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IN THE SUPREME COURT OF FLORIDA

Case No. SC13-46
(LC 2010-663-CFB)

MARVIN CANNON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

On direct appeal from final judgments and sentences, including a death sentence, rendered by the Circuit Court of the Second Judicial Circuit, in and for Gadsden County, Florida, on November 15, 2012, in a capital, criminal case.

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PRELIMINARY STATEMENT

This is the direct appeal of judgments and sentences, including a death sentence (R2/283-294), rendered on November 15, 2012, by the Circuit Court for the Second Judicial Circuit, in and for Gadsden County, Florida, in a criminal case. The Hon. Jonathan Sjostrom, Circuit Judge presided and imposed the judgments and sentences.

Marvin Cannon was the defendant in the circuit court and is the appellant here. He will be referred to as "Mr. Cannon," "Defendant" or "Appellant." The State of Florida was the plaintiff in the circuit court and is the appellee here. It will be referred to as "the State."

The record on appeal is in seventeen volumes that are not numbered consecutively in all respects. Instead, they are sometimes referenced by various parts of the trial. That is:

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

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.

There are seven volumes of transcripts of the guilt/innocence phase of the trial and an eighth volume that contains the transcript of the penalty phase. They begin with volume 1 and go through volume 8. Each volume will be referenced by the letter "T" followed by an appropriate volume and page number.

There is one volume marked "Spencer Hearing." It will be referred to by the word "Spencer" followed by an appropriate page number.

Finally, there is one volume marked "Sentencing." It will be referred to by the word "Sentencing" followed by an appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

Nature of the Case:

This is the direct appeal of final judgments and sentences, including a death sentence (R2/283-294), rendered on November 15, 2012, by the Circuit Court for the Second Judicial Circuit, in and for Gadsden County, Florida, in a criminal, first-degree murder case. The Hon. Jonathan Sjostrom, Circuit Judge, presided and imposed the judgments and sentences, including the death sentence.

Jurisdiction:

This is a first time direct appeal of judgments and sentences, including a death sentence, rendered in a first-degree murder case. This Court therefore has jurisdiction to review them. Art. V §3(b), Fla. Const.; §921.141(4), Fla. Stat. (2010).

Course of the Proceedings:

On August 19, 2013, Mr. Cannon was indicted by a Gadsden County, Florida, grand jury for the offense of first-degree murder (Count I), attempted first-degree murder (Count II), armed robbery with a weapon (Count III), attempted armed robbery with a weapon (Count IV), and trespass of a conveyance (labeled arson of a vehicle in Sentencing Order)

(Count IV). (RII/297) The victim of the homicide was Zachariah Morgan. The offense date was December 24, 2010. (R8/895)

Mr. Cannon was represented by Manuel Garcia, Esq., and Clyde M. Taylor, Jr., Esq. The State of Florida was represented by Richard Combs, Esq., and James Bevelle, Esq. The Hon. Jonathan Sjostrom, Circuit Judge, presided at all stages of the proceedings.

The selection of a 12-person jury began on October 1, 2012, and concluded on October 2, 2012. (*See* V 1-4) The guilt/innocence phase of the jury trial commended on October 3, 2012 and concluded on October 8, 2012. After the state presented its evidence and rested, Appellant moved for a judgment of acquittal as to all counts of the Indictment. (R5/603-08) That motion was denied. (R5/613)

The defense called one witness, Mr. Johnny Cannon. (R5/619-34)

The trial court instructed the jury on the law to consider in the context of reaching a verdict as to all counts. (R6/691-727) Counsel for the parties then made their closing arguments. (R6/727-797) The trial court then instructed the jury further on the rules of deliberation. (R6/797-800)

The jury returned verdicts of guilty as charged on all counts on October 8, 2013. (R2/190-194, 297; R6/813-15)

A penalty phase jury trial was held on October 10, 2012, at the conclusion of which the jury recommended that Mr. Cannon be sentenced to death as to Count I, first-degree murder, by a vote of 9-3. (R2/210)

A *Spencer* hearing was held on November 2, 2012. (Spencer/3-89)

Disposition in the Lower Tribunal:

On November 15, 2013, the court imposed sentence as follows:

Count I, first-degree murder -- death.

Count II, attempted first-degree murder -- life in prison.

Count III, robbery with a deadly weapon -- 30 years in prison.

Count IV, attempted robbery with a deadly weapon -- 15 years in prison.

Count V, arson of a vehicle -- 30 years in prison.

(Sentencing/3-10). On December 7, 2012, Cannon filed a timely notice of appeal to this Court. (R2/350)

Statement of the Facts:

The Guilt-Innocence Phase of the Trial

The evidence presented at the guilt-innocence phase of the trial is extensive but fairly described in materiality in the trial court's Sentencing Order of November 15, 2012. (R2/297-346). The facts as set forth in the sentencing order are as follows:

The Defendant, Marvin Cannon, had sold deer corn to Mr. Zachariah Morgan in the fall of 2010. Mr. Morgan then paid Mr. Cannon for more deer corn but Mr. Cannon did not deliver it. Thus, on or about December 24, 2010, Mr. Morgan, after speaking by telephone with Mr. Cannon and accompanied by his (Mr. Morgan's) friend, Sean Neel, made plans to meet up with Mr. Cannon and secure the pre-purchased corn. (R2/298-9).

According to Mr. Neel, Mr. Cannon directed them to a meeting place in Greensboro, Florida, where they expected to pick up the corn. Mr. Morgan was driving his Ford pickup truck and hauling a flatbed trailer. Mr. Neel recognized Mr. Cannon once they met since he resembled his (Mr. Cannon's) father. Mr. Cannon was accompanied by a fourth person by the name of Antone McMillian. Mr. Morgan did not want Mr. McMillian to ride with them but Mr. Cannon convinced him to allow him to come along. Mr. Cannon then directed Mr. Morgan, who was driving, onto I-10 and eventually onto Flat Creek Road in Gadsden County. Mr. Neel was in the front passenger seat. Mr. Cannon and Mr. McMillian were in the rear passenger seats. (R2/298-9)

Mr. Cannon, who was seated in the rear passenger seat, directed Mr. Morgan to make a U-turn, first to turn off of Flat Creek Road and then to drive down what was described as a pig trail. They eventually came to a

clearing with a shed or dilapidated garage. Both Mr. Neel and Mr. Morgan noticed that Mr. Cannon appeared to be fumbling in his jacket and then faking a cell phone call. Mr. McMillian, according to Mr. Neel, was just sitting there in the rear driver's seat. (R2/300)

Mr. Neel testified that he was suddenly stabbed twice in the neck by Mr. Cannon. Mr. Morgan looked at Mr. Cannon and began hollering in horror. Mr. Neel was positive that only Mr. Cannon stabbed him. (R2/300).

Mr. Morgan floored the accelerator and the truck began swerving as Mr. Neel grabbed a knife. Mr. Neel was thrown from the truck and ran down the pig trail to get help for his friend, convinced that he was going to be killed. He came upon the Renfro family and screamed for help, telling them that someone was killing his friend. A Renfro family member armed himself and located Mr. McMillian near a pond. He held Mr. McMillian there until law enforcement arrived. (R2/301)

City of Gretna Police Officer Michael Lawrence arrived on the scene, secured Mr. McMillian and then found Mr. Morgan dead on the ground, covered in blood from what later turned out to be some thirty stab wounds. Some of the contents of Mr. Morgan's pockets were scattered about including a bank receipt showing a withdrawal from his bank account in the amount of $400.00 the previous day. As other officers arrived, they found

smoke coming from Mr. Morgan's truck. (R2/301) By the time the fire could be extinguished, the passenger compartment was badly damaged.

Mr. McMillian overheard the police talking on the radio about a knife and told the officer transporting him that he left the knife they were looking for in a patrol car. Police recovered the knife from the patrol car where McMillian told them it would be. A piece of the knife blade was broken off, and was later found to match a metal fragment recovered from Mr. Morgan's skull by the medical examiner during the autopsy. (R2/302)

The sheriff's canine team began its search for Mr. Cannon across I-10, through woods and swamps and eventually reached a convenience store near the exit ramp. As they did so, they found Mr. Morgan's wallet together with his credit cards and other items. Witnesses identified Appellant on the convenience store's security camera video. Two days later, Mr. Cannon was arrested at a motel in Gadsden County. He was wearing the same shirt shown on the video. That shirt was tested by FDLE and traces of Mr. Morgan's blood and DNA were found on it. (R2/302-3)

The medical examiner determined that Mr. Morgan had been stabbed some 30 times in the forehead, face, neck, torso, hands and arms, noting that death would not have been instantaneous. Death would have taken "maybe minutes." (R2/303)

The state rested and a defense motion for judgment of acquittal was denied. (R5/603-13) Mr. Cannon exercised his right not to testify. (R5/615) The defense called Johnny Cannon as its sole witness. The jury was instructed on the law and closing arguments were made. (R6/691-797) After deliberation, the jury returned finding Mr. Cannon guilty on all counts as set forth in the Indictment. (R6/813-15)

The Penalty Phase

The transcript of the penalty phase of the trial is found in Volume Eight of the record on appeal. It is referred to as "R8" followed by an appropriate volume and page number.

