IN THE SUPREME COURT OF FLORIDA

NEIL WILSON WILDING,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 82,696

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

ARGUMENT

POINT I

POINT II

POINT IV

POINT V

POINT VI

POINT VII

POINT VIII

AUTHORITIES CITED

OTHER AUTHORITIES

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE OVER APPELLANT'S OBJECTION.

Appellee first claims that the anonymous tip giving Appellant's name was not hearsay, but was relevant "to show a logical sequence of events." This Court has specifically condemned such a reason for admitting hearsay evidence:

> Likewise, we cannot agree that the challenged testimony was admissible to present a logical sequence of events to the jury.... We agree with the Fourth District Court of Appeal in *Harris v. State*, 544 So. 2d 322, 324 (Fla. 4th DCA 1989), that when the only purpose for admitting testimony relating accusatory information received from an informant is to show a logical sequence of events leading up to an arrest, the need for the evidence is slight and the likelihood of misuse is great. In light of the inherently prejudicial effect of an out-of-court statement that the defendant engaged in the criminal activity for which he is being tried, we agree that when the only relevance of such a statement is to show a logical sequence of events leading up to an arrest, the better practice is to allow the officer to state that he acted upon a "tip" or "information received," without going into the details of the accusatory information. 544 So. 2d at 324.

State v. Baird, 572 So. 2d 904, 907-908 (Fla. 1990) (emphasis added). Contrary to Appellee's assertion, an alleged statement to a "logical sequence of events" cannot be used as a backdoor to get prejudicial hearsay before the jury. See Pages 18-19 of Initial Brief.

Appellee next claims on page 16 of its brief that the hearsay had no content and thus did not relay any information to the jury. Such a claim is specious. The content was the name "Neil Wilding." Detective DeVencenzo testified that he had a new suspect in the case T620. Detective DeVencenzo then testified that the anonymous tipster gave him the name of Neil Wilding T622. DeVencenzo also told the jury that they were able to verify a lot of information in the tip T623. There certainly was an inescapable conclusion that a non-testifying witness had furnished information of Appellant's guilt to the police. Thus, it was error to admit the hearsay. Postell v. State, 398 So. 2d 851 (Fla. 3d DCA 1981); Trotman v. State, 652 So. 2d

506, 507 (Fla. 3d DCA 1995) (officer's testimony that after speaking with unidentified person he arrested defendant, Court stated that it took no imagination to conclude that person had told officer defendant was involved in crime and this was hearsay and reversible error).

Finally, Appellee claims the error is harmless because there was other circumstantial evidence that the jury could have used to conclude that Appellant was guilty. It should first be noted that the burden of proving that the error is harmless is on the beneficiary of the error -- in this case the state -- and the burden is very heavy -- proof beyond a reasonable doubt that the error did not influence the jury. State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). Moreover, the harmless error test is not a sufficiency of the evidence test or even an overwhelming evidence test. 491 So. 2d at 1139. Instead, the test is whether the improper evidence could have influenced the jury and the focus is on the improper evidence. State v. Lee, 531 So. 2d 133, 137 (Fla. 1988). Clearly, the improper evidence of an anonymous tip giving Appellant's name could be used by the jury to conclude there was other evidence which the police had to show Appellant's guilt. Thus, the error cannot be deemed harmless beyond a reasonable doubt. It should also be noted that the state's evidence was merely circumstantial and not nearly as strong as the state would have one believe.

For example, by far the most heavily relied on evidence used by the state to connect Appellant to the crime scene was the DNA sample found on the towel at the scene. However, in reality this DNA evidence had very little probative value. DNA analysis eliminates possible donators of the unknown sample. The Lifecodes' witness only compared the unknown sample

to a caucasian data base T1048.[1] Lifecodes could not eliminate some 1200 to 2000 caucasian individuals from Florida from donating the sample T1052.[2] The PCR analysis, which is known to be less accurate, compared the sample only to the caucasian and black data bases and came up with similar results.

The real weakness in the DNA and PCR analyses is that neither statistical analysis was done by comparing the sample to the Hispanic data base.[3] In 1990 there were over a million and a half (1,574,143) Hispanics in Florida. United States Census, Florida 1990[4], but not a single Hispanic was eliminated by the DNA analysis in this case. Thus, the real evidentiary value of the DNA analysis is not that Appellant is one of 2000 possible Florida suspects that DNA analysis cannot eliminate -- but that Appellant is one of approximately 750,000 possible Floridians that DNA analysis cannot eliminate as having left the semen sample at the crime

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[1] In certain limited instances, where other evidence can positively identify the race or ethnic group of the contributor, a comparison to a single data base may be justified. This is because the other evidence already eliminates the other races and ethnic groups. However, in a case such as this, where the evidence at the scene does not positively indicate the race or ethnic group of the contributor, the data base for each race and ethnic group must be compared to the sample.

[2] Thus, the Lifecodes' DNA analysis still left some 2000 suspects. In other words, the chance of Appellant being the caucasian who left the semen sample among those male caucasians in Florida capable of leaving the sample was only 1 in 2000. This is an extremely low probability that Appellant was the donator.

[3] Even the FBI DNA analysis which came under heavy attack in Vargas v. State, 640 So. 2d 1139 (Fla. 1st DCA 1994) made comparisons to the Hispanic data base. 640 So. 2d at 1144 and 1145.

[4] This broke down as follows:

Mexican	161,499
Puerto Rican	247,010
Cuban	674,052
Other Hispanic	491,582

scene.[5] By analogy the strength of this evidence is comparable to the prosecution claiming that because a suspect left the scene in a white car, and because there are 750,000 white cars in Florida, and because the defendant drives a white car there is proof beyond a reasonable doubt that he is guilty. Of course, in both scenarios the statistical evidence does not add up to much. The jury could have decided that other evidence did not convince them beyond a reasonable doubt.[6]

Again, the focus of the harmless error analysis must be on the improper argument or evidence. State v. Lee, 531 So. 2d 133, 137 (Fla. 1988).[7] The improper evidence of an anonymous tip giving Appellant's name could be used by the jury to conclude that there was other evidence which showed Appellant's guilt. It cannot be said that this evidence was not used by the jury.[8] The state has not met its burden of showing this beyond a reasonable doubt.

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[5] This approximation is done by assuming that less than half of the 1,574,143 Hispanics are male.

[6] The state relies on the fact that Appellant used a so-called alias -- his stepfamily's and stepfather's name -- Sturgess. Use of a name that can easily be traced to Appellant is hardly that probative. Moreover, when asked for his name during a traffic stop, Appellant gave the name Neil W. Wilding T904. Contrary to Appellee's claim, the jury could well decide that Appellant did not know any information that was known to others. The crime was well known and had been in the papers, including such facts about the use of a cord T628-29. The state's evidence showed that everyone was talking about the case after it happened T829-30. In any highly discussed case there will be leaks and/or rumors as to what happened. Also, Appellant's conversation with his mother about not committing the murder and his belief that he was being framed certainly by itself would not cause the jury to find Appellant guilty so that it can be said beyond a reasonable doubt that they would not be influenced by the fact that there was an anonymous tip which had given Appellant's name as a suspect.

[7] The harmless error test is not a mechanism for anyone [including Appellee] to "substitute itself for the trier-of-fact by simply weighing the evidence." DiGuilio, supra, at 1139. Instead, "the focus is on the effect of the error on the trier-of-fact" and "the question is whether there is a reasonable possibility that the error affected the verdict." Id. Again, it is the state's burden to show harmless error beyond a reasonable doubt. Id.

