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IN THE SUPREME COURT OF FLORIDA

MARVIN CANNON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-46

ON DIRECT APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR GADSDEN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Rules

Treatises

PRELIMINARY STATEMENT

Appellant, MARVIN CANNON, raises nine issues in his direct appeal from convictions and sentence to death. Cannon was convicted of: (Count I) murder in the first degree of Zachariah Morgan with premeditation and felony murder present; (Count II) attempted first degree murder of Sean Neel; (Count III) armed robbery with a deadly weapon of Zachariah Morgan; (Count IV) attempted armed robbery with a deadly weapon of Sean Neel; and (Count V) arson of a vehicle.

References to the appellant will be to "Cannon" or "Appellant." References to the co-defendant will be "McMillian." References to the appellee will be to the "State" or "Appellee." References to the victim in this case will be to "Mr. Morgan." References to the surviving victim in this case will be "Mr. Neel."

The record on appeal is in seventeen volumes that are numbered consecutively and conform with the requirements of Fla. R. App. P. 9.200.

There are four volumes (1-4) of transcripts for voir dire and jury selection. They are numbered separately from the transcripts of the remaining parts of the trial. They will be references by the letter "V" followed by an appropriate volume and page number "(V#/##)".

There are three volumes (1-3) of pleadings and orders. They are also numbered separately from the other volumes. They will be referenced by the letter "R" followed by an appropriate volume and page number "(R#/##)". There are

eight volumes (1-8) of the guilt/innocence and penalty phase of the trial. Each volume will be referenced by the letter "T" followed by an appropriate volume and page number "(T#/##)".

There is one volume marked "Spencer Hearing." It will be referenced to by the word "Spencer" followed by an appropriate page number "(Spencer/##)".

There is one volume marked "Sentencing." It will be referenced by the word "Sentencing" followed by an appropriate page number "(Sentencing/##)".

Finally, Cannon's initial brief will be referenced by "IB" followed by the appropriate page number "(IB/##)".

STATEMENT OF THE CASE AND FACTS

This is a direct appeal in a capital case. (V1/1). On August 19, 2011, the grand jury of Gadsden County, Florida, indicted Marvin Cannon and Antone McMillian for the December 24, 2010, murder of Zachariah Morgan. (R1/42 – 44). A total of five charges were filed by way indictment: (Count I) murder in the first degree of Zachariah Morgan; (Count II) attempted first degree murder of Sean Neel; (Count III) armed robbery with a deadly weapon of Zachariah Morgan; (Count IV) attempted armed robbery with a deadly weapon of Sean Neel; and (Count V) arson of a vehicle. (R1/42 – 44).

Cannon filed a motion to suppress all statements he made while in custody on December 26, 2010, on the basis that he invoked his right to counsel and was not properly informed of his rights pursuant to *Miranda*.[1] (R1/59 – 60). On September 14, 2012, the trial court granted Cannon's motion to suppress all statements made to law enforcement officers finding that Cannon made a clear unequivocal invocation of his right to counsel, and that he was not advised of his rights under *Miranda*. (R1/140). Prior to Cannon's trial it was determined that co-defendant McMillian was intellectually disabled[2] and not competent to proceed.

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

[2] Mental retardation has been renamed "Intellectual Disability" under the DSM-5. AMER. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL

(R2/310 – 316).

Cannon's trial began on October 1, 2012. The jury found Cannon guilty, as charged, of: (Count I) murder in the first degree of Zachariah Morgan with both premeditation and felony murder; (Count II) attempted first degree murder of Sean Neel; (Count III) armed robbery with a deadly weapon of Zachariah Morgan; (Count IV) attempted armed robbery with a deadly weapon of Sean Neel; and (Count V) arson of a vehicle. (T6/814 – 815; R2/190 – 194).

The penalty phase of the capital trial began on October 10, 2012, and the jury returned an advisory sentence of death by a vote of nine to three (9-3) for the murder of Zachariah Morgan. (T8/1009; R2/210). The trial court held a *Spencer*[3] hearing on November 2, 2012. (Spencer/1). On November 15, 2012, the trial court imposed the following sentences: (Count I) murder in the first degree – death; (Count II) attempted first degree murder – life as a Prison Release Reoffender; (Count III) armed robbery with a deadly weapon – 30 years as a Prison Release Reoffender; (Count IV) attempted armed robbery with a deadly weapon – 15 years as a Prison Release Reoffender; and (Count V) arson of a vehicle – 30 years as a Prison Release Reoffender. (Sentencing/5 – 9). The

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DISORDERS 31 – 41 (Amer. Psychiatric Ass'n, 5th ed. 2013).

[3] *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996).

Appellant filed a notice of appeal on December 4, 2012. (R2/350). The Appellant filed his *Initial Brief* on or about October 7, 2013. This answer follows.

Facts – Guilt/Innocence Phase

Mr. Morgan and Mr. Neel purchased deer corn from Appellant sometime in the fall of 2010. (T1/87). This initial transaction was done entirely between Mr. Morgan and Appellant. (T1/88 – 90). Mr. Morgan then split the purchase with Mr. Neel. (T1/88 – 91). Sometime later, Mr. Neel was interested in buying more deer corn, and asked Mr. Morgan if he could get more. (T1/92). Again, Mr. Morgan acted as the middle-man for the transaction. (T1/92; T2/141). Mr. Morgan told Mr. Neel that Appellant was out of deer corn at that time. (T1/94, 95). Mr. Morgan then agreed to put money upfront to be first in line for the next batch of deer corn when it became available. (T1/95; R2/298).

A few weeks passed and Appellant had yet to deliver the deer corn. (T1/96). Mr. Morgan was also having difficulties reaching Appellant on the phone. (T1/97). Mr. Morgan finally placed a phone call to Appellant from Mr. Neel's phone. (T1/97). Mr. Neel heard Mr. Morgan leave a message saying "I know it's hard times . . . but I need one of two things . . . I either need my money back or my corn . . . whichever, it doesn't matter." (T1/97)

On December 24, 2010, Mr. Morgan called Mr. Neel and told him Appellant had called and the corn was ready for pickup. (T1/98). Mr. Morgan drove with

Mr. Neel to a gas station off of St. Route 267 and I-10. (T1/100). The plan was to pick up Appellant at a local gas station and Appellant would show them where the deer corn was being stored. (T1/101).

Mr. Morgan was pulling a flatbed trailer to carry and store the corn, and was considering purchasing an extra barrel of deer corn. (T1/99). Mr. Neel had never met Appellant before, but upon seeing him at the gas station, Mr. Neel immediately recognized Appellant as being Johnny Cannon's son. (T1/103). Mr. Neel also noticed that Appellant was wearing a distinctive, bulky Los Angeles Lakers jacket.[4] (T1/110; R2/299).

Appellant arrived to the gas station with McMillian, who was introduced as being Appellant's cousin from New York who was there to help. (T1/105). Mr. Morgan did not have any room in his backseat and repeatedly told Appellant that McMillian could not come; however, Mr. Morgan eventually gave in and cleared room in the truck. (T1/105). The four people then rode to pick-up the deer corn. (T1/107 – 108, 111). Mr. Morgan was driving, Mr. Neel rode in the front passenger seat, McMillian rode in the driver side rear seat (behind Mr. Morgan), and Appellant rode in the passenger side rear seat (behind Mr. Neel). (T1/106 – 107).

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[4] This jacket was never recovered during a search of the area. (R2/299).

Appellant directed Mr. Morgan where to go. (T1/111; R2/299). Eventually, Appellant directed Mr. Morgan to drive east on Flat Creek Road. (T1/111). Appellant then instructed Mr. Morgan to drive onto a dirt road. (T1/112). At that point, Mr. Neel heard Appellant fumbling in his jacket, and what Mr. Neel believed was Appellant faking a phone call. (T1/113 – 114).

Mr. Neel was turned facing McMillian when he was suddenly stabbed twice in the neck by Appellant. (T1/115). Mr. Neel did not see McMillian doing anything, and could not see Appellant from his vantage point, but was positive Appellant stabbed him. (T1/116; R2/300). Mr. Morgan then began yelling as he saw the wounds to his friend and Mr. Neel simultaneously dove out of the truck. (T1/117, 119).

Mr. Neel hit the ground running and began to run back towards Flat Creek Road. (T1/119). As he was running, Mr. Neel heard the truck crash, looked back but did not see anyone. (T1/119 – 120). As Mr. Neel continued to run he came upon the Renfroe family home and began to scream. (T1/121 – 122; T2/165, 175 – 176). Mr. Neel was yelling "get your guns, they are killing my buddy." (T2/176; R2/301). A Renfroe family member then armed himself, located McMillian near the crash site, and held McMillian at gunpoint until law enforcement arrived. (T2/176 – 182; R2/301). Appellant was nowhere to be seen.

Officer Michael Lawrence, with the City of Gretna Police Department was the

first police officer on scene. (T2/199; R2/301). McMillian was immediately taken into custody and placed in the back of Ofc. Lawrence's patrol car. (T2/201 – 202). Now being aware of a second suspect, Ofc. Lawrence began a search with the additional law enforcement that had arrived. (T2/202). Ofc. Lawrence then saw Mr. Morgan on the ground approximately 15 feet from where the truck had hit a tree. (T2/202 – 203). Mr. Morgan was dead. (T2/203 – 204). The truck was smoking from inside the cabin, and when the doors to the truck were opened, flames engulfed the entire cabin. (T2/205).

McMillian was moved from Ofc. Lawrence's patrol car into the custody of Deputy Sheriff Brian Faison. (T2/205 – 206; T3/334). While Deputy Faison was transporting McMillian to the county jail, McMillian overheard radio chatter about a knife on Faison's police radio. (T3/335). McMillian suddenly said "Officer Faison, something I want to tell you . . . Tell them the knife that they are looking for is in the back of the patrol car." (T3/335). A subsequent search of Ofc. Lawrence's patrol car found a large black handled knife with a piece of the blade missing. (T3/342). The knife would match a piece of metal removed from Mr. Morgan's skull during the autopsy. (T4/410, 434 – 438; R2/302).

The Gadsden County Sheriff's office began a search for Appellant using its canine team. (T3/310; R2/302 – 303). The track of Appellant took the police across I-10, through fences, culverts, woods, fields, and eventually focused on a

Shell station near an I-10 exit ramp. (T3/312; R2/302 – 303). As the police tracked Appellant they found Mr. Morgan's wallet along with his credit cards and other personal items scattered on the ground. (T3/314).

The police identified Appellant from surveillance video at the Shell station, and the clerk informed the police that Appellant was "real sweaty," "nervous," and looking for a ride. (T3/327, 351). Appellant can be seen on video wearing a yellow shirt and approaching multiple customers. (T3/350 – 351). Two days later, Appellant was arrested at a motel in Gadsden County. (T3/359 – 361). Appellant was still wearing the same yellow shirt seen on video. (R2/303). The yellow shirt was tested by FDLE; Mr. Morgan's blood and DNA were present. (T5/583; R2/303).

The medical examiner determined Mr. Morgan died from more than 30 major stab wounds to his head, neck, chest, arms, and back. (T4/392, 396 – 399). The most severe wounds Mr. Morgan sustained were the four to the left anterior chest which injured the left lung and pulmonary vein, the stab to the right side of his neck which injured the carotid artery, and the stab to the back which injured the right lung. (T4/397, 398 – 399, 426 – 427). Mr. Morgan could have survived for "maybe minutes." (T4/417). In addition to the major stab wounds, there were minor stab wounds, which were classified as defensive wounds, and what also appeared to be a bite mark on his hand. (T4/401). Furthermore, because of the

amount of blood on Mr. Morgan's clothing, the medical examiner believed Mr. Morgan was upright, for part of the attack. (T4/412).

The State rested its case and a defense motion for judgment of acquittal was denied. (T5/603 – 613). Appellant did not testify, and the defense presented Johnny Cannon as its only witness. (T5/615, 619 – 634). Jonny Cannon testified that Appellant was his son who works in the farming business. (T5/620). Johnny Cannon also told the court that he rents property for farming purposes on Flat Creek Road. (T5/620). The Defense rested and the jury retired to deliberate. Following deliberation the jury found Appellant guilty on all counts. (T6/814 – 815; R2/190 – 194).

