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IN THE SUPREME COURT OF FLORIDA

BRIAN KEITH GIBSON,	:	
Appellant,	:	
vs.	:	Case No. 81,769
STATE OF FLORIDA,	:	
Appellee.	:	
______________________________	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HENDRY COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On November 7, 1991, the Hendry County Grand Jury indicted the appellant, BRIAN KEITH GIBSON, for the first-degree premeditated murder of Lupita Luevano on September 30, 1991, first-degree felony murder of Lupita Luevano, and armed burglary. (R 9-11)[1]

Gibson was tried by jury before the Honorable Jay B. Rosman, Circuit Judge, on March 2-18, 1993. (T 1; P 1) The jury found Gibson guilty as charged on all three counts. (R 155-56) The jury recommended the death penalty by a vote of 7 to 5. (R 157)

On April 12, 1993, the court adjudicated Gibson guilty of first-degree murder, merging counts one and two, and sentenced him to death. (R 160-62; S 13-20) The court did not enter a contemporaneous written order to state its findings on aggravating and mitigating circumstances. (R 1-175; SR 72) Although the sentencing guidelines permitted a sentencing range of 4 1/2 to 9 years for the burglary, (R 159) the court imposed a consecutive life sentence. (R 159-63; S 19) The court did not provide written reasons for the departure from the guidelines. (R 159; SR 73) Defense counsel filed a notice of appeal. (R 167)

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[1] References to the record on appeal are designated by "R" and the page number. References to the trial transcript are designated by "T" and the page number. References to the penalty phase transcript are designated by "P" and the page number. References to the sentencing transcript are designated by "S" and the page number. References to the supplemental record are designated by "SR" and the page number.

STATEMENT OF THE FACTS

A. Voir Dire

The court conducted a bench conference so counsel could challenge prospective jurors without being overheard. (T 480-88) Defense counsel requested a ten minute recess so he could consult with Gibson on how to proceed. The court denied the request. (T 489) The bench conference continued, with counsel using both cause and peremptory challenges. (T 489-98)

B. Trial Testimony

In September, 1991, Lupita Luevano lived with Richard Murrish at 839 East Trinidad in Clewiston. (T 1276-78) They owned a Chihuahua and a cat. (T 1278) Murrish kept a set of weights in a back bedroom. (T 1282-83) The window to that room was left open a crack for ventilation for the cat's litter box. (T 1282) Murrish kept his hunting guns in a case in the living room. He kept a loaded shotgun by his bed for protection. (T 1311-12) There was a utility shed in the back yard with a ladder and cement blocks beside it. (T 1289-91) About a month before, Murrish had found some of the cement blocks under the windows to the master bedroom and the bathroom. (T 1292)

On Sunday evening, September 29, Murrish grilled steaks in the back yard. He did not notice anything out of place. (T 1292-95) Later that evening, Murrish and Luevano engaged in sexual intercourse. (T 1296) They had never engaged in anal intercourse. (T 1297) On September 30, Murrish left for work around 6:15 a.m. (T 1298-1300) He heard Luevano lock the carport door when he left.

(T 1300-02) She was scheduled to work at the Stop and Shop from 3:00 to 11:00 p.m. (T 1303)

Tracey White lived next door. (T 1214) Around 6:40 a.m. on September 30, White was leaving for work when he heard a scream from the direction of Luevano's house. (T 1215-16) At first he thought it was one of his children calling to him from his front door. Then he decided it must have been the sound of a truck stopping at the fertilizer plant across the canal. (T 1216-17)

Ramon Iglesias managed the Super Stop food store where Luevano worked. (T 1266) Around 8:30 a.m. on September 30, Iglesias drove a maroon pickup to Luevano's house to ask her to come to work early. (T 1267-69) Her car was parked by the carport, but no one answered when he knocked on the door. (T 1269) Iglesias returned to Luevano's house sometime between 8:30 a.m. and 3:30 p.m. Her car was still there. No one answered when he knocked, but he heard a dog barking. (T 1270-71) Luevano failed to come to work at 3:00. At 3:30, Iglesias went back to her house. Her car was still there, but again no one answered the door when he knocked, and the dog barked. (T 1270-72)

Murrish returned home from work around 6:05 p.m. Luevano's car was still there. (T 1303-04) Murrish used his key to open the carport door. The chain lock was not on. (T 1305) He heard the dog barking in one of the back bedrooms. (T 1305-06) He found Luevano lying face down on the bed in the master bedroom. (T 1307-08) He called her name, shook her, and turned her head. (T 1313, 1331) The room was a wreck. The contents of her purse were

scattered on the floor, the bed was twisted sideways, and the dresser had been moved. There was blood on the walls, floor, dresser, and ceiling. (T 1307-08) Murrish's belt, which should have been in the closet, was on the bed. A barbell was also on the bed. (T 1310) The blankets were on the floor. (T 1312) One of Murrish's shirts and one of Luevano's shirts were on the bed. (T 1312-13) The shotgun should have been leaning against the wall, but was lying on the floor. (T 1332)

Murrish went to a neighbor's house to ask if he had seen anyone, then to the sheriff's department about two blocks away. He did not have a telephone. (T 1314-15) Murrish was not aware of anything of value missing from the house. (T 1319-20)

Around 6:10 p.m. on September 30, Murrish entered the sheriff's office substation and told Deputy Hill that Luevano was dead. (T 1336-40, 1390-91) Hill and Investigator Nuzzo followed Murrish back to his house. (T 1340-41) Hill and Nuzzo entered, looked through the house, and found Luevano lying face down on the bed. (T 1342-52) A paramedic verified that she was dead. (T 1355, 1381-84) Sergeant Notarian arrived, observed the body, and began securing the scene. (T 1390-95) Lieutenant Cassels arrived, spoke to the others, and observed the body. (T 1632-36)

Cassels spoke to Murrish, who was upset, scared, and crying. (T 1637-38) Cassels notified the Florida Department of Law Enforcement (FDLE), the medical examiner, and an investigator for the state attorney. (T 1639) Nuzzo spoke to the neighbors and learned that they heard a scream early that morning and had seen a

red pickup during the day. (T 1373) Cassels spoke to Iglesias and learned that he had come to the house three times, but no one answered the door. (T 1273-74, 1639-40) Investigator Campbell and Sergeant Pittman arrived at the scene around 7:00 p.m. (T 1398-1400, 1642, 1874-75) Cassels returned to the sheriff's office to interview Murrish. (T 1643) An anonymous caller told the Clewiston police that a Mexican male was seen running towards the Cuban market, but they found no witnesses to verify this report. (T 1644-45) FDLE crime scene analyst and fingerprint expert William Tucker arrived at the scene with another FDLE investigator around 9:20 p.m. (T 1456-60)

The investigators found that Luevano's body was mostly nude. There was a shirt wrapped or tied around part of her face and neck. Her panties were ripped and pulled up around her waist. Another shirt was wrapped or tied around her wrist. (T 1352, 1393-95, 1474-75, 1876-77) Tucker observed seminal fluid and took both anal and genital swabbings. (T 1491-93) Blood was on the pillows and spattered throughout the master bedroom. (T 1473-75, 1569-70, 1943) Tucker also collected hairs and fibers from Luevano's anus, back, and hands. (T 1491, 1547-48)

A barbell with one three pound weight attached was on the bed by Luevano's left knee. Another three pound weight was lying at the foot of the bed, and a locknut for the barbell was found under the bed. (T 1352, 1474, 1489-90, 1517, 1877-79) There was a belt by Luevano's back. (T 1474, 1489) A pair of white shorts was on the bed by the body. (T 1495-96) Murrish said neither he nor

Luevano owned any white shorts. (T 1329) A print shirt was by her head, and a white sleeveless shirt was underneath her. (T 1496-1500) A gold chain was found on the bed, and an Indian head charm was found under the bed. (T 1475, 1509-11, 1886-93) Neither Murrish nor Luevano's sister recognized the chain and charm. (T 1316-17, 1978-79) The shotgun was on the floor, partly under the bed. (T 1353, 1475, 1491, 1517) Luevano's wallet, a $5 bill, and some papers were scattered on the floor. Her purse and checkbook were on the dresser. (T 1474, 1490, 1517) The nightstand contained $190 in cash. (T 1474, 1581) The bedsheets were taken into evidence. (T 1509)

In the back bedroom, the investigators discovered an open jalousie window with a cut screen and possible fingerprint smudges on the wall below the window. The smudges were not suitable for comparison. (T 1471-72, 1484, 1515-17, 1553-57, 1582-83, 1880-85, 1924-25) This room also contained a weight bench and barbells. There were clothes on the floor between the bed and the wall. A green towel on the bed appeared to have blood and hair on it. (T 1472, 1479-83, 1584-85, 1880)

Outside of the house, the investigators found a ladder, a cement block, a bucket, and an unopened bottle of Sprite by the open window to the back bedroom. (T 1356-59, 1376-78, 1404-05, 1527-28, 1641, 1885) There were fingerprint smudges on the siding near the window. Pieces of the siding were removed from the house and taken into evidence. (T 1361-62, 1405, 1412-15, 1438-39, 1527-29, 1885, 1895-97) Officers observed a shoe print with a triangu-

lar, diamond, or round dimple pattern, but they did not measure or make a plaster cast of the print. (T 1405, 1415-16, 1435, 1885, 1926-29) Part of the back fence was pushed down, and it appeared that someone had been standing there in the grass. (T 1907-08)

Tucker processed the master bedroom, the back bedroom, the bathroom, the gun case, the barbell on the bed, the weight, the Sprite bottle, the ladder, and other items at the scene for latent fingerprints. He found only sixteen prints suitable for comparison. Thirteen of those were made by Murrish, and the other three were made by Luevano. (T 1506-08, 1525-31, 1562, 1564, 1573-75)

Dr. Wallace Graves, the medical examiner, conducted the autopsy on Luevano on October 1, 1991. (T 1776-79) He found deep splits in the skin of her forehead, around her eyes and lips, on her left cheek, and on her chin. These were associated with depressed fractures of her skull, the bones around her eyes, her cheekbones, her jawbone, and the roof of her mouth. (T 1795-97) Luevano had been struck at least six times with great force by a heavy blunt object. The injuries could have been caused by the barbell, but not by a fist. (T 1799-1801, 1804) There was considerable injury to her brain. (T 1801) There was a lot of bleeding from the injuries to her scalp and face. She inhaled and swallowed blood while still alive, but not necessarily conscious. (T 1803-04, 1828) There were bruises on the back of the left side of her neck. They could have been caused by being grabbed from behind by someone's hands with moderate force. (T 1805-06)

Death was caused by the blunt injuries to the face and skull. (T 1810) Because of the bruises and the shirt wrapped around her neck, Dr. Graves could not rule out strangulation as a contributing factor, but there were no hemorrhages in the underlying tissues, which would have been more suggestive of strangulation. (T 1810-11, 1821) Dr. Graves could not determine the order in which the blows were inflicted. (T 1810) Luevano could have lived up to thirty minutes after the blows to her forehead, but she would have lost consciousness within a few minutes--two minutes or less. Whether she could still feel pain would depend upon the level of her unconsciousness, which could not be determined. (T 1812, 1828-29, 1833)

Dr. Graves found a small tear at the edge of Luevano's anus. This injury was consistent with the insertion of a finger or a penis. (T 1808) Dr. Graves took blood samples, hair samples, and swabs from her mouth, vagina, and anus which he turned over to FDLE. He also made smears from the vagina and anus for his own examination and for FDLE. (T 1790-94) He found sperm in the vaginal smear, but not in the anal smear. (T 1812-13) There was no bruising of the anal or vaginal area. (T 1831) The sperm could have been present in the vagina for up to 48 hours. (T 1831-32) The anal tear was the only evidence of sexual assault, and it was possible that the tear was caused in some other way. (T 1833-34)

Brian Gibson worked at the Clewiston Fertilizer plant. On September 30, 1991, he clocked in at 4:00 a.m. (T 1084-86, 1156-57; R 97) Gibson worked with production manager Jay Odum, Kenneth

Bryant, and Matthew Street to mix a truckload of fertilizer. Gibson weighed the loaded truck at 4:43 a.m. (T 1086-89, 1105-07, 1142-43; R 99) Odum then went to the office to wait for a phone call for another load. (T 1089-90) Bryant went to his truck to take a nap. His truck was parked in back of the plant near the mixing area. (T 1108, 1114 ,1135) Gibson parked his truck in front of the plant at the entrance. (T 1131, 1136) Street went to the office for a cup of coffee. He was returning to the mixing area a few minutes after 5:00 when he saw Gibson walking towards the front of the plant. (T 1143-44, 1149-51)

Odum received a call for another load of fertilizer at 6:30. He walked to the back of the plant, then back through the warehouse to the office. He found Street and Bryant, but not Gibson. Odum saw Gibson's truck parked in front of the plant, but he did not look inside of it. Odum weighed an empty trailer at 6:56. (T 1090-92, 1100-01, 1115-17)

Kimberly Murphy, the dispatcher and bookkeeper, was driving to work on Ventura Avenue between 7:10 and 7:15 when she saw Gibson walking fast on a canal bank near a stop sign. He was not on company property. (T 1155, 1159-62) He was not near his white pickup. (T 1163-64) He was wearing a white T-shirt and work pants or blue jeans. She did not see any stains or blood. (T 1162, 1166-67)

Clifford Watts was standing on the scales at Clewiston Fertilizer talking to Al around 7:00 a.m. on September 30. (T 1171-72) Gibson walked up to them. He was sweating and had fresh

scratches on his face. The scratches were still bleeding. (T 1172-73) Watts asked if he had been fighting. Gibson said he fell out of his truck. (T 1174) Watts did not notice any blood stains on Gibson's clothes. (T 1175-76) Watts had seen Gibson walking on a street near the plant several times before. (T 1174-75)

Alfonso Bynes was with Watts when he saw Gibson walking on the street into the plant by a canal. (T 1177-83) Bynes thought it was between 6:00 and 6:30. (T 1182) Bynes noticed the scratches on Gibson's face when he walked by them. Bynes thought Gibson said he had gotten into a fight. (T 1179) Bynes had seen Gibson off of the plant's property during working hours before. Gibson had told him he was jogging. (T 1182) Gibson had also talked about a girl with a blue car who lived in a house across the canal from the place he parked his truck. (T 1182-83)

Bryant saw Gibson between 6:56 and 7:30. (T 1114-17) He was wearing a white T-shirt, work pants, and company issued rubber boots with square or diamond patterns on the soles. (T 1117-18) He had a scratch on his chin, a couple of scratches on his cheek, and a scratch under his eye. They looked fresh and had not been there at 4:00. (T 1118-19) Gibson said he scratched his face on the pliers he used to roll up his truck window. (T 1132) Gibson looked hot and sweaty. (T 1138) A couple of weeks before, Gibson left work for awhile, returned around 4:30 a.m., and said he had been jogging. (T 1122-23) The front of Luevano's house could be seen from the mixing area at the plant. It was about 150 yards away. (T 1113, 1124) Bryant had sometimes seen Luevano in front

of her house doing chores. Gibson and others had commented that she was attractive. (T 1124-26, 1133) Bryant did not see Gibson in front of Luevano's house on September 30. (T 1139)

Street saw Gibson around 7:30 next to the first aid cabinet at the back office. He had a bandage on his chin and another bandage in his hand. He was sweating and had a couple of small scratches on his face, a small scratch under his right eye, and a large scratch on his chin. He acted a little upset, like he felt bad. (T 1144-45) Street had not seen the scratches when they were working at 4:00. Gibson said he felt bad, had been sleeping in his truck, and fell and hit his face on the door. (T 1146) Once or twice before Street had seen Gibson returning to the plant and sweating. Gibson said he was jogging. (T 1147)