[8] Assuming arguendo, that the other evidence at trial made the jury believe by a preponderance of the evidence that Appellant was guilty, maybe it was the knowledge that there was other evidence through the anonymous tip that pushed the jury into believing beyond a reasonable doubt that Appellant was guilty.

POINT II

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO THE PROSECUTOR'S MISLEADING ARGUMENT CONCERNING DNA EVIDENCE.

Appellee cites to defense counsel's argument and the evidence concerning the fact that the DNA analysis could not eliminate Appellant as a possible contributor to conclude that the prosecutor's argument, that the DNA evidence showed that Appellant was the contributor, was proper. The proper testimony and arguments do not negate the fact that the prosecutor made improper arguments as explained at pages 20-23 of the Initial Brief. Contrary to Appellee's claim, the prosecutor did not merely tell the jury of a statistical probability of exclusion, but told the jury that the DNA analysis "matched" Appellant to the sample:

> Match, ladies and gentlemen. That's what you heard Dr. Baird say. Match. Not exclusion, not possibility of exclusion, not included, you heard match. You heard match five times.

T1124. Contrary to Appellee's claim, the use of the words "match" and "identification" are not proper in the context of DNA analysis.

The prosecutor's misuse of statistical probabilities of DNA analysis showing a "match" and "99.8 percent that Neil Wilson Wilding was the contributor of the semen stain on the towel" (T1122), became even more egregious when one considers that the analysis failed to eliminate a single Hispanic person in Florida from being the contributor. Since there were 1,574,143 Hispanics in Florida in 1990[9] and not a single one was eliminated by the DNA analysis, the prosecutor was misleading the jury by gross proportions.[10]

Appellee claims that the prosecutor's going outside the evidence to compare the DNA analysis to the odds of drowning in a bathtub was proper, but neglects to give any basis for

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[9] United States Census, Florida, 1990.

[10] See pages 2-4 of this brief for further explanation.

such a claim. As explained on page 22 of the Initial Brief, such an argument was improper and reversible error.

Finally, Appellee mentions that there was no objection to the improper remarks by the defense. However, the improper remarks egregiously misled the jury as to the very heart of this case and in such situations where the jury has been misled review of the issue has been permitted, despite the lack of objection, on the ground of fundamental error. E.g. Doyle v. State, 483 So. 2d 89 (Fla. 4th DCA 1986) (misleading jury instruction); Dukes v. State, 356 So. 2d 873, 874 (Fla. 4th DCA 1978) (that which destroys essential fairness of trial constitutes fundamental error); Bloch v. Addis, 493 So. 2d 539 (Fla. 3d DCA 1986) (argument diverting jury from deciding the question before it).

POINT IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL TO THE CHARGE OF SEXUAL BATTERY WHERE THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT A SEXUAL BATTERY OCCURRED.

The state's case as to whether a sexual battery occurred (the vaginal penetration) was based upon the testimony of the medical examiner -- Dr. Villa. While it is true that Dr. Villa testified that the evidence could be consistent with a sexual battery occurring, Dr. Villa testified that the evidence was also consistent with a sexual battery not occurring:

> Q Now is the only possible cause of that [the vaginal laceration] a sexual battery where something is inserted into the vagina, the only possible cause?
>
> A [Dr. Villa] There are other possibilities.
>
> Q Okay. And those possibilities would be the woman herself inserted something in that area?
>
> A [Dr. Villa] That's correct.
>
> Q We could be talking about a feminine product?
>
> A [Dr. Villa] That's correct.

Q We could be talking about, you there was an infection, some type of treatment, medication in a tube that could be pushed in there?

A [Dr. Villa] That's correct.

T772. Finally, when asked about the heart of the matter, Dr. Villa could not conclude that a sexual battery occurred in this case:

Q Now, you said in your microscopic examination of the vaginal area that the inflammation was chronic. In medical terms, what does that mean?

A [Dr. Villa] Older.

Q Okay. As opposed to acute?

A [Dr. Villa] Acute, which is more recent, that's correct.

Q All right. So some of the problems in the vaginal area were chronic, which would mean an ongoing condition with some length of time involved?

A [Dr. Villa] That's correct.

Q Now, can you say for sure, based on your examination, your years of experience, and the number of autopsies you performed, that this woman was raped?

A [Dr. Villa] No, I can't.

T773-74. Thus, the evidence is insufficient to prove sexual battery beyond a reasonable doubt. In the Interest of B.J.S., 503 N.E.2d 1198, 1201 (Ill.App. 4 Dist. 1987) (evidence insufficient though Dr. Warnick found "some abnormalities in the victim which might be consistent with sexual abuse, she noted that these abnormalities could also be caused by other factors"); Golden v. State, 629 So. 2d 109, 110 (Fla. 1993) (evidence insufficient where investigators could not rule out other causes than crime such as an accident); Peters v. Whitley, 942 F.2d 937, 941 (5th Cir. 1991).

Appellee also relies on the binding, strangulation, and the fact that the victim was apparently hit to prove sexual battery. However, none of these facts prove the vaginal penetration required for sexual battery.

Finally, the semen stain on the towel does not prove sexual battery.[11] See State v. Thomas, 570 So. 2d 1023, 1025 (Fla. 3d DCA 1990) (DNA on sheet was irrelevant without specific connection to crime charged). There was no semen found in Ross's vagina. Appellee points out that semen could have decomposed. This is possible;[12] but it does not eliminate the fact that the semen was not found in the vagina and the reasonable hypothesis is that it was not found because a sexual battery did not occur. Also, the lack of external injuries to the vagina is also consistent with the lack of a sexual battery.[13] The point is, the evidence did not prove penetration, as explained in the Initial Brief at pages 27-28, there is a reasonable hypothesis that a sexual battery never occurred. See State v. Hunt, 371 N.W.2d 708 (Neb. 1985) (Hunt breaks in victim's home, strangles victim, then masturbates).

POINT V

IT WAS REVERSIBLE ERROR TO ADJUDICATE APPELLANT GUILTY OF A CRIME NOT CHARGED, SEXUAL BATTERY, WHERE THE ELEMENTS OF SEXUAL BATTERY WERE NEVER ALLEGED IN THE CHARGING DOCUMENT.

Appellee agrees that it "is fundamental error to convict under an indictment that fails to allege one or more of the essential elements of the crime." Appellee's Brief at 24. Nor does Appellee challenge that oral, anal or vaginal penetration by, or union with, the sexual organ of another or vaginal penetration of another are the essential elements of sexual battery

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[11] There was also a minute stain on Ross's housecoat, but that stain was never identified or connected to this case.

[12] However, it is unlikely that decomposition would occur to eliminate every single trace of semen in the vagina but decomposition would not have eliminated the signs of vaginal inflammation.

[13] It should be noted, contrary to Appellee's implied assertion, that the medical examiner testified that inflammation to the vagina was an ongoing condition for some time T773. Dr. Villa testified that the injuries to the vagina were consistent with Ross's attempt to treat the inflammation T772.

under section 794.011(h). Despite the fact that the indictment made no mention of these elements, nor any mention of 794.011(h), Appellee claims the indictment alleged all the elements of sexual battery. Such a claim is frivolous.

Appellee relies on Duboise v. State, 520 So. 2d 260 (Fla. 1988) as an on point case. However, Duboise is irrelevant to the instant issue. The only issue raised in Duboise was whether the charging document alleged "use of actual physical force," 520 So. 2d at 264, Mr. Duboise never raised the issue as to the omission of the essential element of penetration that is in issue here. In Duboise the charging document properly referenced 794.011(3) which included the element of "use of actual physical force" and thus Duboise's complaints about the failure to allege that element were without merit.