At the beginning of the penalty phase proceedings held on October 10, 2012, defense counsel moved to strike the word "advisory" from the jury verdict form. That motion was denied. (T8/877) However, the Court indicated that it would instruct the jury on the importance of its recommendation including language that the jurors should assume their recommendation would be the sentence imposed. (T8/878-9) The Court and the parties also discussed the information that would be provided regarding co-defendant McMillian having been deemed legally incompetent and the legal effect of mental incompetence in terms of being tried for the crimes committed in the case at bar. (T8/879-80)

Mr. Combs then gave an opening statement. He indicated that he was going to rely primarily on evidence already introduced during the guilt-innocence phase to prove the existence of the following aggravating factors: the homicide was committed during the course of robbery; the homicide was carried out in a cold, calculated and premeditated manner ("CCP"); the murder was especially heinous, atrocious and cruel ("HAC"); that Mr. Cannon had previously been convicted of a violent felony; that at the time of the murder, Mr. Cannon was previously convicted of a felony and under supervision by the Office of Probation and Parole; and the murder was committed for financial gain. (T/891-5)

Mr. Taylor then spoke on behalf of Mr. Cannon. He emphasized Mr. Cannon's youth and willingness to help out the family at their farm, and that the alternative to the death penalty would be life in prison without the possibility of parole. (R8/896-7) He added that co-defendant McMillian had been determined to be mentally retarded and therefore would not face the death penalty. (R8/898) He emphasized that the aggravating factors raised by the state had to be proven beyond a reasonable doubt. (T8/899)

Ms. Nekia Germany, a Correctional Probation Senior Officer, (T8/900), testified that Mr. Cannon started his supervised release after being

released from prison on October 4, 2009 in Leon County Circuit Court Case No. 2004-CF-3842. (T8/901-02).

The State next produced victim impact statements from three witnesses. The first victim impact witness was Ms. Aliesha Morgan, the youngest daughter of the victim, Zachariah Morgan. (T8/903-04). She read a prepared statement. (T8/904) She said that Zachariah was married to Aliesha's mother, Lena Morgan, until his death. (T8/904) He fathered four children and had two grandchildren. (R8/905) He worked at Florida State Hospital for 30 years and had his own business as a painter. (T8/905). Zachariah's favorite pastime was fishing. (T8/905). Zachariah taught his children the value of spirituality and financial responsibility. (T8/906)

The second victim impact witness was Isaiah Morgan, the brother of the victim. (R8/908) Isaiah was a minister at the Greater United Church of Christ Written In Heaven Corporation. (R8/908) Zachariah was a deacon in the same church. (T8/908) Zachariah painted the church and many houses for Habitat for Humanity as well as the house of Isaiah's neighbor. (T8/909) Zachariah sometimes cooked fish for the Jerusalem Mount Olive Community Association, a community organization. (T8/910)

The third victim impact witness was Sean Neel, Zachariah's co-worker. (T8/911-12) Neel and Zachariah enjoyed fishing together. (T8/912)

Neel allowed Zachariah to take Neel's young son fishing. (T8/912). Neel traveled with him five times in one year to fishing tournaments. (T8/915).

Defense counsel moved for a mistrial on the basis of Aliesha crying during her testimony and Isaiah wearing his pastor's collar and telling the jury that his family believes in God and wants justice. (T8/918) The court stated that Aliesha's tone was appropriate and that Isaiah's statement did not warrant a mistrial. (T8/921) The court instructed the jury to disregard Isaiah's statement that his family believed in God and wanted justice to be served. (T8/924) The court also re-read an instruction to not consider the victim impact statements as aggravating circumstances. (R8/924).

Defense counsel then called Johnny Cannon, the Defendant's father. (T8/924-31) The Defendant regularly worked with Johnny on Johnny's farm in 2009 and 2010. (T8/931) The Defendant was a dependable worker and a valuable member of Johnny's farming team. (T8/931-32) When the Defendant was working with Johnny, he would help other family members financially. (R8/933) When the Defendant was a teenager, he received government loans for agricultural purposes. (T8/934) The Defendant dropped out of school in the ninth or tenth grade and was a good farmer up through Christmas of 2010. (T8/936)

Defense Counsel next called Dora Cannon, Johnny Cannon's wife and the Defendant's mother. (T8/939-40) Growing up, the Defendant helped his father in the farming business. (T8/942) He liked to babysit his nieces and nephews. (T8/942) When the Defendant was growing up, Dora did not have any concerns about leaving any infants in his care. (T8/947)

The court engaged Mr. Cannon in a right to silence colloquy outside the presence of the jury, and the Defendant stated that he decided to remain silent. (T8/950)

Defense counsel objected to the giving of the cold, calculated, and premeditated (CCP) jury instruction on the ground that the instruction was too vague and violated the Defendant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (T8/955) The court overruled the objection. (T8//955)

A charge conference followed. (T8/951-67) The Court then instructed the jury on the law applicable to the penalty phase. (T8/967-82)

Mr. Combs made his closing argument for the State. (T8/982-97) Mr. Taylor made his closing argument for the Defendant. (T8/997-1006) The Court dismissed the jury to deliberate. (T8/1006) The jury returned, advising the Court that it recommended the death sentence as to Count I of the Indictment by a vote of 9-3. (R2/210)

The *Spencer*[1] Hearing

At the beginning of the Spencer hearing, Mr. Combs discussed the pre-sentence report ("the PSR"), noting that Mr. Cannon qualified as a prison release reoffender. (Spencer/4) Defense counsel objected to the parts of the PSR that includes a host of statements from co-defendant McMillian. (Spencer 5) The state did not object and the Court noted that it would not consider those statements. (Spencer/5) A sentencing guidelines score sheet was offered without objection concerning the counts other than Count I.

Mr. Combs then offered victim impact testimony. Mrs. Leena Morgan is the wife of Zachariah Morgan. (Spencer/7) She testified that her husband was a man of integrity. (Spencer/8) He would help recently released inmates get jobs. (Spencer/8) Their children no longer have a father. (SH 8) The sheriff's office was very kind to her. (Spencer/8).

Daisy Morgan Hadley was Mr. Morgan's sister. (Spencer/9) She testified that he was a man of his word and liked by all races. (Spencer/10) He was not a man of prejudice. (Spencer/11) Isaiah Morgan was the deceased's brother. He missed his brother who was kind to everyone. They had many good times together. (Spencer/12) His brother's loss seemed to

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1 *Spencer v. State*, 615 So. 2d 68 (Fla. 1993).

have just happened that day although it had been two years since his death. Mr. Morgan worked in the church and helped everyone. (Spencer/13-14)

Joseph Morgan is the brother of the deceased. (Spencer/15) He wanted to speak for his son who thought highly of the deceased. Joseph was very close to his brother as they did many things together, and he recited an incident when a perfect stranger came up to him and noted his respect for Mr. Morgan. (Spencer/16-17) His brother cannot be replaced. (Spencer/19)

Derrick Morgan was one of the deceased's sons. (Spencer/20) His father believed in justice and was a fair man. (SH 20) He also believed in the death penalty. (Spencer/21)

Counsel for the parties then presented certain arguments and evidence.

The State argued that the Court could consider statutory aggravating circumstances not presented to the jury based upon the decision in *Hoffman v. State*, 474 So. 2d 1178 (Fla. 1985) (Spencer/22) The aggravator he asked the Court to consider was that the homicide was committed to avoid arrest as set forth in Section 921.141(5)(e), Florida Statutes. (Spencer/22-25) Mr. Combs pointed out that the Defendant knew the victim and the victim knew him. (Spencer/22) Therefore the witness elimination aggravator should

apply. The defense objected. (Spencer/25, 26) The Court said that it would take the matter under advisement. (Spencer/26)[2]

The defense introduced Mr. Cannon's school records as Ex. 1. and a written statement from Mr. Cannon's friend, Ms. Latoya James, as Ex. 2. (Spencer/30-1) Counsel asked the Court to make the entire court file regarding Mr. McMillian a part of the file in the case at bar. The state did not object (SH 27-8) and the Court granted the request. (Spencer/ 28-30)

The defense then presented the testimony of Dr. Terry Leland, a licensed psychologist. Dr. Leland interviewed Mr. Cannon seven or eight times. (Spencer/36) He found M. Cannon to have an IQ of about 77, which put him in the range between low average and mental retardation. (S/ 37) This put Mr. Cannon into the low end of the low average range of intelligence. (Spencer/ 39) He felt that Mr. Cannon suffered from a depressive disorder. (Spencer/ 43) He suffered from alcohol abuse before his incarceration. (Spencer/ 44) Mr. Cannon's sister was serving life in prison for murder and a half brother had a prior murder conviction. (Spencer/48) He noted that he felt Mr. Cannon had narcissistic traits. (Spencer/49) Dr. Leland said that Mr. Cannon doesn't "feel the full range of

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[2] The trial court eventually rejected this aggravator, affording it no weight. (R2/329).

things." (Spencer/50) He has a personality disorder that compelled him to go to trial instead of taking a plea that would avoid the death penalty. (Spencer/51-3) Had he not suffered from this personality disorder, he would have had the good sense to take the plea offer. (Spencer/53)

On cross-examination, Dr. Leland said that he did not know why he had not been asked by defense counsel to prepare a report of his examination and testing of Mr. Cannon. (Spencer/55) He first had contact with Mr. Cannon in March of 2012. (Spencer/55) He was given an arrest report and spoke with the defense team and its investigator. (Spencer/55) He reviewed DOC files, which included some psychological records. (Spencer/56) He was not sure if he saw any IQ test results. (Spencer/56) Cannon was not classified as ESE. (Spencer/57)

Dr. Leland did not believe that Mr. Cannon was mentally retarded. (SH 58) In all the capital cases where he has been a witness, it was for the defense. (SH 58) He did not consider the matter of adaptability when considering the issue of mental retardation. (Spencer/58-9) He felt Mr. Cannon fell into the borderline to low average category of intelligence. (Spencer/ 59) Cannon scored 89 on perceptual reasoning, 86 on working memory and an 86 on processing speed. (Spencer/60) He was aware that Cannon had previously been convicted of armed carjacking and kidnapping.