Penalty Phase

The penalty phase began on October 10, 2012. The Defense moved to strike the word "advisory" from the verdict form. (T8/877). The motion was denied; however, the trial court indicated it would instruct the jury on the importance of its recommendation including language that jurors should assume their recommendation would be the sentence imposed. (T8/878 – 879). An agreement was also reached amongst the parties as to the information regarding co-defendant McMillian being declared legally incompetent and the legal effect of mental incompetence in terms of being tried for the charges. (T8/879 – 880).

Aggravation

The State presented Ms. Nekia Germany, a Correctional Probation Senior Officer, as its only witness. (T8/900). Ms. Germany testified that Appellant was currently on probation with the Department of Corrections, having being released from prison on October 4, 2009, and being placed on supervision that same day. (T8/901 – 902).

Victim Impact

The State presented three witnesses for purposes of victim impact. Aliesha Morgan, Mr. Morgan's daughter, read a statement to the jury. (T8/904 – 907) Isaiah Morgan, Mr. Morgan's brother, and Sean Neel, the surviving victim, each gave testimony. (T8/908 – 917).

Mitigation

The Defense called two witnesses for purposes of mitigation. (T8/925, 939). The first witness was Johnny Cannon, Appellant's father. (T8/926). Mr. Cannon testified that Appellant was a good farm worker who was dependable and a valuable member of the farming team. (T8/931 – 932). To Mr. Cannon's knowledge, Appellant was living with a woman and supporting her children. (T8/933). Appellant was a "good boy" growing up, and began farming when he was 14 or 15 years old. (T8/934). Appellant made use of federal farming grants and loans to young farmers and, against the advice of his father, dropped out of

school in either the 9th or 10th grade to get started in the farming business. (T8/934 – 936).

The next witness was Dora Cannon, Appellant's mother. (T8/940). Mrs. Cannon never had any problems with Appellant growing up. (T8/941). Appellant was always available to help with his nieces and nephews and was a reliable babysitter. (T8/942 – 943). Appellant also helped to raise the children of Latoya James, whom he lived with. (T8/946). Mrs. Cannon saw Appellant act fatherly towards each of the children he would interact with, and felt comfortable leaving children with Appellant. (T8/946 – 947).

On October 10, 2012, the jury returned an advisory sentence of death by a vote of nine to three (9 – 3) for the murder of Zachariah Morgan. (T8/1009).

***Spencer* Hearing**

On November 2, 2012, the trial court held a *Spencer* hearing. (Spencer/3). It was brought to the court's attention that Appellant qualified as a prison release reoffender. (Spencer/4). A criminal punishment code score sheet was submitted without objection concerning Counts II, III, IV, and V. (Spencer/6).

The State presented victim impact testimony from the following individuals: Leena Morgan, Mr. Morgan's widow; Daisy Morgan Hadley, Mr. Morgan's sister; Isaiah Morgan, Mr. Morgan's brother; Joseph Morgan, Mr. Morgan's brother; and Derrick Morgan, Mr. Morgan's son. (Spencer/7 – 22).

The Defense then presented Appellant's school records and a written statement from Ms. Latoya James. (Spencer/30 – 31). The Defense requested the entire court file regarding McMillian be made part of the file in this case. (Spencer/29 – 30). There was no objection from the State and the request was granted. (Spencer/30).

The Defense then presented the testimony of Dr. Terry Leland. (Spencer/33). Dr. Leland is a licensed psychologist who had interviewed Appellant seven or eight times prior to the hearing and over the course of approximately 9 months. (Spencer/36). Dr. Leland found appellant to have an IQ of 77 which fit within the range between "low average" and "mental retardation." (Spencer/36 – 37). Dr. Leland gave a non specific axis one diagnosis of depressive disorder, anxiety disorder and alcohol abuse. (Spencer/43 – 44). He also gave an axis two diagnosis of antisocial avoidance schizoid with narcissistic features. (Spencer/49). Dr. Leland was familiar with the Cannon family and described them as "reasonably intelligent folks;" however, the ability of family members to express themselves was reduced and described the family as emotionally impoverished. (Spencer/42, 46). Dr. Leland noted that of the seven children in the Cannon household, all but one have spent time in prison, most notably Appellant's sister who is serving a life sentence for murder and as well as a half-brother with a prior murder conviction. (Spencer/45 – 46, 48).

Sentencing and Trial Court Findings

The trial court held a hearing on November 15, 2012, to announce findings and sentences as to the convictions. (Sentencing/1). The trial court found the following aggravating circumstances and supported each with findings of fact:

1. The capital felony was committed by a person previously convicted of a felony and on felony probation (Great Weight). (R2/317).
    a. "The State proved that [Mr. Cannon] was sentenced to five years in prison followed by five years of probation in case 2004CF3842. Mr. Cannon began serving the probationary portion of the sentence of October 4, 2009." (R2/317).
2. The defendant was previously convicted of a felony involving the use or threat of violence to the person (Very Great Weight). (R2/317, 320).
    a. "[T]he State's theory was that this aggravating circumstance was established both by a prior criminal episode of carjacking and by the attempted murder and attempted robbery of Sean Neel contemporaneous with Mr. Morgan's murder. The State proved both forms of this aggravating circumstance beyond a reasonable doubt." (R2/318).
    b. "The simultaneous stabbing of Mr. Neel is of great weight. However, in my view, Mr. Cannon's prior violent felony carjacking conviction

is the more weighty, serious aggravating circumstances and so I assign weight only based on Mr. Cannon's participation in the prior carjacking." (R2/318 – 320).

3. The capital felony was committed while the defendant was engaged in, the commission of, or attempting to commit any robbery (Moderate Weight). (R2/320).
    a. "The circumstances of the offenses demonstrate robbery as the only plausible motive for the murder of Mr. Morgan and the attempted murder of Mr. Neel." (R2/320).
4. The capital felony was especially heinous, atrocious or cruel (Less Than Great Weight). (R2/321, 326).
    a. "The wounds to Mr. Morgan's face and arms can only be described as hideous. The facial wounds travelled completely through Mr. Morgan's cheek's and mouth." (R2/321 – 322).
    b. "[T]he evidence supports the conclusion that Mr. Cannon was indifferent to the pain his victims absorbed and acted to subdue the victims as quickly and quietly as possible, consistent with the secluded, rural, wooded location he chose." (R2/322).
    c. "Although no evidence directly indicated that Mr. Cannon personally stabbed Mr. Morgan, overwhelming evidence demonstrates that Mr.

Cannon fully intended the commission of both crimes including the manner of Mr. Morgan's death." (R2/325).

d. "Mr. Cannon's contemporaneous stabbing of Mr. Neel permits application of the HAC aggravator for the near simultaneous stabbing of Mr. Morgan even assuming Mr. McMillian alone actually stabbed Mr. Morgan." (R2/325).

5. The capital felony was committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification (Great Weight). (R2/326, 329).

a. "The evidence proves beyond a reasonable doubt that Mr. Cannon ambushed the victims from behind in the tightly enclosed space of the passenger compartment of the truck with no warning and no provocation." (R2/328).

b. "Mr. Cannon's deception in convincing the victims to travel to a secluded, rural location where no one could help them and, had he succeeded in killing both victims, he would likely have had ample time to try to conceal the killings." (R2/328).

c. "There is no reasonable hypothesis to explain Mr. McMillian's conduct other than acting in concert with Mr. Cannon. Mr.

McMillian's mental retardation is also circumstantial evidence of Mr. Cannon's dominant role in this criminal episode." (R2/329).

d. "Because of Mr. Cannon's heightened premeditation, the victim's surprise was total up to the moment he stabbed Mr. Neel in the neck from the back seat." (R2/329).

(R2/297 – 349; Sentencing/3 – 4).

Mitigation

The trial court did not find any statutory mitigators. (R2/331; Sentencing/4). The following non-statutory mitigators were found and given corresponding weight:

1. The defendant demonstrated appropriate courtroom behavior (Minimal Weight). (R2/331 – 332).
2. The defendant did not resist law enforcement at the time of arrest. (Minimal Weight). (R2/332).
3. The defendant has limited education (Very Little Weight). (R2/332 – 333).
4. The defendant, despite educational shortcomings, applied and received farming grants to raises horses or cattle under a youth program (Very Little Weight). (R2/333).

5. The defendant has worked hard as a farmer for the family business (Very Little Weight). (R2/334 – 335).
6. The defendant was a good provider to his family and his step-children (Very Little Weight). (R2/335).
7. The defendant is a loving person to his siblings and their children (Very Little Weight). (R2/335 – 336).
8. The defendant has a low IQ (Very Little Mitigation Weight). (R2/340 – 341).
9. The defendant suffered from an emotionally impoverished family dynamic (Very Little Weight). (R2/341).
10. The defendant's siblings were imprisoned during his adolescent, teen, and young adult years (Very Little Weight). (R2/341 – 342).
11. The defendant suffered from non specified mental health diagnoses and symptoms (Very Little Weight). (R2/342).
12. The defendant testified for the State in his prior carjacking case (Very Little Weight). (R2/343).

The trial court concluded that the aggravating circumstances outweighed the mitigating circumstances in this case. (R2/345). Moreover, the court found that even if the HAC aggravator was assigned no weight, "the result would be the same because of the other overwhelming aggravation and minimal mitigation supported

by this record." (R2/326). The trial court then imposed the death penalty for – Count I, murder of Zachariah Morgan. (R2/345). This appeal follows.

SUMMARY OF ARGUMENT

Issue I – The trial court did not commit an error of improper doubling because the aggravators of defendant on felony probation and prior violent felony conviction refer to different aspects of the defendant regardless of whether the aggravators result from the same criminal episode. While the prior violent felony goes to the nature of Appellant's conduct and criminal past, the aggravator of felony probation merely refers to his legal status at the time of the crime.

Issue II – The trial court properly found the murder of Mr. Morgan to be heinous, atrocious, and cruel based on Appellant's actions and involvement in the contemporaneous stabbing/attempted murder of Mr. Neel and murder of Mr. Morgan. Mr. Morgan suffered for potentially minutes with at least 30 major stab wounds to his head, neck, face, chest, and back. Evidence of defensive wounds was found on his hands which included a bite mark. Appellant began the savage attack of Mr. Neel and Mr. Morgan by unexpectedly stabbing Mr. Neel twice, in the neck. Mr. Morgan's blood was found on Appellant's clothes days later after he fled the area in an attempt to escape. The application of HAC was not based on the speculative actions and involvement of McMillian, the intellectually disabled co-defendant, but on the direct actions of Appellant.

Issue III – Any error in the jury instruction for Attempted Voluntary Manslaughter did not affect the verdict for Attempted Murder, since Appellant was

convicted of a crime two or more steps removed from the error. In attempting to correct what it perceived as a potential error in the instruction for Attempted Voluntary Manslaughter the trial court mistakenly required the jury to find Mr. Neel had actually died as a result of Attempted Voluntary Manslaughter. No objections to the jury instructions were made by either the State or the Defense. Given that Appellant was convicted, as charged, of Attempted First Degree Murder, it is unlikely the error in the jury instructions misled the jury. As such, the focus is one of harmless error on an issue which was not preserved in the trial court. Even still, since Appellant was convicted as charged, the error is harmless.

Issue IV – The trial court properly denied the motion for Judgment of Acquittal regarding Count III – Robbery with a Deadly Weapon of Zachariah Morgan. The State needed to prove that Appellant intentionally took Mr. Morgan's property with the use of force. The evidence conclusively shows that within minutes of Mr. Morgan's murder, Appellant discarded Mr. Morgan's wallet containing bank card and credit cards, as he fled the scene. Actual value of Mr. Morgan's wallet is not an element of robbery within the Florida Statutes or at common law.