Unlike Duboise, the charging document here does not allege the elements of which Appellant complains -- vaginal penetration, etc.:

> The Grand Jurors of the State of Florida inquiring in and for the body of the County of Indian River, upon their oaths do present that NEIL WILSON WILDING, on or between August 27, 1988 and August 28, 1988, did commit a sexual battery upon Marsha Ross, a person 12 years of age or older, without that person's consent, and in the process thereof used or threatened to use actual physical force likely to cause serious personal injury, in violation of Florida Statute 794.011(3).

R13. Contrary to Appellee's assertion, the indictment in this case did not make reference to section 794.011(1)(h) which lays out the essential elements of sexual battery (vaginal penetration, etc.).[14] Instead, the charging document referred to section 794.011(3) which merely enhances the punishment for sexual battery but fails to mention the essential elements of vaginal penetration, etc. Thus, in this case the indictment wholly failed to allege the

[14] Compare State v. Gray, 435 So. 2d 816 (Fla. 1983) where charging document made proper reference to section 794.011(1)(h).

essential elements of sexual battery and fundamental error occurred. State v. Gray, 435 So. 2d 816 (Fla. 1983).

POINT VI

THE ADMISSION OF DNA EVIDENCE DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

Appellee claims that the state was "sandbagged" by the present issue that the DNA statistical analysis was not generally accepted in the scientific community as "The state was prepared to present further argument if need be to rebut any challenge made be [sic] appellant. Dr. Martin Tracey was available and ready to testify for the state (R690)." Appellee's brief at 29. However, Appellee essentially concedes error by making such a claim because Dr. Martin Tracey's testimony would have destroyed, rather than provided, the required predicate that the DNA statistical analysis was generally accepted in the scientific community.

In Vargas v. State, 640 So. 2d 1139 (Fla. 1st DCA 1994) the State of Florida presented Dr. Martin Tracey as its expert witness in a Frye hearing on DNA statistical analysis. At that hearing Dr. Tracey conceded that there was a dispute in the general scientific community as to substructure groups:

> When asked on cross-examination whether there is a great deal of controversy in the scientific community about whether substructure, especially among Hispanics, affects the accuracy of the FBI's probability statistics, Dr. Tracey said, "there is a great deal of argument about whether ... two data bases for subpopulations, principally within ethnic or within racial groups, are adequate to calculate accurate statistics." He opined "there is a good deal of disagreement, principally because people are asking different questions.... [I]f you use a Mexican or Nicaraguan or Cuban or Puerto Rican data base, you are likely to get different numbers.

640 So. 2d at 1146 (emphasis added). In addition, although Appellee claims that the ceiling principle has been rejected and that Dr. Tracey would rebut the ceiling principle, in fact Dr. Tracey endorses such a principle to overcome the statistical analysis problems:

> We note, in particular, that Dr. Tracey's statement that the problem could be corrected by using the highest frequencies appears to correspond to the modified ceiling principle to the extent it "requires that the largest frequency from the current data bases be used for the defendant's allele frequencies."

640 So. 2d at 1150 (citation omitted). Thus, the state could not have laid the proper predicate through Dr. Tracey. Appellant objected to the introduction of the DNA evidence based on Frye and, more importantly, the law is clear that a scientific predicate must be established prior to the introduction of the evidence. Ramirez v. State, 542 So. 2d 352, 355 (Fla. 1989).[15] Also, contrary to Appellee's assertions otherwise, this Court has condemned predicates based on self-serving testimony. Ramirez v. State, 542 So. 2d at 355 (rejecting scientific method because it was not "established from independent evidence" but only from the "expert's self-serving statement").

Moreover, without acceptance of the statistical methods by the scientific community, the jury was given misleading information. The presentation of patently misleading information, either by instruction, argument or evidence, can constitute fundamental error. E.g. Bloch v. Addis, 493 So. 2d 539 (Fla. 3d DCA 1986) (argument diverting jury from deciding question before it); Haverly v. Clann, 196 So. 2d 38 (Fla. 2d DCA 1967) (admission of evidence (deposition) without proper predicate). When an expert witness testifies without proper predicate, it will be deemed fundamental error which can be reviewed without objection. Wright v. State, 348 So. 2d 26 (Fla. 1st DCA 1977) (failure to lay predicate).

Appellee never does address the specific flaws in the DNA procedures that are outlined in pages 33-41 of the Initial Brief. Instead, Appellee merely regurgitates portions of the

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[15] The state is not sandbagged into believing a predicate is unnecessary when the law requires a predicate. The background of Lifecodes policies and practices shows that the required predicate could not have been established.

record, but the portions do not address the issues. One of the few relevant arguments Appellee tries to make is that the NRC report's condemnation of the practices of Lifecodes is flawed -- see footnote 7 of Appellee's brief. Appellee's claim in this regard has no merit. Essentially, all the articles criticizing the NRC report are primarily authored by one individual (B. Budowie) and are a small minority -- and not the voice -- of the scientific community. In Hayes v. State, 20 Fla. L. Weekly S296 (Fla. June 22, 1995) this Court conducted a de novo review with the NCR report which is recognized as the voice of the scientific community. In footnote 5, Appellee cites to People v. Wesley, 633 N.E.2d 451 (N.Y. 1994) and Caldwell v. State, 393 S.E.2d 436 (Ga. 1990) to claim that Lifecodes procedures and protocols are generally accepted in the scientific community. Both these cases deal with what the scientific community accepted in the 1980's[16] -- before DNA analysis had been scrutinized.[17] DNA testing was not even criticized in the scientific literature until 1989. Eric Lander, DNA Fingerprints on Trial, 339 Nature 501 (1989).

An absence of scientific criticism of the statistics does not equate with "generally accepted in the scientific community." Before the statistics could be controversial, they had to become known and understood. The use of cases which were decided prior to any scrutiny by the scientific community does not prove the statistical methods are "generally accepted" when essentially only the proponents of those statistics had evaluated it, is thus, foolhardy, especially where laboratories early on had hidden the data bases upon which their statistics were

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[16] The Wesley court emphasized that it was dealing with what was acceptable in 1988.

[17] In the beginning courts did not scrutinize DNA testing. The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant, 42 Stanford L. Rev. 465, 466 (1990) ("Courts have lost all sense of balance and restraint in the face of this novel scientific evidence, embracing it with little scrutiny of its actual reliability and little concern for its impact on the rights of individuals").

based. See Geisser, Some Remarks on DNA Fingerprinting, 3 Chance: New Directions for Statistics and Computing 8 (1990) ("Cellmark and Lifecodes use proprietary excused for shielding their data"). The NRC report has condemned the practices that Lifecodes admitted using in this case.

1. Statistical frequencies

A. Statistical evidence was irrelevant.

Appellee does not even try to defend the totally flawed practices utilized by Dr. Baird of presuming the sample came from a Caucasian. As explained in the Initial Brief this flaw alone makes Lifecodes DNA analysis misleading.

B. Other groups.

In footnote 3 of its brief, Appellee attempts to address this issue by pointing out that Lifecodes compared the suspect sample to both Caucasian and Black databases to eliminate all but .021 percent of the population.[18] This is the very type of flawed and misleading analysis which was condemned by the NCR report. The fact that a Black data base was used does not eliminate the problem of not making a comparison to the other groups and subgroups. How can it be said that all the Hispanics were eliminated as donors of the sample without comparing the sample to the Hispanic data base? Yet, this is what was done. For all we know, the DNA sample in this case, while rare in Blacks and Caucasians, was quite common in the other groups such as Hispanics. The analysis that was done cannot legitimately eliminate a single Hispanic. Because there are more than 1.5 million Hispanics in Florida, approximately 12% of Floridians cannot be eliminated as suspects rather than the misleading .021% which the DNA analysis claimed.[19]

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[18] Lifecodes did not compare the sample to a black data base. The page of the transcript to which Appellee refers is the PCR analysis.