(Spencer/61) The DOC testing revealed that no mental health services were necessary. (Spencer/62) He was not exhibiting classic overt symptoms of anxiety and depression. (Spencer/63) Dr. Leland conceded that being in a county jail can cause depression. (Spencer/64) He also indicated that Mr. Cannon's narcissistic traits could be a risk factor in prison. (Spencer/65) He felt Mr. Cannon's reason for rejecting a plea offer of life in prison without the possibility of parole was a logical one. (Spencer/ 66)

By agreement with the state, the defense advised that it would be sending over DOC records regarding some of Mr. Cannon's family members. (Spencer/ 68) Mr. Cannon was offered but declined the offer to testify in his own behalf. (Spencer/ 75)

The Sentencing Order

In sentencing Mr. Cannon to death, the trial court determined that the following aggravating factors had been proven by the state beyond a reasonable doubt:

1. Mr. Cannon was previously convicted of a felony and was on felony probation in Leon County Circuit Court Case No. 2004-CF-3842 at the time of the murder of Mr. Morgan. Assigned great weight. R2/317; §921.141(5)(a), Fla. Stat. (2010).

2. The defendant was previously convicted of a felony involving the use or threat of violence to another person. Assigned very great weight. (R2/317-20; §921.141(5)(b), Fla. Stat.)

3. The homicide was committed while Mr. Cannon was engaged in the commission of or an attempt to commit robbery. Assigned moderate weight. R2/320; §921.141(5)(d), Fla. Stat. (2010).

4 The homicide was committed while Mr. Cannon was engaged in the commission of or an attempt to commit arson. Assigned no weight since it merged with aggravator no. 3 above. R2/320-1; §921.141(5)(d), Fla. Stat. (2010).

5. The homicide was committed for financial gain. Assigned no additional weight since it merges with aggravator no. 3 above. R2/321; §921.141(5)(f), Fla. Stat.

6. The homicide was especially heinous, atrocious or cruel. Assigned only substantial weight. R2/321-6; §921.141(5)(h), Fla. Stat.

7. The capital felony was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. R2/326-29; §921.141(5)(i), Fla. Stat. Assigned great weight.

The trial court determined that none of the mitigating circumstances as set forth under Section 921.141(6)(a)-(g), Florida Statutes, was proven by

a preponderance of the evidence. In so doing, the trial court specifically rejected the mitigator that Mr. Cannon was a minor participant in the homicide. (R2/330-1) However, the trial court found there were several "non-statutory" mitigating circumstances established by a preponderance of the evidence per subsection (h) of this statute as follows:

Defendant acted appropriately during the trial, given minimal weight.

Defendant did not resist arrest when apprehended. Minimal weight.

Defendant had limited education. Given very little weight.

Despite educational shortcomings, defendant applied for and received farming grants. Given very little weight.

Defendant worked hard in family farming business including getting farming grants. Given very little weight.

Defendant was good provider to family and his stepchildren. Given very little weight.

Defendant was loving person to siblings and their children. Given little weight.

(R2/331-36)

Proportionality

The trial court then addressed the defense argument that a death sentence imposed upon Mr. Cannon would be constitutionally

disproportionate to a life sentence for Mr. McMillian or to no sentence at all given the fact that Mr. McMillian had been deemed incompetent to be tried and more than likely mentally retarded. The trial court rejected all of these defense arguments finding that no weight should be given to the circumstances regarding Mr. McMillian. (R2/336-40)

Non-statutory Mitigation based upon Testimony of Dr. Leland

The trial court then considered additional mitigating circumstances related to Mr. Cannon's character and the testimony of Dr. Leland as follows:

A low IQ. Given little mitigation weight.

Emotionally impoverished family dynamic. Given very little weight.

Siblings imprisoned during Mr. Cannon's youth. Very little weight.

Other mental health diagnoses and symptoms. Very little weight.

Mr. Cannon's testimony on behalf of the Leon County carjacking case. Given very little weight.

Statutory Mitigation not addressed by the Defense

The trial court then found that the defense had not established the existence of the statutory mitigators referenced in Sections 921.141(6)(a)-(c) and (e)-(g), Florida Statutes (2010). The court then imposed the death penalty on count one. This appeal follows.

SUMMARY OF ARGUMENT

On issue one, the trial court erred in using the violent nature of Appellant's prior conviction for carjacking as justification for giving great weight to the prior felony and probation aggravator, and then using the same carjacking conviction to find and give great weight to the prior violent felony aggravator. The violent nature of the carjacking conviction was the only fact or characteristic of the carjacking not already taken into account in finding the prior felony and probation aggravator. By using that fact to give greater weight to the first aggravating circumstance, further consideration of the violent nature of the carjacking in finding the prior violent felony aggravator amounted to impermissible double counting.

On issue two, the trial court erred in vicariously applying the HAC aggravator to Appellant for conduct committed by a co-defendant. The greater weight of evidence shows that co-defendant McMillian stabbed and killed the murder victim, and there was no evidence that this was done at the direction of Appellant or with his knowledge. Appellant's stabbing of Sean Neel at the scene is not sufficiently similar or connected to the brutal manner in which the co-defendant killed Zachariah Morgan to support vicarious application of the HAC aggravator. In addition, Appellant's own conduct

did not inflict cruelty on Mr. Morgan because Morgan's awareness of Mr. Neel's injuries would not have put him in fear of his own impending death.

On issue three, the trial court erred in sua sponte changing the jury instruction for attempted voluntary manslaughter and reinstructing the jury. The new instruction did not define justifiable or excusable homicide, and added a requirement that the act caused the death of the victim, which is not an element of attempted manslaughter..

On issue four, the evidence is insufficient to prove a robbery of Zachariah Morgan. The State could not prove there was money in Mr. Morgan's wallet before it was taken. Sean Neel's testimony that it was "nothing uncommon" for Morgan to carry cash was insufficient to prove habit. An ATM receipt showing a recent bank withdrawal was not conclusive because there was no testimony about what Morgan did with that money. The wallet itself was not shown to have any value, so the mere taking of the wallet was insufficient to prove taking property of some value.

On issue five, the evidence is insufficient to sustain a conviction for the attempted robbery of Sean Neel. Neither Appellant nor his accomplice ever demanded, asked for, or attempted to take anything from Mr. Neel. Appellant stabbed Mr. Neel without warning. Mr. Neel ran from the scene before anything was taken and admitted he didn't know why he was stabbed.

On issue six, the evidence was insufficient to prove arson. The state fire marshal excluded non-human causes of the fire to Zachariah Morgan's truck, but could not say whether the fire was intentional or not. No accelerants were used, and common combustibles like paper on the back seat were the point of origin. The state's expert admitted that a dropped lighter or cigarette could have started the fire. Appellant, the co-defendant, and Mr. Morgan were all still in the pickup truck when the only testifying eyewitness fled the scene. He could not see which of them started the fire, and none was excluded by the evidence. Therefore, the State failed to prove the necessary element of causation by either Appellant or the co-defendant under a principal theory.

On issue seven, the court failed to properly instruct the jury in response to a question that arose during deliberations. The jurors asked if they had to cite specific evidence supporting the attempted robbery, in light of the fact that there was no clear taking of Sean Neel's wallet or prepayment of corn like there was with Zachariah Morgan. Defense counsel requested reinstruction on single defendant/multiple counts, to ensure that the jury considered the robbery and attempted robbery separately. The court construed the question as one about circumstantial evidence and refused the instruction, instead telling the jury they only had to fill out the verdict form.

The court also failed to clarify that failing to deliver corn that Mr. Morgan had already paid for would not constitute a robbery.

On issue eight, the court erred in admitting prejudicial hearsay statements by the decedent through the testimony of Sean Neel. These statements went far beyond establishing a logical sequence of events, and demonstrated ill will between Appellant and Mr. Morgan about the corn transaction, bad character on Appellant's part, and a possible motive for robbery and premeditated murder.

On issue nine, the sentence of death is disproportionate in light of the improperly considered aggravating circumstances and the co-defendant's immunity from the death penalty. Although the co-defendant's mental retardation is mitigating, his role as the killer is aggravating. Under the totality of the circumstances, the co-defendant's overall culpability is comparable to Appellant's and should have been considered.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONSIDERING PRIOR VIOLENT FELONY AGGRAVATOR WHERE VIOLENT NATURE OF PRIOR CONVICTION WAS ALREADY USED TO JUSTIFY ASSIGNING GREAT WEIGHT TO PRIOR FELONY AND PROBATION AGGRAVATOR, RESULTING IN IMPERMISSIBLE DOUBLE COUNTING

The trial judge erred in considering and assigning very great weight to the prior violent felony aggravator in support of imposing the death penalty. The court had already considered the violent nature of the prior conviction in assigning great weight to the prior felony and probation aggravator. To consider the same factor again in support of a second aggravator resulted in impermissible double counting.[3] A trial court's ruling on an aggravating circumstance is a mixed question of law and fact, and will be sustained on appeal if the court applied the right rule of law and competent and substantial evidence supports the trial court's findings. *Ford v. State,* 802 So. 2d 1121 (Fla. 2001). *Lynch v. State*, 841 So. 2d 362 (Fla. 2003).

Section 921.141(5)(a) provides that it is an aggravating circumstance supporting imposition of the death penalty if a person commits a capital felony having previously been convicted of a felony and while under sentence of imprisonment or placed on community control or felony probation. The trial judge found this circumstance proven based on

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[3] Note the standard of appellate review referenced here.

Appellant's prior conviction for carjacking in Leon County Case No. 2004-CF-3842, for which he was on probation at the time of the instant offenses.