Issue V – The trial court properly denied the motion for Judgment of Acquittal regarding Count IV – Attempted Robbery of Sean Neel. Although Appellant's initial plan was to rob and murder Mr. Morgan; Mr. Neel presented a crime of

opportunity to Appellant. The testimony established that Appellant began the attack by stabbing Mr. Neel in the neck, who then escaped the moving truck. While the attack on Mr. Neel failed, the attacked on Mr. Morgan succeeded and presents a conclusive example of Appellant's intent to rob and murder both Mr. Neel and Mr. Morgan.

Issue VI – The trial court properly denied the motion for Judgment of Acquittal on Count V – Arson of a Vehicle. The evidence presented at trial established that the fire was intentionally started in the back of Mr. Morgan's truck. The fire began in the rear compartment where both Appellant and McMillian were seated. There were no other explanations for the fire other than human causes. The only logical conclusion from the evidence presented was that the fire was the result of intentionally igniting trash or various objects in the back of the truck in an attempt to conceal or destroy evidence.

Issue VII – The trial court properly addressed the jury's question regarding the verdict forms for Robbery and Attempted Robbery. The question presented by the jury was ambiguous and did not present a clear impression of the jury's concern. The trial court used appropriate discretion and followed the Florida rule of procedure to the letter when responding to the jury question. The court's response was a correct statement of the law which was given after consulting with the State and Defense at length concerning the appropriate response. Since the ultimate

response was a correct statement of the law, the trial court neither abused its discretion nor misled the jury to the detriment of Appellant.

Issue VIII – The trial court properly admitted the testimony of Mr. Neel, because the testimony was offered to show the state of mind of Appellant, and therefore not subject to the hearsay rule. When evidence of an out-of-court statement is offered to show motive and intent for committing a crime, the statements are not hearsay because the statements are not being offered for their truth. Florida courts have repeatedly permitted witnesses to testify regarding out-of-court statements made by the defendant in order to establish the defendant's motive to commit the crime. In this case, the state offered the testimony of Mr. Neel regarding the transaction and non-delivery of deer corn between Appellant and Mr. Morgan to show Appellant's motive to murder Mr. Morgan. The deer corn had already been paid for, and unknown to Mr. Morgan, Appellant was on felony probation. The message left by Mr. Morgan presented an ultimatum to Appellant, either deliver the corn or pay back the money. Whether the transaction actually took place was not a question before the court. Therefore, the trial court properly admitted the statements as an exception to the hearsay rule.

IX – The death sentence is proportionate when compared to similar crimes with comparable aggravators and mitigators. The aggravators of HAC, CCP, and Prior Violent Felony are the most serious and weighty aggravators in the statutory

scheme. In addition, the trial court found the aggravator of defendant on felony probation, and the murder was committed in while the Appellant was engaged in a robbery. No statutory mitigation was found by the trial court, and no mental health history was presented to the court which could reduce Appellant's culpability. Appellant's prior violent felony showcases the escalation of his violent behavior and was carried out in a similar manner to the crime in the present case. In *Simpson v. State*, 3 So. 3d 1135 (Fla. 2009), this court upheld a death sentence with the same aggravators, no statutory mitigators, and sixteen non-statutory mitigators. Competent substantial evidence supports the finding of the aggravators in this case, and as such, Appellant's sentence of death is proportionate.

Issue X – The evidence is sufficient to support a conviction for First Degree Murder with premeditation, when viewed in the light most favorable to the State. The evidence showed that Appellant lured Mr. Morgan on the pretext of delivering deer corn, which had already been paid for. When Appellant reached a secluded area, he attacked without provocation by first stabbing Mr. Neel in the neck. Following the murder of Mr. Morgan, Appellant fled the scene and was caught two days later with Mr. Morgan's blood and DNA on the same shirt he was wearing the day of the murder. Therefore, the conviction for first degree murder should be affirmed.

ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT AN ERROR OF IMPROPER DOUBLING BY USING THE SAME CRIMINAL EPISODE TO APPLY THE AGGRAVATORS OF DEFENDANT ON FELONY PROBATION AND PRIOR VIOLENT FELONY CONVICTION.

Appellant contends the trial court committed an error of improper doubling by using the same criminal episode to justify the application of the aggravators for defendant on felony probation and defendant previously convicted of a violent felony. (IB/24). The trial court found that at the time of the murder, Appellant was under felony probation for an armed carjacking. (R2/317). In addition, the trial court applied the aggravator of prior violent felony conviction and assigned very great weight to the aggravator based on the facts and circumstances of the conviction for armed carjacking which Appellant was serving a probationary period. (R2/318 – 320). The two aggravators address different aspects of Appellant. This court has previously rejected this argument.

a. Standard of Review

"A trial court's ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record." *Ford v. State*, 802 So. 2d 1121, 1133 (Fla. 2001). "The weight to be given aggravating factors is within the discretion of the trial court, and is subject to

the abuse of discretion standard." *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006) (citing *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000)). "[D]iscretion is abused only where no reasonable [judge] would take the view adopted by the trial court." *Buzia*, 926 So. 2d at 1216 (quoting *Huff v. State*, 569 So 2d 1247, 1249 (Fla. 1990))

b. Aggravators at Issue

In its sentencing memorandum the trial court applied the aggravator of Fla. Stat. § 921.141(5)(a) – the capital felony was committed by a person previously convicted of a felony an on felony probation, and assigned the aggravator "Great Weight." (R2/317). The court determined the State had proven beyond a reasonable doubt that at the time of the murder, Appellant was "sentenced to five years in prison followed by five years of probation in case 2004CF3842" – armed carjacking. (R2/317). Appellant began his probationary period on October 4, 2009. (R2/317).

The trial court also applied the aggravator of Fla. Stat. § 921.141(5)(b) – the capital felony was committed by a person previously convicted of a felony involving the use of violence, and assigned the aggravator "Very Great Weight." (R2/317, 320). The trial court found the State had proven the aggravator in two circumstances: first, the prior criminal episode of carjacking; and second, the contemporaneous conviction of attempted murder of Mr. Neel. (R2/318). The trial

court then analyzed each episode individually, and determined that based on the nature of the offense and the conduct of Appellant the conviction for armed carjacking was the more weighty prior offense and assigned weight accordingly. (R2/319 – 320).

c. Trial Court Properly Evaluated and Assigned Each Aggravator

Appellant acknowledges that it is generally proper for a trial court to find both aggravating factors based on the same criminal episode; however, asserts that because the trial court assigned weight on these two aggravators based on the *violent nature* of the prior carjacking, the court inadvertently committed an error of impermissible doubling. (IB/25, 27).

"Improper doubling occurs when aggravating factors refer to the same aspect of the crime." *Green v. State*, 641 So. 2d 391, 395 (Fla. 1994). "This court has previously rejected the claim of improper doubling where the prior violent felony referred to the conviction and under felony supervision referred to the defendant's status at the time of the murder." *Patrick v. State*, 104 So. 3d 1046, 1066 (Fla. 2012) (citing *Rose v State*, 787 So. 2d 786, 801 (Fla. 2001); *Muhammad v. State*, 494 So. 2d 969, 976 (Fla. 1986)). In the present case, the trial court distinguished the weight assigned to each aggravator separately and gave greater weight based on the circumstances surrounding each aggravator. (R2/317, 319 – 320).

When evaluating Appellant's status of being supervised on felony probation the

trial court considered *Blake v. State*, 972 So. 2d 839 (Fla. 2007). In *Blake*, the defendant was convicted of a capital felony while he was on felony probation for non-violent crimes of driving under a suspended driver's license and grand theft auto. *Blake*, 972 So. 2d at 847 – 848. The trial court in *Blake* assigned the aggravator only "some weight," which was upheld on direct appeal, because of the non-violent nature of the offenses. *Id.* at 847. Conversely, Appellant was under supervision for armed carjacking at the time he murdered Mr. Morgan. (R2/317). As such, the trial court assigned "Great Weight" to the felony probation aggravator based on the circumstances of his felony probation. (R2/317).

Appellant's claim of improper doubling is misguided. All of the cases Appellant cited stand for the proposition that a trial court may find the aggravators of under felony probation and prior violent felony conviction because those aggravators refer to different aspects of the *defendant*. *See Patrick*, 104 So. 3d at 1066; *Blake*, 972 So. 2d at 847; *Agan v. State*, 445 So. 2d 326, 328 (Fla. 1983); *Waterhouse v. State*, 429 So. 2d 301 (Fla. 1983) (finding "the previous conviction and the parole status were two separate and distinct characteristics of the defendant, not based on the same evidence and the same essential facts."). The aggravators in this case are related in that each are based on the same criminal episode; however, while the prior violent felony conviction aggravator specifically requires violence as an element, the aggravator of under felony probation does not

require any aspect of violence in order to be proved. *Blake*, 972 So. 2d at 847 (Fla. 2007) (noting that Fla. Stat. § 921.141(5)(a) does not require violence to apply).

In reviewing the aggravator of prior violent felony conviction the court looked at the circumstances of the prior carjacking juxtaposed to the contemporaneous attempted murder conviction. (R2/318). In the prior carjacking the evidence showed Appellant plead guilty and agreed to testify against his codefendant. (R2/318). The court considered Appellant's testimony in the carjacking case as potentially mitigating and ultimately found Appellant:

> (1) agreed over the telephone to participate with his co-defendant in a robbery and knew in advance that the co-defendant would be armed with firearms and their faces concealed with masks;
> (2) personally drove his co-defendants to the place of the robbery in the vehicle he obtained for the purpose of committing the crimes;
> (3) personally met the victim face to face in a parking lot;
> (4) talked to the victim face-to-face while his co-defendants hid nearby in Mr. Cannon's car;
> (5) watched as the co-defendants ran up to the victim and threatened him with guns;
> (6) watched one of his co-defendants pistol-whip the victim;
> (7) helped shove the victim into the victim's car;
> (8) watched the co-defendants drive off with the victim in the victim's car;
> (9) picked the place to conceal the victim's car on some of Mr. Cannon's father's rural land;
> (10) personally selected and directed the co-defendants to a secluded, rural place to conceal the stolen car;
> (11) planned to profit by selling the victim's expensive tire rims.

(R2/319). "For purposes of Mr. Morgan's murder, Mr. Cannon's testimony in the carjacking case is nothing more than an admission of his deep, voluntary

participation in serious, violent preplanned felonies involving the use of a deadly weapon for the purpose of robbery." (R2/319).

It is undisputed that at the time of the murder Appellant was on felony probation for a crime of armed carjacking. In addition, Appellant had been previously convicted of a violent felony – armed carjacking – when he murdered Mr. Morgan. The trial court properly applied each aggravator and assigned weight based on the individual circumstances and violent nature of the prior carjacking. Therefore, this court should deny Appellant's claim of improper doubling.

d. Harmless Error

"When this Court strikes an aggravating factor on appeal, 'the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence.'" *Cole v. State*, 36 So. 3d 597, 609 (Fla. 2010) (quoting *Williams v. State*, 967 So. 2d 735, 765 (Fla. 2007)). In the present case, the trial court found the aggravator of prior violent felony based on the armed carjacking and the contemporaneous attempted murder; however, only assigned weight to the felony carjacking. If this court were to strike the aggravator for carjacking, then the trial court could assign weight on the contemporaneous attempted murder. In other words, the aggravator of prior violent felony would still apply based on the attempted murder. Therefore, any error would be harmless given Appellant's contemporaneous conviction for attempted first degree murder of Sean Neel.

II. THE HAC AGGRAVATOR WAS PROPERLY PROVEN AND APPLIED BASED ON THE ACTIONS OF APPELLANT.

Appellant avers the evidence was insufficient to apply the aggravating circumstance of Heinous, Atrocious, and Cruel because the State failed to prove Appellant actually stabbed Mr. Morgan. (IB/28). Appellant basis this argument on the premise that the evidence only suggests the co-defendant, McMillian, stabbed Mr. Morgan. (IB/28). The evidence though is that Appellant stabbed the victims.

a. Standard of Review

"A trial court's ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record." *Ford v. State*, 802 So. 2d 1121, 1133 (Fla. 2001).

b. Competent Evidence to find Heinous, Atrocious, and Cruel Aggravator

"The HAC aggravator may be applied to torturous murders where the killer was utterly indifferent to the suffering of another." *Hall v. State*, 87 So. 3d 667, 672 (Fla. 2102). In addition, this court "has repeatedly upheld the HAC aggravating circumstance in cases where the victim has been viciously stabbed numerous times." *Perez v. State*, 919 So. 2d 347, 379 (Fla. 2005); *see, e.g., Guzman v. State*, 721 So. 2d 1155, 1159 – 60 (Fla. 1998); *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998); *Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997). "The victim's mental

state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Hall*, 87 So. 3d at 672 (quoting *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988).