[19] This is an exaggeration of frequency by some 600 (12%/.02%) times -- or 60,000%.

C. Substructure groups

Appellee does not address the failure to compare the DNA in the substructure groups. Also, as explained above, the state's expert, Dr. Martin Tracey, acknowledges the dispute in the scientific community.

D. Ceiling principle

Appellee's only reference to the ceiling principle is to note that some people attack the NRC report. However, these are the minority of the scientific community. The NRC is the voice of the scientific community. Moreover, as explained above, Dr. Martin Tracey disagrees with Appellee.

2. Criteria for matching

Appellee has not disputed Appellant's argument.

3. Band shifting

Appellee claims that band shifting did not occur in this case. However, a predicate was never laid to show that Lifecodes analysis was free from bandshifting. Caselaw shows that bandshifting is a regular occurrence in Lifecodes' analysis. People v. Keene, 591 N.Y.S.2d 733 (Supp. 1992); Hayes v. State, 20 Fla. L. Weekly S296 (June 22, 1995).

4. Contamination

As explained in the Initial Brief, there are contamination problems. Appellee claims that the errors in the Lifecodes' procedures are harmless because Daniel Nippes testified to PCR results. However, the statistical frequencies for the PCR results suffer from the same flaws as the Lifecodes' frequencies. See Part 1B above. Furthermore, the main emphasis in this case was on Lifecodes' DNA analysis.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL WHERE APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED.

Appellee has acknowledged that there was a problem with the jury's fear of Appellants possession of the jury questionnaire which required an inquiry by the trial judge. Appellee claims that the trial court's inquiry was proper and that the inquiry showed that the problem was not important. However, as explained on pages 42-43 of the Initial Brief, the inquiry showed that the problem was important and the jury was not of a mind to be fair and impartial going into the trial.

Moreover, after making the inquiry, the trial court even made a finding that "it was reasonable that persons [the jury] that were of the mind were afraid of the defendant" T1229, and further found that if the problem had been identified they would not have sat to judge Appellant's guilt or innocence:

> ... it seems to me that those sort of jurors, if they had been identified at the beginning of the trial, probably would not have sat as jurors in this case.

T1230. Appellant was deprived of his right to be tried by a fair and impartial jury.

The only part of the inquiry which meets the state's burden of showing that the jury was fair and impartial toward Appellant was the inquiry which delved into the thought processes of the jurors. This part of the inquiry was improper and cannot be utilized by the state in meeting its burden of proving a fair and impartial jury. E.g. State v. Hamilton, 574 So. 2d 124 (Fla. 1991); Keen v. State, 639 So. 2d 597 (Fla. 1994); Sanchez v. International Park Condominium Association, Inc., 563 So. 2d 197 (Fla. 3d DCA 1990) (new trial ordered despite jurors claim that extraneous concerns did not influence them).

Finally, Appellee claims that the jury's extraneous concern (fear of Appellant) is not prejudicial.[20] Appellee claims that United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985) is directly on point. However, Watchmaker is distinguishable.[21] In that case some jurors came to fear the defendants (members of a motorcycle gang) because of the evidence they had heard during trial. The fear was natural and not the product of something unrelated to the evidence. In other words, it cannot be said that the jury was not fair and impartial due to an extraneous matter. On the other hand, in the present case the jurors' fear was not based on the evidence. Rather, prior to the introduction of a single piece of evidence they were not fair and impartial. This bias against Appellant would naturally influence the way they perceived the evidence as it was introduced. They would have a bias to view the evidence to conform to the preconceived notion they had of Appellant prior to trial -- a bad person to be feared. It cannot be said that the bias against Appellant was not prejudicial.

POINT VIII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND ALLOWING THE STATE TO PRESENT EVIDENCE OF WHAT OCCURS IN OTHER CASES AS EVIDENCE OF APPELLANT'S GUILT.

Appellee concedes that a defendant should be tried on the evidence against him and not by referring to what occurs in other cases. However, Appellee claims that Appellant "opened the door" to the state's elicitation that in other cases it is not unusual to find any fingerprints by questioning the lack of prints at the crime scene in this case.

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[20] Appellee points to one juror's claim that the questionnaires were not discussed during deliberations. However, there may be inconsistencies as to this matter. Juror Treseman testified that the subject of the questionnaire may have come up in the course of deliberations T1243.

[21] In addition, this Court should not endorse any caselaw that implies that a defendant should be tried by jurors that are in fear of him prior to hearing any evidence. Such a jury is not fair and impartial.

Questioning the evidence in the case at bar simply does not open the door to testimony as to what happened in some other case. Each trial must stand on its own evidence and not on the evidence of another trial. Appellant never elicited any evidence as to what occurs in other cases. At trial the prosecutor must address the defendant's arguments, as to what is present or not present in this case, by presenting evidence and argument as to this case and not by referring to other cases. None of the cases which Appellee cites to for opening the door deal with the instant situation where the defendant attacks the evidence in his case and the state responds with evidence with what occurs in other cases.

Appellee makes the same "opening the door" claim as to the state's introduction of evidence that in other cases semen samples have not been recovered from a victim. Again, Appellant's pointing out the lack of evidence in this case opens the door for the state to present evidence and argument as to this case, but it does not open the door for the state to present evidence as to what occurs in other cases. Appellee also claims that this error was waived by Appellant's not objecting to a question regarding whether it was strange or unusual in not finding semen in Marsha Ross's body. However, the question did not involve what occurred in other cases. Rather, the question in context dealt with what happened in this case and where it was unusual (or strange) in the context of what was seen in this case. It was not an objectionable question as to what occurs in other cases and thus Appellant did not waive the present issue.

Appellee claims that by challenging Dr. Baird's DNA analysis in this case, Appellant opened the door to evidence as to other laboratories' practices. Again, Appellant was on trial based on the analysis done in this case and not on what occurred in other cases. Appellant's

challenging this case's DNA analysis simply does not open the door for the state to bolster its case by other laboratories DNA analysis unrelated to this case.

Appellee does not contend that the improper introduction of what occurs in other cases can be deemed harmless beyond a reasonable doubt as required by State v. DiGuilio, 429 So. 2d 1129 (Fla. 1986). As has been pointed out, the evidence as to what occurs in other cases was used to rebut weaknesses in the state's case that the defense pointed out. The state's only justification is that a door was opened. As explained, no door was opened and every defendant has the absolute right to be tried on the evidence against him, and not on what occurs in other cases. Lowder v. State, 589 So. 2d 933, 935 (Fla. 3d DCA 1991).

POINT IX

IT WAS REVERSIBLE ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

On page 46 of its brief, Appellee claims that in prior cases this Court has rejected the Grand Jury Clause issue raised in this point. Such a claim is without merit. All the cases cited by Appellee involve the Notice Clause and none deal with the Grand Jury Clause.[22] The lesson to be gathered from those cases is that defendants are theoretically on notice of two types of first degree murder.[23] The present issue has nothing to do with notice. Instead, this issue deals with an indictment being constructively amended to bring forth an allegation that was either rejected or not reviewed by the Grand Jury. Appellee has not presented any caselaw that permits bringing forth a theory or charge different from that which was presented to the Grand

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[22] Appellee's confusion regarding the Notice Clause and the Grand Jury Clause is demonstrated by the fact that its argument on this point at page 46 of its brief combines Points IX and I which involve separate concepts and principles.