Section 921.141(5)(b) provides that it is also an aggravating circumstance if the person was previously convicted of another capital felony or a felony involving the use or threat of violence. The trial judge also found this aggravator proven based on Appellant's same conviction for carjacking in the Leon County case.

Generally, the court is permitted to find both aggravators. See *Patrick v. State*, 104 So. 3d 1046 (Fla. 2012) (holding that concurrent use of prior violent felony and felony supervision aggravators is not improper doubling). Improper double counting only occurs when two aggravating factors refer to the same aspect of the crime. *Id*. In this case, however, the judge specifically and expressly cited the violent nature of the prior felony conviction for which Appellant was on probation as the reason for assigning great weight to that aggravating circumstance. The court stated:

> Because Mr. Cannon was on felony probation for a violent felony at the time of Mr. Morgan's murder, I assign this circumstance great weight. See, Blake v. State, 972 So. 2d 839, 847-848 (Fla. 2007) (noting less weight accorded because defendant was on probation for non-violent driver's license offenses at the time of the murder).

(R2/317). It is clear from the order that the court considered not only the fact of a prior violent conviction and the fact that Appellant was under sentence of probation at the time of the murder, but also considered the seriousness of the prior felony conviction in deciding how much weight to accord this aggravating circumstance.

As a result, the violent character of the prior carjacking conviction was already taken into account by the court when considering the prior felony and probation aggravator under § 921.141(5)(a). However, the court considered that same fact again when finding the prior violent felony conviction aggravator in subsection (5)(b) and assigning it great weight. When the same prior conviction is used to support both aggravating circumstances, the only difference between the prior felony and probation aggravator in subsection (5)(a) and the prior violent felony aggravator in subsection (5)(b) is the violent nature of the conviction.

This Court has previously upheld consideration of both aggravators, but the rationale for doing so is absent in this case. For example, when the "under sentence" and prior violent felony aggravators are not based on the same essential feature of the crime or of the offender's character, they can be given separate consideration. *Agan v. State*, 445 So. 2d 326 (Fla. 1983). Consideration of both aggravators is generally permissible because the

previous conviction and parole or probation status are two separate and distinct characteristics that are not based on the same evidence and essential facts. *Waterhouse v. State*, 429 So. 2d 301, 307 (Fla. 1983). Much like a double jeopardy analysis, dual aggravators are allowed because each requires proof of a fact that the other does not.

The instant case is distinguishable because all of the essential facts and characteristics of the prior violent felony conviction have already been taken into account in finding the prior felony and probation aggravator and assigning it great weight. There are no additional facts or circumstances surrounding the carjacking conviction that make it "separate and distinct" as contemplated in *Waterhouse*.

Having already found the prior felony and probation aggravator proven and accorded it great weight based on the violent character of the carjacking conviction, the trial court erred in assigning any weight to the prior violent felony aggravator based on the same prior violent felony conviction. This amounted to impermissible double counting, and resulted in a denial of due process and violation of the prohibition on double jeopardy. The sentencing order imposing the death penalty based on this aggravator should be reversed.

II. THE TRIAL COURT ERRED IN APPLYING HAC AGGRAVATOR TO APPELLANT VICARIOUSLY FOR CONDUCT COMMITTED BY CO-DEFENDANT ABSENT PROOF OF DIRECTING OR KNOWING

The trial court erred in applying the especially heinous, atrocious and cruel aggravating circumstance (hereinafter "HAC") to Appellant and assigning it weight in support of imposing the death penalty. Although the murder victim was stabbed approximately thirty times in a heinous, atrocious and cruel manner, the State failed to prove that Appellant was the person who stabbed him. To the contrary, the evidence showed that co-defendant McMillian probably stabbed the victim, and the State failed to prove by competent and substantial evidence that the actions of the co-defendant were done at the direction of Appellant and with his knowledge. Therefore, the HAC aggravator cannot be applied vicariously to Appellant.

The standard of review of a trial court's finding of an aggravating circumstance is for competent and substantial evidence. *Lynch*, 841 So. 2d 362. When the State relies on circumstantial evidence to prove the aggravating circumstance, the evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor. *Mahn v. State*, 714 So. 2d 391 (Fla. 1998).

a. <u>Antone McMillian committed the murder</u>

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. Despite the presence of several knives at the scene and in the victim's truck, including at least one belonging to the victim, only one knife was connected to the stabbing of the victim. A piece of that knife was broken off and embedded in the skull of the victim, a fact verified by forensic match (T4/435-6)

That knife was shown to be in the sole possession of co-defendant Antone McMillian. McMillian was detained in a patrol car in which the knife was found, and admitted to law enforcement officers that he had placed it there. (T3/ 334-5, 342) Appellant left the scene before that patrol car arrived and was never near it. He was also observed by an eyewitness running from the scene in the opposite direction of Mr. McMillian. Thus, there is absolutely no evidence that Appellant provided the weapon to McMillian either before or after the stabbing of the victim.

McMillian told Investigator Faison that the knife they were looking for was in the Gretna Police car. (T3/334-5) This suggests that only one knife was used to kill Zachariah Morgan and McMillian knew that to be true because he was the one who did it. This is corroborated by the medical

examiner's testimony that all of Morgan's stab wounds could have been inflicted by that single knife. (T4/413)

In addition, trace evidence possibly including McMillian's DNA and excluding Appellant's DNA was found under the victim's fingernails, suggesting that Morgan may have come into close physical contact with McMillian during the struggle for his life and that McMillian was his primary assailant. (T5/576) The FDLE analyst testified that the fingernail scrapings included blood and at least one foreign DNA source. (T5/576)

The sole eyewitness to the incident, Sean Neel, did not testify to any physical contact between Morgan and McMillian before Neel ran away from the scene. Thus, the contact must have occurred after Neel left and during the time when the fatal stabbing of the victim took place. This is further evidence that McMillian was the killer and Appellant was not.

Furthermore, Morgan's blood was found on McMillian's face (T5/576-7), and on a camouflage jacket containing McMillian's ID card (T3/284-5; T5/564). Although Morgan's blood was also found on Appellant's tee-shirt, the presence of blood on McMillian's face suggests that he was in much closer proximity to the victim when the stabbing wounds were inflicted and bleeding occurred, as opposed to afterward, further identifying McMillian as the probable killer.

b. Vicarious application of HAC aggravator

The trial court assumed without deciding that Mr. McMillian inflicted all of the stab wounds to Mr. Morgan, but then applied the HAC aggravator vicariously to Appellant and gave it substantial weight. (R2/326)

The HAC aggravator cannot be applied vicariously to one defendant based on the actions of another absent a showing by the State that the defendant directed or knew how the victim would be killed. *Williams v. State*, 622 So. 2d 456 (Fla. 1993); *Perez v. State,* 919 So. 2d 347 (Fla. 2005) (citing *Omelus v. State,* 584 So. 2d 563 (Fla. 1991). A defendant's presence at the scene of the murder does not make him accountable for a co-defendant's cruelty under the HAC aggravator. Evidence of direction and knowledge of the manner of death is required. *Perez.*

The State did not introduce any testimony by Sean Neel or any other witness that Appellant directed McMillian to stab Mr. Morgan or knew that he would do so thirty times in a heinous, atrocious or cruel manner. The trial court reasoned that Appellant intended the manner or Mr. Morgan's death because his stabbing of Sean Neel was simultaneous with and identical to the manner in which Mr. Morgan was killed (Sentencing Order p. 29). Neither of these findings is supported by competent and substantial evidence in the record.

First, there is no evidence that the stabbings of the two victims occurred simultaneously. To the contrary, Sean Neel testified that he was quickly stabbed twice in the neck while still inside the truck, and then fled the scene without ever seeing anyone strike or stab Mr. Morgan (T1/118-9). Witnesses did not return to the truck until several minutes later. Mr. Morgan's body was then discovered outside the truck with many stab wounds, including defensive wounds indicating a struggle (T4/401).

The manner of the killing was also not identical to the stabbing of Sean Neel. Irrespective of what the State argued might have happened had Sean Neel not escaped, the fact remains that he received only two non-lethal stab wounds to the neck, and remained strong enough to escape the scene and run to a neighboring farmhouse. On the other hand, Mr. Morgan received 30 stab wounds to the face, forehead, neck and torso. His carotid artery and jugular vein were cut. The stab wounds to the face went completely through into the mouth cavity. Morgan sustained cuts to his hands and arms while apparently defending himself, yet his killer continued to press the attack. A piece of the knife was broken off in his skull (T4/402-410). The medical examiner testified that Mr. Morgan would have lived for several minutes and continued to struggle after sustaining these fatal injuries (T4/412, 417). Thus, the injuries that Anton McMillian inflicted on Mr.

Morgan indicate much more cruelty and prolonged suffering than what Appellant inflicted on Sean Neel.

Contrary to the trial court's findings, Appellant's act of stabbing Sean Neel twice is not proof that he intended the cruel manner in which McMillian killed Mr. Morgan. Appellant stabbed Neel from behind quickly and without warning, whereas Mr. Morgan faced and fought back against his attacker at close range, as evidenced by the fingernail scrapings and blood spatter on McMillian's face.

It was not even established that Appellant was present when McMillian inflicted the stab wounds. Witnesses across the street reported seeing a man running toward the interstate, and it is possible that Appellant had taken Morgan's wallet and begun fleeing the scene before McMillian killed Mr. Morgan. Appellant's DNA was excluded as a possible contributor to a touch DNA mixture detected on the back pants pockets from which Mr. Morgan's wallet was taken, while McMillian's DNA was a potential contributor (T5/570). Thus, it is possible that Appellant was not even the person who removed the wallet, but that McMillian did so and Appellant obtained the wallet from him or retrieved it from the ground.