The evidence presented at trial established that Mr. Morgan sustained no fewer than 30 major stab wounds to his head, face, neck, arms, and back. (T4/392, 396 – 399). "The facial wounds travelled completely through Mr. Morgan's cheeks and mouth." (R2/322). Separate wounds to Mr. Morgan's neck, chest, and back could have been fatal individually. (T4/397, 398 – 399, 426 – 427). A metal piece which later matched a recovered knife was removed from Mr. Morgan's head. (R2/324). Mr. Morgan first lost blood into his chest, both lungs were injured, and he was also bleeding from the neck. (T4/427). When Mr. Morgan was not able to get enough blood flow to his brain he would eventually lose consciousness and "go on to die from there." (T4/427). The medical examiner testified that Mr. Morgan could have been alive for "a couple minutes." (T4/427).

In addition, evidence of defensive wounds was found on each of Mr. Morgan's hands as well as what was consistent with a bite mark on Mr. Morgan's left hand. (R2/322). Furthermore, the medical examiner testified that because of the extent of injuries and amount of blood on Mr. Morgan's clothing, it appeared he was upright for part of the attack. (T4/412; R2/322). Finally, Mr. Neel testified that before he dove out of the truck, Mr. Neel heard "a scared to death holler" from Mr.

Morgan. (R2/322).

The evidence clearly "demonstrates that Mr. Morgan was aware of his mortal peril, experienced substantial pain and terror and fought for his life . . . ." (R2/322). In finding the HAC aggravator the trial court stated "the evidence supports the conclusion that Mr. Cannon was indifferent to the pain his victims absorbed and acted to subdue the victims as quickly and quietly as possible, consistent with the secluded, rural, wooded location he chose." (R2/322). Therefore, competent, substantial evidence supports the trial court's finding that HAC applied to the murder of Mr. Morgan.

c. Application of HAC to Appellant

Appellant claims the HAC aggravator was applied vicariously through the conduct and actions of McMillian, his co-defendant. (IB/29). In doing so, Appellant plainly states his belief that based on the evidence presented at trial, McMillian is responsible for the murder of Mr. Morgan. (IB/29).

This court has declined to vicariously apply the HAC aggravator in cases where the evidence showed the defendant neither directed nor knew how the murder would be accomplished. *Perez v. State*, 919 So. 2d 347, 381(Fla. 2005); *Omelus v. State*, 584 So. 2d 563, 566 – 568 (Fla. 1991). Nevertheless, HAC has been upheld "to defendants who did not directly cause the victim's death where the defendant was particularly physically involved in the events leading up to the victim's

murder." *Cole v. State*, 36 So. 3d 597, 608 (Fla. 2010) (it should be specifically noted that in *Cole* this Court denied the application of HAC because Cole was not aware of how the victims were ultimately killed); *but see, e.g., Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001) (upholding the HAC aggravator even though the evidence showed the co-defendant "actually fired the fatal shot, shot two other restaurant employees, and stabbed the assistant manager in the back after is gun misfired); *Cave v. State*, 727 So. 2d 227, 229 (Fla. 1998) ("holding that application of HAC to nontriggerman defendant was proper where defendant removed victim from convenience store at gunpoint, placed victim in car's backseat with codefendant, heard victim plead for her life during the fifteen-to-eighteen minute ride to isolated area, removed victim from car, and turned victim over to codefendant who killed victim"); *Copeland v. State*, 457 So. 2d 1012, 1015 (Fla. 1984) ("holding that application of HAC to nontriggerman defendant was proper where defendant confronted victim at gunpoint, kidnapped victim, and raped victim before the codefendant murdered the victim"). "The [Florida Supreme Court] also made plain in *Perez* that the defendant's presence at the scene of the murder is not by itself enough to render the defendant accountable for a co-defendant's cruelty." (R2/323).

Appellant was convicted of first degree murder with both premeditation and felony murder present. (T6/814; R2/190). The trial court's application of HAC

was specifically due to the actions of Appellant, and was in no way reflective of the presumed actions of McMillian. (R2/325). Appellant attempts to re-litigate an issue of guilt by asserting that "the greater weight of the evidence adduced at trial shows that co-defendant Antone McMillian was the one who delivered the fatal stabbing blows to the victim." (IB/29).

While there is evidence suggesting McMillian stabbed Mr. Morgan, "the evidence did not establish conclusively whether Marvin Cannon alone, Antone McMillian alone, or both Marvin Cannon and Antone McMillian together stabbed Mr. Morgan." (R2/324). The medical examiner was not able to determine the sequence of the stabbing, and testified that the mortal wounds inflicted to Mr. Morgan were the stabs to his chest, back, and neck, not his head where the piece of knife was found during autopsy. (T4/410, 434 – 438). In addition, blood stains matching Mr. Morgan's DNA were found on the shirt Appellant was wearing the night of the murder. (T5/583; R2/303, 325).

In applying HAC, the trial court looked at the sequence of events leading up to the fatal stabbing of Mr. Morgan. First, "there is no testimony in the record that any person saw Mr. McMillian commit any act of violence." (R2/325). Second, "Mr. Cannon committed the first act of violence by stabbing Mr. Neel. The manner of the murder of Mr. Morgan was identical to the ambush stabbing of Mr. Neel." (R2/325). Third, "[t]he timing of the stabbing of Mr. Neel and the murder

of Mr. Morgan was essentially instantaneous." (R2/325). And finally, "Mr. Cannon's conduct after the murder and attempted murder is consistent with his intent that the crimes occur and is equally inconsistent with the defense's argument . . . ." (R2/325).

The trial court considered the possibility that McMillian alone murdered Mr. Morgan and based its decision to apply HAC on the actions of Appellant. "Mr. Cannon's contemporaneous stabbing of Mr. Neel permits application of the HAC aggravator for the near simultaneous stabbing of Mr. Morgan even assuming Mr. McMillian alone actually stabbed Mr. Morgan." (R2/325). It was Appellant who had the motive to murder Mr. Morgan, not McMillian. Appellant set the meeting place, and directed Mr. Morgan to the secluded farm used by his father, not McMillian. Appellant brought the murder weapon and used it on Mr. Neel just moments before the murder of Mr. Morgan, not McMillian. Appellant took Mr. Morgan's wallet following the murder, not McMillian. Appellant fled the crime scene and hid for two days in a motel, not McMillian. The only visible acts of violence were attributed to Appellant, not McMillian. As such, this court should affirm the application of HAC to Appellant's conviction for first degree murder.

III. THE TRIAL COURT'S ERROR IN MODIFYING THE JURY INSTRUCTIONS FOR ATTEMPTED VOLUNTARY MANSLAUGHTER WAS HARMLESS BECAUSE APPELLANT WAS CONVICTED OF A CRIME TWO STEPS REMOVED FROM THE ERROR.

Appellant claims he was denied a fair trial when the trial court sua sponte modified the jury instructions for Attempted Voluntary Manslaughter which was included as a necessary lesser included offense of Count II – attempted first degree murder. (IB/37). This issue, however, is not preserved and not fundamental error. Moreover, the error in the instruction for attempted voluntary manslaughter did not affect the jury's verdict for attempted first degree murder.

a. Standard of Review

"Instructions given by a trial court during deliberations are subject to the abuse of discretion standard of review." *Armstrong v. State*, 73 So. 3d 155, 173 (Fla. 2011). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *Armstrong*, 73 So. 3d at 173 (quoting *White v. State*, 817 So. 2d 799, 806 (Fla. 2002)). However, "when a trial court fails to properly instruct on a crime two or more degrees removed from the crime for which defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis." *State v. Montgomery*, 39 So. 2d 252, 259 (Fla. 2010).

b. Preservation

This Court has "held repeatedly that jury instructions are subject to the contemporaneous objection rule and, 'absent an objection at trial, can be raised on appeal only if fundamental error occurred.'" *Daniels v. State*, 38 Fla. L. Weekly S380 (2013) (quoting *Garzon v. State*, 980 So. 2d 1038, 1042 (Fla. 2008)). In the present case there was no objection to the jury instructions as given. Appellant concedes the error was to an instruction for a lesser offense which is two-steps removed from the crime for which he was convicted. (IB/40) As such, this claim should be dismissed as being unpreserved for direct appellate review.

c. Jury Instructions for Attempted Voluntary Manslaughter

Should this Court review the jury instructions of attempted voluntary manslaughter the error is likely to be deemed harmless. Following the State's closing argument the court attempted to correct what it saw as a potential *Montgomery*[5] error by modifying the jury instructions for attempted voluntary manslaughter. The trial court amended Standard Instruction 6.6 as follows:

> It is not an attempt to commit manslaughter if the defendant abandoned the attempt to commit the offense or otherwise prevented its commission under circumstances indicating a complete and voluntary renunciation of his criminal purpose. . . . In order to convict of attempted manslaughter by act, it is not necessary for the state to

[5] *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010).

> prove the defendant had an intent to cause death; only an intent to commit an act that was not merely negligent, justified or excusable, *and which caused death*.

(T6/767 – 768) (emphasis added). This instruction was given as part of a category one lesser included offence to Count II – attempted first degree murder of Sean Neel. (T6/699 – 705; R1/172 – 173). By amending the jury instruction the trial court mistakenly required the jury to find Mr. Neel had died as a result of Appellant's actions in order to find Appellant guilty of the lesser offense of attempted voluntary manslaughter. This of course was an impossibility given that Mr. Neel testified during trial as to the facts and circumstances of the attack by Appellant. (T1/85 – 140).

Appellant is correct in pointing out that proof of death is not an element of attempted voluntary manslaughter, and therefore the instructions given to the jury could have been misleading. (IB/38). Appellant contends the error was harmful and affected the jury's verdict because there was evidence supporting the justifiable or excusable homicide of Mr. Neel. (IB/40). This claim is based on Mr. Neel's testimony concerning *when and if* he picked up a knife following the unprovoked attack from Appellant. (IB/40). Appellant maintains that the attack on Mr. Neel was in self defense *if* Mr. Neel picked up a knife prior to being stabbed by Appellant, thereby justifying the attack on Mr. Neel. (IB/41).

There is no evidence to suggest that in any way imaginable the attack on Mr.

Neel could be considered justified or excusable. Mr. Neel's testimony at trial was that without provocation Appellant stabbed him twice in the neck. (T1/115; R2/300). It was not until Mr. Neel was stabbed in the neck, and just before being ejected from the truck, he instinctually grabbed the knife that was sitting in the center console. (R/300). In order to conclude the error was harmful to Appellant, this Court would be forced to speculate as to what could have, or what might have happened and ignore the testimony and evidence presented at trial.

Attempted voluntary manslaughter is two steps removed from attempted first degree murder and as such is subject to review for harmless error. (IB/40; *Daniels*, 38 Fla. L. Weekly S380 (Fla. 2013). It is unlikely the error in the instruction for attempted voluntary manslaughter affected the jury's verdict. The error complained of required the jury to conclude that Appellant's actions actually caused the death of Mr. Neel. Appellant was charged with attempted first degree murder. (R1/42 – 44). Instructions on both category one lesser included offenses of attempted second degree murder, and attempted voluntary manslaughter were given, with the obvious error occurring in the latter instruction. (T6/ 699 – 705; 767 – 768). Ultimately, Appellant was convicted as charged of attempted first degree murder. (R2/190 – 194).