Odum saw Gibson near the office and the scales between 7:15 and 7:30. He had a bandage on his face and a bruise under his eye. He said he had been sleeping in his truck and hit his head on the door handle. (T 1093-94, 1101-02) Gibson complained about his stomach and went home for awhile. He clocked out at 7:28 and clocked back in at 8:40. (T 1094-95, 1102, 1120-21) When he returned, he asked Bryant if he had seen a Mexican running on Ventura, which is the street that goes behind Luevano's house and leads to the plant. (T 1123-24) Gibson said he saw a fellow with a stain on his shirt who appeared to be in a hurry. (T 1124) Murphy saw Gibson wearing a blue uniform shirt and pants after he returned from home. (T 1164, 1167-68)

Albert Young, a truck driver for Clewiston Fertilizer, saw Gibson between 10:00 and 11:00 a.m. on September 30. He saw fresh looking scratches on Gibson's face. (T 1186-89) Gibson said he had an argument with his wife. He also said he got the scratches from the door of his truck. (T 1189, 1191) A couple of months before, Young saw Gibson walk into the plant around 6:00 a.m. He said he had been walking for exercise. (T 1189-91)

Vernon Kirkland, another truck driver, saw Gibson between noon and 1:00 p.m. on September 30. He saw the scratches on Gibson's face. Gibson said he fell. (T 1193-97)

The next day, Bryant and Street saw police cars at Luevano's house and asked what happened. Gibson said he heard that a girl had been raped and shot or killed. (T 1126-27, 1148)

Odum, Bryant, Street, Murphy, and Kirkland testified that the Indian head charm and chain found in Luevano's bedroom looked like the ones Gibson usually wore. They had not seen him wearing them after September 30. (T 1095-97, 1127-30, 1147-48, 1164-65, 1168, 1197-99) After the investigators showed the charm and chain to Bryant, Gibson asked what they were doing, but Bryant did not tell him. (T 1128-29) Gibson later heard that they had the chain. He said it was not his, his chain was at home. (T 1129-30)

Randy Perryman worked at the Super Stop with Luevano. (T 1202, 1207-08) Around 5:30 a.m. on September 30, Gibson came into the store and purchased a bottle of Sprite. (T 1203-07) He was wearing blue jeans, a T-shirt, and tennis shoes. (T 1205, 1212) Lt. Cassels showed Perryman a display of six photographs. Perryman

identified a photo of Gibson. (T 1208-11, 1718-22, 1737-38) Perryman also told Cassels that Murrish stopped at the store around 6:30 that morning. (T 1738)

Roxanne Gibson married Brian on June 16, 1989. On September 30, 1991, they lived on Cypress Circle behind a trailer park in Clewiston. (T 1225-26) Roxanne worked at the Git N' Split store from noon to 6:00 p.m. (T 1226-27) Brian came home from work that morning for 30 to 45 minutes because his stomach was hurting. She was still in bed. He laid down on the bed with his clothes on. (T 1228-30) She noticed that he had a scratch on his chin. He said it happened when he was playing with their dog the night before. Later on he said that he scratched himself on the vice grips he used for a window crank in his truck. (T 1230-32, 1251-53)

Brian Gibson went to the Git N' Split after work on September 30. He and Roxanne left the store around 6:00 and went riding around town. They saw police cars at Luevano's house. Roxanne was acquainted with Luevano. (T 1232-34) Roxanne heard what had happened from Brian's mother Tuesday morning. She called Brian at work and told him. He said he had heard about it. (T 1234-35) Tuesday afternoon Brian came to the store. He asked, "[I]f they have my fingerprints wouldn't they come and get me?" She asked if he was there, and he answered no. She told him not to worry about it. (T 1235) On Tuesday or Wednesday, Brian said he had seen a Spanish man running from Luevano's house holding his stomach. (T 1235)

When the investigators showed Roxanne the Indian head charm and chain, she told them they looked like Brian's. She positively identified them in court. Brian's mother gave him the chain. He told Roxanne he found the charm. (T 1235-39) She did not see him wearing them after September 30. Brian said he thought he lost them at work or at home. Roxanne looked for them, but she did not find them. (T 1240-41)

On October 8, 1991, the Gibsons consented to a search of their home. The officers took blue jeans, T-shirts, knives, soap powder, and lint from the washing machine. (T 1241-43) Roxanne had washed their laundry earlier that day, including clothing from September 30. (T 1243-44) She did not see any blood on Brian's clothes, just grease, and nothing appeared to be missing. (T 1256-57) They had talked about moving to Mississippi in January. Brian became nervous and upset when the officers questioned him. He suggested moving then, but Roxanne told him they would have to wait. (T 1244-45)

When the prosecutor asked Roxanne whether Brian ever attempted to have anal intercourse with her, and Roxanne answered yes, defense counsel objected that it was not relevant and the State had not filed any Williams rule notice. The prosecutor argued that Gibson's course of conduct was relevant to identity because the medical examiner found an injury to Luevano's anal area and Murrish denied that she had engaged in such activities. The court overruled the objection and allowed the question and answer to be

repeated. (T 1245-49) Brian did not force her to have anal intercourse, and Roxanne did not let him. (T 1264)

Prior to trial, the court granted the State's motion in limine to preclude the defense from making any reference to an affair between Gibson and Luevano without proffering the evidence and obtaining the court's permission. (R 47-48; SR 13-23) During cross-examination, defense counsel requested the court's permission to ask Roxanne whether she had heard that Brian was having an affair with Luevano. The prosecutor objected that this was unsubstantiated hearsay. The only people who told her that were Brian's parents, and they heard it from Brian a year after the offense. Defense counsel argued that it was not being offered to prove the truth of the matter asserted but to show Roxanne's motive, bias, or prejudice. The court sustained the State's objection. (T 1258-62)

After Brian's arrest, Roxanne learned that he was having an affair with a woman named Tracy. (T 1258, 1263) Roxanne began a relationship with another man, had a baby in December, 1992, and moved to Mississippi in January, 1993. (T 1263)

Tracy Grass had known Brian Gibson since high school. (T 1594-96) They dated in 1982 or 1983. (T 1596-97) They began having an affair in 1990. (T 1597-99) When the prosecutor asked whether Gibson ever attempted to have anal intercourse with her, defense counsel renewed his prior objections and argued that the State was trying to show propensity and that the behavior in question was not a unique or unusual characteristic. The prosecu-

tor again argued that the evidence was relevant to identity. She did not file a Williams rule notice because she did not believe the Williams rule applied. The court overruled the objections. (T 1599-1603) The prosecutor then asked Grass whether Gibson ever wanted her to have anal intercourse with him, and she answered yes. (T 1603) He tried, she told him she was not interested in doing that, and he did not try to force her. (T 1611)

Grass gave the Indian head charm to Gibson for Valentine's Day. She was told it was the only one the store had when she purchased it. Gibson always wore the charm on the gold chain. She last saw Gibson wearing it on the Saturday before September 30, 1991. (T 1604-06) Grass saw Gibson Tuesday evening and noticed scratches on his face. (T 1607) He told her he was drunk and fell into a door. Gibson or someone else also told her he had a fight with his wife. (T 1608) He was not wearing the charm and chain on Tuesday. He said he lost it, and it might be somewhere in his trailer. (T 1608-09) Grass saw Gibson again on Friday. They talked about the homicide and whether the police would catch the murderer. Gibson said he heard that rigor mortis had set in, and he did not think they could test the blood after that. (T 1609-10) Gibson said he had seen the police going in and out of Luevano's house all day. (T 1610)

On October 2, 1991, Lt. Cassels went to Clewiston Fertilizer and interviewed Odum, Bryant, and Murphy. (T 1646-49) On October 3, he interviewed Brian Gibson, advised him of his Miranda rights, and obtained Gibson's tape recorded statement. (T 1650-55)

Investigators Boone and Campbell were also present. (T 1655)

Gibson's date of birth was December 25, 1964. (T 1661) He said he went to work around 4:00 a.m. on Monday. He worked with Odum, Bryant, and Street on a load of fertilizer for Evans until about 6:00. Then they messed around the shop and cleaned up. Gibson laid down in his truck for awhile because he had ulcers and his stomach was bothering him. (T 1664-65) He helped prepare a load of fertilizer for South Bay Growers around 6:45. (T 1665-66) He clocked out a little after 7:00 to go home and take medication for his stomach. (T 1666-67) Gibson was returning to work between 7:30 and 8:00 when he saw a long-haired Hispanic man running north on Francisco, at the intersection with Ventura, towards the Cuban Market. The man looked like someone was chasing him. He was holding his stomach and appeared to have blood or dark stains on his shirt. (T 1667-78) Gibson did not know Luevano, but he had seen her at the Super Stop and outside her house washing her car. (T 1672-73)

When asked to repeat the time sequence, Gibson said they finished the Evans load around 4:30. They cleaned up and sat around talking and drinking coffee until they mixed the South Bay load between 6:00 and 6:20. Then they sat around until they had to mix another South Bay load. (T 1678-84) Gibson left work around 6:20 and arrived home around 6:25. He took two aspirins and laid down for 15 to 20 minutes. He drove back to work around 7:15. (T 1684-86) He was turning onto Ventura from Francisco when he saw the man running towards the Cuban Market. (T 1686-88) The man was

holding his left side and had some spots there. (T 1688-90) Gibson said the investigators could check his time card to get more accurate times for when he left and returned to work. (T 1691)

Gibson did not see any activity at Luevano's house that morning. (T 1693-94) But he had noticed that one guy always rides a bike or walks through there around 6:00. (T 1694) He also noticed a man in a gray car with a telephone antenna who rode back and forth, then stopped and appeared to be taking notes. (T 1696) Gibson first heard about Luevano being killed around 6:00 p.m. (T 1695-97)

Gibson consented to provide blood and hair samples, saying, "I ain't got nothing to hide." (T 1699-1704, 1732-33) A nurse at Hendry General Hospital drew blood samples from Gibson and turned them over to Lt. Cassels. (T 1620-25, 1704-07) Cassels noticed the scratches on Gibson's face and asked how he got them. Gibson said he was injured by his dog on Sunday. (T 1707-09, 1740) Roxanne also told Cassels that Gibson was scratched while playing with their dog on Sunday. (T 1740-41, 1751-52) Campbell took a photograph of Gibson to show the scratches on his face. (T 1705-06, 1911-12, 1939) Campbell said he also noticed scratches on Gibson's forearm, behind his right thumb, and on one of his knuckles, as well as a possible tooth mark on his hand, but he did not take photos of those scratches. (T 1911-12, 1939) Campbell also took Gibson's fingerprints and palmprints. He sent the prints to the FBI with the pieces of siding. (T 1908-10)

On October 8, 1991, Gibson voluntarily went to the Sheriff's Office for another interview and signed a consent to search his residence and vehicle. Roxanne also signed the consent form. (T 1711-13) Campbell, Pittman, and Boone conducted the search. They took some of Gibson's work clothes, including a pair of damp jeans from the clothesline. (T 1713, 1913-18) When Campbell examined the jeans at the office, he found a long black hair inside one of the legs. (T 1918-22, 1939-40) Campbell also found one pair of pants and one shirt with stains which he thought were blood. He sent them to FDLE for analysis. (T 1941-42)

On October 11, Murrish went to the hospital with Captain Chamness so a lab technician could take blood, saliva, and hair samples. (T 1315-16, 1589-93, 1614-16)

On October 13, Cassels learned that the chain and charm found at the scene did not belong to Murrish or Luevano. (T 1713) On October 14, Gibson went to the Sheriff's Office and spoke to Cassels. He had heard that they wanted to talk to him about the chain and charm. He denied that they were his, and said his chain and charm were at home. (T 1714-16, 1737, 1747-48) Gibson made another taped statement on October 16. Cassels, Boone, and Campbell then decided to arrest Gibson for the murder. (T 1716-17)

Deborah Lightfoot, a hair and fiber examiner at the FDLE laboratory in Orlando, received known hair samples from Luevano, Murrish, and Gibson. (T 1946, 1957) She examined debris hairs from the transport sheet, the pillowcases, and barbell, and Luevano's hand and back. The hairs were like Luevano's hair.

Lightfoot also found some animal hairs. (T 1961-64) She found two pubic hairs which did not match the known samples. She did not find any suspect hair which matched Gibson's hair. (T 1973) She found several hairs from the leg of Gibson's jeans. One of those was 12 1/4 inches long and matched Luevano's hair. (T 1964-67) However, no two hairs are identical, even from the same person, and hairs from different people can have similar microscopic characteristics. (T 1968-69)

Billie Shumway, a serology expert from the FDLE laboratory in Tampa, testified that she cannot determine if a stain came from a particular person, she can only eliminate a person as a possible source of a stain. (T 1981, 1985) She received blood and saliva samples from Luevano, Murrish, and Gibson. She determined that all three had blood group O. Luevano and Gibson were secretors, Murrish was not. Luevano had PGM type one plus, one minus, while Murrish and Gibson both had PGM type one plus. (T 1993-95, 2021-23)

Shumway found four semen stains on the fitted bed sheet. Microscopic examination of those stains revealed the presence of sperm. She found blood group substance H in three of the four stains. She found PGM type one in all the stains, and PGM type one plus, one minus in two of them. Since the semen could have been mixed with Luevano's body fluids, either Murrish or Gibson could have been the source of the semen. (T 1999-2003, 2024-27) Shumway found three semen stains on the white shorts. These stains contained blood group substance H and PGM type one. Two of the

stains contained PGM type one plus, one minus. The stains could have come from either Murrish or Gibson having sex with Luevano. (T 2003-08, 2027-30) Both the vaginal swabs and the genital swabs contained sperm, blood group H, and PGM type one plus, one minus. Again, these results were consistent with Luevano having sex with either Murrish or Gibson. (T 2014-16, 2031-32) The scientific evidence did not eliminate either Murrish or Gibson. (T 2038)

Shumway examined Luevano's panties, the flat bedsheet, the green towel, the anal smear, and the anal swab, but she found no semen on them. (T 1995-97, 2016-18, 2032) She examined a pair of jeans, a man's shirt, and a knife for blood, but she did not find any blood on them. (T 2018-19) Shumway sent the vaginal swabs, genital swabs, two semen stains from the fitted bedsheet, two semen stains from the shorts, and stain cards from the known blood samples to another lab for DNA testing. (T 2012-13, 2023-24, 2033-37)

Shirley Ziegler, an FDLE crime lab serologist and DNA analyst from Jacksonville, (T 2041-50) testified that DNA comparison does not result in absolute identification, but can be used to narrow the range of probability or to exclude people. (T 2058-59) She compared DNA from the vaginal swabs and from one of the stains on the shorts with DNA from blood samples from Luevano, Murrish, and Gibson. She found separate DNA bands which matched all three people in both the vaginal swabs and the shorts, so she could not eliminate Gibson or Murrish. (T 2082-92, 2095, 2097-98, 2111) DNA from the second stain on the shorts matched only Luevano. (T 2114)

Over defense counsel's objections, the court allowed Ziegler to testify that using the FBI data base, the probability of finding another white male whose DNA matched Gibson's was one in 350,000. (T 2092-95) Including the FBI data base for black males increased the probability to one in 150,000. Including the FBI data base for Hispanic males increased the probability to one in 21,000. (T 2101) Ziegler admitted that a vocal minority of DNA experts disagree with such statistics. (T 2099-2100)

Alfred Lowe, an FBI fingerprint expert, compared Gibson's known prints with the latent prints on the siding from Luevano's house. He identified six of the latent prints as being made by Gibson. (T 2127-52)

C. Penalty Phase

William Glynn, a corrections officer at the Hendry County Jail, identified Brian Gibson's fingerprints taken when he was booked into the jail on October 16, 1991. (P 6-9) William Tucker, the FDLE fingerprint expert, compared these known prints with the fingerprints on a judgment and sentence and found that they were the same. (P 10-14) On May 14, 1984, Gibson pled to a charge of second-degree murder and was sentenced to 17 years in prison with credit for 692 days time served. (P 14-16) Gibson's date of birth was December 25, 1964, so he was 19 years old when he was sentenced. He had been incarcerated since he was 17. (P 16)

Over defense counsel's objection that the evidence was unduly prejudicial, the court permitted Dean Cassels to testify that he investigated a homicide at Thompson's Zoo on April 20, 1982. (P

18-22) Cassels found Thompson's body on the floor. He identified a photo of the body. (P 23-24) Defense counsel objected that the State did not provide discovery concerning the Thompson homicide until two days before, on March 15, 1993, and the 191 pages of discovery did not include photographs. (P 24-26) The prosecutor responded that they thought discovery had been provided earlier, and it was provided as soon as they learned that it had not. The documents provided did not go to the facts of the murder of Luevano, so defense counsel's ability to prepare for trial was not impaired. Counsel could have deposed Cassels and chose not to. While the photos were not provided, they were listed with other exhibits. (P 27-29) The court found that discovery was provided, the State's conduct was not intentional, and defense counsel could view the photos at that time. (P 29-30) Defense counsel reviewed the photos and objected to their admission because the State was not acting in good faith in providing such late discovery when the case had been pending for 20 months, resulting in his inability to be prepared to fully cross-examine the witness. (P 31) The court reiterated its findings and overruled the objection. (P 32)

Cassels observed multiple injuries to Thompson's head and back, as shown in two photos admitted over defense counsel's renewed objection. (P 33-34) There was a large pool of blood under the body. (P 34) Cassels found a bucket containing several machetes. It was later determined that a machete may have been the murder weapon. (P 35) There were blood spatters on the walls, as shown in a photo admitted over defense counsel's renewed objection.

