order to find the CCP aggravating factor under our case law, ***the jury must determine*** ... that the defendant had a careful plan or prearranged design to commit murder ***before the fatal incident*** (calculated)")). See also *Phillips v. State*, 984 So.2d 503, 512 (Fla.2008) ("A CCP killing demonstrates 'that the defendant had a careful plan or prearranged design to commit murder ***before the fatal incident***'") (quoting *Franklin*); *Lawrence v. State*, 846 So.2d 440, 450 (Fla.2003) (state presented substantial competent evidence that defendant had "a careful plan or prearranged design to commit murder ***before the fatal incident***"); *Thompson v. State*, 619 So. 2d 261, 266 (Fla. 1993) (defendant methodically tortured woman to death; CCP struck because state did not show that he "planned or prearranged to commit the murder ***prior to the commencement of the conduct that led to the death of the victim***"); *McKinney v. State*, 579 So.2d 80, 85 (Fla.1991) ("the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder ***before the crime began***"). Appellant relies on his Initial Brief for further argument on this Point.

POINT VIII

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

Appellant relies on his Initial Brief for further argument on this Point.

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.

Appellant relies on his Initial Brief for further argument on this Point.

POINT X

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

Appellant relies on his Initial Brief for further argument on this Point.

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 capapp@myfloridalegal.com this 17th day of October, 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