Had Appellant been convicted of Attempted Second Degree Murder, it would be appropriate to assume the error in the manslaughter instruction affected the

jury's verdict. *See Daniels v. State*, 38 Fla. L. Weekly S380 (Fla. 2013); *Pena v. State*, 901 So. 2d 781, 787 (Fla. 2005). The additional and erroneous element could be perceived to confuse the jury by requiring proof of an additional element for a lesser offense. However, since the jury convicted Appellant as charged, it is doubtful the error in the manslaughter instruction had any effect since they still had the ability to convict Appellant of attempted second degree murder, but instead found proof supporting the crime as charged. (R2/190 – 194). Therefore, this court should find the error committed by the trial court was harmless and did not affect the jury verdict.

IV. THE EVIDENCE AT TRIAL WAS LEGALLY SUFFICIENT TO SUSTAIN A CONVCTION FOR COUNT III – ROBBERY OF ZACHARIAH MORGAN, BECAUSE VALUE IS NOT AN ELEMENT OF ROBBERY.

Appellant was convicted of Count III – armed robbery with a deadly weapon of Zachariah Morgan. Appellant asserts the evidence was insufficient to support a conviction for robbery because the State failed to prove Mr. Morgan's wallet had any "value." (IB/42). During trial, defense counsel moved for a judgment of acquittal based on the sufficiency of the evidence and the trial court denied the motion. (T5/606; IB/46). However, the victim's wallet was taken and found on the escape route used by Appellant, establishing the robbery.

a. Standard of Review

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. . . . If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction.

Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002) (citing *Banks v. State*, 732 So. 2d 1065 (Fla. 1999)).

b. Robbery of Zachariah Morgan

While tracking Appellant's escape route from the crime scene, police officers found Mr. Morgan's wallet along with driver's licenses, bank cards, paper receipts and credit cards, all belonging to Mr. Morgan. (T3/314; R2/302). No currency

was found in the wallet, and no one testified during trial that there was currency in the wallet prior to the murder. (IB/42 – 43). Appellant contends his conviction for armed robbery cannot stand because no testimony was elicited during trial that Mr. Morgan's wallet had any "value."

Robbery is defined in Fla. Stat. § 812.13(1):

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the court of the taking there is the use of force, violence, assault, or putting in fear.

"Robbery requires that the State show that 'force, violence, assault, or putting in fear was used in the course of the taking.'" *McKinney v. State*, 66 So. 2d 852, 857 (Fla. 2011). Robbery does require the State prove the property taken was of "some value." Fla. Std. Jury Instr. (Crim.) 15.1. Regardless, Appellant's argument distorts the elements for robbery by insisting that the State prove a specific value of the property taken. (IB/43).

Robbery at its most basic level requires the intentional taking of the property of another by force or violence. Value by itself is not an element of robbery. Because value is not an element of robbery, it is permissible for a defendant to be convicted of both robbery, and grand theft for actions resulting from the same crime and not violate double jeopardy. *McKinney*, 66 So. 3d at 857 (noting that each crime has an element that the other does not possess. Robbery has the element of violence and grand theft has the element of value.). The Category One

lesser included offense of robbery is second degree petit theft, Fla. Stat. § 812.014(3)(a), which only requires the intentional taking of property of another without permission. Fla. Std. Jury Instr. (Crim.) 14.1. Therefore, if Appellant could be convicted of petit theft for the taking of the wallet, then he could also be convicted of robbery, if the State could prove the taking was done with the intentional use of force. In the present case, Mr. Morgan's wallet was taken and found during the canine search for Appellant. The murder of Mr. Morgan satisfies the violence element for robbery. As such, the conviction for armed robbery should stand.

Appellant relies on *Eutzy v. State*, 458 So. 2d 755 (Fla. 1984), to support his position. In *Eutzy*, the defendant was convicted of first degree murder and the trial court determined the murder occurred during the commission of a robbery finding the appropriate aggravating factor and assigning weight. *Eutzy*, 458 So. 2d at 757. Eutzy challenged the finding that the murder occurred during the commission of a robbery, asserting there was no evidence of a robbery. *Eutzy*, 458 So. 2d at 757 This Court agreed with Eutzy and disallowed the aggravating factor stating "no evidence was submitted that the victim was in custody of cash or other property before he picked up the Eutzy couple. *Id.* Neither was evidence presented that no cash or property was found on or near the victim's body." *Id.* "The State failed to present any evidence that the victim had anything of value with him before the

murder or that no cash or valuables were found on the victim's body when he was found." *Id.*

In the present case, Mr. Morgan's body was devoid of any personal possessions of value. Mr. Morgan's wallet, complete with IDs, bank cards, and credit cards, was found on the escape route used by Appellant while fleeing the scene of the murder which he committed. (T3/314; R2/302). This is different from the *Eutzy* case because in *Eutzy* the state failed to prove the victim had *anything* on him prior to the murder. *Eutzy*, 458 So. 2d at 757. Moreover, Appellant's argument hinges on both the unknown "value" of Mr. Morgan's wallet, and whether it had any cash at the time. (IB/43). It is true that no testimony was presented which established that at the time of the murder Mr. Morgan was carrying cash. But, Appellant ignores the fact that Mr. Morgan's wallet was found with credit cards and bank cards belonging to Mr. Morgan. (T3/314; R2/302). Credit cards and bank cards are items of inherent value much like cash. Although their value may not be apparent on its face, credit cards and bank cards have immediate value to the holder. Furthermore, the wallet itself has value. Therefore, this Court should affirm Appellant's conviction of Count III – Armed Robbery with a Deadly Weapon of Zachariah Morgan.

V. THE EVIDENCE AT TRIAL WAS LEGALLY SUFFICIENT TO SUSTAIN A CONVCTION FOR COUNT IV – ATTEMPTED ROBBERY OF SEAN NEEL.

Appellant asserts the trial court erred in denying a judgment of acquittal on Count IV – Attempted Robbery of Sean Neel, because the evidence was insufficient to support a conviction. (IB/46). While the robbery of Mr. Morgan succeeded, the robbery of Mr. Neel failed when Mr. Neel escaped. As such, the evidence is sufficient to support a conviction for attempted armed robbery of Sean Neel.

a. Standard of Review

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. . . . If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002).

b. Attempted Robbery of Sean Neel

Appellant asserts Mr. Neel's testimony during trial shows that Appellant did not have the intent to rob Mr. Neel. (IB/47). Specifically he points to the fact that: (1) Appellant only dealt with Mr. Morgan; (2) the deer corn was already paid for; and (3) Mr. Neel's statement to carrying only a dollar at the time of the robbery. (IB/47). Appellant asks this Court to infer that he did not have any intent to rob

Mr. Neel because Appellant was unaware of Mr. Neel's participation. (IB/47). This argument is both irrelevant, and misleading.

Mr. Neel was not the initial the target of Appellant's scheme to rob and murder Mr. Morgan on Christmas Eve 2010. Although Mr. Morgan was the intended target of the initial crime, Mr. Neel presented a crime of opportunity to Appellant. Without provocation, Appellant stabbed Mr. Neel twice in the neck in an attempt to murder Mr. Neel and ultimately take any and all personal property on him. (T1/115; R2/300).

The State is not required to prove the defendant knew or was aware the victim was in possession of property of value in order to prove the crime of attempted armed robbery. Fla. Std. Jury Instr. (Crim.) 15.1 (no element of knowledge of possession of property of value is required within the standard jury instruction on robbery). In addition, the murder and robbery of Mr. Morgan shows the intent of Appellant in carrying out his crime. "The evidence is that the difference between the crime against Mr. Morgan and the crime against Mr. Neel is that the crime against Mr. Morgan succeeded but the crime against Mr. Neel failed." (R2/325). Therefore, the trial court properly denied the defense motion for judgment of acquittal, and this Court should affirm the conviction for Count III – Attempted Armed Robbery of Sean Neel.

VI. THE EVIDENCE AT TRIAL WAS LEGALLY SUFFICIENT TO SUSTAIN A CONVCTION FOR COUNT V – ARSON OF A VEHICLE.

Appellant asserts the trial court erred in denying a judgment of acquittal on Count V – Arson of a Vehicle, because the evidence was insufficient to support a conviction. (IB/46). However, the evidence at trial showed arson as the only possible explanation for the fire inside the victim's truck.

a. Standard of Review

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. . . . If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002).

b. Arson of Mr. Morgan's Truck

Appellant argues the State failed to prove he intentionally started the fire in the back of Mr. Morgan's truck, and puts forward the reasonable hypothesis that McMillian or Mr. Morgan started the fire. (IB/50 – 51).

To sustain a conviction for second degree arson, the State must prove the defendant "willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged any structure, whether the property of himself or herself or another." Fla. Stat. § 806.01. "A 'wilful' setting

fire to or burning would be such an act consciously and intentionally, as distinguished from accidentally or negligently done." *Love v. State*, 144 So. 843, 844 (Fla. 1932).

In the case at bar, Eric Bryant – Fire Marshall, testified the fire started inside the rear passenger compartment of the truck. (T4/462). The rear driver's side seat had been totally consumed by flames. (T4/463 – 464). Although Mr. Bryant could not testify conclusively as to Mr. Morgan's seats because they were not tested, Mr. Bryant was able to inform the court that seats of cars are now made with fire retardant material. (T4/465). The fire was not caused by the truck crashing into the tree and the engine compartment and fuel tank were excluded as possible causes. (T4/476 – 477). There were no electrical malfunctions and no accelerants were involved. (T4/472, 474). Since all possible accidental causes had been eliminated, Mr. Bryant was left with the only possibility that the fire had been started by human means. (T4/478). Mr. Bryant could not say whether the human means of starting the fire were intentional, but did conclude that combustible materials such as paper and various objects were the ignition point of the fire, not the rear seat itself. (T4/478 – 480).

Appellant now argues that since the State could not prove who started the fire, the evidence is insufficient to support a conviction claiming both McMillian and Mr. Morgan as possible suspects for starting the fire. (IB/50 – 51). First, there is

absolutely no evidence to support a reasonable hypothesis that Mr. Morgan, the deceased victim with more than 30 stab wounds, intentionally started the fire in the rear seat of his own truck. Second, because Appellant was prosecuted under the principal theory, Appellant is equally responsible for the intentional actions of McMillian during the course of the criminal episode. (R1/182).

Fla. Stat. § 777.011(a) provides:

> If the defendant helped another person or persons commit or attempt to commit a crime, the defendant is a principal and must be treated as if he had done all the things the other person or persons did if:
>
> 1. The defendant had a conscious intent that the criminal act be done and
> 2. The defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit or attempt to commit the crime.

"Under Florida law, in order to be convicted as a principal for a crime physically committed by someone else, a defendant must both intend that the crime be committed and do some act to assist the other person in actually committing the crime." *Brown v. Crosby*, 249 F.Supp. 2d 1285, 1318 (U.S. Dist. Ct. S.D. Fla. 2003) (citing *Ryals v. State*, 150 So. 2d 132 (Fla. 1933)).

In the instant case, it is Appellant who both intended the criminal acts, and incited them by carrying out the unprovoked stabbing of Mr. Neel. In addition, there is no evidence to suggest the fire was started by accident due to the careless nature of Appellant or McMillian. No testimony was presented at trial that anyone was smoking inside the truck, playing with matches or a lighter, or being careless

with a form of fire prior to the attack. Therefore, the reasonable conclusion is either McMillian or Appellant started the fire intentionally in an attempt to destroy or conceal evidence as Appellant made his escape. As such, this Court should affirm the conviction on Count V – Arson of a vehicle.

VII. THE TRIAL COURT GAVE A PROPER RESPONSE TO THE JURY QUESTION REGARDING THE VERDICT FORMS FOR ROBBERY AND ATTEMPTED ROBBERY.