(P 36-37) Another photo admitted over objection showed that Thompson's pockets were pulled out. (P 38-40)

Thompson was last seen alive by his grandson around 1:00 p.m. on April 19, 1982. (P 41-42) Cassels learned that Brian Gibson went to sell Thompson a snake for his zoo on April 19. (P 42-43) Thompson's pickup was missing. It was found at Gibson's trailer on April 21. Gibson had been seen working on the truck around 2:00 p.m. on April 19. (P 43-45) Gibson removed the bed of the truck and painted it black. (P 45-47) Gibson admitted that he and another man had taken the truck. (P 47, 51-52) Gibson said he had seen two men in a vehicle at Thompson's place and suggested they may have had something to do with the murder. Gibson was very cooperative and consented to a search of his residence. (P 48) Gibson was arrested for theft of the truck and was then indicted for the murder. (P 48-49) Gibson told a corrections officer that he wondered what would happen to him if he said he was defending himself, that Thompson came after him with a hammer and had made sexual advances towards him. (P 49-50)

The investigators did not find Gibson's fingerprints or anything belonging to him in Thompson's house. He never confessed to the murder. (P 50-52) Gibson was 17 when he was arrested. (P 51) Cassels was not aware that Gibson was adjudicated incompetent and was sent to a mental hospital. (P 53) Gibson was not found to be incompetent at the time of the crime. He entered a plea to second-degree murder. (P 54)

Dr. Robert Schultz was the medical examiner who performed the autopsy on Lester Thompson on April 21, 1982. (P 77-80) Dr. Schultz identified four autopsy photos of Thompson and a photo of a machete found at the scene which were admitted over defense counsel's renewed objections; counsel also objected that the prejudicial nature of the photos outweighed their probative value and the State was making the prior murder the focus of the penalty phase trial. (P 80-81, 83, 87-90, 93, 95-97) While displaying the photos for the jury, Dr. Schultz described numerous wounds to Thompson's head and body which he found to be consistent with infliction by a machete or other sharp instrument, including skull fractures, lacerations, and stab wounds. (P 82-99) Brain damage caused by the head wounds was the cause of death. (P 98) Death occurred about 24 to 36 hours before the autopsy, so the condition of the body and the wounds was affected by decomposition. (P 100-01)

Defense counsel objected to the admission of victim impact evidence because it was not relevant to the statutory aggravating circumstances and was designed to create sympathy for the victim. (P 61-63) The prosecutor responded that recent case law permits victim impact evidence. (P 63-63) The court overruled the objection. (P 64)

Max Luevano testified that Lupita Luevano was his younger sister. (P 65) When asked about the impact of her death on him, Luevano responded that "the numbness it left us in our hearts and our minds I cannot describe in this brief moment." (P 65-66) His

sister was an auxiliary police officer and hoped for a career in law enforcement. After her death, he became an auxiliary officer to serve the community and prevent this type of tragedy. (P 66) He said, "Not being able to be with her has really left a void in my heart, as to her dreams and her ambitions and talking [sic] part in helping her with her education and all of that, and, um, it just left an emptiness." (P 67) There were five children in their family; Max was the only brother. (P 67) Lupita's death made them more aware of each other's safety and caused them to arm themselves. It also caused him many sleepless nights. (P 67-68) It affected the lives of his three daughters because Lupita spent time with them, took them shopping, bought them clothes, and cooked for them. (P 68-69)

Angie Luevano testified that Lupita was her younger sister. (P 70) They had a close relationship and saw each other daily. They spent time together at work, going to lunch, at home, going shopping, and with their nieces. (P 70-72) The family lost a member who can never be replaced. Lupita's death made Angie more concerned for her personal safety, less trusting of others, and more likely to respond violently to others. She had trouble sleeping. She no longer had a relationship with anyone because she did not trust anyone. She relied more on God than other people. (P 73-74) She visited her sister's grave every day until about three months before the trial. (P 74-75)

Over defense counsel's renewed objection to victim impact evidence, (P 103-04) Guadalupe Rendon testified that she had five

children and Lupita Luevano was her third daughter. "She was a good daughter." (P 105) Lupita's death "has totally destroyed our lives." (P 106) Theirs was a very close, religious family. Rendon spoke to Lupita every day and took food to her at work. (P 106-07) All of her daughters were very close and talked to each other on a regular basis. Lupita talked about getting married, having children, and becoming a police officer. (P 107) Max decided to go into law enforcement to fulfill Lupita's dreams. (P 107-08) Rendon concluded, "Every day for all the pain, I miss her. I never see her. I will never talk to her again." (P 108)

Over defense counsel's renewed objection, (P 109) Diana Weiss testified that Lupita was her younger sister. They were very close and spent afternoons together going shopping and taking Weiss's two daughters to the lake. (P 110-11) Lupita played with and took care of the girls. (P 111) Weiss missed Lupita's visits at her home, going to the store for Lupita's afternoon coffee breaks, and their daily phone conversations. (P 111-13) Weiss had become suspicious of other people and concerned that someone would break into her house. (P 113) The family's religious belief kept them together. (P 113-14) The family members had become more concerned with each other's safety and frequently called and visited each other to make sure they were okay. (P 114)

Four correctional officers from the Hendry County Jail testified for the defense that Brian Gibson never caused any disciplinary problems at the jail. (P 116-20, 122-32, 134-38) He was receiving mental health medication. (P 119, 124, 131, 137) He

was alone in his cell, ate his meals alone, and went to the recreation yard alone. (P 120, 126, 132-33, 138) He adjusted well to his incarceration. (P 120, 132, 137)

Vernon Kirkland, Jay Odum, Dwayne Bryant, Albert Young, Clifford Watts, and Alphanso Bynes testified that they worked with Gibson at Clewiston Fertilizer. They had no problems or complaints with Gibson. (P 141-43, 150-56, 158-60, 162-64, 166-67) He was a good worker. (P 143, 152, 156, 164, 168) He was not violent or aggressive. (P 142-43, 153, 156-57, 160-61, 164-65, 167-68) He was quiet and kept to himself. (P 153, 168-69)

Billie Ruth Gibson, a sixth grade teacher with 27 years experience, (P 171) testified that she had been married to Brian Gibson's father, William Gibson for six years. William had two sons from a prior marriage, Brian (whom she called Keith) and Kevin. (P 172-73) Brian was in prison during the first year or two of her marriage. She and William visited Brian at least once a month. (P 173-74, 192-93) Brian's mother, Mary Stocksdale, abandoned her husband and sons and went to Australia with another man when Brian was about eight years old and Kevin was four. (P 175-76) There was "an awful lot of drinking" in the home when Mary lived there. (P 176) William worked ten hours a day, six or seven days a week at a gas station, so the children were on their own a lot, although William's sister-in-law, Margaret Gibson, helped some. (P 177) Brian was in special education classes in school and functioned well, although his intelligence was below average. (P 182) Brian's school grades were mostly Cs until his mother

returned when he was 12 or 13, then his grades declined. (P 177-78) Brian dropped out of school and got married when he was 16. He had a son. When Brian was in prison, his wife took the baby to Georgia and disappeared. (P 178)

When Brian was released from prison, he stayed with his father and stepmother in LaBelle for about six weeks. He was fine, and they got along all right. (P 179, 193) Mrs. Gibson made arrangements for family counseling with a counselor from her church on Thursday evenings. (P 179-80, 194) Brian was taking Lithium in prison, but no one told them he should receive medication or counseling when he was released. (P 180) Brian was not happy with the counseling, but he went along with it until one evening when his friends dropped in. Mrs. Gibson invited them to stay for the counseling, but they left. (P 180-81, 194-95) Brian was very angry but remained silent. (P 182, 200) Brian had trouble communicating with other people. (P 181, 190) Mrs. Gibson felt that he needed counseling to help him communicate and deal with people. (P 192) She also felt he needed structure in his life and should not have too much freedom. (P 201)

Brian moved in with Roxanne (Rocket) and got a job. They moved to Clewiston, where Brian got another job. Sometime later, he went to work for Clewiston Fertilizer. (P 183-84) Three or four months after moving, Brian and Roxanne were married. They had a son named Victor. (P 185) Brian and Roxanne had attended church with the Gibsons in LaBelle, but in Clewiston Roxanne refused Brian's request to go to church with him. (P 188, 202) In

Clewiston they had a freer lifestyle. They were drinking and hanging out at the VFW and Moose Lodge. (P 202) Roxanne was a good wife and mother. (P 196) She confided that she was worried about Tracy Grass. (P 204) Victor was 18 months old when Brian was arrested. Brian loved Victor, but he did not spend much time with him and did not seem to know how to play with him. (P 187)

Brian and his father loved each other, but Brian was very dependent on his father. He visited his father at the gas station every day. Brian sometimes lied to his father to avoid having his father think badly of him. (P 185-86, 199, 203-04) Brian told his father that Tracy Grass was pursuing him. (P 204-05) Brian often went fishing with his father. (P 186-87, 199) He argued with his mother. (P 186) Brian did not get along with Kevin. (P 191)

In the Hendry County Jail, Brian was taking Lithium. (P 187) He was seeing a minister and became more religious. (P 188-89, 200) Brian's father visited him in jail almost every Sunday. Brian called his father every Wednesday evening. (P 188) William was worried that Brian would get upset. He told Billie Ruth that when Brian had problems with Dafney, his first wife, he got his father's pistol, put it to his head, and told his father to go get his mother so she could see him kill himself. (P 189) Mrs. Gibson was not aware of Brian experiencing any blackouts in her presence. (P 197) He never indicated that he was hearing voices, having hallucinations, or having extreme nightmares. (P 198)

William Gibson testified that he lived in LaBelle with his third wife, Billie Ruth. He had been a mechanic at Johnny's

Chevron for 25 years. (P 244-45) He was married to his first wife, Mary Stocksdale, for 13 years. They had two sons, Brian, who was born on December 25, 1964, and Kevin, who was about five years younger than Brian. (P 245-47) Mary drank and ran around. She drank while she was pregnant with Brian and after he was born. (P 247) She was in the hospital for several days when Kevin was born. Brian became very upset and was given tranquilizers by the doctor. (P 268-69, 276-77) William and Mary separated a couple of times, then got back together to try to work things out. The third time they separated, they got divorced. (P 247-48) When Mary moved out, she took Kevin but not Brian. Brian was 11 or 12 and was upset by his mother's actions. (P 248)

William obtained custody of both boys when Mary moved to Australia. (P 248-49) He was working twelve hours a day, seven days a week. (P 249-50) He got the boys ready for school. In the afternoon they played with friends until he got home to prepare supper. (P 250) William took Kevin to play ball, but Brian was not interested and stayed home. (P 250-51) William took Brian fishing. (P 270) Brian was 15 when William married Ruby. (P 251) Brian did pretty well in school until his mother returned from Australia, then his grades dropped. (P 252) Brian moved in with his mother for awhile, but it did not work out, and he returned to his father. (P 253) When Brian was 16, he obtained his mother's consent to drop out of school and marry Dafney despite William's opposition. (P 251-53, 271) William gave Brian a trailer to live in and paid all the bills. (P 251, 253) Brian found a job. (P

270) Dafney had a baby, but William had not seen him since he was two years old. (P 252)

As a boy, Brian did not talk to his father about what was going on in his life. William had to ask questions to obtain information. Sometimes Brian got mad and ran out of the house. (P 254) After getting married, Brian sometimes came to the gas station to talk to William. William could not tell whether Brian's answers to his questions were truthful. (P 254, 273-74) Brian sometimes displayed fits of anger or rage. He would get mad and want to fight William for no apparent reason. (P 255) One time, William tried unsuccessfully to help Brian repair the lights on his truck. Brian got mad and broke a taillight with a wrench. (P 255-56) When Brian had problems with Dafney, he argued with William, took William's gun from his truck, put it to his head, and told William to get his mother so she could see him kill himself. (P 256-57) Brian never received any counseling or mental health treatment while he was growing up. (P 257-58)

Brian was arrested for murder when he was 17. He received some counseling in jail. (P 257-58) He attempted suicide by setting his clothes on fire. (P 276-77) He was incarcerated for seven years. William went to the prison to visit him once or twice a month. His mother did not visit. (P 258-59) Brian was released in 1989 when he was 24. He moved in with William and Billie Ruth for awhile. They took him to church and arranged counseling for him, but Brian only saw the counselor four times. (P 259-60, 272-73) Brian met Roxanne and married her despite William's disapprov-

al about six months after his release from prison. They moved to Clewiston. Brian did not continue with the counseling. He stopped going to church. He began drinking. (P 260, 273) William helped him get a job at Clewiston Fertilizer. (P 260-61, 273) Brian and Roxanne had a baby named Victor. (P 261)

Brian's relationship with his father was good, they cared for each other. Brian came to the gas station every day. (P 261) Although Brian's closest family relationship was with his father, he did not confide in him. (P 262) Brian was quiet and kept to himself. (P 263) Brian and Kevin did not get along well and went their separate ways. (P 262)

Brian was arrested for murder again. William went to see him at the jail almost every week. Brian called him at home once a week, on Thursday. (P 261-62) William learned about Brian's affair with Tracey Grass after his arrest. She came to the house and said Brian could not have done it because he was with her at the time of the murder. She then admitted she was not with Brian, she was trying to help him. (P 263-64) Brian told his father he had been seeing Lupita Luevano. On the day of the offense, he went to her house and told her he was going to move to Mississippi. They argued. Luevano pulled a gun on him. He did not remember what happened after that. (P 264-65) Brian told him this after receiving the DNA test results. Before, he denied that he ever knew Luevano. (P 274-75) Brian never said he remembered killing Luevano. (P 266)

Brian was receiving medication and counseling in jail. He told his father he was reading the Bible and would leave his case in God's hands. (P 266) However, he said the same thing after his first arrest. (P 275) Brian did not have any disciplinary problems in the jail. (P 266-67) William was unaware of Brian receiving any counseling during his prior prison sentence. They were not told that Brian needed treatment or counseling when he was released. (P 267) The Gibsons provided Brian with a structured environment when he stayed with them in LaBelle. Brian seemed to do well in a structured environment. (P 268) Brian never told his father that he heard voices or suffered from hallucinations or nightmares. (P 269)