[23] But see Point X of the Initial Brief.

Jury. As explained in the Initial Brief, which Appellee has not contradicted, there is no justification to do so.

It is a basic violation of due process and a fundamental error to convict on a theory not brought by the Grand Jury.[24]

There is only jurisdiction to try a defendant on the charge that is brought by the Grand Jury. Jurisdiction can not be expanded through either consent or waiver.

POINT XIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHERE THERE WAS INSUFFICIENT EVIDENCE THAT THE DNA EVIDENCE PRESENTED TO THE JURY CAME FROM THE CRIME SCENE.

Appellee argues that unless there are signs of tampering it was proper to introduce evidence. However, the present issue does not necessarily involve tampering. Rather, the issue is whether the state was producing evidence that was relevant to the issues in this case -- regardless of tampering or lack of tampering. As explained on page 55 of the Initial Brief, the evidence showed that Lifecodes performed a DNA analysis on a white towel T977, and not the blue towel that was found at the crime scene and collected in evidence T565. Appellee's only answer to this is that the prosecutor noted that the towel was bluish white. The

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[24] See Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948); Markham v. United States, 160 U.S. 319, 16 S.Ct. 288, 40 L.Ed. 441 (1895); The Schooner Hoppet and Cargo v. United States, 11 U.S. 389, 394, 7 Cranch 388, 382, 3 L.Ed. 380 (1813) (Chief Justice John Marshall stated, "But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense ... The rule that a man shall not be charged with one crime and convicted of another, may sometime cover real guilt, but its observance is essential to the preservation of innocence."); State v. Gray, 435 So. 2d 816 (Fla. 1983); State v. Sykes, 434 So. 2d 325 (Fla. 1983); Ray v. State, 403 So. 2d 956 (Fla. 1981); Perkins v. Mayo, 92 So. 2d 641 (Fla. 1957); Minor v. State, 329 So. 2d 30 (Fla. 2d DCA 1976); Haley v. State, 315 So. 2d 525 (Fla. 2d DCA 1975); Causey v. State, 307 So. 2d 197 (Fla. 2d DCA 1975); Long v. State, 92 So. 2d 259, 260 (Fla. 1957) ("where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment").

prosecutor's personal beliefs are irrelevant. The prosecutor did not perform the DNA analysis and was not a witness under oath. What the prosecutor believes simply is not evidence and is not relevant. What is in evidence and relevant to this issue is the testimony of the Lifecodes witness under oath that the towel was white. Where the towel at the crime scene was blue, the state failed to link the DNA evidence from the white towel to this case. See Coyle v. State, 493 So. 2d 550 (Fla. 4th DCA 1986) (state failed to link car in defendant's possession with car police claimed was stolen).

PENALTY PHASE

POINT XIV

THE TRIAL COURT ERRED IN FINDING THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

1. Especially HAC not applicable where victim may have been unconscious or semiconscious.

Appellee hypothesizes that sometime after Appellant entered Marcia Ross's residence[25] Ross awoke and then Appellant raped and strangled Ross while she was conscious. Appellee's claim that Ross was conscious when the strangulation occurred is speculation. Appellee relies on Gilliam v. State, 582 So. 2d 610 (Fla. 1991) to claim that common sense dictates that Ross was conscious when strangled.[26] However, Gilliam was based on an indisputable form of common sense and not a mere inference. There was indisputable evidence that the victim was

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[25] Appellee concedes in its brief that Marsha Ross was unconscious when Appellant entered her residence.

[26] Appellee makes a claim in footnote 11 that Ross's being unconscious or semiconscious was rebutted by the fact that her hands were tied since the tieing would not be necessary to confine Ross or make her helpless. This is illogical. Unconscious or semiconscious people can wake up. The tieing would be to insure that the unconscious person remains unable to resist. It does not automatically mean that the person is fully conscious as Appellee claims. A conscious person, as opposed to an unconscious person, would resist and fight the tieing. There was no such resistance in this case. For all we know, Ross was tied after, unknown to the killer, she had died.

conscious. As this Court explained in Gilliam, the victim could be heard screaming at the time of the murder. 582 So. 2d at 612. It is indisputable that a screaming victim is conscious and not unconscious. Thus, in Gilliam the state had met its burden of proving beyond a reasonable doubt that the victim was conscious so as to apply HAC. The same indisputable type of evidence of the consciousness of a victim applies to all the other cases cited by Appellee.[27] In the present case, there was no evidence of the victim's screaming despite the fact that her windows were open for everyone to hear screams if they had occurred T513. An unconscious person does not scream.

Appellee also speculates that because the victim had injuries she must have been conscious when strangled.[28] There is no evidence to show that Marsha Ross's injuries were not received while she was unconscious or semiconscious. The medical examiner did not testify that the injuries occurred when the victim was conscious or that they could not occur when she was unconscious.[29] In other words, the injuries simply did not prove consciousness.

There were no defensive injuries indicating that Ross was unconscious, semiconscious, or lost consciousness almost instantly. Compare Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987) (victim conscious during attack and had defensive wounds).

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[27] See Sochor v. State, 619 So. 2d 285, 287-288 (Fla. 1993) (defendant's brother remembered victim "screaming for help" as defendant assaulted her; defendant confessed to arguing with victim and "when she hit him" he became angry and choked her); Capehart v. State, 583 So. 2d 1009, 1011 (Fla. 1991) (defendant confessed that he broke in house and lady "woke up" and he tried to knock her out, but he smothered her instead); Holton v. State, 573 So. 2d 284, 286 (Fla. 1990) (Holton confessed to strangling victim, victim left scratches on Holton's chest -- something she could not have done if unconscious).

[28] Contrary to Appellee's assertion, Dr. Vila testified that the marks and scrapes on the neck were all "from the tying of the ligature" T754-55.

[29] Nor did the state rule out, through the medical examiner or other evidence, that the injuries could not have occurred after death. See Rhodes v. State, 547 So. 2d 1202, 1205 (Fla. 1989) (defendant's actions after death of victim cannot be used to support HAC aggravator).

It is difficult to conceive that the victim was fully conscious during the strangulation when one considers that Ross was strangled with a cord that was still attached to the lamp T537,560. It would hardly seem possible to maneuver the lamp around a conscious person -- as compared to an unconscious or semiconscious person. Especially in light of the fact that the lamp and its shade showed no signs of being disturbed T537.

At first glance, the deep scratch marks observed on Appellant's arm by Kirsken Robinson could be evidence that the victim was conscious. However, the context of this evidence shows that the scratches were totally unrelated to the killing of Marsha Ross. There was absolutely no evidence presented showing that Ross scratched her killer. The police conducted fingernail scrapings on Ross but could not find any evidence that she had scratched her killer T707,543.[30] The scratch marks simply were not connected to this case. In addition, Robinson only observed the scratches two days after he heard about the murder T830. Since Robinson also testified that he saw and worked with Appellant every day but that this was the first time that he saw the scratches T834, we know that Appellant did not have the scratches for at least the first two days after the murder. Thus, the scratches could not have been related to the killing of Marsha Ross.

