

IN THE SUPREME COURT OF FLORIDA

ANDREW RICHARD LUKEHART,

Appellant,

vs.

CASE NO 90,507

STATE OF FLORIDA,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

ANDREW RICHARD LUKEHART,

Appellant,

vs.

CASE NO 90,507

STATE OF FLORIDA,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is an appeal from judgments of convictions and sentences imposed on the appellant, Andrew Richard Lukehart, including a conviction of first-degree murder and the sentence of death.

The record on appeal consists of nineteen (19) volumes. Appellant will cite to the record in volumes 1-9 by the volume and page number assigned by the clerk of court as V#R#, and will cite to the transcript of proceedings in volumes 10-19 by the volume and page number assigned by court reporter as V#T#.¹

STATEMENT OF THE CASE

On March 7, 1996, the State of Florida, in the Circuit Court of the Fourth Judicial Circuit in and for Duval County, issued an

¹ The pages in this record on appeal have been numbered in an unusually confusing fashion. Volumes 1-9 contain record, and the pages therein are numbered by the clerk of court as 1-1611. Volumes 10-11 contain transcripts of various proceedings. Those pages are numbered twice, once by the clerk of court as pages 1,612-1,918, and once by the court reporter as pages 1-308. The transcripts continue in volumes 13-19, which are numbered by the court reporter as pages 309-1,644, but are not numbered by the clerk of court. The transcripts then jump back to conclude in volume 12, pages in which are numbered by the court reporter as pages 1,645-71, and also by the clerk of court as pages 1,919-45.

indictment leveling two counts against appellant. Count I charged first-degree murder in the death of Gabrielle Hanshaw, charging the crime alternatively as premeditated murder and felony murder committed during an aggravated child abuse. The charge alleged the crime was committed by inflicting blunt trauma to the head of the victim. Count II charged aggravated child abuse by committing an aggravated battery on Gabrielle Hanshaw, a person under the age of 18 years, by inflicting blunt trauma to the head of the victim. Both counts alleged the act took place in Duval County on February 25, 1996. See V1R13-15.

Jury selection commenced on February 24, 1997, before the Honorable William A. Wilkes, Circuit Judge. See V13T330. After the judge denied motions for judgments of acquittal, the jury returned general verdicts of guilty as charged. See V18T1324, V2R379-80. Penalty proceedings took place on March 13-14, 1997, concluding when the Duval County jury recommended death by the vote of 9-3. See V19T1639-41, V3R400. On March 26, 1997, the trial court conducted a sentencing hearing with no jury present. See V12T1645-60. Appellant moved for a new trial, and that motion was denied. See V12T1647, V3R401-03.

Final sentencing was conducted on April 4, 1997. See V12T1662-71.² In aggravation, the trial court found (1) the murder was committed during the commission or attempted commission of aggravated child abuse, see V12T1664, V3R418-19; (2) the victim was a person less than twelve years of age, see

² A copy of the sentencing order is attached as Appendix A.

V12T1664-65, V3R418; (3) merger of capital felony committed while on felony probation for a 1994 child abuse conviction, and prior conviction of that crime, see V12T1665-66, V3R418-19.

In statutory mitigation, the court found: (1) appellant's youthful age, 22 years at the time of the murder, which was diminished even further because of his low maturity level, deserving some weight in mitigation, see V12T1666, V3R419; and (2) His capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired and deserved some mitigating weight, see V12T1666-67, V3R419.

In nonstatutory mitigation, the court found: (1) Appellant grew up in a dysfunctional home having been raised by an alcoholic father who physically abused him, giving that factor some weight, see V12T1668, V3R421; (2) He has a history of drug and alcohol abuse, and that mitigation deserves some weight, see V12T1668-69, V3R421; (3) At the age of 10, he was sexually abused by his uncle, which drove appellant to depression and caused him to threaten to commit suicide, giving that mitigation some weight, see V12T1669, V3RR421; and (4) He was employed at the time of the crime, a factor deserving of some weight, see V12T1669, V3RR421.

The court adjudicated appellant guilty on both counts, see V12T1670, V3R411-12, imposed the death sentence on count I, see V12T1670, V3R414, V3R417-22, and a concurrent 15-year prison sentence on count II, see V12T1670, V3R415. Appellant timely filed a notice of appeal on May 1, 1997. See V3R431.

STATEMENT OF THE FACTS

This is a tragic story of a fatal incident that occurred among members of the household of Misty Rhue, a 22-year-old mother of three. It was uncontested at trial that on February 25, 1996, Mr. Lukehart caused the death of one of Misty's children, Gabrielle. The State's primary evidence of what occurred came from statements made by Andrew, and from the medical examiner's testimony. No prosecution witness saw the killing. The only eyewitness was Andrew, who testified in his own defense in the guilt phase after numerous statements of his had been introduced by the State in its case-in-chief. Most of the evidence of events surrounding the homicide is undisputed. Also undisputed is the fact that Andrew made many false, uncounseled statements to officers and others in the hours immediately following Gabrielle's death, attempting to conceal his own culpability and giving facts about the cause of death that were in part inconsistent with his trial testimony. The chief factual dispute in the guilt phase focused on precisely how Gabrielle's injuries were inflicted.

The State's theory before the jury as to both the homicide and the aggravated child abuse charges was that in a single brief episode that occurred while changing Gabrielle's diaper or dressing her, Andrew suddenly and fatally struck her head multiple times, after which he tried to cover up his role in her death. The State's homicide theory primarily relied on felony murder with the underlying felony as aggravated child abuse by aggravated battery. The State also asserted evidence of multiple

blows proved premeditated murder. See V17T1262, V17T1284.

The defense's theory to the jury was that Andrew accidentally caused Gabrielle's death while changing her diaper. Distressed and panicked, he ran off and lied about what he had done. But hours after the fatal incident, he remorsefully revealed what happened and helped officers recover Gabrielle's body. The defense argued that it was not a knowing and intentional act to cause great bodily harm, and it was not a premeditated murder, but the evidence may support some lesser charge. See V17T1248, V17T1244.

A. The State's guilt phase evidence

For about two years, Misty had been living on and off at 10502 Epsom Lane in Duval County. Among those living with her back in February 1996 were her boyfriend, Andrew Richard Lukehart; Misty's adopted father, David Hanshaw; her uncle, James Butler; her two-year-old daughter, Ashley Marie Rhue; and her five-month-old daughter, Gabrielle Hanshaw, the victim in this case. Misty's third daughter, Brooke, who is six, was fathered by David Glatley and lives with Misty's aunt and uncle, who adopted Brooke at birth. Ashley's father is Michael Rhue, Misty's estranged husband. Misty is unsure of who fathered Gabrielle: It was probably Troy Lee, but it could have been Michael Hewlet. Because she did not live with her husband or the other two men, she decided to give Gabrielle her adopted father's last name, Hanshaw. See V15T721-24.

Misty met Andrew in December 1994 and their relationship began in March 1995. He moved into the Epsom Lane house in

January 1996, a month-and-a half before the tragedy unfolded.³ Although not true, she told many people, including her adopted father, that Andrew was Gabrielle's father. Andrew wanted to be Gabrielle's father and told her he wanted to live with them because Gabrielle needed a father around. Misty wanted him there. See V15T724-26. There was no evidence of any problems Andrew had with either Misty or any member of her family. Andrew had always had a good, loving relationship with Gabrielle. Misty said he would always hold the child and take care of her needs, including changing her diaper. See V15T769-70.⁴

1. Events immediately preceding the incident

February 25, 1996, the day Gabrielle died, began as an ordinary Sunday in the Rhue home. Andrew awakened at 8:00 or 8:30 a.m., cradled Gabrielle in a normal manner, tended to Gabrielle's needs by changing her diaper and feeding her, and then watched television while holding Gabrielle. See V17T1174, V15T791-92, V15T796. Misty got up around 9:00 a.m., and went with Andrew, Gabrielle, and Ashley to the video store and then to get gas. Ashley, who had recently been hospitalized for an illness, threw up in the car. They returned home by noon, cleaned up Ashley, and went out again, this time to a flea market. They returned home later that afternoon and watched a

³ Back in February 1996, Andrew, about six feet tall and weighed 230-240 pounds. See V15T722.

⁴ Andrew's testimony was similar. When asked how he felt about Gabrielle, Andrew said, "I was proud." V17T1174. He said he was "very selfish with her" because "I was trying to be a perfect parent." V17T1174.

movie with David Hanshaw. David Hanshaw left around 4:45 p.m. to play golf. James Butler had left the house at 10 a.m., and was gone all day. See V17T1175-76; V15T727-29; V15T773-75; V15T783-85; V15T795-99.

After the movie, Andrew and Misty went out to the garage with Ashley to smoke, while Gabrielle remained in a playpen in the den. The phone rang and they returned to the kitchen. Ashley and Gabrielle started crying. Misty got off the phone to take care of Ashley while Andrew went to the den to care for Gabrielle. Misty took Ashley to Misty's bedroom to try to get her to lay down. They were in the bedroom approximately fifteen minutes when Andrew came in, laid Gabrielle on the foot of the bed, and asked where the baby wipes were so he could change the diaper. He took the diaper and left the room with Gabrielle, telling Ashley to "be good for Mommy." At the time Gabrielle was happy, not crying or upset. Andrew left the bedroom and shut the bedroom door. Misty said she heard Gabrielle let out a big laugh and coo, and she heard Andrew doing some baby talk with her. It was about 5 p.m. See V15T728-35; V17T1177.

2. Events immediately following the incident

About 15 minutes later, Misty heard the car door slam and the car crank up. She looked out the window and saw Andrew was in her white 1981 Oldsmobile fixing to leave. By the time she went outside to find out where he was going, he was gone. Gabrielle was not in the playpen. Neither Misty nor the police later that night found anything unusual in the playpen or its surroundings. An open diaper that appeared not to have been used

was observed in the playpen in the den. It contained no evidence of blood. See V15T735-39, V15T773-75, V15T807-10.

About 30 minutes later Andrew called Misty from some Lil' Champ past NAS on Normandy. He was panicky, "telling me to call the cops, call 911.... He said he's chasing a blue Blazer." V15T741. He said "someone had came into my living room, took Gabrielle off the living room floor and left in a blue Blazer." V15T742. "He told me if he couldn't catch the blue Blazer and get Gabrielle back that he was going to kill himself or if anything was to happen to her that he would kill himself." V15T744. She did not take him seriously, and she did not call the police immediately. She went across the street and asked her cousin if he had seen a blue Blazer. She returned to her house and picked up the phone but he wasn't on the phone any longer. She picked up Ashley and started walking to where that Lil' Champ was located, but she didn't make it on foot because her cousin came by. She went back home and, about 15 minutes after talking to Andrew, she called 911. See V15T745-56. A number of officers came to her house then and later that night. She gave them permission to search her house and car. She also told officers Andrew was Gabrielle's father. See V15T757-59.

3. Andrew's surrender and his statements to officers

Some time around 6 p.m., after dusk, Andrew walked out of the woods in a remote location in Clay County and up to the home of off-duty Florida State Trooper Richard Earl Davis. Davis's cruiser was parked out front, and a police helicopter was flying overhead. Davis had just learned officers were investigating the

possible kidnapping of a five-month-old baby by a white male. Davis looked outside and saw Andrew walking into a ditch and toward him. Davis grabbed his gun belt. Andrew put his hands up in the air and said "I'm the one they're looking for." Davis immediately handcuffed him. See V15T812-19, V15T823-24. Davis asked Andrew where the baby was, and Andrew responded, "I don't know what the hell you are talking about, read me my rights." V15T819, V15T824-26. Davis did not read Andrew his rights. Davis called dispatch, and 30 seconds later Clay County Deputy Sheriff Jeff Gardner arrived. See V15T820. At the time Deputy Gardner had been investigating the car Andrew was driving and which Andrew wrecked near a telephone pole near Trooper Davis' house. See V15T828-35. Andrew asked for a lawyer before answering any questions, but the defense was prevented from asking Deputy Gardner whether he or other officers provided a lawyer for him. See V15T843.

During the next 16 hours, Andrew made statements to a succession of officers from various investigating agencies and in various locations, as well as a statement to Misty that had been surreptitiously arranged and recorded by officers. The introduction of all of these statements was objected to prior to trial in a motion to suppress, which the court denied after a lengthy evidentiary hearing, and the State introduced them in its case-in-chief over objection. The manner in which the statements were taken is discussed in Issue I, infra. Without needlessly belaboring those details in this portion of the brief, appellant will summarize the prosecution's case regarding these statements.

Beginning before he was placed in custody, Andrew told Misty and various officers sometimes conflicting variations of the story he told Misty in their telephone conversation. He said somebody kidnapped Gabrielle, he unsuccessfully chased the kidnapper, and finally he cracked up his car in a suicide attempt in a remote Clay County location near Deputy Gardner's house because he was distraught that Gabrielle had been taken away. He also told Deputy Gardner "I wish she hadn't shit in her diaper." His statements detailed how he said "I want to die" and described trying to kill himself first by trying to run his car into a telephone pole and then by trying to hang himself with his T-shirt from a tree branch. Some of the statements were made after an all-night interrogation at the police station when officers took him out and asked him to reenact the kidnapping, pursuit, and suicide attempts. See V15T764-65, V15T776-77, V15T818-26, V15T836-57, V15T864-82, V15T903-V16T937, V16T974-87, V16T994-1020, V16T1089-1120, V17T1182-85.

Ultimately, Andrew admitted to Clay County Sheriff's Lieutenant Jimm Redmond that he accidentally dropped Gabrielle while changing her diaper, and that her head the floor. He tried to resuscitate her numerous times but could not do so. In a panic, he drove around, found a pond, and walked her body into the pond. Immediately upon making this admission, Andrew led officers to the pond in a remote location about 6-8 miles away, in Duval County, where they recovered Gabrielle's body. See V16T1044-75, V16T1092-1107. Gabrielle's body probably would never have been found without Andrew's help. See V16T1051.