Dr. Robert Silver, a clinical psychologist, examined Brian Gibson in 1982. (P 279-80) Gibson's score was normal on a neuropsychological test for impaired brain functioning. (P 281-82, 305) The results from the Minnesota Multiphasic Personality Inventory (MMPI) indicated Gibson was psychologically distressed and upset, probably because he was incarcerated on a serious charge. (P 281-82) The test results also showed that Gibson suffered from an intermittent explosive disorder. A person with this disorder has episodes of rash, explosive aggression disproportionate to the provocation. He would become aware of what happened during the episode after calming down, but would have fuzzy recall and would remember only bits and pieces of the events during the episode. Between episodes, the person is not usually aggressive, but rather mild mannered, regrets the episodes, and sees them as

out of character. (P 283-84, 300-03, 305, 311) The person unconsciously represses feelings of anger, then the feelings build up until they are triggered by some inconsequential event. (P 285)

The MMPI also indicated Gibson was over reporting his symptoms, but Dr. Silver took that into consideration in making his diagnosis. (P 284-85, 300, 310, 313) Gibson was not sophisticated enough to feign the testing criteria for specific disorders. (P 309) Gibson related episodes when he lost his temper severely and disproportionately. (P 286, 301) He said he suffered from blackouts, which involve loss of memory for periods of time when the person seemed to be acting normally and are usually caused by use of alcohol. (P 286-87, 301-02, 310) Repression is different, it is an unconscious way for the mind to protect itself by not allowing threatening information into consciousness. (P 288, 310) A person with intermittent explosive disorder might repress all memory of an explosive episode. (P 311)

Dr. Silver also determined that Gibson's IQ was in the 70 to 80 range, which is below average and on the borderline of retardation. (P 288-89) The test results indicated Gibson was prone to impulsively acting out or would have a history of poor self-control. He was immature and emotionally undeveloped. (P 289)

Dr. Silver examined Gibson again on January 29, 1992. Gibson obtained a prorated verbal IQ of 72 on subtests of the Wechsler Adult Intelligence Scale. (P 290-91) His intelligence was in the lower five percent of the population. He was still inarticulate and unreflective. (P 291) He was somewhat more mature in that he

quit using drugs, was no longer physically abusive of his second wife, and was able to hold a job. (P 292) Gibson's score on the Wechsler Memory Scale was below average and consistent with his IQ. (P 293) Gibson reported that he was suffering from blackouts and hallucinations, but Dr. Silver did not believe he had hallucinations. (P 304-05) Dr. Silver found that Gibson was competent and sane. (P 307)

Dr. Silver diagnosed Gibson as suffering from intermittent explosive disorder and borderline personality disorder. (P 294, 305-06) A person with borderline personality disorder has shown a pattern of instability throughout his life, is very moody, has abrupt shifts in mood and dramatic changes in relationships with other people, has intense episodes of lack of self-control, and has a lack of identity and no internal stability. (P 294-95) A person with these disorders can be helped through treatment or medication, but this would be difficult or impossible with Gibson because he is a "very primitive undeveloped person." (P 295-96, 303) Gibson would benefit from a structured environment, but his explosive personality might still show itself on occasion. (P 297, 303, 312)

Dr. Robert J. Wald, a psychiatrist, examined Gibson on October 22, 1982. (P 314-16) He requested testing for organic brain syndrome, but the electroencephalogram showed no abnormality. (P 317, 331) He determined that Gibson was intellectually slow, consistent with an IQ of 72 or 80-85, but he did conduct an IQ test. (P 317-18, 331-32) Gibson reported having hallucinations and hearing voices, but Dr. Wald found no evidence of present audio

or visual hallucinations. Gibson may have experienced them in the past. (P 319, 332-34, 341) Dr. Wald found no evidence of psychotic, delusional, or paranoid thoughts. (P 318, 332)

Gibson reported having blackouts, which are caused by organic factors such as epileptic seizures or substance abuse. Gibson's blackouts occurred during periods of high stress and may have occurred during times of personal violence directed towards others. He may have been reporting repression, the unconscious blocking of memory of certain events. (P 319-20) It is possible for someone to have retrograde amnesia following a major traumatic event. (P 343-44) He may also have been engaging in denial. (P 322)

Dr. Wald diagnosed Gibson as having dull normal intelligence, intermittent explosive personality disorder, depressive reaction possibly caused by his incarceration for homicide, and a history of drug and alcohol abuse. (P 320, 334-35) A person with intermittent explosive personality disorder reacts very inappropriately with a great degree of explosive energy and violence to an event which would not cause that type of violence by most people. Between the explosive outbursts, he may appear normal, conduct business in a relatively normal fashion, and may or may not be remorseful for act which occurred during the outbursts. (P 321)

Dr. Wald examined Gibson again on September 13, 1983, after a period of time in a state mental hospital. He found Gibson to be competent to stand trial. (P 336)

Dr. Wald examined Gibson a third time in January, 1992. (P 324, 335) Gibson was mildly to moderately depressed and claimed

transient, episodic suicidal ideation. (P 324) Gibson feared going to prison and that he may have killed one or more people without recollection of having done so. He said he did not know whether he committed the crime with which he had been charged. (P 325) Gibson reported blackouts at the time of both murders. (P 336-37) Gibson said he remembered going to work, going home for about an hour because of stomach pains, and returning to work. He did not say he knew Luevano or that he was having an affair with her. He denied any memory of being involved with the murder. (P 337) Dr. Wald found no evidence of psychosis, no hallucinations, delusions, or paranoid thoughts. (P 325) Gibson's intelligence remained in the dull normal or borderline range. (P 325)

Dr. Wald again diagnosed Gibson as suffering from reactive depression with probable explosive personality disorder. (P 325, 338-39) Gibson satisfied all four diagnostic criteria for explosive personality disorder. (P 325-26, 339) A person with this disorder may be helped by psychotherapy and sometimes by medication. (P 328, 339) Psychotherapy works best when the person is perceptive, understanding, and cooperative with treatment. (P 329, 340) But unpredictable outbursts may still occur. (P 329) The structured environment of a the jail, medication, and mental health counseling may explain why Gibson had not acted out while he was incarcerated. (P 329-30) There can be no guarantee that Gibson or anyone else will never have an episode of violence. (P 330) Gibson was sane and competent at the time of the offense. (P 340)

Defense counsel objected to the jury instruction on the heinous, atrocious, or cruel aggravating factor because it was unconstitutionally vague and was not supported by the evidence. (P 214-15, 218-23, 349-54, 356) The court overruled the objection. (P 223, 356) Defense counsel objected to the jury instruction on the cold, calculated, and premeditated aggravating factor because it was not supported by the evidence. (P 223-25, 228-29, 354-56) The court overruled the objection. (P 229, 356) The court gave the standard instructions on heinous, atrocious, or cruel and cold, calculated, and premeditated. (P 391-92)

Following the jury's death recommendation, (P 398) the court ordered a presentence investigation report over defense counsel's objections that it would contain information he could not counter, it could include improper victim impact statements, and the court should not consider information not presented through witness testimony or exhibits. (P 402-03)

D. Sentencing Hearing

The prosecutor asked the court to merge the convictions for first-degree premeditated murder and first-degree felony murder. She also asked the court to depart from the sentencing guidelines and impose a consecutive life sentence for the burglary because Gibson was convicted of an unscored capital offense. (S 3-4)

Having reviewed the presentence investigation report, defense counsel objected to the victim impact statements it contained and to the numerous letters from friends and relatives of Mr. Thompson and Ms. Luevano attached to the report. He had no opportunity to

question the authors of the letters. The letters did not fall within the parameters of victim impact statements. (S 4-5) The prosecutor asked the court to consider the aggravating circumstances and not the letters. (P 5-6)

Defense counsel objected to consideration of the heinous, atrocious, or cruel aggravating circumstance because the jury instruction was unconstitutionally vague and because the State failed to prove the circumstance. (S 6-7) He objected to consideration of the cold, calculated, and premeditated aggravating circumstance because the State failed to prove heightened premeditation. (S 7) He asked the court to consider the mitigating circumstances, including Gibson's childhood environment, his learning and mental disability, that he was a good employee, that he can maintain control when provided medication, counseling, and the structured environment of jail or prison, his explosive personality disorder, and his impaired capacity to appreciate the consequences of his actions and to control his conduct. (S 7-11)

The court orally found four aggravating circumstances: (1) prior conviction of a violent felony, second degree murder; (2) the crime was committed while engaged in the commission of a burglary; (3) the crime was heinous, atrocious, or cruel because of the nature and number of blows, strangulation, anal and vaginal sexual battery, and the terror and pain suffered by Ms. Luevano; and (4) the crime was cold, calculated, and premeditated as shown by the planned watching of Ms. Luevano. (S 13-15, 17-18) The court also considered that Ms. Luevano was beautiful, 20 years old, a

daughter, a sister, a friend, a future wife, and a future mother. Gibson took her to her grave along with many hearts from the community. The prior murder was of an elderly person and was committed in a similar fashion, by inflicting 30 blows to the head with a machete. (S 18-19) The court said it took Gibson's background into consideration, but it rejected his age, mental or emotional disturbance, and impaired capacity as mitigating circumstances. (S 15-17)

SUMMARY OF THE ARGUMENT

I. The trial court sentenced Brian Gibson to death, but it never filed any written order stating its findings upon which the sentence was based, as required by section 921.141(3), Florida Statutes (1992 Supp.). This Court has ruled that the statute requires reversal of the death sentence and imposition of a life sentence when the trial court fails to enter a contemporaneous written order. Because life was the only lawful sentence in the absence of a written order, principles of double jeopardy and due process prohibit resentencing Gibson to death even if this Court reverses his conviction and remands for a new trial.

II. The trial court departed from the permitted range provided by the sentencing guidelines and imposed a consecutive life sentence for burglary. The court did not enter any written reason for departure on the guidelines scoresheet or in a separate written order. The court's failure to enter contemporaneous written reasons for departure requires reversal of the burglary sentence and imposition of a sentence within the permitted range of the guidelines.

III. The trial court overruled defense counsel's relevancy objections and admitted evidence that Gibson had attempted or requested to have anal sex with his wife and girlfriend. The State offered the evidence to prove his identity as the perpetrator of the murder of Luevano because there was some evidence that she may have been anally assaulted. Consensual anal sex is a misdemeanor under Florida law, so an attempt or solicitation to commit this act

is also a crime. Because there was no similarity between the collateral offenses and the charged offenses and nothing unusual about them to point to Gibson as the perpetrator, the collateral offenses were not relevant to any material fact in issue. The admission of collateral crime evidence relevant solely to the defendant's bad character or propensity is presumed to be harmful error. Because the State's evidence of Gibson's guilt was largely circumstantial, the error cannot be found harmless beyond a reasonable doubt, and the convictions must be reversed for a new trial.

IV. The trial court erred by sustaining the State's hearsay objection when defense counsel asked Roxanne Gibson whether she had heard that her husband was having an affair with Luevano. Counsel was not trying to prove the truth of the matter asserted in the out of court statement, so it was not hearsay. Counsel was attempting to establish that Mrs. Gibson was biased and had a motive to testify against Brian Gibson. The court's ruling violated Gibson's constitutional right to confront and cross-examine adverse witnesses. Because Mrs. Gibson was a crucial State identification witness, the error was not harmless. The convictions must be reversed and remanded for a new trial.

V. The trial court erred by denying defense counsel's request for a brief recess to consult with Gibson during a bench conference in which counsel was exercising both cause and peremptory challenges. Gibson's constitutional rights to be present and to have the assistance of counsel mandated the right to communicate with

counsel regarding the use of peremptory challenges at the time they were being exercised. Waiver of these rights cannot be inferred from Gibson's silence. Peremptory challenges are essential to a fair trial, and their nature and purpose make it impossible to determine the extent of prejudice Gibson suffered because of the court's refusal to allow him to consult with counsel. The court's error requires reversal and remand for a new trial.

VI. During the penalty phase, the court erred by overruling defense counsel's objections and admitting four crime scene photos and four autopsy photos all showing the victim of the prior homicide for which Gibson was convicted of second-degree murder. The prejudicial effect of these gruesome photos outweighed their probative value. The photos were unnecessary to establish the fact of Gibson's prior conviction and the details of the crime. Allowing the investigator and medical examiner to display and describe these photos must have affected the jury's sentencing recommendation and cannot have been harmless error. The death sentence must be vacated.

VII. While victim impact evidence and argument do not violate the Eighth Amendment, such evidence must be relevant to a material fact in issue to be admissible. The victims' rights provision of the Florida Constitution allows the relatives of a homicide victim to be heard only when relevant. In the penalty phase of a capital trial, victim impact evidence which is not probative of the aggravating and mitigating circumstances is not relevant and not admissible. Relevant victim impact evidence is not admissible when

its probative value is outweighed by its prejudicial effects. In this case, the trial court admitted, over defense counsel's objections, irrelevant and emotionally inflammatory testimony by Luevano's mother, brother, and sisters about her hopes and plans for the future, her value to the family, and their grief and fear resulting from her death. The court relied upon this testimony in finding nonstatutory aggravating circumstances in its oral statement of reasons for imposing the death penalty. The court's errors violated Gibson's right to a fair penalty phase trial under the due process clauses of the state and federal constitutions and require reversal.

VIII. The trial court erred by instructing the jury upon and finding the HAC and CCP aggravating factors. The State failed to prove heightened premeditation, cool and calm refection, or a careful plan or prearranged design to kill. The State also failed to prove that Luevano was conscious and could feel pain after the first blow.

IX. The trial court violated the Eighth and Fourteenth Amendments by giving the standard jury instructions on the HAC and CCP aggravating factors because they are unconstitutionally vague and overbroad.

X. The trial court erred by rejecting unrefuted expert testimony that Gibson suffered from an intermittent explosive personality disorder and a borderline personality disorder, mental or emotional disturbances which impaired his capacity to conform his conduct to the requirements of law. The court also erred by

failing to expressly identify, evaluate, find, and weigh unrefuted evidence of nonstatutory mitigating circumstances, including his troubled childhood, borderline intelligence, good work record, ability to control his behavior in jail, capacity to form loving relationships, and history of drug and alcohol abuse.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY IMPOSING A DEATH SENTENCE WITHOUT ENTERING A WRITTEN ORDER SETTING FORTH ITS FINDINGS OF FACT UPON WHICH THE SENTENCE WAS BASED.

The trial court sentenced Brian Gibson to death for first-degree murder. (R 160-62; S 19) The court orally pronounced its reasons for imposing the death sentence. (S 13-19) However, the court did not enter a written order setting forth its findings of fact upon which the sentence was based. (SR 72)

Section 921.141(3), Florida Statutes (1992 Supp.), requires the court to "set forth in writing its findings upon which the sentence of death is based." Section 921.141(3) further provides, "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082."

In Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989), this Court ruled:

> [W]e consider it desirable to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. Accordingly, pursuant to our authority under article V, section 2(a), of the Florida Constitution, effective thirty days after this decision becomes final, we so order.

In Stewart v. State, 549 So. 2d 171 (Fla. 1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3294, 111 L. Ed. 2d 802 (1990), this Court held that the trial court erred by failing to provide written findings in support of the death sentence. Because the sentence was imposed prior to the Grossman decision, this Court remanded the case to the trial court for the entry of written findings. However, the Court ruled:

> Should a trial court fail to provide timely written findings in a sentencing proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence.

Id., at 176.

In Christopher v. State, 583 So. 2d 642 (Fla. 1991), the trial court issued its written findings in support of the death sentences two weeks after it sentenced the defendant. This Court vacated the death sentences and remanded for the imposition of life sentences because the trial court failed to comply with section 921.141(3) and the sentencing took place after Grossman was decided. Id., at 646-47. This Court reasoned that preparation of the written findings after the death sentence has been imposed runs the risk that the sentence was not the result of a weighing process or a

reasoned judgment as required by the statute and due process of law. Id., at 647.