Appellee's hypothesis that it was possible that Marsha Ross was conscious demonstrates a failure to understand the burden of proof as far as aggravating circumstances are concerned. Assuming arguendo that it was possible that Ross were conscious when strangled, this simply is not sufficient to prove the aggravating circumstance. Aggravating circumstances must be proven beyond a reasonable doubt. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

[30] Obviously, if the deep scratches on Appellant's arm were caused by Ross there would be some evidence of at least minute amounts of skin, particles, blood or anything of significance. But there was not T543.

"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 v. State, 611 So. 2d 1228, 1232 (Fla. 1993); Clark v. State, 443 So. 2d 973, 976 (Fla. 1983). Conjecture as to the exact events of the murder will not be sufficient to prove HAC. Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990); King v. State, 514 So. 2d 354, 360 (Fla. 1987) ("person may not be condemned for what might have occurred"). Appellee claims that the victim was conscious due to the fact that she was injured. However, an unconscious person can be injured, tied and strangled. To say that this is proof of consciousness is simply conjecture which cannot support the aggravator. Id.

Moreover, many of the trademarks of a conscious victim were simply not present in this case. Ross never screamed or yelled which is a trademark of a conscious victim. Ross was not frail at 5 foot 8 inches and 230 pounds T771. If she had been attacked she would have fought back. Yet, there were absolutely no signs of any defensive wounds or defensive injuries. Nor did she scratch her killer. Based on this it would be pure speculation to say that Ross was conscious and struggled.[31] The evidence indicates Ross was unconscious during the entire time, or if temporarily conscious, she was rendered immediately unconscious by a blow to the head.[32]

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[31] If the victim had been conscious and raped as Appellee claims, there should have been traces of semen around or within the victim rather than being limited to a towel. Also, the items near Ross remained undisturbed. For example, on the table by the couch was a half full cup of coffee and an ashtray with cigarette butts, but not a drop was spilled and the ashtray was similarly undisturbed. Also, the lamp and its shade attached to the cord were undisturbed. Moreover, the fact that a throw rug was slightly disturbed and a cushion was on the floor at best is ambiguous and does not negate a reasonable hypothesis that the victim was unconscious or semiconscious when strangled.

[32] Appellee claims that Ross's unconsciousness or semiconsciousness (whether it be due to a deep narcoleptic sleep or a blow to the head) was rebutted because she would not need to be further tied to be confined. However, the motive for tieing Ross is not the issue. The evidence

As this Court stated in Geralds v. State, 601 So. 2d 1157 (Fla. 1992), an aggravating circumstance cannot stand unless the circumstantial evidence is inconsistent with any reasonable hypothesis of innocence:

> Consequently, to satisfy the burden of proof, the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor. *Eutzy v. State*, 458 So. 2d 755, 758 (Fla. 1984), *cert. denied*, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985).

601 So. 2d at 1163; (CCP stricken where evidence was "susceptible to these different interpretations." 601 So. 2d at 1164).

In the trial court below, the state conceded that Ross was asleep when Appellant was in the residence T1107. The state also conceded to the jury that Ross "was in a deep sleep induced by narcolepsy" T2027. The state may not how change its position on appeal to claim that Ross was never in a deep sleep due to narcolepsy. State v. Adams, 378 So. 2d 72 (Fla. 3d DCA 1979).

This Court has previously rejected Appellee's claim that the killing and strangulation of a victim necessarily means that the victim was conscious and thus the killing was HAC where the period of unconsciousness is unclear and there are inferences that the victim may have been unconscious or semiconscious:

> As to section 921.141(5)(h), Florida Statutes (1981) (crime was especially heinous, atrocious, or cruel), we hold that this factor is not applicable in the instant case. The trial court articulated several facts in support of this finding. First, "that the defendant beat the victim, suffocated her with a pillow and then strangled her with a telephone cord....
>
> As to the manner by which death was imposed, we find that in this factual context the evidence is insufficient, standing alone, to justify the application of the section (5)(h) aggravating factor....

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of lack of consciousness (such as screaming, defensive wounds, etc.) is present. Furthermore, there could be a reason for tieing up an unconscious or semiconscious person -- to insure that they remain confined in the event that they regain consciousness. For all we know, the perpetrator could have tied up Ross after killing her, not totally certain she was dead, to insure that he was long gone should she regain consciousness.

> In the instant case, there is evidence that the victim was under heavy influence of methaqualone previous to her death.... Further, both eyewitnesses stated that the victim was unconscious. The actual period of unconsciousness is unclear. However, she was in this state at least during the period of time between the pillow incident and the act that caused her death. It can also be reasonably inferred from the record that she was semi-conscious during the whole incident as there is evidence that the victim offered no resistance, nor did she make any statements during the attack.

Herzog v. State, 439 So. 2d 1372, 1379-1380 (Fla. 1983) (citations omitted) (emphasis added); see also Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989) (reversal of especially HAC where circumstances were consistent with the victim being semiconscious at the time of her death). Likewise, especially HAC is not present here where due to evidence that: the victim was in a deep sleep due to narcolepsy; the victim did not scream or yell for help; the victim did not resist the attack as shown by the lack of defensive wounds; the lack of competent, substantial evidence of a struggle etc. -- the victim was unconscious or semiconscious at the time of her death. Consequently, this especially HAC aggravator must be stricken. Herzog; Rhodes.

2. Especially HAC not applicable where the evidence did not show that Appellant intended to cause the victim unnecessary and prolonged suffering.

Assuming arguendo that the state had proven Ross to be fully conscious, the HAC aggravator would still not apply in this case. Appellee does not dispute that the method of killing itself (i.e. strangulation) is not sufficient in itself to prove HAC.[33] As explained on pages 59-60 of the Initial Brief, State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (Neb. 1985) and Perry v. New Jersey, 124 N.J. 128, 590 A.2d 624 (N.J. 1991) prove this out. Instead, at page 53 of its brief, Appellee takes the position that HAC applies in cases where there are multiple injuries and death is not instantaneous. Appellee does this by claiming all cases

[33] Likewise, it cannot be said that a method of killing (such as shooting) will be sufficient in itself to disprove HAC.

rejecting HAC deal with "shootings which occurred in a quick fashion" and there were no "injuries beyond the initial and fatal gun shot." Appellee's Answer Brief at 53. First, the cases in the Initial Brief were cited for the general proposition that HAC will not apply unless it is proven beyond a reasonable doubt the defendant intended to cause the victim unnecessary and prolonged suffering. E.g. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); see also Page 58 of the Initial Brief. Second, contrary to Appellee's assertion, HAC has been stricken in numerous cases where there are multiple injuries and death is not instantaneous. E.g. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993) ("fact that victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering").[34] This is true even in non-shooting cases. Brown v. State, 644 So.2d 52, 54 (Fla. 1994) (3 stab wounds, none of which were immediately fatal, standing alone, did not show conscienceless or pitiless crime required for HAC); Demps v. State, 395 So. 2d 501, 504, 506 (Fla. 1981) (multiple stab wounds found not to be especially HAC under circumstances of case); Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975) (defendant beat, bruised, and cut victim with metal bar not especially HAC). Furthermore, the instant case did not reflect the infliction of multiple injuries and there was no evidence of prolonged suffering by the victim.[35] The test is not

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[34] In other cases HAC was rejected even though there were multiple injuries and death was not instantaneous. Kearse v. State, 20 Fla. L. Weekly S300 (Fla. June 27, 1995), rehearing denied, 20 Fla. L. Weekly S565 (victim wounded 9 times); Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Shere v. State, 579 So. 2d 86, 89 (Fla. 1991) (one shot fired, then 5 or 6 shots, then 2 shots to head and one to chest); McKinney v. State, 579 So. 2d 80 (Fla. 1991) (7 gunshot wounds plus 2 lacerations); Blanco v. State, 452 So. 2d 520 (Fla. 1984) (victim shot once and then 6 subsequent shots).