Andrew then gave a written statement describing the events and maintaining Gabrielle's death was a horrible accident. See V16T1108-V17T1120, V16T1044-49, V16T1058-75, V2R346-50. He was arrested at 4 p.m. Monday, placed on a suicide watch. See V1R1.

When Gabrielle's body was recovered, she was wearing a diaper and a "onesy" outfit (a jumper). The jumper was dirty but had no holes or tears. See V17T1139. There was evidence of fecal matter in the pubic area, perhaps indicating that her body had stayed in contact with fecal matter. See V17T1140.

Bonifacio Floro, a medical examiner, found bruises on the forearm and back of the hand of the right extremity, see V17T1144, V17T1148-49, a non-specific bruise on the abdomen which could have been caused by anything prior to death, see V17T1146-47, and five injuries to the skull and brain, see V17T1143, V17T1155.⁵ Her skull had evidence of two fractures in the back left, with evidence of subdural hemorrhaging and bruising and bruising on the back left and right. See V17T1143-51.

Floro said the skull fracture on the left side measured 8½ centimeters. "A child's head would fracture if you hit it hard or if you drop a child from the second floor to the ground floor you would fracture a child's skull," he said. V17T1151. This blow would have rendered her unconscious right away and would itself have been fatal. See V17T1151. It would take dropping

⁵ The body also bore postmortem bite marks that appeared to have been caused by bugs, presumably after the body had been left in the pond. See V17T1148. The body had only one open wound, in the back of the right thigh, which also was a post mortem wound having nothing to do with the cause of death. See V17T1141.

from a height greater than 4-5 feet to cause a blow of this nature. "If you use your fist it will be that force that you need to fracture the skull." V17T1152. The second fracture measured 3½ centimeters. It too would have been caused by a severe blow to the head, would have rendered her immediately unconscious, and would have been fatal. See V17T1152-55. The two fractures and their underlying bruises would have been caused by two separate blows. See V17T1155.

Other than the two fractures and related hemorrhages, Floro found evidence of three other hemorrhages in the skull. Severe blows lacerated blood vessels, causing hemorrhaging and swelling of the brain. The injuries were consistent with her head making contact with a blunt object, possibly consistent with a table or floor, but not a sharp object. He was unable to determine the order in which the wounds were inflicted. See V17T1158-59. Floro concluded that she died of "multiple blunt trauma to the head with cerebral swelling and subdural hemorrhage." V17T1160. The cause of death in his opinion was homicide. He opined it could not have been an accidental death, but he offered no opinion about whether the killing had been premeditated. See V17T1160. Over objection, he opined the injury would not be consistent with a man of 6'2" holding the infant at his waist level and dropping the infant to the ground. See V17T1160-62.

B. The defense's guilt phase evidence

After all of Andrew's statements had been introduced over objection in the State's case, Andrew testified as the only defense witness. Andrew gave jurors the following account:

A [LUKEHART] Well, Misty and Ashley had gone in to take a nap, I picked up Gabrielle and she had a messy diaper, so I went in the bedroom and grabbed a diaper and some baby wipes. And the baby wipes weren't in there so I asked Misty where they were at and she told me where they were at. So I took her in the back room and changed her diaper. And when she was -- when I was trying to snap her clothes back together she was pushing up on her elbows.

Q [DEFENSE COUNSEL] What do you mean by that?

A By what?

Q How she was pushing up?

A She was using her elbows to make herself rise up.

Q Where were you actually at in the house?

A There's a back den room.

Q Where was she?

A On the floor.

Q What did you do?

A I pushed her down.

Q What do you mean you pushed her down?

A I shoved her down.

Q And what part of her body did you touch when you were shoving her down?

A About right here.

Q Would you describe for us where you are touching your own body?

A In the upper chest close to the neck area.

Q Do you know what amount of force you used to do that?

A I'd say quite a bit.

Q How many times, if you know, that you did that?

A I don't know.

Q Do you know how many times she came up on her elbows?

A No.

Q What happened as you were doing this?

A She stopped moving.

Q What do you mean?

A The last time I did it she just stopped moving, she was just completely still.

Q What did you do?

A I tried to check her out, see what was wrong with her, and then I realized she wasn't breathing so I tried to do mouth-to-mouth on her.

Q Do you know how to do that?

A Yes.

Q So what do you mean mouth-to-mouth, what did you actually do?

A Well, from what I've learned on infants you're supposed to put your mouth over their mouth and their nose and give them couple short breaths, so it fills their lungs.

Q Did you feel her heart beat?

A Yes.

Q Was it still there?

A Yes.

Q What did you do next?

A I started -- I got scared and I started to panic, and I ran outside and threw the diaper away and jumped in the car and started up and left.

Q You remember where you put the diaper?

A In the trash can.

Q Is that the dirty diaper?

A Yes.

Q You say you started the car and left, did you have Gabrielle with you?

A Yes, I put her in the passenger seat in the front.

Q Why did you do that?

A I was scared, I was panicking, I didn't know what to do.

Q Where did you go?

A I just -- I drove out to Normandy and turned onto Normandy and just started driving.

Q Why?

A I was scared.

Q Did you touch or do anything with Gabrielle during that time?

A Yeah, I was trying to give her mouth-to-mouth while I was driving.

Q Did you feel her heart beat?

A Yes.

Q Was it there?

A Yes.

Q By the way, Andy, when this happened did you see any blood?

A No.

Q Was there any blood on you?

A No.

Q Did you see any blood on her at all?

A No.

Q Where did you go as you drove around?

A I ended up at, I think, Chaffee Road, I'm not sure but I think that's what it is.

Q Did you go there on purpose?

A No, I was just driving.

Q What did you do on Chaffee Road?

A Well, I pulled over and tried to do mouth-to-mouth again, and then that's when her heart beat stopped.

Q What did you do?

A Started to cry, and my panic got worse.

Q What did you do with the baby?

A Well, I drove some more after that and I turned onto another road where I found the dirt road.

Q Had you ever been there before?

A Never.

Q What did you do down that dirt road?

A That's where I went out and took her to the pond.
Q As you got out of the car did anything happen with her?
A Yeah, her head hit the door.
Q How do you know that?
A Cause I remember hitting it pretty hard.
Q Did you do that on purpose?
A No.
Q As you were going down to the pond, what were you doing?
A I was trying to do mouth-to-mouth and all that again.
Q Did it work?
A No.
Q Did you feel her heart beat?
A No.
Q Did you put her in the pond?
A Yes.
Q How did you do that?
A I threw her in.
Q Why did you throw her?
A I don't know, I was just -- I was real scared, I didn't know what to do.

V17T1176-82; see also V17T1206-10.

His testimony gave much the same account as his statements to officers with but a few relevant differences. He testified that he shoved her down, not dropped her. He also testified that he threw her into the pond, not walked her in.

Andrew openly admitted to officers and to the jury that he lied in the hours immediately following Gabrielle's death about what happened, explaining he felt "scared," "ashamed," "bad," and "guilty." See V17T1188, V17T1190, V17T1192, V17T1199. He told jurors he did not intend to cause great bodily harm to Gabrielle, and he did not intend to kill her. See V17T1198.

C. **The State's penalty evidence, which focused entirely on detailing a prior offense, prosecution, and punishment**

The State focused the entire penalty phase proceedings on details of a prior felony conviction of child abuse.

Jacksonville Sheriff's Officer Donald Franklin Tuten said on April 14, 1994, he responded to a call at University Hospital regarding an injured eight-month old infant named Jillian French, reportedly a possible drowning. Andrew was responsible for having help summoned, and Andrew accompanied the child to the hospital. See V18T1350, V18T1342-44. Doctors told Tuten the injuries sustained were from physical abuse, not drowning. See V18T1345. Jillian French had suffered head injuries and broken ribs and a broken arm and leg. See V18T1347-48.

Andrew told Tuten he was Jillian's father. See V18T1344. Tuten said Andrew told him that while babysitting Jillian,

he decided to give the child a bath. And that he had left the child after completing the bath to go get some dry clothes leaving the child in the tub with the water running through a hose that was connected to the facet [sic]. He then stated he left the child for four to five minutes to obtain some dry clothes for the child. When he returned with the dry clothes the child was lying on her back holding a hose.

Then he changed his story several times, with the position of the hose but holding the hose in her hands.

V18T1345. Upon further questioning by Tuten,

[h]e stated that the baby appeared to be lifeless while laying in the tub. He then picked the baby by an arm and a leg, went to the area of outside, the outside area, then started to perform CPR on the baby during [sic] breast and chest impressions. . . He stated that he gave her several breaths, she started to vomit, she then became -- had life in her again.

He then instructed another little girl that apparently was there to go get some help from a next door neighbor since they did not have any telephone there to call 911.

He stated that he kept giving her breaths, when it appeared she would go unconscious that she'd stop breathing and he would put his face down, see if she was breathing. He didn't think she was breathing so he would start bumping on her stomach to get any water out because he thought there might be water. When he pushed on her stomach she started to vomit, so he had

to continue to doing CPR on her to keep her breathing.

V18T1346-47. When Tuten asked Andrew to explain,

[h]e changed his story numerous times. When I asked him about the broken ribs, he said the ribs could have been broken when he was performing CPR on this baby.

When I asked him about the arm and the leg, he that the arm and leg -- at first, he said several days earlier, I believe on the 9th of April, that he was carrying the baby, that he had fallen down with the baby and that's how the broken bones occurred.

Then he changed his story and said that he lied to me, and then he said that the bones were broken because of the mother possibly.

He changed his story again and stated that the bones were possibly broken when he snatched the baby by the arm and the leg out of the bathtub.

V18T1348.

Medical doctor Janette Capella said treating physicians found Jillian had a "closed head injury including a subdural hematoma on the left side; she also had retinal hemorrhages, she was determined to have fractures of her right arm, both upper and lower right arm and her left leg, which were somewhat older than her acute head injury." V18T1353. The retinal hemorrhages indicate the baby had been shaken around a lot very recently. See V18T1353. She did not need surgery. See V18T1354. The subdural hematoma is a collection of blood just underneath the dural lining, the skin surrounding the brain. It is indicative of "usually being struck in the head. And it requires a fair amount of force to cause that kind of injury." V18T1354. During her hospitalization, Jillian suffered a seizure. She also suffered some damage to her eyes as a result of the injuries to her head. See V18T1356-57.

Andrew was arrested for aggravated child abuse, see

V18T1349, but was charged with the lesser offense of felony child abuse, see V18T1361, according to former prosecutor Holly Dunlap. She also charged Jillian's mother, Monica Plummer. See V18T14360-61. Andrew was not Jillian's natural father. In September 1994 Andrew pleaded guilty to felony child abuse and served 10 months in jail per the State's recommendation, even though the guidelines range was 40.5 months to 67.5 months imprisonment. See V18T1363, V18T1366-67. He was placed on probation for four years. See V18T1362-64. The plea agreement required him to take parenting skills and anger control classes, have no contact with Jillian, and have no contact with any minor children until he completed his courses. Parenting skills class would last a couple of months. See V18T1368. The anger control class would last 3-6 months. See V18T1369.⁶

The State introduced the judgment and sentence in that case, which has attached to it an order of probation. The court took judicial notice of the judgment and sentence. See V18T1371-72.

Correctional probation specialist Robin Soloman said Andrew

⁶ Dr. Krop later explained that anger management and parenting skills classes are primarily educational in nature, as distinguished from therapy or counseling. Those classes do not focus on the individual; they focus on people generally, teaching the right ways and wrong ways of doing things, and skills and methods to increase the person's ability to deal with parenting and anger. Parenting skills, for example, tries to teach acceptable methods of disciplining children, how to reinforce behavior, and how to better listen and communicate. These classes are superficial. Therapy, on the other hand, is more directed toward the individual, requiring the patient to work on why the anger exists in the first place, and why the person uses inappropriate methods to deal with anger. Therapy tries to figure out why the problem exists and helps the person resolve some of the underlying conflicts that resulted in this behavior. See V18T1442-46, V18T1453-56.

was placed on probation on September 2, 1994, and the first time she saw him was May 3, 1995. See V18T1375-76. She conducted monthly home visits while Andrew lived with Misty Rhue and her children, never finding anything wrong. See V18T1383. To Solomon's knowledge, Andrew never had any contact with Jillian after his release, thereby complying with one of the special conditions of probation. See V18T1377-78. Two other related special conditions were that he enroll in and successfully complete parenting skills classes, and that he not have unsupervised contact with minor children until successfully completing that training. He did successfully complete those classes on October 11, 1995. See V18T1378-80, V18T1384. He also satisfied another special condition, which required him to successfully complete anger control classes. He completed anger control classes on April 25, 1995. See V18T1380, V18T1383. Andrew was on active probation in February 1996 under her supervision. See V18T1381.

The only other State evidence was the following victim impact statement, which was introduced by stipulation:

Gabrielle Hanshaw was five months old at the time of her death. Although she was young, she had already developed her own unique personality. Gabrielle was a happy baby and was loved by many family members.

V18T1341; see also V3R393.

D. **Unrebutted mitigating evidence showed that Andrew was a deeply disturbed product of sexual child abuse and other serious mental and behavioral problems**

Uncontested evidence of many family members and a mental health expert established that Andrew grew up as a deeply

disturbed and abused child who was raised in a highly dysfunctional family. First he was abused by his alcoholic father. Then he was sexually abused by his uncle. He experienced the loss of two people who were perhaps the closest of all to him. He suffers from a variety of diagnosable mental disorders. And despite these problems and his mere borderline intelligence, he recognized that he was terribly troubled and needed help, but the little help he got did not come soon enough to prevent tragedy.