Again, in Hernandez v. State, 621 So. 2d 1353, 1357 (Fla. 1993), this Court vacated the death sentence and remanded for imposition of a life sentence because the trial court failed to issue contemporaneous written reasons supporting the death sentence. This court explained that the purpose of requiring written findings is to ensure that the death sentence

> results from a thoughtful, deliberate, and knowledgeable weighing by the trial judge of all aggravating and mitigating circumstances surrounding both the criminal and the crime, as dictated by the United States Supreme Court and our own state constitution.

Id. Furthermore, the purpose of requiring a contemporaneous written order is "to ensure that written reasons are not merely an after-the-fact rationalization for a hasty, visceral, or mistakenly reasoned initial decision imposing death." Id.

In the present case, because the trial court sentenced Gibson to death without ever filing written findings in support of the death sentence, the sentence must be vacated, and the case must be remanded for imposition of a life sentence pursuant to section 921.141(3) and the decisions in Grossman, Stewart, Christopher, and Hernandez.

Moreover, even if this Court reverses Gibson's conviction and remands for a new trial because of one or more of the trial errors argued in Issues III, IV, and V, infra, this Court must mandate the imposition of a life sentence in the event that Gibson is again convicted of first-degree murder. Because life was the only lawful

sentence which could be imposed in the absence of written findings to support a death sentence, the trial court's failure to enter written findings effectively acquitted Gibson of the death sentence under the provisions of section 921.141(3). See Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991)(reasonable life recommendation by jury effectively acquitted defendant of death sentence). Thus, the state constitutional protection against double jeopardy prohibits subjecting him again to the death penalty for this offense if he is retried or resentenced for any reason. Id.; Art. I, § 9, Fla. Const. Due process of law also prohibits subjecting Gibson to the death penalty on retrial or resentencing because it would be fundamentally unfair to force him to choose between arguing guilt phase or penalty phase issues on appeal. Id.; Art. I, §§ 9, 17, Fla. Const.

ISSUE II

THE TRIAL COURT ERRED BY DEPARTING FROM THE SENTENCING GUIDELINES PERMITTED RANGE FOR THE BURGLARY SENTENCE WITHOUT PROVIDING WRITTEN REASONS FOR THE DEPARTURE.

The sentencing guidelines provided a permitted range of 4 1/2 to 9 years imprisonment for sentencing Brian Gibson for burglary. (R 159) The prosecutor asked the trial court to exceed the guidelines and impose a consecutive life sentence for burglary on the ground that Gibson was also convicted of an unscored capital offense. (S 3-4) The court imposed a consecutive life sentence for burglary. (R 159-60, 163; S 19) The court orally stated that

this sentence was "based upon what has been presented." (S 19) The court or its clerk wrote "consecutive life sentence to death penalty" in the space provided for "TOTAL SENTENCE IMPOSED" on the guidelines scoresheet. The court left blank the space provided for "REASONS FOR DEPARTURE" on the scoresheet. (R 159) The court did not enter a separate written order stating its reasons for departing from the guidelines. (SR 73)

Because the trial court failed to provide contemporaneous written reasons for departing from the guidelines when it sentenced Gibson for burglary, the sentence must be reversed, and the case must be remanded to the trial court for resentencing with no possibility of departure from the guidelines. Owens v. State, 598 So. 2d 64 (Fla. 1992).

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S ATTEMPTS TO HAVE ANAL INTERCOURSE WITH HIS WIFE AND GIRLFRIEND BECAUSE IT WAS NOT RELEVANT TO ANY MATERIAL ISSUE OTHER THAN APPELLANT'S BAD CHARACTER OR PROPENSITY.

Dr. Graves found a small tear at the edge of Luevano's anus. This injury was consistent with the insertion of a finger or a penis. (T 1808) Dr. Graves made smears from the vagina and anus. (T 1793-94) He found sperm in the vaginal smear, but not in the anal smear. (T 1812-13) There was no bruising of the anal or vaginal area. (T 1831) The sperm could have been present in the vagina for up to 48 hours. (T 1831-32) The anal tear was the only

evidence of sexual assault, and it was possible that the tear was caused in some other way. (T 1833-34) Richard Murrish testified that he and Luevano engaged in sexual intercourse on the evening before the homicide, but they had never engaged in anal intercourse. (T 1296-97)

Brian Gibson was married to Roxanne Gibson at the time of the offense. (T 1225-26) When the prosecutor asked Roxanne whether Brian ever attempted to have anal intercourse with her, and Roxanne answered yes, defense counsel objected that it was not relevant and the State had not filed any Williams rule notice. The prosecutor argued that Gibson's course of conduct was relevant to identity because the medical examiner found an injury to Luevano's anal area and Murrish denied that she had engaged in such activities. The court overruled the objections and allowed the question and answer to be repeated. (T 1245-49) Brian did not force Roxanne to have anal intercourse, and she did not permit him to do it. (T 1264)

Tracy Grass had known Brian Gibson since high school. (T 1594-96) They dated in 1982 or 1983. (T 1596-97) They began having an affair in 1990. (T 1597-99) When the prosecutor asked whether Gibson ever attempted to have anal intercourse with her, defense counsel renewed his prior objections and argued that the State was trying to show propensity and that the behavior in question was not a unique or unusual characteristic. The prosecutor again argued that the evidence was relevant to identity. She did not file a Williams rule notice because she did not believe the Williams rule applied. The court overruled the objections. (T

1599-1603) The prosecutor then asked Grass whether Gibson ever wanted her to have anal intercourse with him, and she answered yes. (T 1603) He tried, she told him she was not interested in doing that, and he did not try to force her. (T 1611)

Although seldom prosecuted, sodomy continues to be a criminal offense in the State of Florida. In Franklin v. State, 257 So. 2d 21, 24 (Fla. 1971), this Court held that section 800.01, Florida Statutes (1969), which made "the abominable and detestable crime against nature" a felony, was unconstitutionally vague when applied to oral or anal sexual activity between consenting partners. However, the Court also ruled that "society will continue to be protected from this sort of reprehensible act" under section 800.02, Florida Statutes (1969), which made "any unnatural and lascivious act with another person" a misdemeanor. Id. The legislature subsequently repealed section 800.01, but section 800.02, Florida Statutes (1993), still proscribes "any unnatural and lascivious act with another person" except for a "mother's breast feeding of her baby."[2] This Court has never receded from the decision in Franklin. More recently, the United States Supreme Court ruled that state sodomy laws do not violate the Fourteenth Amendment and that there is no constitutionally protected right to engage in private, consensual, homosexual sodomy. Bowers v.

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[2] While counsel believes that the term "unnatural and lascivious act" is unconstitutionally vague, especially in light of the legislature's perception that it was necessary to expressly exclude breast feeding, which is self-evidently neither unnatural nor lascivious, that issue is not before the Court in this appeal.

Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); U.S. Const. amend. XIV.

Because consensual anal intercourse is a crime under section 800.02, attempted anal intercourse is a crime under the provisions of section 777.04(1), Florida Statutes (1993). Also, anyone who encourages or requests another person to engage in anal intercourse is guilty of the offense of criminal solicitation under the provisions of section 777.04(2), Florida Statutes (1993). Even if requesting or attempting to engage in private, consensual anal intercourse were not a crime, many people still believe that such behavior is immoral, sinful, perverted, disgusting, or otherwise unacceptable.

Similar fact evidence of other crimes, wrongs, or acts is admissible only if it is relevant to prove a material fact in issue; it is not admissible when it is relevant solely to prove the defendant's bad character or propensity. Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959); § 90.404(2)(a), Fla. Stat. (1993). Where, as in this case, the State offers the evidence to prove identity, there must be pervasive points of similarity between the charged offense and the collateral offense, and the similarities must be so unusual as to point to the defendant as the perpetrator of both offenses. Henry v. State, 574 So. 2d 73 (Fla. 1991); Drake v. State, 400 So. 2d 1217 (Fla. 1981).

In Henry, during the trial for the murder of the defendant's wife, the court admitted evidence that the defendant kidnapped and killed her son from a former marriage shortly after he killed his wife. This Court held that the collateral crime evidence was not relevant to prove identity because the facts that both victims were family members and were stabbed in the neck "did not provide sufficient points of similarity from which it would be reasonable to conclude that the same person committed both crimes." Id., at 75. This Court reversed and remanded for a new trial.

In Drake, during the trial for the murder of a young woman the defendant met in a bar, the court admitted evidence of prior sexual assaults on two other young women who were not killed. This Court held that the collateral offenses were not sufficiently similar to the murder, in which there was little evidence of sexual assault, to prove identity. Although the hands of all three victims were bound, this was not sufficiently unusual to point to the defendant as the perpetrator. Id., at 1219. This Court reversed and remanded for a new trial.

In Thompson v. State, 494 So. 2d 203 (Fla. 1986), the defendant was tried for the strangulation murder of a woman found in a box in a dumpster. Her car was found near a church, and a witness identified the defendant as the man he had seen talking to the victim by the car. The trial court admitted evidence of a prior offense in which the defendant kidnapped another woman and sexually battered her in the parking lot of the same church. This court held that admission of the collateral crime evidence was

reversible error because it was not sufficiently similar to be relevant--in the murder case, the victim was badly beaten but there was no substantial evidence of sexual abuse, while there was no evidence of beating or other bodily harm in the sexual battery case.

In the present case, there is no similarity between the charged offenses of murder and burglary and the collateral offenses of attempted sodomy or solicitation to commit sodomy. Luevano may or may not have been the victim of an anal assault. Dr. Graves testified that the anal tear was consistent with penetration by a penis or finger, but the injury could have been caused some other way. Roxanne Gibson and Tracy Grass testified that Brian Gibson requested or attempted to engage in anal intercourse with them, but they refused, and Brian did not force them. That Gibson desired to have consensual anal intercourse with his wife and girlfriend but accepted their refusals does not in any way tend to prove that he broke into Luevano's house and beat her to death with a barbell, whether or not she was anally assaulted. A frustrated desire for consensual sexual experimentation with a wife or girlfriend is commonplace and cannot be equated with killing someone to obtain gratification.

Because the State's collateral crime evidence was not relevant to identity or any other material fact in issue, it could only be used to show Gibson's bad character or propensity to desire anal sex. The improper admission of such irrelevant collateral crime evidence must be presumed to be harmful error because of the danger

that the jury will take the bad character or propensity as evidence of the crime charged. Peek v. State, 488 So. 2d 52, 56 (Fla. 1986). The trial court's error in admitting the evidence requires reversal for a new trial unless the State demonstrates beyond a reasonable doubt that the error did not affect the jury's verdict, regardless of whether the properly admitted evidence was legally sufficient or even overwhelming. State v. Lee, 531 So. 2d 133, 136-38 (Fla. 1988); Ciccarelli v. State, 531 So. 2d 129, 131-32 (Fla. 1988). Because the State's evidence of Gibson's guilt was largely circumstantial, it cannot be determined beyond a reasonable doubt that the verdict was unaffected. Czubak, 570 So. 2d at 928. The conviction must be reversed, and the case must be remanded for a new trial.

ISSUE IV

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO CONFRONT ADVERSE WITNESSES BY FORBIDDING CROSS-EXAMINATION OF HIS WIFE ABOUT A MATTER RELEVANT TO HER BIAS OR MOTIVE, WHETHER SHE HAD HEARD APPELLANT WAS HAVING AN AFFAIR WITH THE VICTIM.

The trial court granted the State's pretrial motion in limine to preclude the defense from making any reference to an affair between Gibson and Luevano without proffering the evidence and obtaining the court's permission. (R 47-48; SR 13-23) During cross-examination, defense counsel requested the court's permission to ask Gibson's wife, Roxanne, whether she had heard that Brian was having an affair with Luevano. The prosecutor objected that this

was unsubstantiated hearsay. The only people who told her that were Brian's parents, and they heard it from Brian a year after the offense. Defense counsel argued that it was not being offered to prove the truth of the matter asserted but to show Roxanne's motive, bias, or prejudice. The court sustained the State's objection. (T 1258-62)

Section 90.801(1)(c), Florida Statutes (1993), defines hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evidence of an out of court statement which is not offered to prove the truth of the matter asserted is not hearsay. Anderson v. United States, 417 U.S. 211, 219, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974); Fields v. State, 608 So. 2d 899, 903 (Fla. 1st DCA 1992). Defense counsel was not trying to prove that Gibson actually had an affair with Luevano, he was trying to demonstrate that Roxanne was biased and had a motive to testify against her husband because she had heard that he had an affair with Luevano.

The Sixth and Fourteenth Amendments guarantee the accused the fundamental right to confront and cross-examine the witnesses against him. Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); U.S. Const. amends. VI and XIV. The Florida Constitution also guarantees this right. Coxwell v. State, 361 So. 2d 148, 150 n.5 (Fla. 1978); Coco v. State, 62 So. 2d 892, 894-95 (Fla. 1953); Art. I, § 16, Fla. Const.

The defendant's right to cross-examine a State witness includes the right to impeach or discredit the witness. This may be accomplished by revealing possible biases, prejudices, or ulterior motives. Davis, at 316-17. The defense must be allowed to explore on cross-examination the underlying facts which form the basis for the attack on the witness's credibility. Id., at 318. Thus, the defendant has the "right to probe into the influence of possible bias in the testimony of a crucial identification witness." Id., at 319.

In Corley v. State, 586 So. 2d 432, 434 (Fla. 1st DCA 1991), rev. denied, 598 So. 2d 78 (Fla. 1992), the district court explained,

> It is widely recognized that a defendant has the right to fully cross-examine an adverse witness to reveal any bias, prejudice, or improper motive that the witness may have in testifying against the defendant....The matters tending to show bias or prejudice that the defendant wishes to elicit on cross-examination do not have to be within the scope of direct examination. Nor is the defendant required to lay any other predicate prior to eliciting the information on cross-examination.

More simply stated, "Any evidence tending to establish that a witness is appearing for the State for any reason other than to tell the truth should not be kept from the jury." Williams v. State, 600 So.2d 509 (Fla. 3d DCA 1992).

Roxanne Gibson was a crucial identification witness for the State. She was one of two witnesses who positively identified the gold chain and Indian head charm found in Luevano's bedroom as belonging to her husband, Brian Gibson. (T 1225-26, 1236-41) This

was an important link in the State's chain of circumstantial evidence of the identity of the perpetrator of the murder. Roxanne also testified that Brian made a highly incriminating statement to her. The day following the murder, Brian asked her if the police had his fingerprints, wouldn't they come get him. (T 1235) She further testified that Brian became upset when the police questioned him. They had previously discussed moving to Mississippi in January, but Brian then said they should move now. (T 1244-45) As discussed in Issue III, supra, the State presented Roxanne's testimony that Brian attempted to have anal sex with her as similar fact evidence of identity. (T 1245-49)

Roxanne Gibson's credibility was automatically placed in issue when she took the stand to testify against her husband. Mendez v. State, 412 So. 2d 965, 966 (Fla. 2d DCA 1982). Defense counsel should have been "afforded wide latitude to demonstrate bias or a possible motive of the witness to testify as [s]he has." Id. It would be only natural for a wife who heard that her husband was having an affair with another woman when he was accused of brutally murdering her to feel biased and to be motivated to testify against her husband.

The trial court violated Gibson's right to confront and cross-examine adverse witnesses when it sustained the State's hearsay objection and precluded defense counsel from cross-examining Roxanne Gibson about her bias and motive to testify arising from having heard that her husband was having an affair with Luevano. The violation of a defendant's constitutional rights is subject to

harmless error review under Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1965). As explained in State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986), the harmless error test places the burden on the State to prove beyond a reasonable doubt that the error did not contribute to the conviction. This burden cannot be satisfied in this case because the violation of Gibson's right to confront and cross-examine his wife prevented defense counsel from fully developing his attack upon Roxanne Gibson's credibility as a crucial State identification witness. See Davis v. Alaska, 415 U.S. at 319; Davis v. State, 527 So. 2d 962, 963 (Fla. 5th DCA 1988).