[35] Unconsciousness usually occurs within a matter of seconds. Dupree v. State, 615 So. 2d 713, 715 (Fla. 1st DCA 1993). Dr. Villa testified that unconsciousness could occur after seconds in this case T1795.

whether there are injuries, but whether the defendant intended to cause the victim unnecessary and prolonged suffering. Deaton v. State, 480 So. 2d 1279 (Fla. 1985) illustrates a defendant's intention to cause unnecessary and prolonged suffering. The trial court's order in Deaton shows that the defendant strangled the victim to death as he was driving a car. 480 So. 2d at 1282. The killing took 15 minutes and the victim begged and pleaded for his life. Id. As the victim begged, the defendant "tightened the cord until the victim started spitting up blood." Id. The defendant "laughed and joked about how long it took the victim to die." Id. This Court agreed with the trial court's finding that the defendant "enjoyed unmercifully the pain and suffering the victim was forced to endure." Id. This was the essence of HAC, and not the mere method of killing.

As explained on pages 59-60 of the Initial Brief, strangulation by itself does not prove HAC as it does not show an intention to cause unnecessary and prolonged suffering. In State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (Neb. 1985) the court found that tieing the victim's arms and legs and then strangling the victim with a nylon stocking was not evidence that the "acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time." 371 N.W.2d at 721. Likewise, the evidence in this case did not show the intentional infliction of unnecessary pain. The method of killing may not support the HAC aggravator by itself. Perry v. New Jersey, 124 N.J. 128, 590 A.2d 624 (N.J. 1991); Hunt, supra.

Appellee does not really articulate why this crime would be especially HAC. One might have a "gut" feeling that this was a heinous crime. However, aggravators are supposed to be objectively viewed and not to be based on "gut" reactions. See Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993) (although murder was "vile and senseless" where victim begged for

life, the killing was not set apart from other capital murders and did not rise to the level of especially HAC). It was error to find HAC in this case.

Remedy

Appellee claims that the rule is that one aggravating circumstance will not support a death sentence applies only in cases where there "existed substantial statutory and nonstatutory mitigation." Appellee's brief at 54. Such a claim is specious. First, there is no requirement that any statutory mitigation exist. For example, in one of the cases which Appellee claims statutory mitigation is required, Clark v. State, 609 So. 2d 513 (Fla. 1992), death was struck and there was no statutory mitigation and two nonstatutory mitigators (abusive childhood and history of drug abuse). Second, the cases have never required substantial mitigation. Rather, this Court has consistently stated that death will not stand unless there is either nothing in mitigation or very little mitigation. E.g., Besaraba v. State, 20 Fla. L. Weekly S212 (Fla. May 4, 1995); Thompson v. State, 19 Fla. L. Weekly S655 (Fla. 1994); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); White v. State, 616 So. 2d 21 (Fla. 1993); McKinney v. State, 579 So. 2d 80 (Fla. 1991); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Songer v. State, 544 So. 2d 1010 (Fla. 1989). In any event, there were significant mitigating factors present here. The trial court gave substantial weight to the unrefuted evidence that Appellant has a high potential for rehabilitation R544. In Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988), this Court held -- "unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation."[36] In addition, the trial court found five mitigating circumstances as explained

[36] Appellee also cites to Cooper, but for the proposition that a new sentencing is the remedy when an aggravator is stricken and only one remains. However, in Cooper the error involved the exclusion of mitigating evidence and not a situation where a single aggravator remained. Hill v. State, 549 So. 2d 179 (Fla. 1989) suffers from the same problem -- two aggravators remained and resentencing due to prosecutor's improper argument.

on pages 62-64 of the Initial Brief. It cannot be said that there was no mitigation or virtually no mitigation in this case.

Finally, Appellee cites to 3 cases on page 56 of its brief to claim that a proper remedy is resentencing. However, none of the cases involved the Songer situation where only one aggravator remained and it could not be said that there was nothing, or virtually noting, in mitigation.[37] Appellant relies on his Initial Brief for further argument on this point.

POINT XV

THE PROSECUTOR'S COMMENTS TO THE JURY DURING THE PENALTY PHASE DEPRIVED APPELLANT DUE PROCESS AND A FAIR AND RELIABLE SENTENCING.

1. Repetition of the facts of irrelevant aggravating circumstances.

Appellee first claims there is no issue because Appellant's objections to the improper remarks were sustained and no curative instruction was requested. It does not matter that the objections were sustained, the prosecutor repeatedly made the improper arguments. It is improper for the prosecutor to attempt to evade or circumvent at trial court's rulings by repeatedly continuing to make improper arguments after objections have been sustained. Cf. Taylor v. State, 640 So. 2d 1127, 1134 (Fla. 1st DCA 1994) (improper to place information before jury which the judge has previously ruled inadmissible); Gonzalez v. State, 450 So. 2d 585 (Fla. 3d DCA 1984). Furthermore, a curative instruction simply would not be sufficient to cure the error. That is why Appellant moved for a mistrial. See Garron v. State, 528 So. 2d 353, 358-59 (Fla. 1988) (prosecutor's repeated improper remarks could only be cured by mistrial); Geralds v. State, 601 So. 2d 1157, 1162 (Fla. 1992) (instruction to disregard cannot

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[37] See Lamb v. State, 532 So. 2d 1051 (Fla. 1988) (3 aggravators remained); Schaffer v. State, 537 So. 2d 988 (Fla. 1989) (2 aggravators remained); Cook v. State, 542 So. 2d 964 (Fla. 1989) (2 aggravators remained).

unring bell after the prosecutor rings it); Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994) (issue preserved where objection made but instruction would not cure error).

Appellee next claims one of the comments was harmless as being cumulative to other similar improper arguments. However, it was the cumulative effect of the prosecutor's comments which caused Appellant to request a mistrial T2043. Moreover, this does not take away from the other improper comments that were placed before the jury. The repeated remarks cannot be deemed harmless.[38]

Finally, Appellee claims that the trial court was incorrect in sustaining the objections to improper arguments. For example, Appellee claims that the comments about activities after the murder (such as wiping away prints) were relevant to prove the HAC aggravator, and were not an improper attempt to argue CCP as the trial court ruled. However, it is well-settled that after death activities are not related to HAC. Appellee claims there was no evidence in the record to show that the prosecutor was screaming and pointing at Appellant. However, when Appellant objected to this the prosecutor did not deny doing it. Also, the trial court sustained Appellant's objection.

2. Golden Rule argument.

On page 62 of its brief, Appellee relies on Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1993) to claim that the prosecutor's request for the jury to put itself in the place of the victim was proper. However, Jones is unavailing to Appellee's claim. In Jones, the jury was asked

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[38] Appellee also claims that because jury instructions informed the jury of the aggravators and thus the error was harmless. However, in every capital case the jury is instructed on the aggravators. But this fact does not render the error of improper argument regarding aggravators harmless. See Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985) (new penalty proceeding where jury heard argument that did not relate to the statutory aggravating circumstances). To hold otherwise would make all error per se harmless.

to think about the period of time involved in the killing and was not asked to put itself in position of the victim by contemplating "how she felt." See Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (improper Golden Rule argument for stat to invite jury "to imagine the victim's final pain, terror and defenselessness").

3. Requesting the jury to impose the same penalty that the defendant imposed.

Appellee claims that this improper remark is harmless because it was an "isolated comment."[39] However, as shown in the point there was more than one improper comment. Cumulatively they cannot be deemed harmless.