Andrew, 22 at the time of Gabrielle's death, was born in Pennsylvania to Bonnie and Randy Lukehart on April 10, 1973. A year and a half later, Bonnie and Randy gave birth to Andrew's only sibling, Jennifer. See V19T1547, V17T1172-73. Andrew grew up in Pennsylvania with or around many cousins, aunts and uncles. See V18T1386-88, V19T1530-32, V18T1413-31, V19T1581-19.

Andrew was raised in an alcoholic, abusive, dysfunctional home. His father, Randy, was a narcissistic, neglectful, chronic alcoholic. He physically and verbally abused both Andrew and Jennifer, hitting them, manipulating them, using obscene and degrading language, twice turning Jennifer's whole face black and blue. See V19T1529, V19T1548, V18T1474-75. "Andrew had learned to just sit back in a chair because he learned that if he was quiet he wouldn't get hit," Randy said. V19T1529.

Randy's alcohol abuse was so severe that when he finally quit drinking in September 1977 -- when Andrew was 4 -- it took Randy six years, counseling three days a week, and AA five days a week, to get rehabilitated to an acceptable level. See V19T1528-

29, V19T1547. Randy spent very little time being a father to Andrew. The Lukeharts tried to put 4-year-old Andrew in AlTeen and AlNon to get counseling, but it didn't work because he was not yet a teenager and couldn't relate to the teenagers in the program. See V19T1530, V19T1547-48.

Throughout Andrew's childhood, his family saw plenty of evidence that something was seriously wrong, especially starting around the time he was ten and in the fifth grade. One time, Bonnie said, Andrew's teacher called the parents into school because he was "banging his head against the wall or whatever." V19T1549. When Andrew was between 7 and 11, he was pegged as a class clown in school, always experiencing difficulties. See V19T1550. The family went through some counseling, but it was not the same as having Andrew see a psychiatrist, and they couldn't afford to continue therapy. See V19T1550-51, V15T1533-34. Bonnie tried to provide a loving and supportive environment, but she stopped hugging him, and once stormed out of his school angrily after the school wanted to have him retested. She is not aware of him ever confiding in or speaking with any family members, or having anyone there to help him discuss the problems he was experiencing. See V19T1551-57.

Around the same time Andrew's behavior demonstrated he was experiencing problems, his uncle Donnie, Randy's brother, died. Donnie, who had been confined to a wheelchair, was apparently the one person in whom Andrew did confide. Donnie's death hit the family hard. Randy dealt with it poorly, becoming withdrawn and returning to his verbally abusive ways. He wasn't

there for Andrew when Andrew needed him, realizing now that "I let him down." V19T1532-33.

The family moved from Pennsylvania to Maine around 1989 when Andrew was 15 or 16 years old. See V19T1549-50. A couple of years later, in 1991, tragedy struck again when Andrew's sister, Jennifer, died suddenly in an automobile accident. See V18T1386-88, V18T1398, V18T11417-19, V19T1527. Andrew was very close to his sister, and he became quite distraught when she died. See V18T1458, V18T1419. At her funeral, he placed a key inside her coffin, and he said it was for when she wants to come home, if she wants to come home. His cousin, Stephanie Lynn Repko, who described that incident, added that "Andrew always tries to act like nothing bothers him." V18T1397. Right after she died, Andrew went to live with his aunt Carol Valentine. See V18T1398. "Why Jenny, why not me," he said to his aunt, Kathleen Valentine. V18T1419. He was very depressed, was crying a lot, and was almost suicidal. See V18T1419.

Jennifer's sudden death coincided with a series of revelations that shed light on some of the problems Andrew had been suffering since his early childhood. For the first time, he and many of his relatives finally and openly acknowledged to each other they had been sexually abused for years by Andrew's uncle, Llewellyn Scram. See V18T1388-91, V18T1416-19, V18T1422-23, V18T1425-26, V19T1520-22, V19T1541-43. Scram abused at least ten children and went to prison. He admitted fondling and having oral sex with Andrew's sexual organs. The last time he saw Andrew was in 1985 or 1986. See V18T1411-15.

Andrew first publicly acknowledged the abuse to his cousin and fellow victim, Melissa Ann Smith, telling her Scram forced him to perform oral sex, masturbation, and anal intercourse, beginning when Andrew was about 8 years old. When Andrew described it, he got bent out of shape, very upset, crying sometimes, then stopping, appearing very angry, pacing back and forth, smoking cigarette after cigarette. See V19T1521-22, V19T1541-43, V18T1471.

Melissa too had trouble dealing with the abuse, as had other cousins and victims, including Kimberly Scram and Stephanie Lynn Repko. Melissa still exhibits a certain amount of rage in dealing with her children, frequently losing patience and control. See V19T1524-25, V19T1544-45. Kimberly dealt with the problem by drinking, and once even tried to commit suicide. See V18T1428-33. She has been through counseling and needs more help. See V18T1425-28. Andrew too resorted to alcohol and drug abuse, got into trouble a lot, and even participated in drug and alcohol abuse with Kimberly's mother. See V18T1429.

After the revelations surfaced, Andrew's behavior became scary and disturbing. Kimberly described him as "quiet and troubled." V18T1430. Stephanie similarly noticed strangeness:

[W]e were sitting down talking and he had said that he was having dreams, dreams about killing people.

Then I got kind of scared and we got into a little fight and he never hurt me ever but he had taken a pair of scissors out of the drawer and he put them up to his chest and he said exactly this: He said, I'm going to stab myself. And he walked out of the room. And I guess he had gone for a walk until he cooled down and he came back and at that time my Aunt Kathy Valentine, she came down from her house to talk to him. After that I just left the room because -- because I guess

she wanted to talk to him, you know, face to face in private.

V18T1393. He did not in fact injure himself with the scissors. See V18T1400. Stephanie had an infant son, four or five months old, and to her knowledge Andrew never did anything inappropriate with that child. See V18T1394-95.

Andrew was able to maintain employment. He was a capable worker in the construction business who understood what to do once he was shown. See V19T1540. He also later worked as a warehouse laborer for Coast Fruit, where he was employed at the time Gabrielle died. See V17T1173.

On at least some level, Andrew knew he had serious problems. When Kimberly's life started unraveling, he tried to help her get straightened out, reflecting on his own problems. See V18T1430-31. Shortly after he injured Jillian French in April 1994, he reached out for help. He called his attorney, Amy Grass Gilmore, and told her he was "ready to snap and possibly hit somebody," V18T1406, and asked for therapeutic help:

[H]e wanted to be inpatient, and get treatment rather than be in jail. And he told me he had some problems upstairs, and I put upstairs in quotes so I know he was talking about his head. And I wrote that he said he had problems upstairs such as paranoia.

V18T1406. A mental health expert, clinical psychologist Dr. Harry Krop,⁷ examined Andrew in the French case and agreed at

⁷ Dr. Krop has a Ph.D. in clinical psychology from the University of Miami. He did an internship in child psychology, and postdoctoral work in neuropsychology. He is a licensed psychologist in Florida specializing in forensic psychology. He has evaluated 8,000-9,000 persons. Dr. Krop has been qualified and testified as an expert in 441 civil cases and 784 criminal cases around the United States and Canada, including 85-90 times

that time Andrew needed long-term inpatient treatment. See V18T1404, V18T1449. He testified in the present case that in 1994 Andrew was

a very seriously disturbed individual. Mr. Lukehart revealed to me pretty much a lot about his family, about the dynamics of his own victimization, about his own sexual abuse, and a lot of his own interactions with individuals throughout his life. And I felt that he was a seriously disturbed individual who had been involved in some types of counseling, but again my opinion that he was very [im]mature when he participated in those counseling sessions and they were fairly superficial.

And I felt that given the seriousness of the charge at that time and also the extent of the conflicts that he had experienced as a child, and as an adolescent, I felt he was in need of long-term residential treatment. I essentially felt that given his inability to control his anger, and that this had been a life long problem for him from a very young child, and the lack of real serious treatment that he had received, I felt that it was important that he get long term treatment, primarily in some type of residential program where he could be essentially off the streets and in some type of facility while he was being treated.

V18T1449.

Dr. Krop recognized in 1994 that Andrew was suffering severe consequences from his own sexual victimization, including anger and inner conflict. See V18T1450. The severity was even greater in Andrew because the abuse came from within his own family and involved homosexual assaults:

the consequences psychologically are often more severe in individuals in which the abuse occurs within a family situation, and also when it's male on male or female on female, but the same sex sexual abuse the research shows usually has longer lasting and more

in penalty phases of capital cases. In about 90% of the capital cases, he has testified for the defendant, but only 70% of the time in the last 10 cases. He was stipulated to be an expert in this case. See V18T1434-39.

serious psychological consequences, and particularly male on male because of the whole homosexual type of stigma that results from that type of sexual abuse.

So although Mr. Lukehart was able to admit to me that he had been sexually abused, I did not get the impression [sic] he had ever really dealt with it. And although I am not suggesting to the jury that all of his problems are related to that victimization, nor am I suggesting that he abuses or his own abuse is an excuse for what he did, it certainly is a contributor to the means he has never really learned to resolve the anger and the emotional feelings that were associated with his own victimization.

V18T1451; see also V18T1506-07.

Dr. Krop was called upon in 1997 to reevaluate Andrew after Gabrielle Hanshaw's death. In addition to reviewing the work he did in 1994, Dr. Krop examined Andrew three more times totaling 14 hours; reviewed police reports; the 911 tape; Gabrielle's medical records; the investigator's case activity summary; notes from Andrew's participation in an anger management class; various poems and drawings Andrew has done; his school records; his medical records; his probation records as a juvenile; his records from the Maine Youth Center; his records from the Maine Department of Human Services; his records from the Arrowstock Mental Health Clinic from 1990; 42 depositions from family members, police officers, physicians, and other individuals who gave depositions in this case; interviewed various family members; and consulted with psychiatrist Dr. Miller, who previously evaluated Andrew. Dr. Krop also administered neuropsychological testing to examine for brain damage because there was evidence that Andrew had a history of suffering head injuries, he had been evaluated for learning disability, and Dr. Krop believed there may be a neurological explanation as to why

he has had problems with impulse control and anger. See V18T1440-41, V18T1451-53.

It became obvious to Dr. Krop that Andrew has always had problems with anger and impulse control. Andrew cannot identify his own basic values, but clearly understands it is wrong to hit or abuse a child. He has acknowledged his responsibility for Gabrielle's death since the very first meeting with Dr. Krop in this case, and he has never done anything to suggest that Gabrielle did something to bring about her own death. His problem is not one of legal incompetence or insanity. Andrew knows acting in a violent manner is wrong prior to the act and after the act, and recognized that in his anger control classes, too. His problem is with the act itself, when he is under stress, when he feels he tends to lose control or tends not to think in rational ways. Balled up inside of him is a combination of different feelings, including guilt, anxiety, defensiveness, and a desire not to get caught, all of which showed up in this case. See V18T1456-60, V18T1479-84, V18T1490-96, V18T1502.

Depression and anger were common themes throughout his life. He had behavioral problems since elementary school, and some efforts were made to get him some help. One teacher was concerned he would harm himself. Depression and anger were also the most common themes running through Andrew's poetry. For example, in one poem called Skullcrusher, which he wrote after he was incarcerated in the present case, he talks about death and skull fractures -- things that would have certainly been on his mind after he was charged in this case -- but he does not mention

children or suggest that he had any reason to lose control the way he did. Another of his poems demonstrates his awareness that through spirituality or belief in God he may learn more appropriate ways of dealing with the problems he's had in his life. In a poem about Misty Rhue, he wrote about how immature that relationship was, and how moody and unpredictable she was. Ironically, he would get very upset when he saw Misty punishing the child or doing anything to physically discipline her. See V18T1462-64, V18T1485-92, V18T1508-V19T1517.

Distancing himself from his chief abuser, Scram, did not resolve any of the problems. In 1990 a clinic recommended Andrew should get counseling at the Maine Youth Center. The Youth Center's records indicate he was clearly a disturbed individual but that family dynamics were a significant contributor to his emotional problems. See V18T1464-65. His mother, Bonnie, and his father, Randy, apparently were part of the problem. Bonnie seemed to get angry when confronted with her part in the whole dysfunctional family situation, and Randy tended to be passive and compliant, avoiding what was really going on. They didn't even know about the abuse until after Jennifer's death. See V18T1465-66.

Dr. Krop's clinical diagnosis concluded with findings that Andrew suffers from four different mental disorders:

(1) intermittent explosive disorder; (2) substance abuse, especially alcohol; (3) post-traumatic stress disorder; and (4) personality disorder with anti-social, immature, and borderline features. See V18T1467-70.

The first, intermittent explosive disorder, features

the occurrence of discreet episodes of failure to resist aggressive impulses that result in serious assaultive acts or destruction of property.

Basically it involves an individual in which there are several discreet episodes of failure to resist the impulse, the degree of aggressiveness expressed during the episodes is grossly out of proportion to any precipitating psycho social stressors, that is in this case if a child cries or if a child wets their pants or if a child is disobedient and then the individual reacts in an abusive way, that is clearly out of proportion and inappropriate to the situation.

And then the other criteria is that the aggressive episodes are not better accounted for by another major mental disorder such as drug use, or some other type of medical condition.

V18T1467-68.

The second disorder, substance abuse, stems from Andrew's life long use of alcohol and other drugs. His father first gave him liquor at the age of five, and he's been a heavy alcohol drinker since he was 13 and a user of marijuana since he was 8.