Appellant claims the trial court erred in responding to the jury question, and refusing to re-instruct the jury on Std. Jury Instr. (Crim.) 3.12(a) – Single Defendant, Multiple Counts. (IB/53). However, the trial court's response to the jury question was a correct statement of the law, which was derived after careful consideration and argument from the state and defense.

a. Standard of Review

"[I]t is generally recognized that the feasibility and scope of any reinstruction of the jury is a matter residing within the discretion of the trial judge." *Henry v. State*, 359 So. 2d 864, 866 (Fla. 1978). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *Armstrong v. State*, 73 So. 3d 155, 173 (Fla. 2011) (quoting *White v. State*, 817 So. 2d 799, 806 (Fla. 2002)). However, 'the court should not give instructions which are confusing, contradictory, or misleading." *Armstrong*, 73 So. 3d at 173 (Fla. 2011) (quoting *Butler v. State*, 493 So. 2d 451, 452 (Fla. 1986)).

b. Jury Question and Re-Instruction

During deliberations the jury asked the following question:

> As to count 4, attempted robbery with a deadly weapon, we're not clear as to what the law states. Can we assume or do we have to cite specific evidence. By assume, we mean because he took Morgan's wallet, but no clear attempt was made to take Neel's wallet, et cetera, prior payments of corn, which I'm not sure –

(T6/806). The trial court then sought the input of both the State and the Defense before making a ruling. (T6/803). The State suggested "that the court instruct the jury that they make a determination of whether the evidence proves the elements beyond a reasonable doubt. They are not required to cite the specific evidence that they rely upon." (T6/802). The initial response from the defense was as follows:

> MR. GARCIA: I think we have an instruction that has already been given that applies: It is the evidence and the evidence alone from which you are to make your decision. So that would address the assumption part of it. And then, of course, we have the multiple - - single defendant multiple counts instruction that you may or may not want to give that again.
>
> THE COURT: What is the relevance of that?
>
> MR. GARCIA: I think it's in the question it says as to Count - - well - -
>
> THE COURT: I'm following you. Was there anything else?

(T6/804). The Defense then requested the court instruct the jury that "Count 3 has no bearing on what they should find as to Count 4, and because they found something on Count 3, they should not assume." (T6/805). The State's counter argument was that the requested instruction by the Defense was an incorrect statement of the law. (T6/805). The State wanted the jury to "take a look at all the evidence as it applies to each count." (T6/805). Below is the resulting dialogue:

THE COURT: Because what they (the jury) are saying is a summary of circumstantial evidence. We tell them you must consider the evidence as to each offense separately. When we tell them a separate crime is charged in each count, and although they have been tried together, each crime and the evidence applicable to it must be considered separately, evidence relevant to one crime can also be relevant to as other crimes charged, because it's one criminal incident and one criminal episode. I don't want to - - I can't tell them accurately or consistent with the law that once they're done with one, then they can't consider the evidence leading to that conclusion as it is relevant to the evidence other crimes charged.

MR. TAYLOR: I agree with that. My concern is that they may feel because they reached a decision on Count 3, they have to reach the same decision on Count 4, based on trying to interpret that note. That's my concern. That gets us back to each case is separate and distinct. Your decision on Count 3 can be the same or different than your decision on Count 4.

THE COURT: Can I see the note again?

All right. Here's what I think we're going to do. I'm following you, Mr. Taylor, but I think you're reading more into it than there is here. I do think I can change this instruction to at least make it clearer, as you are requesting.

So what I'm going to say is: **It's your responsibility to determine if the evidence proves each element of each offense beyond a reasonable doubt**, along with the rest of the language that I have already cited.

I just think if I introduce - - I think the fairer reading of this note is when they say assume, what they mean is **apply circumstantial** - - **analyze circumstantial evidence**. If we change the note that way, I think it makes perfect sense.

Can we apply circumstantial evidence or do we have to cite specific evidence? By apply circumstantial evidence, we mean because he took Morgan's wallet and no clear attempt was made taking Neel's wallet, et cetera, prior payments of corn.

> I think that makes a lot more sense than trying to read this to say once we find him guilty of Count 3, for some reason we have to find him guilty of Count 4. I don't think that's a fair reading of the note.
>
> Do you want to put an objection on the record, and let me give you what I have written here and you can read it.

(T6/805 – 807) (emphasis added) . . . .

> MR. TAYLOR: Yes, sir.
>
> THE COURT: All right. So you want to put the objection on the record, as far as the language proposed?
>
> MR. TAYLOR: Yes, Sir.
>
> THE COURT: All right. So that's overruled.

(T6/807). The final response that was sent to the jury was "**you are not required to cite evidence. You are required only to complete the verdict form. Your responsibility is to determine if the evidence proves each element beyond a reasonable doubt.**" (T6/809) (emphasis added).

c. Trial court's response was appropriate and not misleading.

Pursuant to Fla. R. Crim. P. 3.410, "[i]n its discretion, the court may respond in writing to the inquiry without having the jury brought before the court, provided the parties have received the opportunity to place objections on the record and both the inquiry and response are made part of the record." The trial court followed this rule to the letter.

Appellant maintains that by reading the word "circumstantial" into the jury's

question the court erred in its reinstruction, but this argument ignores the fact that the response to the jury was a correct statement of law. (IB/54). The question presented by the jury was ambiguous and confusing. By reading the word 'circumstantial' into the question, the court attempted to fully decipher the jury's intent. (T6/806 –807). This is well within the trial court's discretion.

Ultimately, the jury heard none of the colloquy between the trial court, State, and Defense and was unaware of the re-wording of their question. While the response that was sent back to the jury was not what the defense precisely requested, the trial court made every attempt to accommodate the defense and make the response as clear as possible. (T6/805 – 809).

Appellant contends the question posed by the jury shows that the conviction for Attempted Armed Robbery of Sean Neel was based on improper evidence and cites to *Nesbitt v. State*, 966 So. 2d 447 (Fla. 2d DCA 2007) and *Eutzy v. State*, 458 So. 2d 755 (Fla. 1984). (IB/55). In *Nesbitt*, the defendant entered an open plea of guilty to two counts of robbery resulting from taking one purse from two victims. *Nesbitt*, 966 So. 2d at 448 (Fla. 2d DCA 2007). The Second District Court of Appeal overturned one of the convictions for robbery stating "If Nesbitt took a single purse, there could only be a single "taking" and, consequently, only a single

armed robbery." *Nesbitt*, 966 So. 2d at 448 (Fla. 2d DCA 2007). In *Eutzy*, as discussed in Issue IV[6], this Court found that the State failed to present any evidence of any taking which would constitute a robbery. *Eutzy*, 458 So. 2d at 757.

Appellant's argument would be well placed had he been convicted of Armed Robbery of Sean Neel; but he was not, Appellant was convicted of **Attempted** Armed Robbery of Sean Neel, and as such the cases cited are inapplicable. Both *Nesbitt* and *Eutzy* involve charges of Armed Robbery, where the question before the court was whether there was evidence of an actual taking. *See Nesbitt v. State*, 966 So. 2d 447 (Fla. 2d DCA 2007); *Eutzy v. State*, 458 So. 2d 755 (Fla. 1984). By the nature of the charge of Attempted Armed Robbery, the relied upon evidence will be insufficient to support a conviction for Armed Robbery.

Even so, the question this Court should consider is whether the trial judge abused his discretion in responding to the jury's question. *Henry v. State*, 359 So. 2d 864, 866 (Fla. 1978). Since the trial court's response to the jury question was a correct statement of law, Appellant cannot show that the trial court abused its discretion in its response to the jury and as such this court should deny Appellant's claim, and affirm Appellant's conviction for Count IV.

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[6] *Supra* Issue IV.

VIII. THE TRIAL COURT PROPERLY OVERRULRED THE DEFENSE OBJECTIONS TO HEARSAY DURING MR. NEEL'S TESTIMONY BECAUSE THE STATEMENTS MADE WERE OFFERED TO SHOW THE STATE OF MIND OF APPEALLANT UPON HEARING THEM AND NOT FOR THE TRUTH OF THE MATTER ASSERTED.

Appellant asserts that the testimony of Sean Neel regarding the purchase of the deer corn and phone calls to Appellant from Mr. Morgan should have been excluded as hearsay. However, the trial court properly admitted the testimony of Mr. Neel, because the testimony was offered to show the state of mind of Appellant, and therefore not subject to the hearsay rule. When evidence of an out-of-court statement is offered to show motive and intent for committing a crime, the statements are not hearsay because the statements are not being offered for their truth. The state offered the testimony of Mr. Neel regarding the transaction and non-delivery of deer corn between Appellant and Mr. Morgan to show Appellant's motive to murder Mr. Morgan.

a. Standard of Review

"The standard of review of a trial court's decision on the admissibility of evidence is generally an abuse of discretion standard." *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006). "The question of whether evidence falls within the statutory definition of hearsay is a matter of law subject to *de novo* review." *Burkey*, 922 So. 2d at 1035 (citing *K.V. v. State*, 832 so. 2d 264, 265 –

266 (Fla. 4th DCA 2002)).

b. Testimony of Sean Neel

During trial, Mr. Neel testified that Mr. Morgan facilitated the second transaction for deer corn. (T1/92). After contacting his supplier, Mr. Morgan informed Mr. Neel that his supplier did not have any deer corn available at that time. (T1/94, 95). Mr. Morgan agreed to put money upfront to be first in line when the deer corn became available. (T1/95). After a couple weeks the deer corn had not been delivered. (T1/96).

Mr. Morgan then used Mr. Neel's cell phone to call to "one of Johnny Cannon's sons" from his phone. (T1/97 – 98). While the phone call was unsuccessful, Mr. Neel heard Mr. Morgan leave a message saying "I know it's hard times . . . but I need one of two things . . . I either need my money back or my corn . . . whichever, it doesn't matter." (T1/96 – 97). The defense raised multiple hearsay objections to Mr. Neel's testimony regarding the second transaction of deer corn. (T1/93, 95). The defense objections were overruled because the State had offered the statement to show the effect on the listener. (T1/93).

c. Statements Excluded from Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

matter asserted." § 90.801(1)(c), Fla. Stat. (2013). "An out-of-court statement that is not offered to prove the truth of the matter asserted, i.e. to prove the facts contained in it are true, is not hearsay." § 801.4, 1 Fla. Prac. Evid. (2013). "When evidence of an out-of-court statement is offered to prove the state of mind of a person who heard the statement, the statement is not hearsay because it is not being offered to prove the truth of the statement's contents."[7] § 801.6, 1 Fla. Prac. Evid. (2013). "The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements." *Breedlove v. State*, 413 So. 2d 1, 6 (Fla. 1982) (quoting *Dutton v. Evans*, 400 U.S. 74, 88 (1970)).

Florida courts have repeatedly permitted witnesses to testify regarding out-of-court statements made to the defendant in order to establish the defendant's motive to commit the crime. *Blackwood v. State*, 777 So. 2d 399 (Fla. 2000); *Foster v. State*, 778 So 2d. 906 (Fla. 2000); *Koon v. State*, 513 So. 2d 1253, 1255

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[7] "If testimony concerning an out-of-court statement by A to B is offered to show that B was on notice of an event, the statement is not being offered to prove the truth and, therefore, is not excluded by the hearsay rule." § 801.6, 1 Fla. Prac. Evid. (2013). Said another way, "[a]n out-of-court statement by a garage mechanic to A that A's brakes were defective is not hearsay if it is offered to prove that A had notice of the defective brakes. However, if the statement is offered to prove that the brakes were, in fact defective, it is hearsay." § 801.4, 1 Fla. Prac. Evid. (2013).

(Fla. 1987); *United States v. Cruz*, 805 F.2d 1464, 1478 (11th Cir. 1986); *Eugene v. State*, 53 So. 3d 1104 (Fla. 4th DCA 2011). In the present context, the "effect on the listener" or "state of mind" refers to Appellant, not the witness at trial.

In *Blackwood v. State*, the defendant objected to testimony from the victim's sister concerning statements the victim made to the defendant. *Blackwood*, 777 So. 2d at 407 (Fla. 2007). The witness's testimony was that days before her murder, the victim had told the defendant she had previously aborted his children, and was currently pregnant with another man's child. *Id.* The witness also testified that the victim had told the defendant that she wanted nothing to do with him. *Id.* This Court held that the statements were properly admitted at trial stating, "the victim's statements were offered to show the effect such statements had on [the defendant]. His state of mind and knowledge were relevant to show both his motive and intent in committing the murder." *Id.*

Likewise, in *Eugene v. State*, 53 So. 3d 1104 (Fla. 4th DCA 2011), the defendant sought to preclude the introduction of emails from the victim to the defendant prior to the victim's murder. *Eugene*, 53 So. 3d at 1109. The emails from the victim dictated a dramatic change in her relationship with the defendant. *Id.* at 108. The victim talked of her displeasure with the defendant, her feelings for another man, and her concern that people were interfering with her relationships in an attempt to "protect" her. *Id.* at 108 – 109. Relying on the

decision in *Blackwood*, the Fourth District Court of Appeal held the emails "were admissible to establish a motive for the homicide." *Id.* at 1109.