The United States Supreme Court has accorded special recognition to the harmfulness of any curtailment of the defendant's right to effective cross-examination, declaring that it "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Davis v. Alaska, at 318. The violation of Brian Gibson's right to confront and cross-examine one of the State's key witnesses requires reversal of the convictions and remand for a new trial.

ISSUE V

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO BE PRESENT AND TO THE ASSISTANCE OF COUNSEL BY DENYING DEFENSE COUNSEL'S REQUEST TO CONSULT WITH APPELLANT BEFORE EXERCISING PEREMPTORY CHALLENGES.

During the second of four rounds of voir dire,[3] a bench conference was conducted out of the hearing of the prospective jurors while the parties exercised challenges for cause. Brian Gibson did not participate in the conference. (T 480-88) Defense counsel requested a ten minute recess so he could consult with Gibson on how to proceed. The court denied the request. (T 489) The bench conference continued, with counsel using both cause and peremptory challenges. Gibson did not participate. (T 489-98) The court did not ask whether Gibson ratified counsel's actions at the end of the conference, (T 498) nor when the jury was sworn. (T 986-88)

The accused has the constitutional right to be present at all stages of his trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934); Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); U.S. Const. amends. VI and XIV; Art. I, §§ 9 and 16, Fla. Const. The challenging of jurors is an essential stage of the trial where the presence of the accused is mandated. Francis, at 1177; Fla. R. Crim. P. 3.180(a)(4).

The accused also has the constitutional right to the assistance of counsel in making his defense. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Myles v. State, 602 So. 2d 1278, 1280 (Fla. 1992); U.S. Const. amends. VI and XIV;

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[3] A fifth round of voir dire was conducted in the process of selecting two alternate jurors. (T 986-1062)

Art. I, § 16, Fla. Const. The right to assistance of counsel mandates the right to communicate with counsel during trial:

> Self-evidently, assistance of counsel cannot be rendered illusory or ineffective by a trial court's rulings....While there are many facets to the right to assistance of counsel, there can be no doubt that a core element is ready access to and communication with counsel during trial....
>
> Any delay in communication between defendant and defense counsel obviously will chill this constitutional right. Communication between defendant and defense counsel must be immediate during the often fast-paced setting of a criminal trial.

Myles, at 1280.

In Johnson v. Wainwright, 463 So. 2d 207, 211 (Fla. 1985), this Court explained that communication between the defendant and counsel is necessary during the exercise of peremptory challenges:

> Just as the accused has the right to the assistance of counsel, he also has the right to assist his counsel in conducting his defense....Thus in Francis the defendant's presence during the exercise of peremptories was deemed important because of the aid the accused could have given to his counsel.

In Walker v. State, 438 So. 2d 969 (Fla. 2d DCA 1983), voir dire was conducted in open court in the defendant's presence, but the judge, prosecutor, and defense counsel retired to another room out of the jury's presence for the exercise of peremptory challenges. The court denied the defendant's request to accompany them after determining that counsel had consulted the defendant concerning the challenges. The district court found reversible error because the defendant was not present to consult with counsel at the time the challenges were exercised. The court explained

that the exercise of peremptory challenges is not a mechanical function; it involves the formulation of on-the-spot strategy decisions which may be influenced by the actions of the prosecutor. Id., at 970.

Similarly, in this case the trial court violated Gibson's rights to be present and to communicate with his counsel during the challenging of jurors by conducting the challenges in a bench conference without Gibson's participation (T 480-98) and by denying defense counsel's request for a brief recess to consult with Gibson about how to proceed before counsel exercised peremptory challenges. (T 489) Gibson's physical presence in the courtroom and his representation by counsel were insufficient because he was not given the opportunity to communicate with counsel about the use of his peremptory challenges while they were being made. Id.

While the rights to presence and assistance of counsel may be waived, waiver cannot be inferred from the defendant's silence. Francis, at 1177-78. In this case, as in Francis, Gibson did not expressly waive his right to participate in the exercise of peremptory challenges, voluntarily absent himself from the courtroom, nor expressly ratify his counsel's actions. Therefore, the State cannot show that he made a knowing and intelligent waiver of his rights. Id., at 1178. See Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

This Court explained the importance of the use of peremptory challenges in Francis, at 1178-79:

> The exercise of peremptory challenges has been held to be essential to the fairness of a

> trial by jury and has been described as one of the most important rights secured to a defendant....It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations.

The nature and purpose of peremptory challenges makes it impossible to assess the extent of prejudice to the defendant when he is not present to consult with his counsel during the time that the challenges are exercised. Id., at 1179; Walker, at 970. The trial court's refusal to allow defense counsel to consult with Gibson regarding the use of peremptories cannot be shown to be harmless beyond a reasonable doubt and was reversible error entitling him to a new trial. Francis, at 1179; Walker, at 970.

ISSUE VI

THE TRIAL COURT ERRED BY ADMITTING GRUESOME CRIME SCENE AND AUTOPSY PHOTOGRAPHS OF THE VICTIM OF THE PRIOR MURDER BECAUSE THEIR PREJUDICIAL EFFECT OUTWEIGHED THEIR PROBATIVE VALUE.

During the penalty phase trial, the State introduced a certified copy of Gibson's judgment and sentence for second degree murder imposed on May 14, 1984. (P 12-15; R 150-53) Over defense counsel's objection that the prejudicial effect outweighed the probative value, (P 19-22, 79-80) the court admitted extensive testimony by Investigator Cassels and the medical examiner concerning the details of the prior murder and the nature and

extent of the victim's injuries resulting from about thirty blows to his head and body with a machete or other sharp instrument. (P 22-50, 80-98) This testimony was illustrated by the introduction of four crime scene photos of the victim's body and four autopsy photos of the victim. (R 154)

These photos were admitted over defense counsel's additional objections, especially regarding the State's late disclosure of the photos. The State provided 191 pages of discovery regarding the prior murder only two days before. Photographs were listed as exhibits, but the actual photographs were not provided for defense counsel's inspection until he objected. (P 23-26, 31, 33-34, 38-41, 80-81, 83-84, 87-90, 92-93) With regard to the discovery violation, the court found that the State did provide discovery, the prosecutor's conduct was not intentional, and any prejudice to the defense was cured by counsel's review of the photos in court. (P 29-32) But see Hill v. State, 535 So. 2d 354 (Fla. 5th DCA 1988)(denial of defense requested continuance violated due process when defense counsel was not permitted to depose State's DNA expert until the evening before trial).

Upon the presentation of the third autopsy photo, a close-up of the victim's shaved head showing ten or twelve wounds, including a depressed skull fracture with exposed brain matter, (P 87, 90-92) defense counsel objected that the prejudicial nature of the photo outweighed its probative value and that the photographs were making the prior offense the focus of the penalty phase. (P 87-88) The court overruled the objection. (P 90)

Section 921.141(5)(b), Florida Statutes (1992 Supp.), made Gibson's prior conviction for a felony involving violence an aggravating circumstance. This Court has ruled that evidence of the details of a prior violent felony is admissible in the penalty phase of a capital trial. Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla.), cert. denied, __ U.S. __, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1992); Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989).

However, section 90.403, Florida Statutes (1991), provides,

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

In Duncan v. State, 619 So. 2d 279, 282 (Fla. 1993), this Court applied section 90.403 and held that the admission of a single gruesome autopsy photo was error when the State proved the defendant's prior violent felony conviction by introducing the judgment and sentence for second-degree murder and the chief investigator's testimony relating the details of the crime. This Court further held that the error was harmless because no further reference was made to the photograph, it was not urged as a basis for a death recommendation, it was not made a focal point of the proceedings, and the jury was well aware of the conviction. Id.

In this case, the admission of eight gruesome photos of the victim of the prior violent crime was also error because the prejudicial effect of the photos outweighed their probative value and resulted in the needless presentation of cumulative evidence in violation of section 90.403. The error was more egregious than the

error in Duncan because it was not a single, isolated incident. Eight separate photos were introduced, displayed to the jury, and described in graphic detail by Cassels and the doctor. The gruesome photos of the prior murder victim became the focal point of the penalty phase trial. While the prosecutor did not specifically refer to the photos in her closing argument, she again described what was shown in the photos in graphic detail:

> Isn't it eerie Lester Thompson was found in his residence, blood splatters covering the walls of his residence where he lay, found lying face down in a pool of blood. He was beaten severely about the head area until he had depressed skull fractures. The brain matter exposed from the wounds because of the massive amounts of blows and the type of blows that he sustained. No less than thirty blows to his head and upper body area.

(P 366-67)

Under the circumstances of this case, the court's repeated errors in admitting gruesome photos of the prior murder victim cannot be found harmless beyond a reasonable doubt as required by State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The photos were completely unnecessary to establish the existence of the prior conviction, which was proved by admission of the judgment and sentence. They were unnecessary to establish the details of the prior crime because the testimony by Cassels and the medical examiner was more than sufficient to do so. The State went far beyond the parameters of the statutory aggravating circumstance. The only possible purpose for using the photos was to provide explicit and gory evidence of the heinous, atrocious, or cruel nature of the prior offense. The State's resort to prosecutorial

over-kill must have affected the jury's sentencing recommendation. The death sentence must be vacated, and the case must be remanded for a new penalty phase trial with a new jury.

ISSUE VII

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY ADMITTING IRRELEVANT VICTIM IMPACT EVIDENCE AND BY FINDING NONSTATUTORY AGGRAVATING CIRCUMSTANCES BASED UPON SUCH EVIDENCE.

Over defense counsel's repeated objections that the evidence was not relevant to any statutory aggravating circumstance, (P 61-64, 69, 103, 109) the trial court admitted testimony by the mother, brother, and two sisters of Lupita Luevano concerning her hopes and plans for the future, her value to their family, and their agonizing grief and fear following her death. (P 65-75, 105-08, 110-14) During the sentencing hearing, defense counsel objected to the court's consideration of victim impact statements in the presentence investigation report and letters from the friends and relatives of both Luevano and the prior murder victim, Lester Thompson. (S 4-5) The prosecutor asked the court to confine its consideration to the statutory aggravating circumstances and not the letters. (S 5-6) Yet the court's oral statement of reasons for the death sentence included,

> The pictures displayed how you destroyed her God given beauty. This young woman was a very beautiful twenty-year-old person.
>
> There was a person that was taken from us, but you took more than just a person. You took a daughter, you took a sister, you took a

> friend, and you took a future wife. You took a future mother. She was more than just a person. She meant a lot to many, many people.
> In consideration and reflection of this case, it simply wasn't a murder that you committed. It was a desecration of life itself in review of those photographs.
> You took Lupita Luevano to her grave, and many hearts from this community with her.

(S 18)

In Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), the Supreme Court ruled that the Eighth and Fourteenth Amendments prohibited the introduction of a victim impact statement containing information about the personal characteristics of the victims, the emotional impact of the crimes on the family, and the family members' opinions and characterizations of the crimes and the defendant. The Court held that such information was irrelevant to the capital sentencing decision, and its admission created an unacceptable risk that the death penalty may be imposed in an arbitrary and capricious manner. Id., at 502-03. In South Carolina v. Gathers, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989), the Court extended the Booth rule to statements made by a prosecutor to the sentencing jury regarding the personal qualities of the victim.

But in 1991, the Supreme Court abruptly reversed its position on the admissibility of victim impact evidence and argument under the Eighth Amendment. In Payne v. Tennessee, 501 U.S. __, 111 S. Ct. 2597, 115 L. Ed. 2d 720, 736 (1991), the Court held,

> [I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimate-

> ly conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

It is important to notice that the Payne holding is permissive and not mandatory. The State of Florida is not required to allow the prosecution to present evidence of the victim's character and the impact of her death on her family, but Florida is not prohibited from allowing such evidence by the Eighth Amendment. Thus, the Eighth Amendment leaves Florida free to determine whether victim impact evidence is relevant and admissible in a capital sentencing proceeding. Id., 115 L. Ed. 2d at 735.

However, Florida's latitude in permitting victim impact evidence is not without constitutional limits.

> In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. See Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

Id., 115 L. Ed. 2d at 735.

The Florida Legislature responded to the Payne decision by enacting section 921.141(7), Florida Statutes (1992 Supp.), which provides,

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the

> defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Notably absent from section 921.141(7) is any provision for the proper consideration by the jury or sentencing judge of the victim's uniqueness as a human being or the loss to members of the community. The statute plainly does not establish a new statutory aggravating circumstance. Instead, it requires proof of one or more of the aggravating circumstances provided by section 921.141-(5), Florida Statutes (1992 Supp.), as a predicate for the admissibility of the victim impact evidence. Section 921.141(5) limits the aggravating circumstances which may be considered to the eleven factors listed in that section, none of which directly involve the victim's uniqueness as a person or the loss to community members. If the jury and trial judge are statutorily precluded from considering any aggravating factor not listed in section 921.141(5), what legitimate purpose does the victim impact evidence and argument allowed by section 921.141(7) serve?

The most fundamental principle of Florida evidentiary law is that evidence must tend to prove or disprove a material fact in issue to be relevant and admissible. See, e.g., Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959); §§ 90.402 and 90.403, Fla. Stat. (1991). This Court had ruled that victim impact evidence was not relevant and not admissible in murder trials long before Booth and Payne were decided. In Melbourne v. State, 51 Fla. 69, 40 So. 189 (1906), the

defendant was convicted of first-degree murder and sentenced to death for the fatal shooting of a law enforcement officer. During trial, the prosecutor asked a witness whether the victim had a wife, and the witness answered, "Yes, sir." This Court held that this simple, brief exchange was reversible error:

> The fact that the deceased did or did not have a wife had no sort of relevancy or pertinency to any issue in the case; and,...its development at this trial could have no other effect than to prejudice the defendant with the jury.

Id., 40 So. at 190.

Similarly, in Rowe v. State, 120 Fla. 649, 163 So. 23 (1935), the defendant was convicted of first-degree murder and sentenced to life for a shooting incident in which the victim was armed and the defendant claimed self-defense. The trial court overruled defense counsel's objection to the prosecutor's question regarding the size of the victim's family. This Court ruled, "The fact that deceased may have had a family is wholly immaterial, irrelevant, and impertinent to any issue in the case." Id. However, the issue was procedurally barred because the objection was untimely and the defense failed to move to strike the answer. This Court reversed and remanded for a new trial on other grounds.

After Booth, but before Payne, this Court treated victim impact evidence as an impermissible nonstatutory aggravating factor. In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the murder victim's niece testified before the judge alone at the sentencing hearing about the effect of the victim's death on the victim's children and expressed her opinion favoring a death

sentence. This Court held that allowing such evidence in aggravation was reversible error under Booth and remanded for resentencing. Id., at 1263.

In Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989), this Court held that application of section 921.143, Florida Statutes (1987), to allow victim impact evidence in a capital case was unconstitutional under Booth. This Court found that the impact of the death on the victim's family members was a nonstatutory aggravating circumstance and was not an appropriate basis for a death sentence.

Even after Payne was decided, this Court's decisions in cases tried before the effective date of section 921.141(7) indicated that relevance to a material fact in issue was the test for determining the admissibility of victim impact evidence. In Hodges v. State, 595 So. 2d 929 (Fla.), vacated on other grounds, __ U.S. __, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992), affirmed on remand, 619 So. 2d 272 (Fla. 1993), the trial court admitted evidence of the victim's statements to police and her sister, who broke down in tears while testifying, about the victim's desire to continue to prosecute Hodges for indecent exposure despite his attempts to dissuade her. This Court rejected Hodges' Booth claim on the ground that the evidence was admissible under Payne. Id., at 933. Moreover, the evidence was relevant to establish Hodges' motive to prevent his prosecution for indecent exposure, and was therefore relevant to establish two statutory aggravating circumstances--the

murder was committed to disrupt or hinder the lawful exercise of government functions or enforcement of the law[4] and was cold, calculated, and premeditated.[5] Id., at 934.