See V18T1468, V18T1471. Dr. Krop said

I am not again suggesting that because he drinks or uses drugs that he engaged in this particular act because as far as I know he wasn't drinking or using drugs at the time of this incident, but his life long term use of alcohol and other kinds of drugs certainly can cloud a person's judgment in general.

V18T1468. Alcohol and substance abuse helped shape his personality, reflecting that he learned to deal with stressful situations by finding a way not to deal with them directly, by avoiding them, by numbing himself or running away or by fighting.

See V18T1496-97.

The third disorder, post-traumatic stress disorder, stems from the homosexual fondling, sodomy, and exposure to homosexual pornography he was forced by his uncle to endure over a period of

years. He has also talked about flashbacks, about trusting people, and about avoidance in terms of intimacy or closeness.

I attribute some of these problems, certainly not all, but some of these problems to what we call post-traumatic stress disorder related to his sexual abuse victimization which had never been treated.

V18T1469.

The fourth disorder, personality disorder, is found when personality traits take the form of inappropriate behavior toward oneself or toward society.

[T]he three most dominate [sic] inappropriate types of personality features in him would be antisocial, immature, and what we call borderline which is tendency for a person to sometimes engage in self destructive type of behavior as well as behavior which could be destructive outside.

The immaturity is real evident in Mr. Lukehart. Mr. Lukehart is essentially like a kid in a large body. And if you look at all of his psychiatric records and school records and talking to his parents immaturity is what has best characterized him throughout all those different descriptions.

And even in his writings, his poems and his interests, it's again not healthy stuff but it's not that unusual for an adolescent or teenager to write the kind of poems with the kind of music, heavy metal music that a lot of adolescent and teen[]agers listen to. And a lot of the poetry is coming to grips with more at that time and a lot of focus on these kinds of things. It's not -- it's immature but it's not that unusual.

V18T1469-70. Andrew has "very inadequate" coping skills,

whether it's dealing with his sexual abuse victimization, his dysfunctional family, his own inadequacies. . . . So this is a man who clearly has poor coping skills, he has used alcohol, he's used drugs to avoid dealing with his feelings and rather than learning how to deal with them through therapy in a mature way he learned some really inadequate ways of coping.

V18T1471. Andrew obviously exercised poor judgment when he entered another stressful household with children. See V18T1494.

Because of his disorders, he would become stressed by things that would not cause others to feel stressed, such as the "shitty diaper" in this case. See V18T1497. When the State asked if changing a "shitty diaper" should have triggered the intermittent explosive disorder, Dr. Krop said of course not, see V18T1497, explaining:

Well the way he described it to me the incident it wasn't the, quote, shitty diaper that caused him to explode, it was the escalation of partly his own behavior and reaction to it, and in that he could not effectively do what was necessary for the care taking of that child. The child began crying more, he would do things to -- in his mind -- try to get the child to stop crying but all that did was basically escalate the whole situation.

So, it was basically just a series of events which were on his part very inappropriate.

V18T1498. When asked to consider that the diaper may not have been changed at all, and that Andrew's testimony might not have been accurate, Dr. Krop said that made no difference: Andrew was there, Andrew acted inadequately and inappropriately, and whatever took place was an escalation of events caused by Andrew for which Andrew accepts responsibility. If he lied, his fabrication was self-protective, expressing his desire, at least initially, not to be caught. See V18T1499-1502.

Andrew's I.Q. is 79, in the borderline range among the lowest 7-8% of the population, even though at times he appears to be more intelligent. See V18T1477. He is a decent writer, and has some other skills, but his disabilities have rendered him unable to use or maintain them. See V18T1471-72, V18T1477-78. The prison system could supply him with some of the psychological care and structured environment that he needs. See V18T1471-72.

When the State asked if Andrew was under any extreme mental or emotional disturbance on the day Gabrielle died, he said:

I indicated that he was -- he is a seriously disturbed person; to indicated he was a seriously disturbed person on that day, terminology that you're using as, you know, I'm familiar with that is in terms of the statutory and I view that as a legal kind of conclusion that is really up to the jury or the trier of fact to determine.

V18T1504. In sum, Dr. Krop said Andrew is

a seriously disturbed individual with various diagnoses. And I guess not just looking at labels, he derives from a very dysfunctional family situation, he has never matured to the point where he clearly should not have been responsible for someone else because he's really -- can't be responsible for himself, and he's never learned to really cope with the pressures and strains of everyday life, yet a lot of being a parent and the outcome of that was clearly evident.

So he's a very seriously disturbed individual who ideally should have had help before and hopefully can still have an opportunity to get some help within the confines of the prison situation.

V18T1473.

No new evidence was presented to the judge at the sentencing hearing on March 26, 1997. See V12R1919-36.

SUMMARY OF ARGUMENT

I. Officers conducted an unconstitutional custodial interrogation of Andrew without advising him of his rights and after he made an unequivocal, personal, unlimited invocation of his right to have counsel present during questioning to protect him from the rigors of interrogation. Though he later was read his rights and waived them, those waivers are ineffective. All statements he made in the absence of warnings and after he invoked his right to counsel should have been suppressed. See Miranda v. Arizona; Edwards v. Arizona.

His confession to Lt. Redmond, including the evidence it produced, was further inadmissible because it was actually coerced. He was threatened to confess or face arrest; he was subjected to a judicially condemned "Christian burial" technique; he had been deprived of sleep for 28 hours; he had been held in custody and under interrogation for at least 16 straight hours; he had been handcuffed for 6-12 hours after being taken into custody; repeatedly he had been moved from place to place; he had been distraught after wrecking his car and committing two possible suicide attempts; and his constitutional rights had been ignored. See Brewer v. State; Sawyer v. State.

II. The court improperly prevented appellant from introducing, in cross-examination, evidence that he was denied his right to counsel, which would have allowed the jury to cast doubt on the voluntariness of his statements. See Crane v. Kentucky.

III. The State presented insufficient evidence of premeditation as a matter of law. See Kirkland v. State. Given that the aggravated child abuse charge was predicated solely on the infliction of the homicidal injury, there was no felony separate and independent from the homicide to support felony murder. See Mills v. State. If any convictions are affirmed, the charges of murder and aggravated child abuse should be reduced to manslaughter. See Norton v. State.

IV. The court refused to permit him to make a legitimate, tactical waiver of the excusable or justifiable homicide defenses, instructing the jury to consider those defenses even though neither was relevant and the instruction undermined the

defense. See Armstrong v. State; Smith v. State

V. The death sentence is disproportional, especially because no similar death sentence has been affirmed. See Smalley v. State.

VI. Because there was no accompanying felony separate and independent from the homicide, the court erred by instructing, finding, and weighing the aggravator of murder committed during an enumerated felony. See Mills v. State.

VII. The court erred by instructing, finding, and weighing the aggravator of being on felony probation, because it had not yet taken effect at the time of the murder. Retroactive application was contrary to legislative intent, see State v. Lavazzoli, making the aggravator an ex post facto law, see Lynce v. Mathis.

VIII. The cosentencers impermissibly doubled the aggravating circumstances of murder during an aggravated child abuse and murder of a child under 12, both of which involved a single aspect of the crime on these facts. See Provence v. State.

IX. The aggravator for murder of a child under 12, and its instruction, are facially unconstitutional. They are overbroad; overinclusive; give cosentencers no guidance or discretion; do not take into account any circumstances of the crime; do not require the accused to know the victim's age or youth, to intend to kill because of the victim's age, or to know the victim is present; create a strict liability determinant of life or death; and apply to much of the population. See Zant v. Stephens.

X. The State impermissibly made the sole focus of its penalty phase proceedings the details of a prior felony conviction of child abuse. See Finney v. State.

XI. Prosecutorial misconduct in closing argument was fundamental error. The prosecutor minimized and denigrated the significance of valid mitigating evidence, which showed that Andrew had been the victim of physical, sexual abuse; invoked the jurors' fears of a world full of victims who commit crimes; improperly suggested Andrew was looking for an excuse; implied the jury should send a message to child abuse victims not to break the law; appealed to the basest emotions; and invited jurors to consider extra-legal moral considerations. See Garron v. State; Campbell v. State.

XII. The noncapital sentence was imposed in the absence of guidelines, see Gibson v. State, and restitution was ordered without a hearing, notice, or findings, see Shipley v. State.

ARGUMENT

I. WHETHER THE COURT ERRONEOUSLY PERMITTED THE STATE TO INTRODUCE STATEMENTS OBTAINED FROM ANDREW LUKEHART DURING CUSTODIAL INTERROGATION IN THE ABSENCE OF MIRANDA WARNINGS AND AFTER HE UNEQUIVOCALLY INVOKED HIS RIGHT TO COUNSEL UNDER EDWARDS V. ARIZONA, THEREBY VIOLATING HIS PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION AND DEPRIVING HIM OF HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Upon handcuffing Andrew and taking him into custody, officers did not advise him of his Miranda rights. Nonetheless, Andrew almost immediately made a personal, unequivocal, unlimited request for counsel. "He said, I don't want to speak to anybody until I see a lawyer," and officer admitted. V11R1768. But officers did not provide him with a lawyer. And officers did not cease the questioning once he asked for a lawyer. Instead, they immediately questioned him about the investigation. Numerous

officers participated and engineered an unbroken chain of police-initiated interviews and conversations over a 17 to 18-hour period, beginning the very moment Andrew was taken into custody and asked for a lawyer, and continuing through the night and the next day. After ignoring his request not to be interrogated in the absence of counsel, officers repeatedly induced him to make numerous incriminating statements; repeatedly advised him of his constitutional rights, inducing waivers of those rights. In a critical interrogation, one officer went even further by using the unduly coercive "Christian burial" interrogation technique to get Andrew to confess, and threatening to arrest him for murder if he did not change his story.

Andrew moved to suppress his statements. See R1V89-91, V11R1906-11. After a pretrial hearing,⁸ the trial court denied his motion. See V1R92, V11R1908-14. The defense renewed its objection at trial. See V15T842, V15T892, V16T993, V17T1166-67, V17T1220-21. The State then introduced virtually all of those statements against Andrew in its case-in-chief at trial. See V2R346-50, V15T764-65, V15T776-77, V15T818-26, V15T836-57, V15T864-82, V15T903-V16T937, V16T974-87, V16T994-1020, V16T1044-51, V16T1089-1120, V16T1058-75, V16T1103-V17T1107, V17T1182-85.

⁸ Evidence at the pretrial suppression hearing focused on the manner in which Andrew made various statements, not the contents of those statements. Almost all of the facts in the text above regarding the suppression issue came from the State's witnesses. Andrew also testified at the suppression hearing, and his account largely coincided with the State's witnesses. See V11R1882-1906. Specific references are made in the text above to the few instances where his testimony materially disputed that of the officers.

Testimony about Andrew's statements constituted a huge portion of the State's guilt phase evidence in this case. The introduction of all these statements and evidence flowing therefrom deprived Andrew of his protection against compelled self-incrimination and a fair trial in violation of the fifth, sixth, and fourteenth amendments of the United States Constitution and article I, sections 9 and 16 of the Florida Constitution.

A. Andrew's invocation of his right to counsel, and the ensuing interrogations

In the early evening hours of Sunday, February 25, 1996, law enforcement officers from Jacksonville and Clay County were combing the woods in a Clay County area near Normandy and Cecil Field looking for a white male driving a dark Buick pursuing a dark blue Blazer, and for a kidnapped child. See V11R1732-33, V11R1759-65. Clay County Deputy Jeff Gardner, responding to a vehicle accident report, spotted the dark Buick wrecked off the side of County Road 217. He saw a baby chair and baby clothes in the unoccupied car. The ignition and lights were still on, and the car was in drive. He called the dispatcher and got vague information. He was told, however, that the vehicle belonged to a Mr. Lukehart, and it "had been involved in an apparent abduction." See V11R1763-64.

At the same time, off-duty Florida Highway Patrol Trooper Earl Davis Jr. was with his wife in their Clay County home just seconds away from where the car wrecked. Parked outside their home was his marked cruiser equipped with blue lights. A police helicopter was flying overhead with its spotlight illuminating

his yard. Knowing something was wrong, he called in and was informed officers were searching for a white male in woods who had possibly abducted a 5-month-old child. Trooper Davis soon saw Andrew, wearing shorts, tennis shoes, and no shirt, in a ditch walking toward the Davis house. See V11T1746-50. Without prompting, Andrew walked up to Trooper Davis, said "I'm the one they're looking for," and put his hands up in the air. See V11R1750-51, V11R1883, V11R1893. Trooper Davis ran inside, got his gun and gun belt, and emerged five seconds later. By that time Andrew "was up there close to my sidewalk, I told him to turn around, and I put my handcuffs on him." V11R1751-52, V11R1755-57. Trooper Davis said he cuffed Andrew "[b]asically for officer safety, also, you know, that he said they were looking for him, so that was basically it, I put them on there just for custody reasons." V11R1752; see also V11R1757. After he placed Andrew in custody, Trooper Davis asked Andrew if he knew where the baby was, and Andrew "said he didn't know what the hell I was talking about, read me my rights." V11R1752; see also V11R1757-58.

Trooper Davis immediately called the Clay County Sheriff's Office and told officers "I had the guy." See V11R1752. "[W]hen he threw his hands up in the air and said I'm the one they're looking for, that gave me a perfectly good idea who it was," Trooper Davis said. However, Trooper Davis did not read Andrew his constitutional rights. See V11R1752, V11R1758. He also did not believe Andrew was under arrest for a felony. See V11R1754.