There was no evidence of any physical contact between Appellant and Mr. Morgan, as all of Appellant's aggressive actions were directed at Mr.

Neel. *Cf. Cave v. State*, 727 So. 2d 227 (Fla. 1998) (finding that defendant was sufficiently involved and culpable in murder committed by accomplice to warrant application of HAC aggravator where defendant personally removed victim from store at gunpoint and put victim in the car); *Copeland v. State*, 457 So. 2d 1012 (Fla. 1984) (upholding HAC aggravator where defendant was equal participant in murder and who confronted victim at gunpoint and provided murder weapon to the accomplice). In this case, the State failed to prove that Appellant had any physical contact with Mr. Morgan or directly threatened him with a weapon while he was still alive.

The court also found that Appellant's conduct after the killing is consistent with his intent that the crimes occur because he took Mr. Morgan's wallet and fled without calling for help. However, knowledge that the crime will be committed is insufficient. The State must prove the defendant's knowledge of the cruel manner in which the crime will be committed. *Omelus v. State,* 584 So. 2d 563 (Fla. 1991, supra.

Even assuming that Appellant knew McMillian would kill Mr. Morgan with a knife, there is no evidence that he knew or intended that McMillian stab him 30 times, a key fact cited in the trial court's sentencing order as justification for the HAC aggravator. *Cf. Archer v. State*, 613 So. 2d 446 (Fla. 1993) (reversing vicarious application of HAC aggravator

where defendant knew accomplice would use handgun to kill victim but didn't know he would shoot him four times while he begged for his life). It is the infliction of numerous and vicious stab wounds that warrants application of the HAC aggravator. Appellant's conduct alone does not rise to that level, nor does it prove that Appellant intended for McMillian to stab Mr. Morgan as many times as he did.

The trial court referred to Mr. McMillian's mental retardation and diminished mental capacity when assuming that Appellant had to be the leader and organizer of the crime. However, this results in improper burden shifting, forcing Appellant to disprove that he was directing or knowing of Mr. McMillian's actions rather than holding the State to their burden of proving that such direction or knowledge existed. If Mr. McMillian's mental deficits did not prevent him from stabbing Mr. Morgan thirty times, then those deficits, standing alone, are not competent and substantial evidence of the direction and knowledge required for vicarious application of the HAC aggravator.

Finally, perhaps sensing that the evidence supporting vicarious application of the HAC aggravator was insufficient, the court then found that a "significant part of the cruelty experienced by Mr. Morgan occurred when Mr. Cannon stabbed Mr. Neel twice in the neck." The court reasoned that

this was evidence of Appellant's cruelty because Mr. Morgan became aware of his own mortal peril (R2/325). This is insufficient evidence of cruelty to make Appellant's conduct *especially* heinous, atrocious or cruel.

Awareness of the suffering of other victims only rises to the level of cruelty within the meaning of the HAC aggravator if the murder victim(s) "clearly understood their impending deaths because they saw the other victims were being systematically eliminated." *Hall v. State*, 87 So. 3d 667, 676 (Fla. 2012) (Pariente, J., concurring in part and dissenting in part).

In this case, Appellant's rapid stabbing of Sean Neel was not the type of systematic elimination of another victim that would suggest to Zachariah Morgan that he himself was about to die, nor was it indicative of intent to inflict pain or the prolonged and tortuous suffering for which the HAC aggravator is intended. Thus, Appellant's conduct is insufficient to establish HAC if McMillian's vicarious conduct is not also applied. Accordingly, the evidence is insufficient to support application of the HAC aggravator in this case, and that finding should be reversed.

III. THE TRIAL COURT REVERSIBLY ERRED IN SUA SPONTE REINSTRUCTING JURY ON ATTEMPTED VOLUNTARY MANSLAUGHTER

The trial court erred in giving a misleading and incomplete instruction on attempted voluntary manslaughter. The standard of review for jury instructions is abuse of discretion, but the court's discretion is strictly limited by case law. *Krause v. State*, 98 So. 3d 71 (Fla. 4th DCA 2012). It is an abuse of discretion to give instructions which are confusing, contradictory, or misleading. *Armstrong v. State*, 73 So. 3d 155 (Fla. 2011).

During the original jury charge, the judge read Std. Instruction 6.6 on Attempted Voluntary Manslaughter as a lesser included offense on count two. After the State gave its closing argument, the court then changed the instruction on its own motion (T6/766-8). The court did this while the jury was present, and did not conduct a charge conference to receive input from the attorneys or afford them an opportunity to object. Correcting what it perceived to be a Montgomery[4] error regarding the element of intent, the Court reinstructed the jury as follows:

> To prove the lesser crime of attempted voluntary manslaughter, the State must prove to [sic] following element beyond a reasonable doubt. Marvin Cannon committed an act which was intended to cause the death of Sean Neel, and would have resulted in the death of Sean Neel,

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

> except that someone prevented Marvin Cannon from killing Sean Neel, or he failed to do so. However, the defendant cannot be guilty of attempted voluntary manslaughter if the attempted killing was excusable or justifiable *as I have previously explain* [sic] those terms.
>
> 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.
>
> Now turn with me to page 12. In order to convict of attempted manslaughter by act, it is not necessary for the State to 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*. That's the extent of the corrections on the jury instructions.

(T6/767-8) (emphasis added). Page 12 refers to Standard Jury Instruction 7.7 on Manslaughter by Act, which was provided to the jury in written form to follow as the court read it.

This instruction was erroneous in two respects. First, by referring the jury to the instruction for completed manslaughter, the court erroneously required the jury to find that Appellant committed an act that caused death before they could find him guilty of attempted voluntary manslaughter as a lesser included offense of attempted murder. The death of the victim is not an element of attempted manslaughter. Rather, the court should have instructed the jury that the State had to prove Appellant intentionally

committed an act which would have caused death had he not been prevented or failed. As given, the instruction is misleading because it is not clear whether the court was referring to the death of Sean Neel, the alleged victim of the attempted murder in count two, or Zachariah Morgan, the victim of the completed murder alleged in count one.

Thus, in seeking to avoid a *Montgomery* error, the trial court essentially committed one by adding an additional element to a lesser included offense that was neither alleged in the indictment nor an element of the greater charge of attempted murder. Requiring the jury to find that the act caused death required greater proof for the lesser-included offense than for the greater offense. This prevented the jury from exercising their pardon power and finding Appellant guilty of this lesser offense.

Second, the instruction was incomplete because it failed to include a reinstruction on justifiable or excusable homicide. Because manslaughter is a residual offense that is only defined by the exclusion of lawful killings, any instruction on manslaughter must also include an instruction defining justifiable and excusable homicide. *Pena v. State*, 901 So. 2d 781, 786-787 (Fla. 2005); *Hedges v. State*, 172 So. 2d 824 (Fla. 1965). Standard Instruction 6.6 expressly extends this rule to an instruction on attempted manslaughter, directing the court that any reinstruction on attempted

voluntary manslaughter must include a reinstruction on justifiable and excusable homicide. The court failed to do this.

Appellant was convicted of attempted first-degree murder. Because attempted voluntary manslaughter is two steps removed from that offense, the error is not fundamental and is subject to harmless error analysis. *Pena*, 901 So. 2d at 787; *State v. Lucas*, 645 So. 2d 425 (Fla. 1994). However, the error was harmful in this case because there was evidence supporting a justifiable or excusable attempted homicide of Sean Neel.

Neel testified that he was very suspicious of Appellant as they rode together in Mr. Morgan's truck. Neel thought Appellant was faking a cell phone call and making furtive movements in the back seat (T1/113-14). He admitted having a sinking feeling that something bad was going to happen (T2/146). In addition, there was a butcher knife within Neel's ready reach in or on the center console of the truck, a fact known to Appellant when Neel and Morgan rearranged the items in the truck, including the knife, to make room for him and Mr. McMillian to sit (T2/144-45).

More importantly, Mr. Neel admitted to arming himself with the knife during his confrontation with Appellant. Although Neel testified that he did not pick up the knife until after Appellant stabbed him the first time, he admitted that things happened very quickly and he wasn't sure of the exact

order of events (T2/147). Trial counsel also impeached Neel with a prior inconsistent statement in deposition that suggested he armed himself sooner. Neel admitted on cross-examination that at the time of being stabbed, he somehow had that knife in his hand (T2/150). He also admitted to making the following pretrial statement:

> When I heard Marvin Cannon, when he lined up with me is, is what I'm saying, I'm thinking it took place. Because he made a movement back there and I got hit. As the knife is going into me, I probably had that knife in my hand.

(T2/152). This testimony suggests that Neel armed himself with the knife when he heard Appellant making movements in the back seat and suspected trouble brewing, not in response to being stabbed. If Neel grabbed the butcher knife prior to being stabbed, this would support an argument that Appellant reacted in self-defense to an imminent attack by Sean Neel, and that the attempted homicide of Neel was justifiable or excusable.

As a result, the erroneous and misleading reinstruction on attempted voluntary manslaughter was not harmless beyond a reasonable doubt. The conviction on count two for attempted murder should be vacated, and this case remanded for retrial on that count.

In addition, the court considered the attempted homicide of Sean Neel as one of two prior violent felonies supporting an aggravating factor for

imposition of the death penalty. The court found that both the attempted homicide of Neel and a prior carjacking were proven beyond a reasonable doubt, merged the two, and then assigned that aggravator very great weight. Appellant also challenges the propriety of using the carjacking conviction to support this aggravating circumstance (see Issue I, supra). Therefore, reversal of the attempted murder conviction on count two means the prior violent felony aggravator should not have been considered in imposing the death penalty on count one.