In Burns v. State, 609 So. 2d 600 (Fla. 1992), the trial court admitted evidence of the victim's background, training, character, and conduct as a law enforcement officer. Again this Court rejected a Booth claim on the ground that the evidence was admissible under Payne. Id., at 605. However, this Court held that the trial court erred by admitting the evidence because it was not relevant to any material fact in issue. Id., at 605-06. This Court found that the error was harmless as to the finding of guilt, but the evidence and the prosecutor's emotional argument based on the evidence may have improperly influenced the jury in recommending death, so the interests of justice and fairness required a new penalty proceeding before a newly empaneled jury. Id., at 606-07.

The enactment of section 921.141(7) cannot constitutionally dispense with the requirement that victim impact evidence must be relevant to a material fact in issue to be admissible. Article I, section 16(b) of the Florida Constitution expressly requires victim impact evidence to be relevant to be admissible:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these

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[4] § 921.141(5)(g), Fla. Stat. (1989).

[5] § 921.141(5)(i), Fla. Stat. (1989).

> rights do not interfere with the constitutional rights of the accused. [Emphasis added.]

Sections 921.141(2) and (3), Florida Statutes (1992 Supp.), require the jury's advisory sentence and the sentence imposed by the court to be based upon a determination of whether sufficient statutory aggravating circumstances, as set forth in section 921.141(5), exist to justify a death sentence, and whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances. Thus, the existence of statutory aggravating circumstances and mitigating circumstances are the material facts in issue during the penalty phase of a capital trial in Florida.

Section 921.141(1), Florida Statutes (1992 Supp.), provides for the admission of evidence which is "relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6)." Thus, victim impact evidence is relevant to a material fact in issue and admissible when it tends to prove or disprove an aggravating or mitigating circumstance. See Hodges, 595 So. 2d at 933-34. When victim impact evidence is not probative of the aggravating or mitigating circumstances, it is not relevant and should not be admitted. See Burns, 609 So. 2d at 605-07.

Under the provisions of Article I, section 16(b), Florida Constitution, even relevant victim impact evidence must be excluded to the extent that it interferes with the constitutional rights of the accused. Perhaps the most fundamental and significant constitutional right of the accused is the right to a fair trial

under the due process clauses of the state and federal constitutions. U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. Accordingly, the Florida Evidence Code provides,

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

§ 90.403, Fla. Stat. (1991). Thus, to preserve the constitutional right to a fair trial, relevant victim impact evidence must be excluded when its probative value is outweighed by its prejudicial effects, and the admission of unduly prejudicial victim impact evidence violates the right to due process of law. See Payne, 115 L. Ed. 2d at 735.

In the present case, the State relied upon four statutory aggravating circumstances: (1) prior conviction for a violent felony, § 921.141(5)(b); (2) felony murder, § 921.141(5)(d); (3) heinous, atrocious, or cruel, § 921.141(5)(h); and (4) cold, calculated, and premeditated, § 921.141(5)(i). (P 362-71; S 5) The State's victim impact evidence, consisting of testimony by Luevano's mother, brother, and two sisters, showed that Luevano hoped to become married, have children, and become a law enforcement officer, that she was very involved in the lives of her family members, that she was loved and valued by her family, and that her family experienced extreme grief and fear because of her death. (P 65-75, 105-08, 110-14)

This evidence was certainly not probative of Gibson's prior conviction for the murder of Lester Thompson nor of his commission

of the murder of Luevano in the course of committing a burglary. The evidence was not probative of the heightened premeditation consisting of a careful plan or prearranged design to kill required for the cold, calculated, and premeditated circumstance. See Clark v. State, 609 So. 2d 513, 515 (Fla. 1992); Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988).

Nor was the evidence probative of the heinous, atrocious, or cruel aggravator. This factor is limited in its application to a "conscienceless or pitiless crime which is unnecessarily tortuous to the victim." Sochor v. Florida, 504 U.S. __, 112 S. Ct. 2114, 119 L. Ed. 2d 326, 339 (1992). As explained in Cannady v. State, 620 So. 2d 165, 169 (Fla. 1993), quoting, Williams v. State, 574 So. 2d 136, 138 (Fla. 1991), this

> "factor is permissible only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another."

The State's victim impact evidence was not relevant to rebut the defense evidence of mitigating circumstances, which pertained to Gibson's personal history, family relationships, mental disturbance, impaired capacity, and peaceful adjustment to incarceration. (P 116-345) Since the victim impact evidence was not probative of the aggravating and mitigating circumstances, it was not relevant to any material fact in issue and should not have been admitted.

The court's error in admitting the irrelevant victim impact evidence was extraordinarily prejudicial to the defense. The

evidence served no legitimate purpose and was plainly designed to arouse the jurors' sympathy for Luevano and her family and to inflame their emotions against Gibson. For example, Max Luevano testified that "the numbness [Lupita's death] left in our hearts and our minds I cannot describe in this brief moment." (P 65-66) Max further stated, "Not being able to be with her has really left a void in my heart, as to her dreams and her ambitions and talking [sic] part in helping her with her education and all of that, and, um, it just left an emptiness." (P 67) Luevano's mother, Guadalupe Rendon testified that Lupita's death "has totally destroyed our lives," (P 106) and, "Every day for all the pain, I miss her. I never see her. I will never talk to her again." (P 108) This case stands in stark contrast to cases in which victim impact evidence was relevant to a material fact in issue, such as Hodges and Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), vacated on other grounds, __ U.S. __, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992), opinion on remand, 614 So. 2d 483 (Fla. 1993). In Hitchcock, this Court found that testimony by the victim's mother describing her daughter was relevant to rebut the defendant's claim that the victim consented to sexual intercourse and "was not introduced to inflame the jury against Hitchcock or to create sympathy for the victim or her family." Id., 578 So. 2d at 691.

The State's victim impact evidence in this case was not only emotionally inflammatory, it may also have confused or misled the jury. The court's instructions gave absolutely no guidance to the jury in how to use the victim impact evidence. (P 390-96) The

court gave vague and overbroad instructions on the aggravating factors of cold, calculated, and premeditated and heinous, atrocious, or cruel, (P 392) as argued in Issue IX, infra. The jury may very well have misused the victim impact evidence to find the statutory aggravators or to find nonstatutory aggravating factors.

The court compounded its errors in admitting the irrelevant, inflammatory, and misleading victim impact evidence by relying on it to establish nonstatutory aggravating circumstances in the court's oral reasons for imposing the death sentence. The court found that Luevano was beautiful, young, a daughter, a sister, a friend, and a future wife and mother, who was valued by many people, and that Gibson took her to her grave along with the hearts of many members of the community. (S 18) Again, this case stands in contrast to such cases as Davis v. State, 586 So. 2d 1038, 1040-41 (Fla. 1991), vacated on other grounds, __ U.S. __, 112 S. Ct. 3021, 120 L. Ed. 2d 893 (1992), affirmed on remand, 620 So. 2d 152 (Fla. 1993), in which the improper admission of victim impact evidence was found to be harmless error because it was not heard by the jury and the court's written findings were limited to the statutory aggravating factors with no evidence of reliance on the victim's daughter's statement requesting the death penalty.

Under the circumstances presented by this case, the court's errors in admitting irrelevant and unduly prejudicial victim impact evidence and finding nonstatutory aggravating circumstances based upon that evidence deprived Brian Gibson of his fundamental

constitutional right to a fair trial and violated the due process provisions of the state and federal constitutions. U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. The court's errors also violated the victim impact provisions of the Florida Constitution. Art. I, § 16(b), Fla. Const.

Given the emotionally inflammatory nature of the testimony, the improper admission of this evidence must have affected the jury's death recommendation. The evidence clearly affected the court's decision to impose the death sentence because the court expressly relied upon it. Therefore, the court's errors cannot be found harmless under the test provided by Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1965); and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The death sentence must be vacated, and the case must be remanded for a new penalty phase trial with a newly empaneled jury.

ISSUE VIII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND ORALLY FINDING AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

The State requested the court to instruct the jury on the heinous, atrocious, or cruel (HAC)[6] and cold, calculated, or premeditated (CCP)[7] aggravating circumstances. (P 216-18, 225-26)

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[6] § 921.141(5)(h), Fla. Stat. (1992 Supp.).

[7] § 921.141(5)(i), Fla. Stat. (1992 Supp.).

Defense counsel objected to both instructions on the ground that they were not supported by the evidence. (P 214-15, 218-25, 227-29, 352-56) The court overruled the objections and gave the standard HAC and CCP instructions requested by the State. (P 223, 229, 356, 392) At the sentencing hearing defense counsel argued that the HAC factor had not been proven beyond a reasonable doubt (S 6-7) and that the State had failed to prove the heightened premeditation required for the CCP factor. (S 7)

The State has the burden of proving aggravating circumstances beyond a reasonable doubt. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993). When the State relies on circumstantial evidence to support an aggravating factor, "the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). "Moreover, even the trial court may not draw 'logical inferences to support a finding of a particular aggravating circumstance when the State has not met its burden." Robertson, at 1232. As a matter of state law, it is error to instruct the jury on aggravating factors which are not supported by the evidence. Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993); White v. State, 616 So. 2d 21, 25 (Fla. 1993); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993).

Regarding the CCP factor, the court orally found:

> [T]hat the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, again, based upon the facts that the jury considered in this, and this court has considered, this court finds that there was premedi-

> tation. The planned watching of the victim in this case, I find does rise to that level of being an aggravating circumstance.

(S 14-15)

In Jackson v. State, 19 Fla. Law Weekly S215, S217 (Fla. April, 21 1994), this Court summarized its prior decisions establishing what must be found to establish CCP:

> Thus, in order to find the CCP aggravating factor under our case law, the jury [and the sentencing judge] must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson, 604 So.2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers, 511 So. 2d at 533; and that the defendant exhibited heightened premeditation (premeditated), Id.; and that the defendant had no pretense of moral or legal justification. Banda v. State, 536 So. 2d 221, 224-25 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S. Ct. 1548, 103 L. Ed. 2d 852 (1989).

The trial court's oral findings were plainly inadequate to support CCP. The court failed to address any facts showing cool and calm reflection, a careful plan or prearranged design to commit murder, heightened premeditation, and the absence of any pretense of moral or legal justification. The court found only "premeditation" and "planned watching of the victim." (S 14) In Geralds v. State, 601 So. 2d at 1163, this Court ruled,

> To establish the heightened premeditation required for a finding that the murder was committed in a cold, calculated and premeditated manner, the evidence must show that the defendant had a "careful plan or prearranged design to kill." . . . A plan to kill cannot be inferred solely from a plan to commit, or the commission of another felony.

Thus, a plan to kill cannot be inferred from "planned watching of the victim."

Moreover, there was no evidence of any planned watching of the victim by Gibson. Gibson, together with his co-workers, had noticed Luevano doing chores outside her house and that she was attractive. (T 1124-26, 1133, 1672-73) This was nothing more than the normal behavior of workers who happen to see a pretty woman. Gibson had also seen Luevano at the convenience store where she worked. (T 1672-73) Again, this was a normal occurrence, especially in a small town like Clewiston. Luevano's boyfriend, Richard Murrish had found some cement blocks under their master bedroom and bathroom windows about a month before the homicide. (T 1292) However, there was absolutely no evidence that Gibson was responsible for this incident. Gibson's co-workers testified that he sometimes left the fertilizer plant to go walking or jogging. (T 1122-23, 1147, 1174-75, 1182, 1189-91) Yet there was no evidence to connect these events with Murrish's discovery of the cement blocks under the windows.

The State's circumstantial evidence at trial showed that Gibson entered the back bedroom window of Luevano's home after Murrish left for work, sexually battered her, killed her by inflicting multiple blows to her head with one of Murrish's weights, cleaned himself, then returned to work. See Statement of Facts, B. Trial Testimony, supra. This evidence was legally insufficient to prove CCP beyond a reasonable doubt because it was consistent with the reasonable hypothesis that Gibson entered

Luevano's house intending only to have sex with her, then became enraged and spontaneously killed her when she resisted or tried to escape. Geralds v. State, 601 So. 2d at 1163-64; Gore v. State, 599 So. 2d 978, 987 (Fla.), cert. denied, __ U.S. __, __ S. Ct. __, 121 L. Ed. 2d 545 (1992).

Moreover, evidence of the defendant's mental or emotional disturbance may negate a finding of cold deliberation. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). Dr. Silver, a clinical psychologist, and Dr. Wald, a psychiatrist, examined Brian Gibson in 1982 and again in 1992. (P 279-80, 290, 299, 305, 314-16, 323-244, 331, 335) Both doctors determined that Gibson suffered from an intermittent explosive personality disorder, which is characterized by episodes of rash, explosive aggression disproportionate to the provocation. Between episodes, the person is not usually aggressive, but rather mild mannered, and appears to behave normally. (P 283-85, 293-94, 300, 304, 320-21, 326-27, 334, 338-39) The person unconsciously represses feelings of anger, then the feelings build up until they are triggered by some inconsequential event. (P 285, 298) Dr. Silver found that Gibson was over-reporting his symptoms, but took that into consideration in making his diagnosis. (P 284-85, 300, 309-10, 313) Gibson was not sophisticated enough to feign the testing criteria for specific disorders. (P 309). In 1992, Dr. Silver found that Gibson was also suffering from borderline personality disorder. (P 294, 305-06) A person with borderline personality disorder has shown a pattern of instability throughout his life, is very moody, has

abrupt shifts in mood and dramatic changes in relationships with other people, has intense episodes of lack of self-control, and has a lack of identity and no internal stability. (P 294-95) The doctors' testimony was unrefuted and negated the CCP factor.

Regarding the HAC factor, the court orally found:

> [T]hat the crime was heinous, atrocious or cruel. And based upon the facts in this case, the facts that we've heard concerning the manner in which this murder took place, I do find that third aggravating circumstance has been proven beyond a reasonable doubt.

(S 14) The court summarized the facts as follows:

> You [Gibson] broke into Lupita Luevano's home. You raped her. You sodomized her by having anal intercourse with her. You bound her, she was choked. And you beat her about the face.
>
> According to Dr. Graves, you broke her cheekbones, you broke her jaw, you broke the upper plate of her mouth. You displaced an eye. And you crushed her skull to the point that brain matter was showing. She was choking on her own blood.
>
> We can only imagine with fear and terror what she was going through the last minutes of her life. The tremendous fear, tremendous terror and the tremendous pain. You invaded the privacy of her home. You invaded the privacy of her body. The pictures displayed how you destroyed her God given beauty. This young woman was a very beautiful twenty-year-old person.

(S 17-18)

In fact, the State did not prove beyond a reasonable doubt that Gibson had anal intercourse with Luevano. Dr. Graves found a small tear at the edge of Luevano's anus. This injury was consistent with the insertion of a finger or a penis. (T 1808) Dr. Graves made smears from the vagina and anus. (T 1790-94) He

found sperm in the vaginal smear, but not in the anal smear. (T 1812-13) There was no bruising of the anal or vaginal area. (T 1831) The sperm could have been present in the vagina for up to 48 hours. (T 1831-32) Dr. Graves found that the anal tear was the only evidence of sexual assault, and it was possible that the tear was caused in some other way. (T 1833-34) However, the FDLE DNA analyst found DNA matching Gibson's in a vaginal swab, (T 2082, 2085-86) so the State's evidence was adequate to find that he had vaginal intercourse with Luevano.

The State did not prove beyond a reasonable doubt that Luevano was choked. Dr. Graves found bruises on the back of the left side of her neck. They could have been caused by being grabbed from behind by someone's hands with moderate force. (T 1805-06) Because of the bruises and the shirt wrapped around her neck, Dr. Graves could not rule out strangulation as a contributing factor, but there were no hemorrhages in the underlying tissues, which would have been more suggestive of strangulation. (T 1810-11, 1821)

Nor did the State prove beyond a reasonable doubt that Luevano experienced tremendous pain. Death was caused by the blunt injuries to the face and skull. (T 1810) Dr. Graves could not determine the order in which the blows were inflicted. (T 1810) Luevano could have lived up to thirty minutes after the blows to her forehead, but she would have lost consciousness in two minutes or less. Whether she could still feel pain would depend upon the

level of her unconsciousness, which could not be determined. (T 1812, 1828-29, 1833)

This Court has ruled that when death was caused by a single blow to the head with a baseball bat, the HAC factor did not apply. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989). Because the State failed to prove that Luevano remained conscious after the first blow, the State's evidence was insufficient to support the court's finding of the HAC factor in this case. See DeAngelo v. State, 6116 So. 2d 440, 443 (Fla. 1993); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989); Herzog v. State, 439 So. 2d 1372, 1380 (Fla. 1983).