The dispatcher alerted Deputy Gardner. It took Deputy

Gardner only 20-25 seconds to go from Andrew's car to Trooper Davis' house. He was followed immediately by Jacksonville Sheriff's Officers Richard G. Davis and Ed Sweat, who also had been searching the area. See V11R1752-53, V11R1732-33. Andrew was still in handcuffs. See V11R1768. Deputy Gardner, who also claimed Andrew was not under arrest, see V11R1769-70, began to interrogate Andrew. Andrew asserted his constitutional right to speak to a lawyer before further questioning. Nonetheless, officers interrogated him:

Q [BY MS. COREY FOR THE STATE] What did you say to Lukehart?

A [BY DEPUTY GARDNER] I asked him what was going on.

Q What did he say to you?

A He said, I don't want to speak to anybody until I see a lawyer.

Q Did he tell you something on his own after that? Well, I'm sorry, let me ask a different question first.

Did you try to question him after that any further after he asked for a lawyer?

A I just asked him basically what's going on. I had no idea what was going on.

At that time he kind of looked over toward the tree there and said I just tried to kill myself.

Q Did he say anything else on his own about the tree?

A Yes, he did. He said that he had taken his shirt off, tied it to his neck, also tied it to a limb on a tree and he tried several times to jump out of the tree and hang himself.

V11R1768-69 (emphasis supplied). Officer Davis confirmed that Andrew was immediately questioned after asking for a lawyer:

Q [BY MS. COREY FOR THE STATE] Did you hear this defendant ask for a lawyer?

A [BY OFFICER DAVIS] Yes, he did.

Q How many times?

A Only one time.

Q Did you ever try to question him after he asked for a lawyer?

A No, we tried to ask him where the baby was -- where the -- what happened and what happened with the

baby did the baby -- did the Blazer or what happened. Actually we were trying to ask him what happened to the Blazer, what was the situation.

Q Was that so you could continue the search?

A Yeah, we were looking for the baby.

V11R1736 (emphasis supplied). Officer Davis did not attempt to obtain an attorney for him. See V11R1744, V11R1884.

Deputy Gardner said Andrew agreed to accompany officers back to the wreck site, which was only seconds away. See V11R1769. Deputy Gardner took Andrew with him, still handcuffed in the back of the patrol car. Deputy Gardner said he did not ask Andrew any questions during the seconds they were in the cruiser. See V11R1753, V11R1770-71. While in the cruiser, Andrew pointed to a tree and said "that's where I just tried to hang myself." See V11R1771.

At the wreck, Deputy Gardner let Andrew, still handcuffed, get out of the car and gave him a cigarette. Andrew kept asking for more cigarettes, and officers gave him the smokes. See V11R1772-73, V11R1896.

Q [BY MS. COREY FOR THE STATE] Did this defendant ever make any statements to you on his own?

A [BY DEPUTY GARDNER] Yes, he did.

Q What did he say to you?

A While he was leaning against the back of the car I was standing there, he looked at the ground, he kind of shook his head, he made the statement I wish she hadn't shit in her diaper.

Q At the time he made that statement did you know what he was talking about?

A I had no idea.

Q What happened after that?

A As I said, I stayed with him until other people, other officers arrived. And shortly later I believe Officer Davis stayed with him and I left the area.

Q All right. Now, during the rest of the time you stayed with him, do you recall this defendant saying something else to you about being in trouble?

A Yes, I do.

Q Now, Judge, these next statements we're going to put on the record because Mr. Edwards [defense counsel] has a motion about keeping the second part of it out but I've got to lay it all out for the Court.⁹

What did this defendant tell you about being in trouble?

A He stated it's not going to look good on me now.

Q All right. And after that did you ask him a question just about that one statement?

A I just basically said what do you mean?

Q And what did the defendant say to you?

And it's okay for you to go ahead and say it in this hearing, we have to put it on the record in this hearing, we're not going to do it in the trial.

A I was arrested for child abuse before but I didn't do it.

Q Okay. How was the defendant acting during the time that he made those statements to you about being in trouble or being on probation?

A He was extremely nervous, sweating heavily,

Q Did this defendant ever say that he wanted to tell his story to someone?

MR. EDWARDS [FOR DEFENSE]: Object, leading.

THE COURT: Sustained, don't lead the witness.

BY MS. COREY:

Q Do you recall this defendant ever requesting to speak to anyone?

A Yes, I do.

Q All right.

A He did say he wanted to talk to the detectives.

Q And did you and Officer Davis eventually turn him over to detective Goff and your Lieutenant Waugh?

A Yes, we did.

V11R1773-76. Likewise, Officer Davis gave this account:

Q [BY MS. COREY FOR THE STATE] All right. Now, what did you do with this defendant while you were waiting for the detectives from the Jacksonville Sheriff's Office to arrive?

A [BY OFFICER DAVIS] We were standing outside of the car.

Q All right. Did anyone try to question this defendant in your presence after his request for a lawyer?

A No.

⁹ This is a reference to the defense's pretrial motions to prohibit the introduction of collateral crime evidence in the guilt phase, and to prohibit the introduction of guilt phase evidence regarding probation arising from that collateral crime. The court granted those motions. See V1R87-88, V1R93-95.

Q Did you or Officer Gardner attempt to question the defendant?

A No.

Q Did this defendant make any statements on his own to you or in your or Officer Gardner's presence?

A Yes, he did.

Q Did me [sic] make a complaint about his shoulders?

A Yes, he did.

Q What did he say?

A He said why do I have to wear these handcuffs, my shoulders are hurting.

Q What did you offer to allow him to do?

A To have a seat in the back seat of the car.

Q What did he respond to that?

A He just wanted to stand outside and smoke a cigarette.

Q Did he actually ask for a cigarette or ask someone in your presence for a cigarette?

A I don't recall, I know he wanted to smoke a cigarette, I can't even recall if he smoked one or not.

V11R1736-39 (emphasis supplied).

Officer Davis said Andrew made the statement that his girlfriend would be mad at him and would not let him live there anymore "because they had gotten away." See V11R1739-40. Andrew also described the car wreck, saying he wanted to run the car off the road into the telephone pole, but he missed, and he didn't accept failure very well. See V11R1740. Andrew asked why he was being forced to wear handcuffs, and Officer Davis responded it was because he had tried to commit suicide. See V11R1740. Officer Davis insisted that Andrew was not under felony arrest but was held in custody because he was a danger to himself. See V11R1738-39, V11R1733-35. Nobody informed Andrew he was being held under the Baker Act, and without question Andrew was not free to go. See V11R1742-43.

Officer Davis said that after Andrew's initial request for a lawyer, he did not see Andrew raise the subject again:

Q [BY MS. COREY FOR THE STATE] And other than that one time the defendant had asked for a lawyer at the beginning, did he every mention a lawyer again?

A [BY OFFICER DAVIS] No, he didn't.

Q Did this defendant ask you something about being able to talk to someone?

A Yes, he did.

Q What did he say?

A He asked several times if he could tell his side of the story, when was I going to get a chance to tell my side of the story.

Q How many times would you say he said that?

A I don't recall but more than once.

Q Was that in your presence and Officer Gardner's presence?

A I know it was in my presence, I'm not sure if Officer Gardner was standing there with me.

Q Who did you tell him would be able to talk to him if he wanted to talk?

A I told him we had some fellow detectives coming out from Jacksonville to talk to him.

Q And did you relate that defendant's request to talk to someone to Detective Lavelle Goff of the Jacksonville Sheriff's Office?

A Yes, I did.

V11R1740-41, see also V11R1897.

Several detectives arrived at the scene around 8:00 p.m., including Jacksonville Sheriff's Detective Lt. L. H. Goff. Both Deputy Gardner and Officer Davis informed several detectives, Lt. Goff among them, that Andrew had asked to see a lawyer. See V11R1744, V11R1778, V11R1785. Lt. Goff was also informed that Andrew said he tried to kill himself, and that he wanted to talk to a detective. See V11R1786-87.

[BY MS. COREY FOR THE STATE] And what did you say at that point?

A [BY LT. GOFF] At that time I went over to where he was sitting in the police car.

Q To where who was sitting?

A Mr. Lukehart.

Q What did you do?

A I said, I understand that you want to talk to a detective but I understand also that you asked for a lawyer earlier.

And he said, yes, I did, but he says I asked for a

lawyer because I had heard the officers talking about previous arrests.

And I said well, you know, did you want to talk to us now?

And he said yes, he did.

So at that time I said well, before I talk to you because you've asked for a lawyer I want to go through your constitutional rights with you. And at that time I advised him of his constitutional rights.

Q Prior to the time that the officers came over and told you that Lukehart wanted to talk to a detective, did you ever attempt to question him or interrogate him about the disappearance of Gabrielle Hanshaw?

A No.

Q Why?

A Well, at that point I had been told earlier that he had asked for a lawyer, so just out, you know, I did not approach that area at all.

Q All right. When you said that to Lukehart, I'm sorry, when Lukehart said to you that he only requested for a lawyer because of the talk about his prior arrest, what did you say to him?

A At that point I said, well, if you want to talk to us now, you know, I need to advise you of your constitutional rights.

Q And did he maintain that he wanted to talk to you?

A Yes, he did.

V11R1787-88. Lt. Goff, with Lt. Waugh standing there, advised Andrew of his constitutional rights, and Andrew waived his rights. See V11R1789-94, V11R1798-99, V11R1804-08. Andrew then talked to Lt. Goff and Lt. Waugh for 30 minutes to an hour out in Clay County. The officers claimed he did not again ask for a lawyer. See V11R1794-97, V11R1810. Andrew was not yet under arrest, and an attorney was not provided for him by the officers. See V11R1798-1800.

Around 9:00 p.m., Jacksonville Sheriff's Detective Aaron Timothy Reddish arrived at the scene where he saw Andrew seated in the back of a patrol car. Goff advised Detective Reddish that Andrew had been read his rights and made a statement. See

V11R1821-23. Detective Reddish got into the car and again advised Andrew of his constitutional rights, even though he did not believe Andrew was a suspect. Andrew said he understood his rights and proceeded to give a statement. See V11R1825-28, V11R1857-58. Detective Reddish said he was not advised that Andrew had asked for a lawyer. See V11R1851-52.

Andrew was out at the site for about three hours. See V11R1884-85. Some time around 9 p.m., Officer Davis transported Andrew in a cruiser back to the Epsom Lane home. In the car, Officer Davis said Andrew said he did not want to get out at Epsom lane, and he feared this would ruin his chances of ever becoming a policeman. See V11R1828-29, V11R1742.

Police arranged to stage and secretly record a conversation between Misty and Andrew. Once Andrew arrived at Epsom Lane, Andrew was placed in Officer Raffaely's cruiser, which was specially equipped with a hidden recording device. Misty Rhue was placed in the car, and she spoke with Andrew in a surreptitiously recorded conversation. They were taken to the Police Memorial Building in Jacksonville, talking the whole time, with Andrew again describing a kidnapping. See V18R1829-30.

At the Police Memorial Building, Andrew was taken into an interrogation room. Officers said they finally removed the handcuffs, and Detective Reddish again advised him of his constitutional rights. Andrew made additional statements beginning just after midnight, continuing until about 6 a.m. See V18R1832-36, V11R1874, V11R1881-82, V11R1831-36, V11R1884-85.

Andrew testified that the handcuffs were not removed during

that phase of the interrogation, and even though he was told he was not under arrest, he felt he was not free to leave. He said the handcuffs were finally removed when they left headquarters. See V11R1886-89.

Around 6 a.m. Monday, February 26, Detectives Reddish and Kearney took Andrew, no longer handcuffed, to reenact what Andrew said had happened. First they went to McDonald's for breakfast, then to Walmart where Detective Reddish bought him some better fitting clothes. They were armed and kept Andrew within 15-20 feet at all times. See V11R1836-40, V11R1854-55, V18R1889. Then they went to the various locations Andrew had discussed with officers where he said the child had been abducted and where he stopped to call Misty. Andrew made statements along the way. See V11R1840-45, V11R1887-90.

Around 10:30 a.m., Clay County Sheriff's Lieutenant Jimm Redmond took over the questioning in Detective Reddish's patrol car. Andrew was definitely a suspect. Lt. Redmond did not read Andrew his rights at that time, Andrew did not then ask for a lawyer, and Lt. Redmond was not aware Andrew had ever asked for an attorney when he got in the car with Andrew. Andrew was not handcuffed. See V11R1845, V11R1861-64, V11R1872-73, V11R1877.

In that conversation, Lt. Redmond said he told Andrew it was important to find the baby; they don't want the child or the baby out in the hot sun; the authorities or the family needed some closure; and the child needed a decent burial. He also said that if he stuck with that story he was probably going to be arrested for murder. About twenty minutes into the conversation, Lt.

Redmond showed Andrew a picture of Gabrielle. Andrew told him not to show it to him because he did not want to see it, but he definitely saw the photo and verified that it was the child they were searching for. Lt. Redmond put the photo in his pocket. Lt. Redmond said Andrew was sobbing and agitated, not crying uncontrollably. Andrew repeated what he said earlier about the Blazer. Andrew said "I can't tell you any more." Lt. Redmond suggested Andrew's account was outlandish and he didn't believe it. He even went so far as telling Andrew he would probably be arrested for murder if he didn't change his story:

Q [BY DEFENSE] Did you also tell Mr. Lukehart at or about this time that if you stick with this story chances are you're going to be arrested for murder?
A [BY REDMOND] Yes.

V11R1875. Then, for the first time, Andrew admitted he was responsible for Gabrielle's death. He said he would tell the details but first he wanted to be removed from the area.

See V11R1865-66, V11R1874-82.

Andrew recalled Lt. Redmond waving Gabrielle's picture in front of him and telling him "I needed to help them find her, so he could give her a Christian burial or if she was still alive that they could get there in time to save her." See V11R1891. Though being shown the photo may not have been unusual under the circumstances, Andrew broke out crying hysterically, and "eventually told him if he took me away from the people and the cameras that I'd tell him everything." See V11R1891-92, V11R1902-04.