4. Improper statement that the sentencing was about the victim and not about the defendant.

On page 60 of its brief, Appellee claims that the comment that the sentencing was not about the defendant, but was about the victim, was proper. Telling the jury that the penalty phase was not about the defendant (which includes mitigation about his character, background, and other nonstatutory mitigators) and was about the victim (which includes the victim impact evidence which is not supposed to be weighed) is patently improper. This error is egregious and requires reversal as it tells the jury to ignore the non-statutory mitigating circumstances, while improperly imploring the jury to consider (or weigh) non-statuary aggravating information -- victim impact information.

5. Arguing non-statutory aggravating circumstances.

On page 63 of its brief, Appellee claims that the comment that Appellant's mother was "used" and was another victim of Appellant was a proper comment on the evidence. However, there was no evidence that Appellant "used" his mother or made her a victim. The mere fact that she testified for Appellant simply does not prove that Appellant was using her or making her a victim.

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[39] Appellee offers an illogical test for harmless error -- if there is one improper comment it is harmless if it is "isolated", if there is more that one improper comment they are harmless as cumulative.

POINT XVI

APPELLANT WAS DENIED DUE PROCESS AND A FAIR, RELIABLE SENTENCING DUE TO THE INTRODUCTION OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES DURING THE PENALTY PHASE.

Appellee claims the testimony about the victim's mother needing an ambulance, being hysterical and screaming and crying that her baby had been killed was relevant because it explained Office Left's actions. However, during the penalty phase the jury was not sitting to judge Officer Lett's actions. His actions simply were irrelevant.

Appellee also claims the testimony about the victim's mother needing an ambulance, being hysterical and screaming and crying that her baby had been killed was harmless because it was very brief. However, as explained in the Initial Brief at 70-71, this information was repeated to the jury not once, not twice, but three times. It was repeated to the jury so that it would be etched in the jury's mind.[40] More importantly, this was a highly emotional subject matter, much more emotional than a victim's background. It is the type of evidence which influences emotions rather than reason. Inflaming the minds and passions of the jury in the penalty phase cannot be deemed harmless.

Finally, Appellee claims that when the evidence came in Appellant's objection was sustained and because he did not ask for a curative instruction he has waived the issue. Appellee misrepresents the record in making this claim. As explained in the Initial Brief, this type of evidence was elicited 3 times and Appellant objected all 3 times. His first two objections were overruled. It is not required to ask for the remedy of a curative instruction where the trial judge has overruled the objection. Ralston v. State, 555 So. 2d 443, 444 (Fla.

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[40] Thus, the jury would be sure to remember this evidence without it being mentioned in argument.

4th DCA 1990). Certainly, the trial court's error on these two occasions is preserved. Id. Moreover, even as to the third objection, which the trial court sustained, the issue is preserved because the highly inflammatory and prejudicial testimony is of such a nature that no curative instruction could erase it from the jurors' minds. Walt Disney World Co. v. Blalock, 640 So. 2d 1156, 1158 note 1 (Fla. 5th DCA 1994) ("You can throw a skunk in the jury box and instruct the jurors not to smell it, but it doesn't do any good"); Geralds v. State, 601 So. 2d 1157, 1162 (Fla. 1992) (once bell rung, instruction can not unring it).

POINT XVII

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Appellee claims relief is not warranted due to the elimination of the HAC aggravator. However, death is inappropriate with only one aggravator -- pages 28-29.

Appellee claims the trial court weighed the evidence and this Court cannot review the proportionality of the sentence. Such a claim is without merit. Sinclair v. State, 20 Fla. L. Weekly S293 (Fla. June 22, 1995) (proportionality review in death cases is mandated).

Appellee disagrees with the trial court's view of the evidence as mitigating and with mitigating evidence that was unrebutted and uncontroverted. By completely ignoring all the evidence presented during the penalty phase, Appellee implied Appellant had a good childhood rather than an abusive childhood. This would be true if one ignored his childhood -- especially the beatings and killing of pets by his stepfather. See page 11 of Initial Brief, R543. Appellee also implies the abuse did not exist because the mother was not informed of it until after she divorced the stepfather. However, the mother testified that she had an "inclination" about what had been happening T1869. Moreover, Appellant's silence about the beatings and abuse was understandable in light of the testimony that the stepfather may have threatened violence if the

children talked and the mother's opinion that this fear of violence kept the silence until the family was 500 miles away from the stepfather T1875. Dr. Hicks' testimony was unrebutted and uncontroverted that what happens to a person in childhood and adolescence influences what happens when he is an adult (T1952-53) and that Appellant received the beatings at a time he was trying to establish some sense of identity T1907-08. The trial court found the abusive childhood as a mitigator and he did not give it little or no weight.

Appellee claims the testimony of Della Wooten and Jean Hensley as to Appellant's good character traits (see Initial Brief at 10) was "superficial." However, these witnesses believe enough in Appellant's good character traits to understand that this was an isolated, out-of-character incident for despite knowing that Appellant had been convicted of murder they would rehire him "in a heartbeat" and give him a place to stay if given the chance T1854-55,1861.

Next Appellee quarrels with the trial court's giving the mitigating factor potential for rehabilitation "substantial weight." However, this is a significant factor. Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). Appellee also claims that Dr. Hicks, an expert in the field of mental health T1904, was not credible. However, the trial court found Dr. Hicks to be credible, and it is not for Appellee to second guess the credibility determination on appeal.

Finally, Appellee claims that the testimony of six prison guards should be discounted because 70-75% of inmates exhibit good behavior. Appellee ignores the context of their testimony (see Initial brief at 13-14) and the importance of their testimony -- good conduct shows a disposition to make a well-behaved and peaceful adjustment to life in prison. It excludes Appellant from being among the worst of the worst for which the death penalty is reserved. Six prison guards coming forward on Appellant's behalf certainly is significant.

POINT XIX

THE TRIAL COURT ERRED IN USING THE WRONG STANDARD TO REJECT APPELLANT'S DRUG ABUSE AS A MITIGATING CIRCUMSTANCE.

Contrary to Appellee's claims, the trial court's direct explanation for rejecting this mitigator was that there was "no connection" between the abuse and "his actions in committing the murder" R544. This is the wrong standard for rejecting drug abuse. Initial Brief at 78.

Appellee acknowledges that to limit drug abuse to the crime charged is improper because it ignores a defendant's background and character. Appellee's brief at 78. Dr. Hicks explained that abuse of drugs can disrupt a young person's establishing a sense of identity and a sense of community T1917. This would definitely relate to Appellant's background and character and it was error to wholly dismiss it on improper grounds. To ignore evidence relating to character and background violates Lockett v. Ohio, 438 U.S. 586 (1978).

Appellee attacks Dr. Hicks because she has no training in the field of addiction. However, Appellee ignores Dr. Hicks did research and papers in the area of addictions T1903. Appellee also simply disagrees with Dr. Hicks testimony. However, Dr. Hicks' testimony was unrebutted, and supported by factual evidence,[41] and thus cannot simply be rejected. Johnson v. State, 20 Fla. L. Weekly S343, 346 (Fla. July 13, 1995).

CONCLUSION

Based on the foregoing arguments, this Court should reverse Appellant's convictions, and vacate or reduce his sentence, and remand this cause for a new trial or grant relief as deemed appropriate.

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[41] The trial court acknowledged the fact that there was drug use R544, but rejected the mitigation based on a wrong legal standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 22nd day of December, 1995.

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Of Counsel