In the instant case, as in *Blackwood* and *Eugene* the testimony of Mr. Neel was being offered to show that Appellant had a motive to murder Mr. Morgan. Mr. Morgan had paid for a product he had not yet received and all attempts Mr. Morgan made to contact Appellant were unsuccessful. (T1/95 – 97; R2/298). Unknown to Mr. Morgan, Appellant was on felony probation at the time and was therefore in danger of violating his probation. (T8/901 – 902).

Appellant cites to *Daniels v. State*, 606 So. 2d 482 (Fla. 5th DCA 1992), to support his claim that the hearsay statements were inadmissible. In *Daniels*, a television and three videocassette recorders were stolen from Melrose Elementary School. *Id.* at 483. At trial a witness testified that prior to the defendant's arrest he received an anonymous phone call from someone who claimed to see property in the defendant's car with Melrose Elementary School written on it. *Id.* at 483. The defendant, who was a custodian at the school, was ultimately convicted of petite theft. *Id.* at 483. On appeal, the Fourth District determined the witnesses' statements "exceeded the bounds of detail necessary to explain the [witnesses] actions." *Id.* at 484.

The nature of the statements in *Daniels*, are distinctly different from the instant case. In *Daniels*, the statements did not present a relevant effect of either

the defendant or the witness, and instead consisted of an out-of-court statement that went directly to an element of the crime and ultimately the defendant's guilt, namely the stolen property was seen in the defendant's car.

The statements made by Mr. Morgan to Appellant properly fit within the exclusion to the hearsay rule. The statements were not being offered to show the truth regarding the second purchase of deer corn, and arraignment Mr. Morgan had with Appellant. The statements were offered to show the effect they had on Appellant and demonstrated Appellant's motive to murder Mr. Morgan. "For both of these purposes, knowledge and motive, the truth of the matter is not an issue." *Foster v. State*, 778 So. 2d 906, 915 (Fla. 2000).

Moreover, motive is not an element of murder which the State was required to prove. *See*, 7.2 Fla. Std. Jury Instr. (Crim.). Therefore, the trial court properly admitted the testimony of Mr. Neel, and this court should deny Appellant's claim.

IX. APPELLANT'S DEATH SENTENCE IS PROPORTIONATE WHEN COMPARED TO SIMILAR CASES WITH COMPARABLE AGGRAVATORS AND MITIGATORS.

Appellant challenges the proportionality of his death sentence based on a claim of improper application of aggravating circumstances, and the fact that his co-defendant, McMillian, has been deemed Intellectually Disabled.[8] (IB/62). As a matter of law, Appellant's case is not reviewed for the relative culpability based on the co-defendant. Appellant's case is reviewed for proportionality when compared to similar cases with comparable aggravators and mitigators. In the face of extreme aggravation and relatively meager mitigation, Appellant's claim of a disproportionate death sentence should be rejected.

a. Standard of Review

In determining whether death is a proportionate penalty in a given case this Court conducts "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Bright v. State*, 90 So. 3d 249, 262 (Fla. 2012) (quoting *Williams v. State*, 37 So. 3d 187,

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[8] Mental retardation has been renamed "Intellectual Disability" under the DSM-5. AMER. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 31 – 41 (Amer. Psychiatric Ass'n, 5th ed. 2013).
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205 (Fla. 2010)). A direct-appeal determination of death-penalty proportionality is not a matter of simply counting the aggravating and mitigating factors. As this Court explained in *Woodel v. State*, 985 So. 2d 524, 532 (Fla. 2008):

> In weighing the aggravating circumstances against the mitigating factors, the court understands that the weighing process is not simply an arithmetic exercise. The court's role is to consider the quality of the factors to be weighed, not the quantity of those factors. Accordingly, the court considers the nature and quality of the aggravators and mitigators that is has found to exist.

In reviewing the trial court's determination of the factual foundation for its death-penalty decision, the Court generally defers to the trial court, that is, whether a factual finding is supported by "competent, substantial evidence." *See, e.g.*, *Allred v. State*, 55 So. 3d 1267, 1277 – 1278, 1281 (Fla. 2010).

b. Proportional Review of Appellant's Case

A proper proportionality review of Appellant's case considers the totality of the circumstances compared to similar cases. *See Woodel*, 985 So. 2d at 532. The evidence in this case shows that Appellant, who was under supervision by the department of corrections for a violent armed carjacking, lured Mr. Morgan on the pretext of delivering corn which was prepaid for by Mr. Morgan. Appellant sprung an unprovoked attack on Mr. Neel by violently stabbing him in the neck. When Mr. Neel escaped, the focus of the attack became Mr. Morgan. When the attack was finished, Mr. Morgan had at least 30 major stab wounds to his head, neck, face, chest, back, and arms. (R2/301). There was evidence of a bite mark on Mr.

Morgan's hand as well as defensive wounds. (R2/303 – 304). The medical examiner testified that it could have taken Mr. Morgan "minutes" to die, and the attack began while Mr. Morgan was upright. (R2/303). Appellant fled the scene with Mr. Morgan's wallet, and was found two days later hiding in a hotel. (R2/301). When Appellant was arrested he was still wearing a shirt with Mr. Morgan's blood on it. (R2/301).

The trial court found five statutory aggravators and assigned weight accordingly. Four of the five aggravators are undisputed[9]:

- The capital felony was committed in a cold, calculated, and premeditated manner (Great Weight). (R2/326, 329).
- The capital felony was committed by a person on felony probation (Great Weight). (R2/317).
- The defendant was previously convicted of a felony involving the use or threat of violence to the person (Very Great Weight). (R2/317, 320).

[9] Appellant makes an allegation of improper doubling in Issue I. *Supra*, Issue I. Should the Court agree with Appellant, the aggravator of Prior Violent Felony Conviction could be found based on the contemporaneous attempted murder of Sean Neel. (R2/320).

- The capital felony was committed while the defendant was engaged in, a robbery (Moderate Weight). (R2/320).

The jury recommended a death sentence by a vote of nine to three (9-3). (T8/1009). The trial court did not find any statutory mitigators, and assigned "little weight" to twelve (12) non-statutory mitigating circumstances. (R2/331; Sentencing/4).

Based on the unchallenged aggravating and mitigating circumstances, this case is comparable to *Gregory v. State*, 118 So. 3d 770 (Fla. 2013). In *Gregory*, the defendant was convicted on two counts of first degree murder for the execution style shooting of his ex-girlfriend and her new boyfriend. The trial court in *Gregory* found the aggravators of CCP, defendant on felony probation, prior violent felony, and the murders were committed during the course of a burglary. The trial court found one statutory mitigator of – extreme emotional disturbance – and six non-statutory mitigators. This court upheld the sentence in *Gregory* as proportionate "in relation to other cases with similar aggravating and mitigating circumstances." *Gregory*, 118 So. 3d 770, 786 (Fla. 2013) (citing *Deparvine v. State*, 995 So. 2d 351, 381 – 383 (Fla. 2008) (upholding death sentence as proportionate in light of four aggravators (contemporaneous murder conviction, CCP, under sentence of imprisonment, and pecuniary gain) and little weight assigned to mitigating circumstances); *Winkles v. State*, 894 So. 2d 842, 847 – 848

(Fla. 2005) (upholding death sentences as proportionate in light of four aggravators (prior violent felony, CCP, avoiding arrest, and commission during a kidnapping) and four non-statutory mitigators). Appellant's case is not as mitigated as *Gregory*, and has been assigned at a minimum the same aggravating factors. (R2/317 – 344). In addition, the aggravator of HAC was applied by the trial court and discussed in Issue II.

Should this Court uphold the finding of HAC, the instant case would be more comparable to *Simpson v. State*, 3 So. 3d 1135 (Fla. 2009). In *Simpson*, the defendant was convicted of two counts of first-degree murder for the ax murder of a couple who was home during a burglary. *Simpson*, 3 So. 3d at 1138. The trial court found the aggravators of CCP, HAC, felony probation, prior violent felony, and crime committed during the course of a burglary. *Id.* at 1139. The court in *Simpson* did not find any statutory mitigators, but did find and apply sixteen (16) non-statutory mitigators. *Id.* at 1139. This Court found Simpson's sentence proportionate when compared to cases involving double murders with similar aggravators and mitigators. *E.g.*, *Bevel v. State*, 983 So. 2d 505 (Fla. 2008) (finding the death penalty appropriate for a double murder when no statutory mitigators were present and the defendant also had a prior violent felony); *Lynch v. State*, 841 So. 2d 362 (Fla. 2003) (holding the death sentence was proportionate even with one statutory mitigator when there was a double murder and the

aggravators included CCP and prior violent felony); *England v. State*, 940 So. 2d 389 (Fla. 2006) (finding the death penalty proportionate where the aggravators were felony probation, prior violent felony, HAC, and the murder was committed in the course of another felony).

In the instant case, Appellant attempted to murder Mr. Neel and was successful in the murder of Mr. Morgan. This occurred during the commission of a robbery of both Mr. Morgan and Mr. Neel. Mr. Morgan was stabbed at least 30 times in the head, face, neck, arms, chest, and back, and survived for minutes before dying. (T4/392, 396 – 399, 417). Prior to the attack on Mr. Morgan, Appellant stabbed Mr. Neel twice in the neck. Appellant was on probation for a violent armed carjacking, and lured Mr. Morgan to his death under the pretext of delivery of deer corn which had been prepaid. (T8/901 – 902; R2/325). It is clear when examining the totality of the circumstances that the trial court properly found the appropriate aggravators on competent substantial evidence and assigned them weight accordingly.

The aggravators of CCP, HAC, and prior violent felony are the most serious and weightiest aggravators set forth in the statutory scheme. *Gregory v. State*, 118 So. 3d 770, 786 (Fla. 2013) (citing *Silvia v. State*, 60 So. 3d 959, 974 (Fla. 2011)); *Buzia v. State*, 926 So. 2d at 1216 (quoting *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999). Moreover, this Court "has previously affirmed the death penalty in a

single-aggravator case where the single aggravator was a prior violent felony." *Armstrong v. State*, 73 So. 3d 155, 175 (Fla. 2011); *see Bevel v. State*, 983 So. 2d 505, 524 (Fla. 2008) (citing *Ferrell v. State*, 680 So. 2d 390 (Fla. 1996)); *see also Lindsey v. State*, 636 So. 2d 1327, 1329 (Fla. 1994). In *Armstrong*, the aggravator of a prior violent felony conviction alone was enough for this Court uphold a death sentence when presented with minimal mitigation. *Armstrong*, 73 So. 3d at 175.

In the case at bar, the trial court in its sentencing order went as far to say that "[Appellant's] prior violent felony aggravator alone would substantially outweigh the minimal mitigation proven in this case." (R2/320). Therefore, this Court should uphold the decision of the trial court and affirm Appellant's death sentence.

c. Appellant's Relative Culpability Compared to Co-Defendant, McMillian

Appellant claims that his death-sentence is disproportionate when compared to McMillian's purported life-sentence. (IB/62). This claim attempts to re-litigate Appellant's culpability in the murder of Mr. Morgan, and presents a new unsupported standard of review for proportionality.[10]

[10] "Therefore, a proper proportionality analysis would require the trial court to balance McMillian's reduced culpability due to his mental retardation against his increased culpability for being the actual killer and acting on his own accord." (IB/63).

Relative Culpability as a Matter of Law

In his initial brief, Appellant cites *Henyard v. State*, 992 So. 2d 120 (Fla. 2008), to support his position that Appellant's sentence is disproportionate, when compared to McMillian's case and culpability. (IB/65). However, Appellant uses an inaccurate application of the facts and rulings from *Henyard* to support his position.