Lt. Redmond put Andrew in Lt. Redmond's vehicle and drove

less than a ¼-mile away to a cul-de-sac, where they talked in the car. See V11R1866-67. After Andrew smoked a cigarette, Lt.

Redmond said Andrew described what happened:

Briefly he said that he was changing the baby's diapers, that he was cradling, holding the baby, and that the baby was squirming, he dropped the baby on the baby's head. He told me that he yanked the baby up and he knew he hurt the baby when he did that. Subsequent to that he shook the baby trying to revive the baby. And said he knew she was dead.

V11R1868, see also V11R1878-79. Toward the end of their conversation about 15 or 20 minutes later Lt. Redmond said he asked if Andrew would tell them where Gabrielle was and he said "she was a long way off," near Normandy Boulevard in Jacksonville. See V11R1869. Andrew ultimately led Detective Reddish, Jacksonville Sheriff's Detective Bill Kearney, and Lt. Redmond to the pond where Gabrielle was located. After finding the baby, Lt. Redmond said he gave Andrew a constitutional rights form which Andrew read and appeared to understand. Andrew was then wrote out a statement of four pages. See V11R1869-72, V11R1846-48. "They told me it was the right thing to do," Andrew said. See V11R1906.

Andrew said he asked for a lawyer "a couple of times," including when he sat in the back of a patrol car, but "[t]hey didn't respond, they just kept asking me questions." See V11R1892, V11R1898. He said some officers treated him with respect and without threats or promises. See V11R1899.

B. All the statements were introduced in violation of law under the principles of *Miranda*, *Edwards*, *Traylor*, and *Haliburton*

1. The erroneous ruling of the trial court

The defense moved to suppress all the statements made after Andrew was taken into custody and invoked his right to counsel. Officers did not advise Andrew of his rights when he was taken into custody, and they ignored his invocation of his right to counsel, compelling and coercing him to waive the right he already had invoked and inducing statements involuntarily. See R1V89-91, V11R1906-11. The State argued that Andrew was "not in custody for anything other than that he had turned himself in for some unknown charge that he was not told that he was under arrest and nobody else knew what was going on at the time"; and he was not questioned until he requested to speak to officers, was advised of his rights and waived them around 8 p.m. Sunday, making all the subsequent statements voluntary. See V11R1911-13. The trial court denied the defense's motion, stating two rationales.¹⁰ First, the court focused entirely on the number of times Andrew had been given his rights and waived them after he invoked his right to counsel:

So how many [waivers] does he have to give before they stick? That's my point, I mean, if he had never been given any rights, anything that he said after I want a lawyer up to the time that he was given his constitutional rights, anything that was obtained by -- from the defendant was something that he voluntarily gave, not that it was solicited by way of a question by any officers.

So my question to you, Mr. Edwards, when does the constitutional rights -- when do we have to quit giving it to him? He said on each occasion he signed at least one form that he understood it all, so where is the point there that we don't have to continue giving him

¹⁰ The court's rationale was stated orally at the conclusion of the suppression hearing. See V11R1906-14. A copy of the colloquy is attached to this brief as Appendix B. The written order contained no rationale at all. See V1R92.

the rights?

V1R1909. Second, the court concluded that he was not in custody during at least the first 5-7 hours he was held handcuffed behind his back, and thereafter his statements were made voluntarily pursuant to waivers of his rights:

up until well after the midnight hour which would put us into the 26th of February, he was not even a suspect at that point, he was still looked upon kindly as the person who had tried to apprehend or at least he chased as he says the abductor of the baby. So I don't even think he was in custody, but if he was in custody after Detective Goff gave those constitutional rights to him I think anything he said after that was freely and voluntarily made on his part.

V11R1913-14. The court's ruling constitutes reversible error.

2. The controlling legal principles

The self-incrimination clause of the fifth amendment of the United States Constitution, applied to the states through the fourteenth amendment, confers upon all citizens the privilege against being compelled by law enforcement into making self-incriminating statements in custodial interrogations. See Miranda v. Arizona, 384 U.S. 436 (1966). Miranda held that one's right to enjoy the privilege would be meaningless without protecting the privilege during custodial interrogations, which are inherently coercive. To protect the privilege, the Court held that any statements made by a defendant while in custodial interrogation are inadmissible unless the State proves both that the accused was fully advised of his rights -- including the rights to be silent and to have the assistance of counsel during interrogation -- and that the accused knowingly, intelligently, and voluntarily waived those rights. Any statement made during

custodial interrogation in the absence of the Miranda warnings is irrebuttably presumed to be coercive and involuntary and cannot be introduced by the prosecution in its case-in-chief.

If a person invokes his right to silence under Miranda, the officers are required to "scrupulously honor" the invocation of that right by immediately terminating the interrogation. See Michigan v. Mosley, 423 U.S. 96 (1975). But the restraint on police action is far more strict if the person invokes the right to counsel. "[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege" because counsel occupies a vital, critical, and unique role in the adversarial criminal justice system. Miranda, 384 U.S. at 469; Fare v. Michael C., 442 U.S. 707, 719 (1979). Thus, in Edwards v. Arizona, 451 U.S. 477 (1981), the Court found it necessary to adopt a clear, unequivocal, and absolute bright-line rule:

we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . An accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards 451 U.S. at 484-85.

Under Edwards, when "counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted

with his attorney." Minnick v. Mississippi, 498 U.S. 146, 153 (1990); see also, e.g., Smith v. Illinois, 469 U.S. 91 (1984) (holding that once a defendant clearly invoked his right to counsel, police were obliged to honor his request and cease questioning, and his subsequent waiver of his Miranda rights was ineffective). Moreover, Florida law prohibits officers from doing anything to prevent a person in a custodial interrogation from seeing a lawyer who has been retained on his behalf without his knowledge. See Haliburton v. State, 514 So. 2d 1088 (Fla. 1987) (rejecting the fifth amendment precedent of Moran v. Burbine, 475 U.S. 412 (1986), and applying article I section 9 of the Florida Constitution to demonstrate that a person subjected to police custodial interrogation has greater constitutional protection under the values of liberty uniquely protected by the language and spirit of the Florida Constitution's due process clause than by the fifth amendment). Edwards is so absolute that it shields defendants from subsequent police-initiated interrogations three or more days later by different officers regarding different crimes, even when officers did not know the right had been invoked days before in an unrelated interrogation. See Arizona v. Roberson, 486 U.S. 675 (1988).

The Edwards rule was designed to ensure the accused's constitutional privilege against self-incrimination is protected. It protects an accused in police custody from being badgered by officers into waiving the very constitutional right the accused had just invoked, the exact circumstance that arose here. See Minnick, 498 U.S. at 150. Even though the rule is not designed

to aid in the truth-finding function, see, e.g., Solem v. Stumes, 465 U.S. 638 (1984), its purpose is so important that it has been rigidly and consistently adhered to by the Supreme Court without exception. Similar principles operate under article I section 9 of the Florida Constitution. See Traylor v. State, 596 So. 2d 957, 966 & 966 n.14 (Fla. 1992).

3. Applying the law demonstrates reversible error

(a) Andrew was in custody

The court erroneously accepted the State's argument that Andrew was not "in custody" when he invoked his right to counsel and during the first six or so hours of his 17 or 18 hours of interrogation, presumably because he was not a "suspect" or under "arrest" for a felony at the time. This conclusion is wholly unsupported by fact or law.

Initially, determining whether one was "in custody" is a mixed question of fact and law. See Thompson v. Keohane, 116 S. Ct. 457, 465-67 (1995). The trial court's legal determination is not entitled to a presumption of correctness, for the appellate court must independently review the legal issue de novo. See Thompson; accord Ornelas v. United States, 116 S. Ct. 1657 (1996) (holding appellate courts are to conduct de novo review of determinations of reasonable suspicion and probable cause).¹¹

The ultimate "in custody" determination in the present

¹¹ The appellate court may show some deference to the trial court's findings of historical facts, subject to a clear error standard of review. See Thompson; accord Ornelas. However, there is no material factual dispute concerning the custody issue in this case.

context requires this Court to

examine all of the circumstances surrounding the interrogation, but "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983) (per curiam) (quoting [Oregon v.] Mathiason, [], 429 U.S. [492 (1977)]], at 495, 97 S. Ct., at 714).

Stansbury v. California, 114 S. Ct. 1526, 1528-29 (1994); see also Thompson, 116 S. Ct. at 465 (defining the inquiry as whether, under the totality of circumstances, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave"); Miranda, 384 U.S. at 612 (applying the right to anyone "deprived of his freedom of action in any significant way"). Likewise, a person is deemed "in custody" under article I section 9 "if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest." Traylor, 596 So. 2d at 984 n.16.

Custody is measured objectively from the defendant's perspective, not from the subjective view of the law officers involved. The Court in Stansbury held that whether or not officers believe a person was a suspect, under arrest, or in custody, is immaterial to the question of whether he was "in custody" in the constitutional sense. Thus, the State and the trial judge were wrong in making the custody determination dependant on what the officers believed or whether he "arrested."

Applying the correct standard, the facts here show undoubtedly that Andrew was "in custody" within seconds of his

appearance at Trooper Davis' house and before he invoked his right to counsel. Disheveled, upset, and stranded after cracking up his car, he walked out of the woods up to a state trooper's house. A marked FHP cruiser was parked in front and a police helicopter was flying overhead with its spotlight on. He faced the trooper, raised his hands over his head, and surrendered himself, saying "I'm the one they're looking for." Trooper Davis, aware officers were looking for a white man involved in a kidnapping, armed himself with a gun, ordered Andrew to turn around, and handcuffed his hands behind his back. Reporting "I had the guy," Trooper Davis summoned assistance. Deputy Gardner, Officer Davis, and Officer Sweat, all on duty officers, responded in two more marked cruisers. Andrew was now stranded and isolated in the middle of a densely wooded area, surrounded by the antagonistic forces of four armed law officers and three marked police cruisers, his hands cuffed behind his back after he surrendered himself. Trooper Davis handcuffed Andrew "for custody reasons." Andrew said he did not feel free to leave, and he demonstrated his eminently reasonable belief by telling officers to read him his rights and by asserting his right to speak to a lawyer before questioning. See, e.g., New York v. Quarles, 467 U.S. 649, 655 (1984) (Quarles "undoubtedly" was in custody where he was "surrounded by at least four police officers and was handcuffed when the questioning at issue took place").

Once officers took Andrew into custody shortly after 6 p.m. Sunday, they never released him. Even the trial judge appeared to agree that he was in custody from the point that Lt. Goff read

him his rights around 8 p.m. Sunday, and the evidence of continuing custody is compelling. Officer Davis admitted Andrew was not free to go the entire time they were together. Shortly after Andrew was taken into custody, Deputy Gardner learned from Andrew that he had a prior conviction for child abuse. Officers they kept Andrew handcuffed for at least the first 5 or 6 consecutive hours, during which time they took him in official cruisers from Trooper Davis' house to the wreck cite to the Epson Lane residence to the Police Memorial Building. There he was interrogated in an interrogation room until around 6 a.m. Monday. (He may even have been kept handcuffed the entire time he was in the Police Memorial Building, though that fact is in dispute.) Afterward, armed detectives took him to a restaurant and store, always keeping him within 15-20 feet and under their watchful eyes. Then they took him to all the locations he had described in his statements to reenact the events. Eventually, officers took him back to the wreck cite, to the cul de sac where he first confessed, and to the pond where they recovered Gabrielle's body. At no time was Andrew ever free to leave.

(b) This was officer-initiated interrogation

The record contains undisputed evidence that officers initiated the interrogation at the very moment he was taken into custody despite the fact that he had not been given his Miranda warnings and despite the fact that he unequivocally said he did not want to answer any questions without a lawyer.

Trooper Davis testified that immediately after he placed Andrew in custody, "I asked him where the baby was at, and he

said he didn't know what the hell I was talking about, read me my rights." V11R1752. He did not read Andrew his Miranda rights, and he did not provide Andrew a lawyer. Deputy Gardner and Officer Davis each testified that after Trooper Davis placed Andrew in custody, Andrew said he did not wish to speak to anyone before seeing a lawyer. Then they immediately questioned him about the investigation, asking him what was happening, where the baby was, and what was going on with the Blazer. See V11R1736, V11R1768-69. They did not read him his Miranda rights, and they did not provide him a lawyer.

These officers' questions constituted interrogation within the meaning of Rhode Island v. Innis, 446 U.S. 291 (1980), and Traylor, 596 So. 2d at 985 n.17. Innis began with the clear holding that express questioning by police about an investigation constitutes interrogation under the fifth amendment. See 446 U.S. at 298-99. Here, the officers conceded they asked Andrew questions about the investigation authorities were actively conducting and in which they knew Andrew had some involvement.¹² See, e.g., Silling v. State, 414 So. 2d 1182 (Fla. 1st DCA 1982) (Edwards violated when deputy asked defendant "why she did it").

Innis then went further, holding that aside from direct questioning, any other words or actions on the part of the police beyond those normally attendant to arrest and custody also amount

¹² Interestingly, Officer Davis said he did not "question" Andrew. However, Officer Davis's subjective view is irrelevant because whether an interrogation took place is measured from the viewpoint of reasonable person standing in the defendant's shoes. See Innis; Traylor. In any event, his own testimony, as well as that Deputy Gardner, contradicted his self-serving assertion.

to interrogation if, from the suspect's perspective, the police should know it is reasonably likely to elicit an incriminating response. See Innis, 446 U.S. at 300-01; see, e.g., State v. Brown, 592 So. 2d 308 (Fla. 3d DCA 1991) (functional equivalent of interrogation found where after Brown invoked right to counsel, an officer continued to discuss the case in a "protracted and evocative" delineation of the evidence police had gathered). Officers' words or actions might be even more susceptible of constituting interrogation if the officers know the person is upset or unusually disoriented. See Innis, 446 U.S. at 302-03. All statements are deemed incriminating if a prosecutor might want to use them against the accused, whether they may appear to be inculpatory or exculpatory, true or false. See 446 U.S. at 301 n.5. Given all the circumstances here, the words and actions of Trooper Davis, Deputy Gardner and Officer Davis certainly fit the alternative definition of interrogation.