Because the court failed to enter any written findings, the death sentence must be vacated, and Gibson must be resentenced to life, as argued in Issue I, supra. In the alternative, the court's errors in finding and instructing the jury upon the unproven CCP and HAC aggravators requires reversal and remand for a new penalty phase trial before a newly empaneled jury.

ISSUE IX

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY GIVING VAGUE AND OVERBROAD JURY INSTRUCTIONS ON THE HEINOUS, ATROCIOUS, OR CRUEL AND COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCES.

The State requested the court to instruct the jury on the heinous, atrocious, or cruel (HAC)[8] and cold, calculated, or premeditated (CCP)[9] aggravating circumstances. (P 216-18, 225-26) Defense counsel objected to the HAC instruction because it was unconstitutionally vague and overbroad. (P 213-14, 349-52, 356) He objected to both instructions on the ground that they were not supported by the evidence, (P 214-15, 218-25, 227-29, 352-56) as argued in Issue VIII, supra. The court overruled the objections and gave the standard HAC and CCP instructions requested by the State. (P 223, 229, 356, 392)

The weighing of an invalid aggravating circumstance violates the Eighth Amendment. Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 858 (1992); U.S. Const. amend. VIII. An aggravating circumstance is invalid if it is so vague that it leaves the sentencer without sufficient guidance for determining the presence or absence of the factor. Id. When the jury is instructed that it may consider such a vague aggravating circumstance, it must be presumed that the jury found and weighed an invalid circumstance. Id., 120 L. Ed. 2d at 858-59. Because the sentencing judge is required to give great weight to the jury's sentencing recommendation, the court then indirectly weighs an invalid circumstance. Id., 120 L. Ed. 2d at 859. The result of this process is error because it creates the potential for arbitrariness in imposing the death penalty. Id.

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[8] § 921.141(5)(h), Fla. Stat. (1992 Supp.).

[9] § 921.141(5)(i), Fla. Stat. (1992 Supp.).

The court's HAC instruction provided,

> Number 3, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vial [sic]. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was consciousless [sic] or pitiless and was unnecessarily torturous to the victim.

(P 392)

This Court has ruled that this new standard instruction on the HAC factor is not unconstitutionally vague because it adequately defines the terms of the factor. Taylor v. State, 630 So. 2d 1038, 1043 (Fla. 1993). Appellant respectfully disagrees and requests this Court to reconsider the vagueness of the HAC instruction.

The first paragraph of this instruction simply recites the statutory language, "especially heinous, atrocious or cruel," from section 921.141(5)(h), Florida Statutes (1992 Supp.). In the absence of a sufficient limiting construction, the statute is unconstitutionally vague and overbroad and violates the Eighth Amendment. Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988); U.S. Const. amend. VIII. The second paragraph of the instruction purports to define the statutory terms, but it does so in the same language which was held unconstitutionally vague and overbroad in Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990). Thus, the constitu-

tionality of the instruction depends upon whether the final paragraph provides sufficient guidance to the sentencer.

In Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), the Supreme Court found that the HAC aggravator provided adequate guidance to the sentencer because this Court's opinion in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), construed HAC to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Sochor v. Florida, 504 U.S. __, 112 S. Ct. 2114, 119 L. Ed. 2d 326, 339 (1992).

In Sochor, the Supreme Court ruled that it had no jurisdiction to decide whether the HAC jury instruction used in that case[10] violated the Eighth Amendment because this Court had ruled that the issue was procedurally barred by the defendant's failure to object at trial. Id., 119 L. Ed. 2d at 337-38. Sochor also claimed that this Court had failed to adhere to the Dixon limiting construction in subsequent cases and therefore failed to provide sufficient guidance to the sentencing judge. The Supreme Court rejected that argument because it found that this Court had consistently applied the HAC factor to cases where the defendant strangled a conscious victim. Id., 119 L. Ed. 2d at 339-40. The Sochor decision does not hold that a jury instruction using the Dixon limiting construc-

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[10] The only HAC jury instruction given in Sochor was that "the crime for which the defendant is to sentenced was especially, wicked, evil, atrocious or cruel." Id., 119 L. Ed. 2d at 335. This instruction was subsequently held to violate the Eighth Amendment in Espinosa.

tion of HAC would provide sufficient guidance under the Eighth Amendment; that question was not before the Court.

Cases decided after Proffitt call into question the adequacy of the Dixon limiting construction of HAC. The Supreme Court has ruled that a State's capital sentencing scheme must genuinely narrow the class of defendants eligible for the death penalty, and a statutory aggravating circumstance must provide a principled basis for the sentencer to distinguish those who deserve capital punishment from those who do not. Arave v. Creech, 507 U.S. __, 113 S. Ct. __, 123 L. Ed. 2d 188, 200 (1993). "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Id.

Thus, the term "pitiless" is unconstitutionally vague because the jury might conclude that every first-degree murder is pitiless. Id., at 201. The term "conscienceless" suffers from the same defect; all first-degree murders can be seen as conscienceless. "Unnecessarily torturous" might also be construed by the jury as applying to all first-degree murders because any pain or suffering felt by the victim is plainly unnecessary. Moreover, the phrase "the kind of crime intended to be included" does not limit the jury's consideration of the HAC factor solely to unnecessarily torturous murders, but implies that such murders are merely an example of the type of crime to which HAC applies.

Furthermore, this Court has been applying narrower constructions of HAC than the Dixon construction. In Cannady v. State, 620

So. 2d 165, 169 (Fla. 1993), and Williams v. State, 574 So. 2d 136, 138 (Fla. 1991), this Court ruled that the HAC factor "is permissible only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." And in Stein v. State, 19 Fla. Law Weekly S32, S35 (Fla. Jan. 13, 1994), this Court held, "Because we find no evidence in the record that Stein intended to cause the victims unnecessary and prolonged suffering, we find that the trial judge erroneously found that the murders were heinous, atrocious, or cruel." [Emphasis added.] Neither of these limiting constructions has been incorporated into the HAC jury instruction. The whole point of Espinosa is that the jury must be informed of the limiting construction of an otherwise vague aggravating circumstance, and failure to do so renders the sentencing process arbitrary and unreliable.

In Jackson v. State, 19 Fla. Law Weekly S215, S216-17 (Fla. April 21, 1994), this Court ruled that the standard CCP jury instruction, which simply repeats the language of the statute, is unconstitutionally vague because it does not inform the jury of the limiting construction this Court has given the CCP factor. Therefore, the trial court erred by giving the standard CCP instruction in this case.

But this Court also ruled that claims that the CCP instruction are vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. Id., at S217. Also, in

Sochor v. State, 619 So. 2d 285, 290-91 (Fla. 1993), this Court ruled that Espinosa claims do not amount to fundamental error and are procedurally barred unless the defense objects to the vagueness of the HAC and CCP instructions. Appellant respectfully requests this Court to reconsider these procedural bar rulings because the nature of the constitutional error involved satisfies this Court's definitions of fundamental error.

This Court has defined fundamental error as error which amounts to a denial of due process; it is error which goes to the foundation of the case or the merits of the cause of action. Sochor, at 290; Ray v. State, 403 So. 2d 956, 960 (Fla. 1981); Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978); Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970).

Both the United States Supreme Court and this Court have ruled that the failure to properly instruct the jury on the essential elements of the crime charged is fundamental error. Screws v. United States, 325 U.S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 2d 1495 (1945); Brumbley v. State, 453 So. 2d 381, 386 (Fla. 1984). In Screws, the Supreme Court declared,

> [W]here the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial.

Id., at 107. The same rule must also apply to aggravating circumstance jury instructions.

Those provisions of the Bill of Rights which are fundamental and essential to a fair trial are made obligatory on the states by the due process clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The Eighth Amendment is one of those provisions; state laws which violate the Eighth Amendment violate the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 666-67, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

In the penalty phase of a capital trial, proof beyond a reasonable doubt of statutory aggravating circumstances is the foundation of the State's case for the death penalty. The proper determination of the presence or absence of aggravating circumstances plainly goes to the merits of the State's case. Jury instructions on aggravating circumstances which are "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor" violate the Eighth Amendment. Espinosa, 120 L. Ed. 2d at 858-59. Because of the great weight accorded to jury sentencing recommendations in Florida capital cases, it is essential to a fair trial to provide jurors with aggravating circumstance instructions which inform them of what they must find to apply the circumstance. Id. Therefore, the use of unconstitutionally vague aggravating circumstance jury instructions violates due process and constitutes fundamental error.

This Court has held that the use of an unconstitutionally vague instruction on HAC or CCP is harmless error when the facts of the case establish the presence of the factor under any definition

of the terms and beyond a reasonable doubt. Thompson v. State, 619 So. 2d 261, 267 (Fla.), cert. denied, __ U.S. __, 114 S. Ct. 445, 126 L. Ed. 2d 378 (1993); Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993). This is not such a case. The sufficiency of the evidence to establish HAC and CCP was very much in dispute during the penalty phase and sentencing hearing, and appellant's argument that the evidence was legally insufficient to find either factor is presented in Issue VIII, supra. Under these circumstances, the failure to adequately inform the jury of what they must find to apply HAC or CCP undermined the reliability of the jury's sentencing recommendation, created an unacceptable risk of arbitrariness in imposing the death penalty, and could not have been harmless beyond a reasonable doubt. The death sentence must be vacated.

ISSUE X

THE TRIAL COURT ERRED BY FAILING TO FIND AND WEIGH PROVEN MITIGATING CIRCUMSTANCES.

The Eighth and Fourteenth Amendments prohibit the State from precluding the sentencer in a capital case from considering any relevant mitigating factor, and they prohibit the sentencer from refusing to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 U.S. 869, 71 L. Ed. 2d 1 (1982); U.S. Const. amends. VIII and XIV. The sentencer must be allowed to consider and give effect to mitigating evidence relevant to the defendant's background and character precisely because the punishment should be directly related to the

personal culpability of the defendant. Penry v. Lynaugh, 492 U.S. 302, 327-28, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

Moreover, the Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings, 455 U.S. at 114. To insure fairness and consistency, this Court must conduct a meaningful independent review of the defendant's record and cannot ignore evidence of mitigating circumstances. Parker v. Dugger, 498 U.S. 308, 321, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991).

To insure the proper consideration of evidence of mitigating circumstances this Court has ruled that the trial court must expressly evaluate each mitigating circumstance to determine whether it is supported by the evidence and whether nonstatutory factors are truly mitigating in nature. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). The court must find that a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). "Once established, a mitigating circumstance may not be given no weight at all." Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991).

Defense counsel asked the court to consider the following mitigating circumstances: Gibson's childhood environment, his learning and mental disability, that he was a good employee, that he can maintain control when provided medication, counseling, and the structured environment of jail or prison, his explosive

personality disorder, and his impaired capacity to appreciate the consequences of his actions and to control his conduct. (S 7-11)

Section 921.141(6)(b), Florida Statutes (1992 Supp.), establishes as a mitigating circumstance, "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." This Court has effectively removed the adjective "extreme" from the statutory circumstance:

> However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say.

Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

Section 921.141(6)(f), Florida Statutes (1992 Supp.), provides as a mitigating circumstance, "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

Dr. Silver, a clinical psychologist, and Dr. Wald, a psychiatrist, examined Brian Gibson in 1982 and again in 1992. (P 279-80, 290, 299, 305, 314-16, 323-244, 331, 335) Both doctors determined that Gibson suffered from an intermittent explosive personality disorder, which is characterized by episodes of rash, explosive aggression disproportionate to the provocation. Between episodes, the person is not usually aggressive, but rather mild mannered, and appears to behave normally. (P 283-85, 293-94, 300, 304, 320-21, 326-27, 334, 338-39) The person unconsciously represses feelings of anger, then the feelings build up until they are triggered by

some inconsequential event. (P 285, 298) In 1992, Dr. Silver found that Gibson was also suffering from borderline personality disorder. (P 294, 305-06) A person with borderline personality disorder has shown a pattern of instability throughout his life, is very moody, has abrupt shifts in mood and dramatic changes in relationships with other people, has intense episodes of lack of self-control, and has a lack of identity and no internal stability. (P 294-95)

While the trial court orally stated that it considered this evidence, it did not find the doctors' testimony to be mitigating. Instead, the court focused upon the doctors' findings that Gibson was sane at the time of the offense, competent to stand trial, and over-reported his symptoms of mental illness. (S 15-17) But legal sanity and competence to stand trial are not the proper criteria for determining the presence or absence of the mental mitigating circumstances. While Dr. Silver found that Gibson was over-reporting his symptoms, he took that into consideration in making his diagnosis. (P 284-85, 300, 309-10, 313) Gibson was not sophisticated enough to feign the testing criteria for specific disorders. (P 309) The evidence of Gibson's mental or emotional disturbance and impaired capacity was unrefuted by the State, so the trial court's failure to find and weigh these uncontroverted mitigating circumstances is reversible error. Farr v. State, 621 So. 2d 1369, 1369 (Fla. 1993).

Defense counsel also presented unrefuted evidence of several nonstatutory mitigating circumstances. Gibson suffered a troubled

childhood because his alcoholic mother abandoned him to be raised by his father, who had to work long hours and could not provide proper supervision. (P 175-76, 247-48) Evidence of a difficult childhood is mitigating. Eddings, 455 U.S. at 107, 115; Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992); Maxwell v. State, 603 So. 2d 490, 491-93 (Fla. 1992). Gibson suffered from low intelligence, with an IQ of only 72, which is at the borderline of retardation. (P 182, 288-93, 320) Evidence of borderline intelligence is mitigating. Scott, 603 So. 2d at 1277; Cochran v. State, 547 So. 2d 928, 932 (Fla. 1989). Gibson was a good worker and did not cause any problems for his co-workers. (P 141-43, 150-69) Having a good work record is mitigating because it demonstrates the potential for rehabilitation. Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987). Gibson's behavior was controlled by the structured environment of the jail, counseling, and medication; he did not cause any disciplinary problems in the jail. (P 116-138, 187, 266-67) Evidence of the defendant's good prison record must be considered in mitigation. Skipper v. South Carolina, 476 U.S. 1, 4-7, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); Kraemer v. State, 619 So. 2d 274, 276 & n.1, 278 (Fla. 1993); Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). Gibson had the capacity to form loving relationships with his father and son. (P 185-87, 261) Scott, 603 So. 2d at 1277; Harmon v. State, 527 So. 2d 182, 188-90 (Fla. 1988). Finally, Gibson had a history of drug and alcohol abuse. Farr, 621

So. 2d at 1369; Kraemer, 619 So. 2d at 277-78; Scott, 603 So. 2d at 1277.

The trial court summarily disposed of the evidence of nonstatutory mitigating circumstances by stating, "I have taken into consideration your background, what has occurred previously." (S 15) The trial court's failure to expressly identify, evaluate, find, and weigh the unrefuted nonstatutory mitigating circumstances established by the evidence was reversible error requiring remand for a new sentencing hearing. Nibert, 574 So. 2d at 1062; Campbell, 571 So. 2d at 419.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgment and sentences and remand this case for the following relief: Issue I, resentence appellant to life for murder; Issue II, resentence appellant within the guidelines permitted range for burglary; Issues III, IV, and V, grant appellant a new trial; Issues VI, VII, VIII, and IX, conduct a new penalty phase trial with a new jury; and Issue X, resentencing by the court.