IV. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN CONVICTION FOR ROBBERY OF ZACHARIAH MORGAN

Appellant was convicted in count three of armed robbery of Zachariah Morgan. As to the taking element of robbery, the court instructed the jury that they had to find Appellant took a wallet or U.S. currency from Mr. Morgan (T6/707). The evidence was legally insufficient to support a conviction for robbery because the State failed to prove the taking of U.S. currency, and failed to prove that the wallet itself was property of some value. The sufficiency of the evidence is a question of law reviewed de novo on appeal. *Rasley v. State,* 878 So. 2d 473 (Fla. 1st DCA 2004).

To prove robbery, the State must prove that the defendant took property from the person or custody of the victim by force, and that the property taken was of "some value." *Holliday v. State*, 781 So. 2d 496, 498

(Fla. 5th DCA 2001). In this case, the State proved that Appellant took Mr. Morgan's wallet, but failed to introduce any testimony or evidence that the wallet itself, independent of any cash contents, was property of value.

A robbery conviction can be based on the taking of a wallet regardless of whether it contained any money; however, there must be evidence that the wallet itself had value. *See Armstrong v. State*, 931 So. 2d 187, 195 n.5 (Fla. 5th DCA 2006) (finding taking of wallet sufficient to prove completed robbery where witness testified to $12 purchase price of the wallet, establishing value). In this case, no witness testified that Mr. Morgan's wallet had any value, so the wallet itself was not properly the subject of a larceny, and taking the wallet is insufficient to sustain a conviction for robbery unless it contained U.S. currency as alleged in the indictment.

The State's evidence of U.S. currency consisted of (1) testimony from Sean Neel that it was "nothing uncommon" for Mr. Morgan to carry cash (T1/102), and (2) an ATM receipt showing that Mr. Morgan withdrew $400 from the bank on the day before the murder (T3/255, 286; T6/729). This evidence was insufficient to convince a rational trier of fact beyond a reasonable doubt that Mr. Morgan had U.S. currency in his wallet before Appellant took it on December 24.

Regarding Neel's testimony, evidence of habit is admissible to prove that an individual's conduct on a particular occasion was in conformity with the habit. § 90.406, Fla. Stat. (2010). However, evidence that a person has engaged in a particular type of conduct in the past is not, without more, admissible to prove that the person acted in the same way on the occasion in question. *Botte v. Pomeroy*, 497 So. 2d 1275, 1278 (Fla. 4th DCA 1986). To constitute a habit, the conduct must be a person's regular response to a repeated specific situation so that the response becomes semi-automatic. General conduct is not habit and is not probative. Charles W. Ehrhardt, *Ehrhardt's Florida Evidence,* Vol. 1, p. 325-6 (2013). In addition, the testimony must come from a person with adequate knowledge, and specific instances of conduct must have occurred routinely enough to permit finding that a habit was shown to exist. *Id*.

Neel's testimony was insufficient to establish that he had adequate knowledge of Mr. Morgan's cash-carrying habits to be able to testify about them, or that he had observed sufficient instances of conduct by Mr. Morgan to establish that they were so routine as to constitute a habit. Mr. Neel did not say that Mr. Morgan always carried cash, usually carried cash, had the habit of doing so, or anything to that effect. He only said that it was "nothing uncommon for him to have some cash on him." (T1/102). The

prosecutor attempted to lead the witness into saying more, but defense counsel objected and the court sustained. Mr. Neel gave no further testimony on the subject.

The fact that a specific instance of conduct is not unusual or not uncommon is a long way from saying it is so routine as to constitute a habit within the meaning of § 90.406. Mr. Neel's testimony was insufficient to show a habit and was not probative of whether Mr. Morgan was carrying U.S. currency on December 24.

The ATM receipt was also insufficient to prove that Mr. Morgan had U.S. currency on his person at the time of the murder. No witness testified to why Mr. Morgan withdrew that money on the 23rd or what he intended to do with it. No one said that Mr. Morgan put the money in his wallet, and Mr. Neel did not report seeing any cash on Mr. Morgan's person or in his wallet when they were riding together in the pickup truck. Mr. Neel did say that Mr. Morgan had prepaid for his corn purchase from Appellant (T1/96-7), so the fact that he was meeting Appellant to pick up the corn is also not evidence that he needed money with him. The receipt alone is insufficient to prove beyond a reasonable doubt that the money was in the wallet. He could just as easily have left it at home or spent it on Christmas presents.

Therefore, the State failed to prove the taking of any property of value from Mr. Morgan. *See Eutzy v. State,* 458 So. 2d 755 (Fla. 1984) (finding evidence of robbery insufficient where State failed to prove that victim had anything of value on him before the murder). Trial counsel moved for judgment of acquittal on this count based on the sufficiency of the evidence, but the court denied the motion (T5/606). Accordingly, the issue is preserved for appellate review and the conviction should be reversed.

V. THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN CONVICTION FOR ATTEMPTED ROBBERY OF SEAN NEEL

The State charged Appellant in count four with attempted robbery of Sean Neel. To prove attempted robbery, the State must show that the defendant had the intent to take money or property from the alleged victim, and committed an overt act that was capable of accomplishing the goal. *Green v. State*, 655 So. 2d 208 (Fla. 3rd DCA 1995). The sufficiency of the evidence is a question of law reviewed de novo on appeal. *Rasley v. State,* 878 So. 2d 473 (Fla. 1st DCA 2004). The standard of review is whether, taking the evidence in the light most favorable to the State, the evidence is sufficient to convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt. *Twilegar v. State*, 42 So. 3d 177 (Fla. 2010). However, when the evidence is wholly circumstantial, it must also be inconsistent with any reasonable hypothesis of innocence proposed by the defendant. *Id*.

The evidence was insufficient to show either intent or an overt act capable of accomplishing a robbery of Sean Neel. The stated purpose of Appellant's meeting with Zachariah Morgan was to complete a sale of deer corn. The State's theory was that Appellant staged the meeting in order to rob Mr. Morgan, supported by the fact that Mr. Morgan's wallet was taken and then abandoned along the route Appellant took from the scene.

However, there is no evidence that Appellant had any intent to rob Mr. Neel. Appellant had dealt exclusively with Mr. Morgan, who made the prepayment and all of the phone calls for both the prior and current corn transactions (T1/89-101). Sean Neel had no role in any of the arrangements (T2/141). He testified that he had never met Appellant or had any contact with him prior to December 24 (T1/100-101). There was no testimony that Appellant was even aware that Neel would be accompanying Mr. Morgan on that day. In addition, the corn was already paid for, and Neel testified that he wasn't carrying any money except one dollar in his pocket. There was no evidence that Appellant believed otherwise. Even assuming for the sake of argument that Appellant stabbed Neel to facilitate the subsequent robbery of Mr. Morgan's wallet, there is no evidence showing that the purpose of the stabbing was to facilitate a robbery of Mr. Neel.

More importantly, at no time did Appellant or McMillian ask Mr. Neel for money or demand anything from him (T2/148). Mr. Neel testified that Appellant began stabbing him in the pickup truck virtually without warning (T1/115-16; T2/142-43). Mr. Neel admitted on cross-examination that he really didn't know why Appellant stabbed him (T2/148).

Defense counsel moved for a judgment of acquittal on this count based on the insufficiency of the evidence (T5/604). Counsel argued that it is pure speculation on the State's part to conclude that the taking of Mr. Morgan's wallet is proof that Appellant intended to rob Mr. Neel as well. When the State charges multiple counts of robbery but only a single item was taken from one victim, the evidence supports only a single count of robbery and the second conviction must be vacated. *Nesbitt v. State*, 966 So. 2d 447 (Fla. 2nd DCA 2007). Because the evidence fails to show an attempted taking from Sean Neel, the conviction for attempted robbery of Mr. Neel must be reversed.

VI. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE INTENT AND CAUSATION ELEMENTS OF ARSON BEYOND A REASONABLE DOUBT

Appellant was charged in count five with second-degree arson of a structure for the burning of Zachariah Morgan's pickup truck. However, the evidence was insufficient to support this charge. The sufficiency of the

evidence is a question of law reviewed de novo on appeal. *Rasley v. State,* 878 So. 2d 473 (Fla. 1st DCA 2004). The standard of review is whether, taking the evidence in the light most favorable to the State, the evidence is sufficient to convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt. *Twilegar v. State*, 42 So. 3d 177 (Fla. 2010). However, when the evidence is wholly circumstantial, it must also be inconsistent with any reasonable hypothesis of innocence proposed by the defendant. *Id*.

To sustain a conviction for second degree arson, the State must prove that the defendant willfully or unlawfully, or while in commission of any felony, damages or causes to be damaged by fire or explosion any structure, including a vehicle. § 806.01(2), Fla. Stat. (2010). To prove willfulness, the State must introduce evidence that the defendant intentionally started the fire. *Knighten v. State*, 568 So. 2d 1001 (Fla. 2nd DCA 1990).

In this case, the evidence does not establish that Appellant started the fire at all, much less intentionally. When Sean Neel escaped from the truck and ran away, there were still three people inside: Zachariah Morgan, Antone McMillian, and Appellant. The fire started sometime after Neel left the scene, but neither he nor any other witness saw who started the fire or how (T1/118). The fire was small and contained, smoldering for several

minutes until other witnesses arrived and opened the truck door, providing air for the flames to erupt (T2/184).

The State relied on the expert testimony of the fire marshal, Eric Bryant, to prove its case for arson. Mr. Bryant testified that the fire started inside the passenger compartment of the truck (T4/462). The fire was not caused by the truck crashing into a tree, and the engine compartment and fuel tank were excluded as possible causes (T4/476-77). There were no electrical malfunctions and no accelerants were involved (T4/472, 474). Despite the absence of accelerants, he concluded that the fire was arson because all accidental causes were excluded, leaving human agency as the sole cause of the fire by process of elimination (T4/478).