Andrew remained in the coercive environment throughout the entire time and never revoked his unequivocal assertion of his desire to deal with the authorities through counsel. His request wasn't even "scrupulously honored" under the less demanding Mosley standard. He could not have reinitiated the interrogation because the interrogation process had not stopped: it only started in earnest after he invoked his right to counsel. Moreover, nothing he said legally constituted reinitiation, and the State in the trial court never even claimed that he had reinitiated the interrogation. Officers said he wanted to tell his story, not that he specifically wanted to tell his story to

detectives. They could have provided him a lawyer, as they were constitutionally required to do, but instead they chose to provide him detectives to talk to.

(c) Conclusion

The facts and law compel two conclusions. First, all the statements Andrew made, from the moment he was first questioned by Trooper Davis until Lt. Goff read him his rights and got a waiver for the first time, were inadmissible under the United States and Florida Constitutions. Second, those statements as well as every other statement Andrew made during the ensuing 17 or 18 hours, and all evidence flowing therefrom, were erroneously introduced in violation of the strict and rigid rule of Edwards and its Florida analogue of Traylor. His subsequent Miranda waivers were ineffective because the officers flatly ignored his personal, unequivocal, unlimited request for counsel and immediately initiated custodial interrogation. From Andrew's perspective, and from the perspective of any reasonable person in his shoes, the officers effectively conveyed the message that Andrew's invocation of the right to counsel was meaningless and would not be honored. The blatant manner in which officers disregarded Andrew's rights under oppressive circumstances also amounts to a due process violation under Haliburton.

The trial court's decision not to suppress the statements was based on its misapprehension of settled law. The court's primary focus was on the number of times Andrew was read and waived his rights, not on the fact that he invoked his right to counsel before he waived his rights. In so doing, the court

totally forgot the requirements enforced in Miranda, Edwards, Minnick, Roberson, Traylor, Haliburton, and many other cases: When counsel is requested, the interrogation must cease, and "any subsequent waiver during a police-initiated encounter in the absence of counsel during the same period of custody is invalid." Traylor, 596 So. 2d at 966 n.14 (emphasis supplied).

Numerous other decisions demonstrate the reversible nature of the trial court's error. For example, in Smith v. Illinois, 469 U.S. 91 (1984), a suspect being advised of his Miranda rights invoked his right to counsel. Instead of terminating communication related to the investigation, police continued to give the Miranda warnings, apparently attempting to cloud Smith's clear invocation of the right to speak through a lawyer. The Court held that once he clearly invoked his right to counsel, police were obliged to honor his request and cease questioning; and his subsequent waiver of his Miranda rights was ineffective, requiring suppression of all responses to continued police questioning in the absence of counsel.

In Smith v. State, 492 So. 2d 1063 (Fla. 1986), this Court reversed a capital murder conviction where police continued to interrogate Smith after he clearly invoked his rights to silence and counsel, after which Smith expressly waived his rights and made an "alibi" statement the prosecution introduced against him. This Court found an Edwards violation, rendering Smith's subsequent Miranda waiver ineffective, and the "alibi" statement inadmissible. In Kyser v. State, 533 So. 2d 285 (Fla. 1988), this Court reversed a murder conviction and death sentence for an

Edwards violation where State introduced statements made to various officers after Kyser told one officer "I think I want to talk to a lawyer before I talk about that and I hope you understand that." In State v. Brown, 592 So. 2d 308 (Fla. 3d DCA 1991), Brown unequivocally invoked his right to counsel but an officer proceeded to tell Brown all the incriminating evidence he had gathered, leaving Brown alone in an interrogation room for 1½ hours room to think about it. Brown was then moved to a booking room at which time he said he decided to "tell the truth" or "his side of the story." He was read his rights, waived them, and made a confession. The trial and district courts suppressed the confession, concluding the officer's words and actions constituted an interrogation that violated Edwards, rendering the subsequent Miranda waiver ineffective.

C. **Lt. Redmond's interrogation was extraordinarily coercive under the totality of circumstances in violation of self-incrimination and due process protections**

The pretrial suppression motion argued that irrespective of the Miranda and Edwards violations, the interrogation conducted by Lt. Redmond was particularly coercive under the totality of circumstances which included the use of a photograph of the victim and a "Christian burial" speech. The State responded that Lt. Redmond had no reason to believe Andrew was particularly susceptible to talk of religion and he had no reason to believe a picture of the baby would make him break down and confess, making the "Christian burial speech" a noncoercive interrogation. Without discussing these arguments, the trial court summarily ruled that everything Andrew said pursuant to valid Miranda

waivers was voluntary and admissible. See R1V89-91, V11R1906-11.

The State has the heavy burden to establish a statement was voluntarily made under the totality of the circumstances. See, e.g., Colorado v. Spring, 479 U.S. 564 (1987); Roman v. State, 475 So. 2d 1228 (Fla. 1985); Sawyer v. State, 561 So. 2d 278 (Fla. 2d DCA 1990). The products of a fundamentally unfair or unreasonable interrogation are inadmissible under not only the self-incrimination clauses but also the federal and state due process clauses. See, e.g., Brown v. Mississippi, 297 U.S. 278 (1936); Haliburton v. State, 514 So. 2d 1088 (Fla. 1987). The facts here demonstrate that evidence obtained pursuant to Lt. Redmond's interrogation should have been suppressed.

Andrew's encounter with Lt. Redmond took place between 10:30 a.m. and noon Monday, February 26. By that time, Andrew had been awake for about 28 consecutive hours during which he suffered a nightmarish series of events.¹³ He had been held in continuous custody for at least 16 straight hours. He had been subjected to interrogation by a variety of officers from a variety of agencies in a variety of locations throughout that entire time. He had been repeatedly moved from one place to another beginning the moment he was taken into custody. He had been held with his hands cuffed behind his back for at least 6 consecutive the hours, and perhaps as many as 12 consecutive hours. He had been in a car wreck and was clearly agitated and upset. He may have

¹³ Note also evidence that Andrew was an immature child-like person with borderline intelligence and a multitude of personality disorders.

tried to commit suicide twice, once by attempting to ram his car into a telephone pole and running off the road, and another time by hanging himself from a tree limb. (Even when he was booked police knew he was a suicide risk.) His ordeal in the woods was so rough that it left his clothes tattered and unusable. He had been denied his request to get the protection of a lawyer to shield him from overbearing pressures of custodial interrogation in violation of Edwards (and the jury was deprived of that knowledge, see Issue II, infra). He had been pressured to waive the right to counsel, and his Miranda rights had been violated.

After going through all of this, Andrew was subjected by Lt. Redmond to a "Christian burial technique" of psychologically coercive interrogation, which this Court consistently has labeled as "unquestionably a blatantly coercive and deceptive ploy." Roman, 475 So. 2d at 1232; see also Hudson v. State, 538 So. 2d 829, 830 (Fla. 1989). An experienced officer like Lt. Redmond had to know this kind of ploy has been repeatedly and expressly condemned by Florida courts. But he used the ploy nonetheless, making it even more forceful by compelling Andrew, against his will, to look at a photograph of the infant. The pressure became too great, and Andrew blurted out "I can't tell you any more." But Lt. Redmond kept pressuring him, even him he would probably be arrested for murder if he didn't change his story. Andrew was sobbing and agitated, and he may have become hysterical. His will now overborne, he broke down and gave a confession.

These circumstances are even worse than in Sawyer and other cases where confessions were suppressed. In Sawyer, several

cadres of city police interrogated a fragile defendant over a period of about 16 hours. They psychologically pressured him. They questioned him throughout the night, denying him the opportunity to sleep. He had been awake about 28 consecutive hours by the time he confessed. During their interrogation, police violated Edwards by ignoring his one unequivocal request for counsel (as well as an equivocal one). Police also violated his Miranda rights when they began their interrogation without advising him of his rights, and by failing to scrupulously honor his request to cut off questioning. See also, e.g., Snipes v. State, 651 So. 2d 108 (Fla. 2d DCA 1995) (coerced where police violated Miranda throughout lengthy interrogation and applied other coercive pressure to emotionally disturbed suspect).

All of these circumstances existed in the present case, but this case is far worse. Unlike Sawyer, an officer here intimidated and threatened Andrew to change his story or be arrested for murder, a tactic at least as unlawfully coercive as the one condemned in Brewer v. State, 386 So. 2d 232 (Fla. 1980). Brewer held a confession involuntary where police threatened the defendant with the electric chair, implying they had the power to reduce the charge against him and that his confession would lead to a lesser charge. By telling Andrew he would probably be arrested if he didn't change his story, Lt. Redmond necessarily implied Andrew might not be charged at all, or would be charged with something less than murder, if he changed his story. See also Martinez v. State, 545 So. 2d 466, 467 (Fla. 4th DCA 1989) (unduly coercive for police to tell accused he "could wind up" in

the electric chair if he was not truthful with the police).

Also unlike Sawyer, Andrew was held with his hands cuffed behind his back for 6-12 consecutive hours. Last, but not least, here -- unlike Sawyer -- officers applied the coup de grâce by preying on Andrew's mind with images of the baby's body being left out in the hot sun, the family needing closure, and the child needing a decent burial.

The circumstances here are far more compelling than those in cases like Roman and Hudson, where the Court found the police's use of the "Christian burial technique" under their facts did not render the respective statements involuntary. In Roman, the accused had never been handcuffed, had not been in custody, and made his statement at 10 p.m. after having arrived at the station voluntarily just 3½ hours earlier. There was no evidence of sleep deprivation, there had been no preceding Edwards or Miranda violation, and there was no suggestion by police that he would get better treatment if he confessed. In Hudson, the Court cited no circumstances other than the facts of the interrogation itself and at least two waivers of his Miranda rights, so apparently no other oppressive circumstances existed.

D. The remedy is reversal for a new trial

Evidence of Andrew's statements made up the bulk of the State's case-in-chief. Notably, none of the facts of his false self-exculpatory statements contributed to the jury's understanding of precisely what took place during those few moments when Andrew caused Gabrielle's death. Instead, it diverted the jury's attention to Andrew's character, effectively

portraying him as an evil and deceptive liar, which had nothing to do with the manner in which he caused Gabrielle's death.

Without his illegally obtained statements, the State would have had little or nothing in evidence to introduce. Moreover, had all this illegally obtained evidence not been introduced, Andrew certainly would not have elected to testify. His self-incriminating testimony was unlawfully induced by erroneous introduction of inadmissible statements. See Harrison v. United States, 392 U.S. 219 (1968). The State cannot prove beyond a reasonable doubt the erroneous introduction of these statements did not affect the jury's verdict. See Traylor, 596 So. 2d at 973; State v. DiGuilio, 491 So. 2d 1129, 1130 (Fla. 1986).

II. WHETHER THE COURT ERRED BY PREVENTING CROSS-EXAMINATION TO CHALLENGE THE VOLUNTARINESS OF THE STATEMENTS.

When Deputy Gardner testified before the jury about Andrew's statements, defense counsel's cross-examination attempted to place before the jury the fact that officers did not provide Andrew a lawyer despite his request. Defense counsel was attempting to cast into doubt the voluntariness of Andrew's statements. The State objected, arguing it was not relevant because the court already had determined the issue, and the court sustained the State's objection. See V15T842-43. The defense raised the issue again in its motion for a new trial, but it was denied. See V3R401-03. This was reversible error.

The voluntariness of a defendant's incriminating out-of-court statement is a proper issue for the jury to determine, and denying a defendant the right of cross-examination to introduce

evidence to cast doubt on a statement's credibility is a denial of his rights of confrontation, due process, and a fair trial. See U.S. Const. amends. IX, XIV; art. I, §§ 9, 16, Fla. Const.; see, e.g., Crane v. Kentucky, 476 U.S. 683 (1986); Olden v. Kentucky, 488 U.S. 227 (1988); McIntosh v. State, 532 So. 2d 1129 (Fla. 4th DCA 1988).

The court's rulings prevented the defense from cross-examining a prosecution witness to present evidence directly bearing on voluntariness, a major issue in these proceedings. The right to presence of counsel during custodial interrogation is a vital, critical, and indispensable part of the voluntariness determination, especially when that right has been invoked. See Edwards; Roberson; Traylor. The jury here knew Andrew had asked for a lawyer, but then were denied the evidence that officers refused to give him one. That's unfair and deprived the jury of necessary information. Because the alleged voluntary statements were critical in this trial, the court's decision to hide from the jury this relevant, necessary, constitutionally protected evidence was harmful, reversible error.

III: WHETHER THE CONVICTIONS OF FIRST DEGREE MURDER AND AGGRAVATED CHILD ABUSE BY AGGRAVATED BATTERY ARE INVALID BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION, AND THERE WAS NO FELONY SEPARATE AND INDEPENDENT FROM THE HOMICIDE.