In *Henyard*, the defendant, who was 18 years-old, and the co-defendant, who was 14 years-old, were convicted of kidnapping, sexual battery, attempted first degree murder, and two counts of first-degree murder, after they abducted a mother and her two young children. *See Henyard*, 689 So. 2d 239, 242 – 244 (Fla. 1996). Relying on *Allen v. State*, 636 So. 2d 494 (Fla. 1994), this Court took into consideration the co-defendant's age, and noted the holding in *Allen* which prohibited a death sentence for a defendant who was 16 years-old or younger at the time of the offense. *Henyard*, 689 So. 2d at 254; s*ee also Roper v. Simmons*, 543 U.S. 551, 578 (2005)(holding "[t]he Eight and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"). This Court held that the cases between Henyard and his 14 year-old co-defendant were "per se incomparable," since his co-defendant was younger than 16 years-old at the time of the offense, and therefore death was never a valid punishment option. *Henyard*, 689 So. 2d at 254 – 255.

More plainly stated, when a death sentence is prohibited as a matter of law due to the age or mental incapacity of a co-defendant, this Court does not address the relative culpability between the two defendants because the cases are incomparable.

In the instant case, McMillian has been deemed mentally retarded and adjudicated incompetent to proceed and is therefore constitutionally barred from being eligible to receive the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding the execution of a mentally retarded person to be unconstitutional).

A review of the trial court's Sentencing Order shows that McMillian has been mentally retarded since he was an infant, began receiving SSI for mental retardation at age 7, did not walk until age 6, and was not potty trained until age 7. Even into his adolescence, McMillian "still needed assistance with eating and cleaning himself after going to the bathroom." (R2/311). McMillian's mother reported to doctors that "[h]e won't do anything on his own. People do try to take advantage of him but if he knows something is wrong he'll tell you and won't do it. But he would never hurt anybody." (R2/311). Multiple doctors evaluated McMillian and confirmed he tested in the mild to moderate range of mental retardation. (R2/311, 314, 315). McMillian was initially adjudicated incompetent to proceed in May of 2011. (R2/316). In August of 2012, the trial court reevaluated McMillian's competency and the court again adjudicated McMillian

incompetent to proceed. (R2/316).

Appellant, suffers from no such disability. Therefore, as a matter of law, this Court should not consider McMillian's relative culpability since he is constitutionally barred from receiving the death penalty.

Appellant's review of Relative Culpability

In reviewing the proportionally of the sentence Appellant maintains that McMillian is responsible for the murder of Mr. Morgan. (IB/62 – 63). While there is evidence which strongly suggest McMillian was involved in the attack on Mr. Morgan, there is no evidence in the record that shows McMillian is solely responsible for the death of Mr. Morgan. Appellant claims McMillian is responsible for the "fatal blow" to Mr. Morgan. (IB/64). This assertion is not supported by any testimony. No one testified to witnessing McMillian commit any act of violence, let alone stab Mr. Morgan. (R2/325). In addition, while the head wound where the metal tip was recovered from was serious, it was not one of the wounds which could have been fatal on its own. (T4/396 – 399).

Even still, the trial court considered McMillian's participation in the murder in light of Appellant's sentence. (R2/324 – 326). The trial court properly addressed this proportionality claim by the defense in its Sentencing Order. (R2/337). "In the context of multiple persons responsible for a murder the important 'proportionality' is proportionality to each defendant's culpability." (R2/337).

> The United States Supreme Court and this Court has consistently held that a sentence of death must be proportional to the defendant's culpability. Thus, in *Enmund*, the Court indicated that in the felony murder context a sentence of death was not permissible if the defendant only aids and abets a felony during the course of which a murder is committed by another and defendant himself did not kill, attempt to kill, or intend that a killing take place or that lethal force be used. Later in *Tinson* the Court said a sentence of death in the felony murder context can be proportional if the defendant is a major participant in the felony and the defendant's state of mind amounts to a reckless indifference to human life.

Stephens v. State, 787 So. 2d 747, 759 – 760 (Fla. 2001).

In *Farina v. State*, 801 So. 2d 44 (Fla. 2001), the defendant was convicted of first-degree murder, armed robbery, burglary, conspiracy to commit murder, and three counts of attempted first-degree murder for a robbery at a Taco Bell restaurant in 1992. *Farina*, 801 So. 2d at 48 – 49. The defendant and his juvenile brother planned and participated the robbery together, but [the defendant's brother] actually fired the fatal shot, shot two other restaurant employees, and stabbed the assistant manager in the back after his gun misfired." *Id.* at 48. The defendant was given a death sentence, and his brother was given a life sentence. *Id.* at 55. This Court upheld the defendant's death sentence as proportional to the life sentence of his brother because of the defendant's direct participation and equal culpability in the crime. *Id.* at 55 – 56.

In making his argument, Appellant ignores the fact that a jury found him guilty of first-degree murder with both premeditation and felony murder. (T6/814 – 815;

R2/190). Appellant has been sentenced based on his actions and involvement and not those of McMillian.

Still, Appellant maintains that McMillian's mental retardation has a bearing on and basis to reduce Appellant's sentence. (IB/62 – 64). McMillian's intellectual disabilities affect McMillian's culpability due to a diminished capacity, not Appellant's. (R2/337); *See Atkins v. Virginia*, 536 U.S. 304, 316 – 321 (2002). "Because Mr. Cannon's culpability is not diminished by mental retardation, his death sentence is not disproportionate to a life sentence for Mr. McMillian or any other result that may apply to Mr. McMillian because of his severe cognitive deficits." (R2/337).

"Mr. Cannon's death sentence would not in any sense be 'disproportionate' to a life sentence for Mr. McMillian given the overwhelming evidence of Mr. Cannons' murderous intent and his direct, immediate participation . . . [in] this criminal incident including, especially his attempted murder of Mr. Neel by stabbing . . . ." (R2/337). Therefore, this Court should affirm Appellant's sentence as proportionate.

X. THE EVIDENCE AGAINST APPELLANT WAS SUFFICIENT TO SUSTAIN A CONVICTION OF FIRST DEGREE MURDER.

Although not raised on direct-appeal, "this Court has an obligation to review the sufficiency of the evidence in every case in which a sentence of death has been imposed." *Gregory v. State*, 118 So. 3d 770, 785 (Fla. 2013) (citing *Jones v. State*, 963 So. 2d 180, 184 (Fla. 2007). In this instant case, the evidence was sufficient to support a conviction for first degree murder.

a. Standard of Review

"In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Gregory v. State*, 118 So. 3d 770, 785 (Fla. 2013) (quoting *Simmons v. State*, 934 So. 2d 1100, 1111 (Fla. 2006)); *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001). This court also applies a special standard of review when a conviction is only based upon circumstantial evidence:

> Where the only proof of guilt is circumstantial evidence, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.

Jackson v. State, 25 So. 3d 518, 531 (Fla. 2009)(quoting *Darling v. State*, 808 So. 2d 145, 155 (Fla. 2002)(internal citations omitted).

b. Murder of Zachariah Morgan

Appellant maintains that the evidence presented at trial was wholly circumstantial and did not dispel every reasonable hypothesis but that of guilt. Namely, Appellant plainly states that the evidence points directly to McMillian as being responsible for the murder of Mr. Morgan, and incorrectly attributes a non-fatal head wound as being the fatal blow which he claims was inflicted by McMillian.

To prove the crime of first-degree murder of Zachariah Morgan, the State must prove: (1) Zachariah Morgan is dead; (2) the death was caused by the criminal act of Appellant (Marvin Cannon); and (3) there was a premeditated Killing of Zachariah Morgan. *See*, 7.2 Fla. Std. Jury Instr. (Crim.).

In *Jackson v. State*, 25 So. 3d 518 (Fla. 2009), this court upheld a conviction and sentence of death based on circumstantial evidence, because the State presented "competent, substantial evidence that [was] consistent with . . . guilt." *Jackson*, 25 So. 3d at 532. The victim in *Jackson* stole money from the defendant. *Id.* After publicly searching for the victim, the defendant was seen with the victim bound and gagged in an apartment bathroom. *Id.* The defendant was seen making a death threat against the victim and witnesses also testified to seeing the victim carried out by the defendant and placed into the trunk of a car. *Id.* The victim then

went missing, and her body was recovered six months later. Due to the decomposition of the body, the medical examiner was unable to determine a cause of death. At trial the defense theory was that a serial killer, who had been active in the area was responsible for the murder. However, the testimony at trial showed the stark differences in the serial murders and the murder of the victim. This Court determined that "because competent, substantial evidence support[ed] the jury's findings and because [the] 'evidence is consistent with the defendant's guilt'" the trial court did not err in denying a motion for judgment of acquittal.

Even though the evidence in this case is circumstantial, the record contains sufficient evidence to support Appellant's conviction of premeditated first degree murder. Mr. Morgan gave money to Appellant as an advance purchase on deer corn. (T1/95; R2/298). For the next couple weeks, Mr. Morgan was unable to contact Appellant, who already had Mr. Morgan's money, but had not delivered the deer corn. (T1/96 – 97). Prior to the Christmas Eve attack and murder, Mr. Morgan left a message for Appellant saying "I know it's hard times . . . but I need one of two things . . . I either need my money back or my corn . . . whichever, it doesn't matter." (T1/96 – 97). Unknown to Mr. Morgan, Appellant was on felony probation at the time. (T8/901 – 902).

On Christmas Eve 2010, Appellant lured Mr. Morgan to a remote piece of farm land on the pretext of delivering the corn he owed to Mr. Morgan. (T1/98). A

group of 4 rode in Mr. Morgan's truck – Appellant, McMillian, Mr. Neel and Mr. Morgan. (T1/107 – 108, 111; R2/299). Once they were on the property and out of sight, Appellant struck. First he attacked Mr. Neel, stabbing him twice in the neck. (T1/115). Mr. Morgan screamed in horror as he looked at Mr. Neel. (T1/117). Mr. Neel escaped, the truck crashed, and Appellant fled the scene with Mr. Morgan's wallet. (T1/119). Mr. Morgan suffered at least 30 major stab wounds to his head, neck, face, chest, arms and back. (T4/392, 396 – 399). Appellant was found two days later in hotel. (T3/359 – 361). When Appellant was arrested he was wearing the same distinctive blood stained shirt as the day of the murder. (R2/303). The blood on Appellant's shirt was proven to be Mr. Morgan's. (T5/583). In addition to the evidence against Appellant, there was evidence which showed McMillian was a participant in the murder of Mr. Morgan.

Appellant's hypothesis of innocence is that McMillian committed the murder of Mr. Morgan; however, as the jury found, the evidence did not support Appellant's theory of defense. Appellant had the motive to murder Mr. Morgan. Appellant arraigned the meeting with Mr. Morgan, and lured him to a secluded piece of farm land, known only to Appellant. Appellant brought the murder weapon with him. Appellant stabbed Mr. Neel in the neck just moments before Mr. Morgan was murdered. It was Appellant who took Mr. Morgan's wallet following the murder, as he fled the crime scene. It was Appellant who hid for two days from the police.

And, Appellant had Mr. Morgan's blood on his shirt, when he was arrested. The only evidence against McMillian, an impressionable mentally retarded young man, was the victim's blood on McMillian's clothes. Even still, this was a crime scene that was littered with blood, given the more than 30 stab wounds to Mr. Morgan.

Based on a review of the evidence presented in this case, a "rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Simmons*, 934 So. 2d at 1111. Therefore, this Court should conclude the evidence was sufficient to sustain a conviction for the first-degree murder of Zachariah Morgan.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the State of Florida respectfully requests this Court to affirm the trial court's evidentiary rulings, affirm Appellant's convictions, and affirm the sentence of death for Appellant – Marvin Cannon.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Baya Harrison by E-MAIL – bayalaw@aol.com – and U.S. Mail to P.O. Box 102 Monticello, FL 32344, on December 13th, 2013.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
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IN THE SUPREME COURT OF FLORIDA

MARVIN CANNON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-46

APPENDIX

1. Sentencing Order, dated – November 15, 2012 .

AG#: L13-2-1054