However, Mr. Bryant admitted on cross-examination that he could not determine whether the fire was intentionally set, or whether it was started by an open flame or a dropped cigarette, lighter, or other heat source (T4 478-79). Although the seats of the truck were flame retardant and would require long exposure to a heat source to catch fire, the point of ignition was determined to be common combustible materials on top of the driver's side rear seat, such as papers or loose clothing (T4/479-80).

Defense counsel moved for judgment of acquittal on this count based on the State's failure to prove that the fire was intentionally set (T5/604).

The State argued that the statute provides in the alternative that the fire need not be willful if it occurs in the course of a felony, and this alternative was added to the charge by information following the grand jury indictment (T5/612). The court ultimately denied the motion.

The evidence is insufficient because even in cases where the fire was started during the commission of a felony, the State must still prove that the defendant "damaged or caused to be damaged" the structure. § 806.01(2), Fla. Stat. (2010). The jury instruction provided that the first element of the crime is that Appellant caused damage to the vehicle by fire. This element of causation is lacking because the State failed to prove, either directly or circumstantially, that Appellant started the fire. The State also failed to prove that co-defendant Antone McMillian started the fire, precluding conviction under a principal theory.

As stated earlier, there were three individuals remaining in the truck when Sean Neel fled the scene. Neel described a chaotic scene where the truck and its occupants were flying about in the passenger compartment. Both Mr. Morgan and Mr. Neel lost the shoes they were wearing from their feet. The truck ultimately crashed violently into a tree. Debris was everywhere (T1/118-20). There is also evidence that Mr. Morgan fought his attacker, suffering defensive wounds to his hands and obtaining McMillian's

DNA under his fingernails. It is possible that during this melee, Mr. Morgan armed himself with a cigarette lighter or other heat source and attempted to use it as a weapon to defend himself, then dropped it inside the truck, unintentionally setting fire to some papers or other "common combustibles."

Where the defendant is shown to be the only person in the structure who could have started the fire, combined with proof of motive and opportunity, the evidence is sufficient to prove arson. *State v. Bonebright*, 742 So. 2d 290 (Fla. 1st DCA 1998). However, motive and opportunity alone are insufficient if other people were present or had access to the structure during the time when the fire occurred. *See Moberly v. State*, 562 So. 2d 773 (Fla. 2nd DCA 1990) (finding evidence insufficient to conclusively prove that defendant caused the fire where doors and windows were left open and apartment was vacant for 30 minutes, leading to reasonable hypothesis that someone else started the fire).

In this case, the State's circumstantial evidence fails to exclude Mr. Morgan as potentially the person who started the fire while he was fighting for his life inside the pickup truck. Therefore, the evidence is insufficient to establish the causation element for arson beyond a reasonable doubt. The conviction on count five should be reversed.

VII. THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO GIVE PROPER JURY INSTRUCTION IN RESPONSE TO JURY QUESTION

The trial judge erred in refusing defense counsel's requested instruction in response to a question from the jury during deliberations. The feasibility and scope of reinstruction following a jury question is within the trial court's discretion. *Henry v. State*, 359 So. 2d 864 (Fla. 1978); Fla. R. Crim. P. 3.410. However, the court's answer to a jury question should include a correct and complete statement of the law relative to the jury's inquiry. *Garcia v. State,* 492 So. 2d 360, 366 (Fla. 1986). The standard of review is abuse of discretion. *Perriman v. State*, 707 So. 2d 1151 (Fla. 3rd DCA 1998).

After the jury retired to deliberate, they returned the following question:

> As to count 4, attempted armed 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 –

(T6/801-02). Defense counsel requested that any response to this question include a reinstruction on single defendant, multiple counts (T6/805). The concern was that in the absence of any "specific evidence" of a taking from Mr. Neel, the jury was asking if they could assume such a taking occurred

based solely on the taking of the wallet from Mr. Morgan, and that the jury would feel pressure to return the same verdict on both counts based on evidence of only one taking.

The trial court refused the request, and read the word 'circumstantial' into the question, making it a request to consider the taking of property from Mr. Morgan as circumstantial evidence of an intent to rob Mr. Neel (T6/806-807). The court then answered the question by saying that the jury was not required to cite the evidence they relied upon, but only to complete the verdict form and determine whether the evidence proves every element beyond a reasonable doubt (T6/809). Defense counsel objected and the court overruled the objection (T6/807).

The trial court's refusal to reinstruct on separate counts and rewording of the jury's question was error. The jury question can be fairly read as asking if proof of one robbery justifies an assumption that a second robbery of a different victim was intended. This was a key disputed issue during the trial. The State's position is that the taking of Morgan's wallet was circumstantial evidence of Appellant's intent to rob both victims, while the defense argued there was no such intent shown. By failing to answer the portion of the jury's question that asked if they can "assume" a robbery was intended, the court deprived Appellant of his defense to this charge.

Std. Jury Instruction 3.12(a) provides as follows:

> A separate crime is charged in each [count of the information] [indictment] [information] and, although they have been tried together, each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each. A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crime(s) charged.

This instruction is designed to prevent exactly what the jury was contemplating in their question: using proof of one robbery to assume another robbery in the absence of any evidence of an attempt to take property from the victim alleged in count four. Evidence of a single taking from one victim is insufficient to sustain two robbery convictions on separate victims. *Nesbitt v. State*, 966 So. 2d 447 (Fla. 2nd DCA 2007). Therefore, rereading Instruction 3.12(a) would have been a correct and complete statement of the law relative to the jury's inquiry. Failing to do so constitutes an abuse of discretion.

In addition, the jury cited to the prior payments for corn as possible evidence supporting robbery. This is an incorrect basis for finding Appellant guilty of robbery. Robbery requires the taking of property of value from the victim by force, not the failure to deliver goods or services or pay for something obtained from the victim voluntarily. *See Eutzy v. State*, 458 So. 2d 755 (Fla. 1984) (rejecting State's argument that failing to pay

taxi driver the cab fare that was due and owing supports finding that murder of cab driver occurred during commission of robbery).

To the extent the jury was asking or suggesting that the prior payments for corn were relevant evidence of a robbery of Zachariah Morgan or the attempted robbery of Sean Neel, the trial court had a duty to reinstruct the jury on the elements of robbery and attempted robbery, including the taking requirement, in response to that question. Counsel did not object to the court's response on this basis, but did renew his earlier objections to the hearsay testimony about the corn transactions (T6/807-809). The failure to correct this mistake of law constitutes fundamental error in this case because it allowed the jury to rely on a legally insufficient basis for conviction.

As a result of the foregoing errors in response to the jury question, the conviction on count four should be reversed.

VIII. THE TRIAL COURT ERRED IN PERMITTING STATE TO INTRODUCE PREJUDICIAL HEARSAY STATEMENTS

The trial court permitted Sean Neel to testify over objection about statements made outside of court by Zachariah Morgan. These statements constituted inadmissible and irrelevant hearsay, and the trial court reversibly erred in overruling defense counsel's repeated objections and admitting the testimony. The standard of review of a trial court's ruling on the admissibility of evidence is generally for abuse of discretion; however, the

question of whether evidence fits the statutory definition of hearsay is a matter of law, subject to de novo review. *Burkey v. State*, 922 So. 2d 1033 (Fla. 4th DCA 2006).

The statements generally concerned Mr. Morgan's interactions with Appellant about the purchase of deer corn leading up to the date of the murder. Morgan told Neel that Appellant had corn to sell. Neel was not present for the first purchase because Morgan handled it on his own. Neel never met Appellant or had contact with him prior to December 24. Three or four weeks later, Neel asked Morgan to see about purchasing more corn. Morgan relayed that Appellant had no corn at that time, but would accept prepayment to put them at the front of the line. Morgan paid cash money to Appellant in advance. (T1/90-96).

After Morgan paid, there was a delay of several weeks. Morgan told Neel that he kept trying to call Appellant but he wouldn't answer or return the calls. Morgan used Neel's phone to call and tell Appellant he either wanted his corn or his money back. Morgan told Neel that the seller was one of Johnny Cannon's sons. (T1/96-97).

On December 24, Morgan called Neel and told him it was time to go pick up the corn. Morgan brought an extra barrel in case there was additional corn available. Morgan told Neel about all the aggravation of

dealing with Appellant and that he was going to see where his heart was. Neel didn't bring any money with him because the transaction had already occurred. (T1/98-102).

Defense counsel lodged repeated objections to this testimony on the basis of hearsay and lack of personal knowledge, all of which the court overruled (T1/93-94, 95, 99). The State argued that the statements were admissible to prove their effect on the hearer, i.e. to explain that Neal met with Appellant on December 24 and rode to the field on Flat Creek Road for the purpose of picking up the corn.

However, the specific accusatory statements by Mr. Morgan about Appellant were so likely to be misused by the jury as proof of bad character that they should have been excluded. Morgan's hearsay statements tended to show that Appellant was dishonest in his business dealings, that there was ill will brewing between Appellant and Morgan over the corn transaction, and that Appellant was aware of an ultimatum to deliver the corn or return Morgan's money. This improperly suggested a possible motive to commit robbery and premeditated murder without affording Appellant an opportunity for confrontation and cross-examination about the statements.

If it is important to establish a logical sequence of events, summary explanations should be substituted for any detailed accusatory remarks.

Daniels v. State, 606 So. 2d 482 (Fla. 5th DCA 1992). It is impermissible to exceed the bounds of detail necessary to explain the witness's actions, and doing so renders the out-of-court statements more prejudicial than probative, and therefore inadmissible under § 90.403, Fla. Stat. (2010). *Id* at 484; *see also Jones v. State*, 577 So. 2d 606, 608 (Fla. 4th DCA 1991) (general statements are sufficient to explain why witness went to defendant's location, and specific prejudicial statements about the defendant are inadmissible hearsay).

In this case, the only statement by Mr. Morgan that was relevant to explain why he and Sean Neel were meeting with Appellant was the call saying it was time to go pick up the corn. The fact that Mr. Morgan had prepaid Appellant for the corn and then suffered a delay and "all this aggravation" was only relevant to show Appellant's bad character or an intent to default on the sale. Likewise, Mr. Morgan's statements to Appellant that he wanted his corn or his money back were not relevant to show their effect on the hearer, Sean Neel. Rather, they were a backhanded and impermissible attempt to show that Appellant had a motive to commit robbery and premeditated murder because he was being forced to provide either corn or money that he didn't have or wasn't willing to hand over. Thus, the fact that Morgan told Appellant to pay him back or provide the

corn was only relevant to prove the truth of Morgan's statement, which is a hearsay purpose.

Furthermore, the fact that Morgan had prepaid the transaction on Neel's behalf was not material to any fact in dispute at trial. If anything, it tended to negate any inference that Appellant's purpose in luring Morgan to Flat Creek Road was to rob him of the money he intended to pay for the corn with. Neel himself said he had only one dollar in his pocket because the corn was already paid for.

The non-hearsay purpose for which the State seeks to introduce out-of-court statements must relate to a material issue in the case, and the probative value must not be substantially outweighed by the prejudicial effect of the statements. *Foster v. State*, 778 So. 2d 906, 915 (Fla. 2000); § 90.403. If the only relevant use of the testimony is to prove the truth of the matter asserted, then the statements are hearsay.

In this case, Morgan's accusatory statements about Appellant receiving payment and then avoiding calls, causing aggravation, and needing to refund Morgan's money were not relevant to any material or disputed issue in the trial. These statements had no effect on the hearer, Sean Neel, nor was such detail necessary to establish a logical sequence of events. The

State went far beyond the bounds of detail necessary to explain why Morgan and Neel met Appellant and went to Flat Creek Road.

The jury also referenced the prior payments for corn in their question about whether the evidence was sufficient to prove attempted robbery of Sean Neel. The jury stated that "no clear attempt was made to take Neel's wallet, et cetera, prior payments of corn," suggesting that they considered the hearsay testimony about prepayment in finding Appellant guilty of robbery in count three. As argued above in Issue VII, the prepayment for the corn and subsequent failure to deliver by Appellant were not admissible to prove the taking element of robbery. *Eutzy v. State*, 458 So. 2d 755 (Fla. 1984). Therefore, the erroneous introduction of the hearsay was prejudicial and substantially outweighed any probative value. The trial court committed reversible error in admitting the hearsay testimony, and the error is not harmless beyond a reasonable doubt. The evidence also violated Appellant's right of confrontation and cross-examination, as the statements were not testimonial and did not fit any firmly rooted exception to the hearsay rule. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The convictions for murder, attempted murder, robbery and attempted robbery should be reversed.

IX. THE SENTENCE OF DEATH IS DISPROPORTIONATE

The sentence of death imposed on Appellant is disproportionate and violates the Eighth Amendment ban on cruel and unusual punishment. This is so because several aggravating circumstances were improperly found and assigned weight, and because co-defendant Antone McMillian, who actually committed the murder[5], has been deemed incompetent to stand trial due to mental retardation and will never face the death penalty. *See Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242 (2002) (holding unconstitutional the execution of a mentally retarded person). The standard of review on the proportionality of the death penalty is a comprehensive analysis to determine whether the crime is among the most aggravated and least mitigated of murders, considering the totality of the circumstances. *Bright v. State*, 90 So. 3d 249 (Fla. 2012).

The trial court ruled that the sentence is not disproportionate because co-defendant McMillian's mental retardation makes him less culpable as a matter of law (R2/337). However, the fact that McMillian actually committed the killing makes him generally more culpable than a co-defendant who did not. *Hannon v. State*, 638 So. 2d 39 (Fla. 1994). This is particularly true where, as here, there was no evidence presented that

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[5] The record evidence supporting the conclusion that McMillian was the killer is set forth in Issue II, part a, and is incorporated here by reference.

Appellant dominated McMillian or exerted any influence or control over him. The mere fact that McMillian's retardation may have made him susceptible to domination is insufficient to prove that any such coercion or intimidation actually existed. *Lawrence v. State*, 846 So. 2d 440 (Fla. 2003).

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. The court should then have balanced this overall level of culpability against that of Appellant before deciding the question of proportionality. The court did not do so, depriving Appellant of any meaningful proportionality analysis.

In this case, the fact that McMillian possessed the mental wherewithal to kill Mr. Morgan on his own with no apparent direction from Appellant, and that he did so in a vicious manner that would have warranted application of the HAC aggravator had it been committed by Appellant, makes him at least equally culpable to Appellant for the murder of Zachariah Morgan even after taking his mental retardation into account. Appellant also has a below-average IQ of 77. However, the trial court stated that a death sentence for Appellant would only be disproportionate if his culpability for Mr. Morgan's murder was less than McMillian's culpability (R2/337).

The fact that a co-defendant inflicted the fatal blow and did not receive the death penalty is a mitigating factor. *Urbin v. State*, 714 So. 2d 411 (Fla. 1998). The trial court refused to find this fact mitigating as to Appellant because of McMillian's retardation (R2/336-38). As a result, the court improperly used the fact of McMillian's low IQ twice, once to decrease McMillian's culpability for his role in the crime, and again to disregard the fact that Appellant wasn't the killer. This placed undue emphasis on one factor at the expense of other factors relevant to the question of proportionality. Proportionality is supposed to be based on the totality of the circumstances, not once circumstance.

The court also found that Appellant was the dominant actor in the crime, and that the assumption McMillian was the only person to stab Morgan was not supported by a preponderance of the evidence. This is incorrect. There is no evidence that Appellant dominated McMillian or exerted any pressure, intimidation or coercion over him. Furthermore, the greater weight of the evidence establishes McMillian as the killer. Appellant's main involvement was in making the corn transaction and bringing the victims to Flat Creek Road, and stabbing Sean Neel. There is no evidence that he stabbed Zachariah Morgan or directed McMillian to do so that would justify labeling him "dominant."

The cases cited by the trial court in support of the notion that a death sentence is not disproportional anytime the co-defendant is ineligible for the death penalty are distinguishable. In *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996), the acquittal of the co-defendants did not render the defendant's death sentence disproportional because it was a murder for hire case and she was the mastermind and dominant force behind the murder who controlled the actions of the others. Thus, she was factually more culpable than the co-defendants who were acquitted.

In *Henyard v. State*, 992 So. 2d 120 (Fla. 2008), the co-defendant was not only a juvenile ineligible for the death penalty as a matter of law, but the defendant was the triggerman who shot one of the victims four times. The juvenile also received the maximum possible sentence of eight consecutive life sentences with 50 years minimum mandatory. In the instant case, the co-defendant was the killer, yet received no penalty at all. He also is not ineligible for the death penalty as a matter of law due to age, but as a mixed question of law and fact due to a finding of diminished mental capacity. The rationale for the two rules is different.

McMillian's ineligibility for the death penalty is based on different considerations than just his relative culpability in the murder. In *Henyard,* the Court reasoned that the defendant's age was such a substantial mitigating

factor that it cannot be outweighed by any set of aggravating circumstances. *Id* at 127. By comparison, the U.S. Supreme Court ruled in *Atkins* that mentally retarded defendants make poor witnesses, and are less able to assist their attorneys and make a persuasive showing of mitigation, creating a risk of wrongful execution. *Atkins,* 536 U.S. at 320-321. Thus, in the case of a mentally retarded person, the justification for banning the death penalty is not just that the defendant is less culpable for his actions per se, but also that he will be less able to demonstrate any reduced culpability that might otherwise exist in the case, and less able to understand the retributive and deterrent purposes of the death penalty. *Id.*

Thus, a mentally retarded person might still be extremely culpable in a murder, yet remain ineligible for the death penalty due to the fear that he will be an unsympathetic witness who is unable to assist his attorneys or persuade the jury of his relevant mitigating circumstances. Thus is the case with Mr. McMillian, whose mental retardation, while sufficient to insulate him from the death penalty, is not as mitigating per se as a juvenile's age.

Therefore, Appellant submits that McMillian's role as the killer is still a relevant consideration in a proportionality analysis for Appellant, particularly in light of the arguments presented in Issues I and II regarding the prior violent felony and HAC aggravators and the mitigating

circumstances found by the trial court to be proven by the preponderance of the evidence during the penalty phase. Under the totality of the circumstances, including the relative culpability and mental capability of Appellant and co-defendant McMillian, plus all relevant mitigating and aggravating circumstances, execution is an excessive punishment in this case.

CONCLUSION

For the reasons set forth above, the Court is asked to reverse and set aside the judgments and sentences, including the death sentence, rendered against Mr. Cannon on November 15, 2012, remand the cause to the circuit for a new trial on all counts and grant the defendant such other relief as is deemed appropriate in the premises.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished counsel referenced below at the addresses indicated by email delivery and U.S. mail delivery this 6th day of September 2013.

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CERTIFICATE OF COMPLIANCE

I further certify that this initial brief of appellant was prepared using a Times New Roman font, 14 point, not proportionally spaced, in accordance with the Florida Rules of Appellate Procedure.

Baya Harrison

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