The indictment charged aggravated child abuse based on aggravated battery, and first-degree murder based alternatively on premeditation or felony murder, with the underlying felony being aggravated child abuse by aggravated battery. See V1R13. The defense moved for judgment of acquittal at the close of the

State's case and the defense's case, and the motions were summarily denied. See V17T1166-67, V17T1220-21. The State argued premeditation in its closing argument, see V17T1258-62, but conceded "basically ... the State is going to rely on a theory of felony murder," V17T1262. The jury returned general verdicts of guilty as charged. See V2R379-80, V18T1324. The motion for judgment of acquittal was renewed after trial and again was denied. See V3R401-03. The court's decisions not to grant the motions for judgment of acquittal were error because the evidence did not prove premeditated murder, and the conviction of aggravated child abuse by aggravated battery and felony murder based on the same homicidal act are contrary to Florida law because there was no felony separate and independent from the homicide. The rulings violated appellant's rights to a fair trial, equal protection, due process, and against double jeopardy and cruel and/or unusual punishment. U.S. Const. amends VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

A. The evidence of premeditated murder was insufficient

Premeditation, § 782.04(1)(a)(1), Fla. Stat. (1995), is a killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

Standard Jury Instr. (Crim. Cases).

Though the State presented some direct evidence through Andrew's own statements, it relied exclusively on circumstantial

evidence to support premeditated murder. When the State relies on circumstantial evidence to prove premeditated murder,

a motion to acquit as to such murder must be granted unless the State can "present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Kirkland v. State, 684 So. 2d 732, 735 (Fla. 1996) (quoting State v. Law, 559 So. 2d 187, 188 (Fla. 1989)). Indeed, if "the State's proof fails to exclude a reasonable hypotheses [sic] that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993).

Kormondy v. State, 22 Fla. L. Weekly S635, 636-37 (Fla. Oct. 9, 1997), rehearing granted and opinion unchanged, 23 Fla. L. Weekly S7 (Fla. Dec. 24, 1997); see also, e.g., Norton v. State, 23 Fla. L. Weekly S12, 13 (Fla. Dec. 24, 1997); Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997).

The State's own unrebutted evidence failed to exclude the reasonable hypotheses that this was a killing caused by an accidentally extreme use of force, rage, or a sudden, impulsive, and complete loss of control similar to heat of passion killings. Andrew's relationship to Gabrielle was that of a loving care giver right up to the moment of her death. Even that very morning he cradled her, fed her, and changed her diaper, and he was attempting to care for her when he took her into the den where she died. There was no hint of animus, malice, hatred, spite, violence, or ill will directed toward Gabrielle, Misty, or any other member of that family. There was no preconceived plan to kill or do any harm at all. There was no motive. There was no evidence he had fully formed a conscious decision to kill before the killing, or that there was sufficient time to allow

for reflection. No weapon was used or brought to the scene. Her death was sudden, unexpected, and quick. Nobody witnessed the killing. The circumstantial evidence of five blows to the head was the only evidence possibly suggesting premeditation.¹⁴

Evidence of multiple blows, standing alone, does not prove premeditation, especially when all the other circumstances contain no evidence to suggest premeditation, or, as here, refute premeditation. The best example is this Court's recent decision in Kirkland. Kirkland got hold of a knife and slashed the victim's through "many" times causing a very deep, complex, irregular wound" that cut off her breathing and produced a great deal of bleeding, bringing about her death by sanguination or suffocation. Kirkland apparently also beat her with a walking cane, causing blunt trauma wounds, and there was evidence of sexual friction between Kirkland and the victim before the attack. However, this Court looked at the total record and rejected premeditation as a matter of law because of "strong evidence militating against a finding of premeditation." 684 So. 2d at 732. The Court found, first, "there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide," id. at 735, the same as in the present case. "Second, there were no witnesses to the events immediately preceding the homicide," id., whereas here there were witnesses, and they refuted

¹⁴ The prosecutor argued to jurors in closing, "I submit to you the fact there is more than one blow to the head gives you all the reason you need to find him guilty of premeditated murder." V17T1259.

premeditation. "Third, there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide," id., the same as the present case. "Fourth, the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan," id., again the same as the present case. "Finally, while not controlling, we note that it is unrefuted that Kirkland had an IQ that measured in the sixties," id., again similar to this case where unrebutted evidence showed Andrew suffers from borderline intelligence and numerous mental disorders.

In Coolen, the State had evidence that Coolen suddenly attacked the victim Kellar with a knife without warning or provocation, stabbing him multiple times, inflicting deep stab wounds to the chest and back as well as defensive wounds on the forearm and hand. Coolen had threatened him with the knife earlier in the evening; Coolen and Kellar fought over a beer; and the victim tried to fend off the attack. This Court rejected premeditation as a matter of law because evidence also showed Coolen "came of nowhere" to make a sudden and unprovoked attack, and the multiple stab wounds were consistent with an unpremeditated murder resulting from an escalating fight over a beer or a preemptive attack due to Coolen's paranoid belief the victim would attack him first. See also, e.g., Knowles v. State, 632 So. 2d 62 (Fla. 1993) (no premeditation in fatally shooting juvenile three times, after which he killed his father); Hoefert (no premeditation where defendant had strangled several women (not to death) during sexual assaults, but his latest victim died

by asphyxiation after which he dug a hole to bury the body and then fled to Texas); Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990) (no premeditation where hijacker shot and killed officer with three shots from a 9-mm pistol, including contact wound to the head and two shot to chest, any of which would have been fatal, and defendant then tried to kill second officer); Smith v. State, 568 So. 2d 965 (Fla. 1st DCA 1990) (proof of asphyxiation, troubles between Smith and victim, and cover-up after murder, was insufficient to prove premeditation); Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983) (no premeditation with evidence of motive to kill and defendant chased victim down and struck him repeatedly with knife).

Likewise, the evidence does not prove second-degree murder. Section 782.04(2), Florida Statutes (1995), requires proof that the defendant committed an unlawful killing "by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life," which must include proof of "ill will, hatred, spite or an evil intent," Standard Jury Instr. (Crim. Cases). There is no such proof in this record.

In Norton, this Court recently reduced a premeditated murder conviction and death sentence to manslaughter. The victim had been killed by a gunshot wound to the back of the head, had an imprint from a tire track on the back of her right pant leg, and had been disposed of in an open filed among trash and debris. Though other evidence was sufficient to link Norton to the victim and to prove him guilty of an unlawful killing, there was no additional evidence to prove beyond a reasonable doubt he

premeditated or had a depraved mind. Like Norton, this is a tragic case of manslaughter. See § 782.07, Fla. Stat. (1995); see also Febre v. State, 158 Fla. 853, 30 So. 2d 367 (1947) (reducing premeditated murder to manslaughter for sudden impulsive killing).

B. The aggravated child abuse conviction and sentence, and its application to underlie felony murder, violates Florida law and federal and state double jeopardy protections

Count II charged aggravated battery "by inflicting blunt trauma to the head of the victim" who was under the age of 18, thereby alleging aggravated child abuse under section 827.03(1)(a), Florida Statutes (1995). Both the premeditated and felony murder theories alleged in Count I were predicated on the same infliction of blunt trauma. See V1R13. Florida law as well as double jeopardy principles prohibit the dual convictions and punishments on these facts.

In Robles v. State, 188 So. 2d 789, 792 (Fla. 1966), this Court recognized that "the felony murder rule does not apply unless the supporting felony is separate and independent from the homicide." Two decades later, this Court applied that rule in Mills v. State, 476 So. 2d 172 (Fla. 1985). Mills was charged and convicted at trial of first-degree murder, aggravated battery, and burglary. On appeal, Mills challenged the dual conviction of felony murder and aggravated battery, both of which were caused by firing a shotgun. The Court did a straightforward double jeopardy analysis applying principles of Blockburger v. United States, 284 U.S. 299 (1932), and State v. Enmund, 476 So. 2d 165 (Fla. 1985), and found no violation on that ground.

However, the Court held that the Blockburger-style analysis is not dispositive under unusual circumstances like those in the present case where felony murder and the underlying violent crime are both based on the same lethal act and cause a single death.

Notwithstanding the Enmund analysis, this Court held:

we do not believe it proper to convict a person for aggravated battery and simultaneously for homicide as a result of one shot gun blast. In this limited context the felonious conduct merged into one criminal act. We do not believe that the legislature intended dual convictions for both homicide and the lethal act that caused the homicide without causing additional injury to another person or property. Hence we vacate the sentence and conviction for aggravated battery.

Mills, 476 So. 2d at 177. The Court recognized that commission of the enumerated felonies in the felony murder statute very rarely inflict mortal injuries themselves. Rather, they usually accompany a separate and independent act of homicide.

Mills is controlling. The aggravated child abuse conviction is based on the single transaction of infliction of blunt trauma, which is also the core of the first-degree murder charge. There is no crime of aggravated battery alleged or committed separate and independent of the homicide. There being no other underlying felony charged or proved, the felony murder conviction must fall along with the aggravated child abuse charge.

Florida statutes and double jeopardy principles support this conclusion. Under section 775.021(4)(b)2., Florida Statutes (1995), both the aggravated child abuse and the homicide -- when based on the same infliction of mortal injury -- are degree variants of the same core act of aggravated battery, and the appellant cannot be convicted and punished of both. See, e.g.,

Anderson v. State, 695 So. 2d 309 (Fla. 1997) (defendant could not be convicted and sentenced for both perjury in official proceeding and providing false information in application for bail, arising out of single lie); Thompson v. State, 650 So. 2d 969 (Fla. 1994) (reversing dual convictions of sexual battery on incapacitated victim and sexual battery while in custodial authority of child); Sirmons v. State, 634 So. 2d 153 (Fla. 1994) (reversing dual convictions of robbery of weapon and grand theft of automobile arising from single taking of car at knife point); Goodwin v. State, 634 So. 2d 157 (Fla. 1994) (reversing dual convictions of UBAL manslaughter and vehicular homicide).

Section 775.021(4)(b)3., Florida Statutes (1995), prevents multiple convictions for "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense," an apparent reference to permissive lesser included offenses, see Sirmons, 634 So. 2d at 155 (Kogan, J., concurring). If the aforementioned analysis does not apply to subsection (4)(b)3., then the dual convictions of aggravated child abuse and felony murder must fall under (4)(b)3. because in the charging document and proof, the aggravated child abuse, and the aggravated battery on which it is based, are wholly subsumed in the felony murder. Every element of aggravated child abuse by aggravated battery is included in this felony murder indictment. An example may be in Laines v. State, 662 So. 2d 1248 (Fla. 3d DCA 1995), where the court struck dual convictions for second-degree murder and aggravated battery in which Laines killed a victim with a rapid-fire series of violent blows and gunshots in

single transaction.

At bottom, double jeopardy does not permit dual convictions for felony murder and the underlying felony when the underlying felony is the commission of the lethal crime. See U.S. Const. amends. V, XIV; Whalen v. United States, 445 U.S. 684 (1980) (punishing rape and killing in perpetration of rape was unconstitutional cumulative punishment because proof of same rape was needed to prove felony murder); see also, e.g., United States v. Dixon, 113 S. Ct. 2849, 2857 (1993) (cannot subsequently prosecute for drug offense where contempt already found for violating court order that incorporated same drug offense); Harris v. Oklahoma, 433 U.S. 682 (1977) (barring subsequent prosecution for robbery with firearm because Harris already had been tried for felony murder based on the same underlying felony); accord art. I § 9, Fla. Const.; see Mills; Robles. In this situation the underlying substantive criminal offense is “a species of lesser-included offense.” Dixon, 113 S. Ct. at 2857 (quoting Illinois v. Vitale, 447 U.S. 410, 420 (1980)). This differs from claims where the underlying felony is distinct from the murder itself, such as theft, robbery, sexual battery, or burglary. See, e.g., Boler v. State, 678 So. 2d 319 (Fla. 1996).¹⁵ Boler and Mills are easily harmonized. Alternatively, Boler should be overruled because punishing felony murder and the

¹⁵ The Third District has misread Boler to permit dual convictions of aggravated child abuse and felony murder. See Dingle v. State, 699 So. 2d 834 (Fla. 2d DCA 1997); Green v. State, 680 So. 2d 1067 (Fla. 3d DCA 1996). Those decisions erroneously stretched the general rule discussed in Boler without ever considering Mills, which has long been the law in Florida.

underlying felony violates double jeopardy. See Whalen.

C. Conclusion

For the reasons stated above, neither theory of first-degree murder can be sustained. The first-degree murder conviction and the aggravated child abuse conviction should be vacated and the cause remanded for resentencing on the charge of manslaughter.

IV: WHETHER THE COURT ERRONEOUSLY REFUSED TO ALLOW
 APPELLANT TO WAIVE THE JUSTIFIABLE OR EXCUSABLE
 HOMICIDE DEFENSES.

In the guilt phase charge conference, defense counsel attempted to waive the justifiable or excusable homicide defenses in the standard homicide instruction because appellant was not asserting the murder was lawful, justifiable, or excusable. The prosecutor said she was not comfortable with the waiver but "I'm not going to debate it any further if he really doesn't want it." Defense counsel maintained the instruction did not apply and should not be given because "I just don't think it makes sense" under the circumstances. The court overruled the waiver, saying:

I know it doesn't make sense probably but a lot of these charges don't make sense that we give but in order to be abundantly cautious I'm going to give them anyway. Supreme Court has said justifiable homicide and excusable homicide are to be given.

V17T1222-23. The instruction was given, and the jurors were handed a copy of the instruction to take with them into the jury room. See V2R353-78, V17T1296-V18T1323. The court prejudicially erred by refusing to allow this waiver, depriving appellant of due process and a fair trial. See U.S. Const. amends. VIII, XIV; art. I §§ 9, 16, Fla. Const.

There is no question a defense can be waived. Likewise,

this Court has held that even a fundamentally required justifiable and excusable homicide instruction can be affirmatively waived. See Armstrong v. State, 579 So. 2d 734 (Fla. 1991) (counsel's request for abbreviated version of the standard instruction deemed an affirmative waiver for tactical reasons to tailor instructions to the defense); Abbarno v. State, 654 So. 2d 225 (Fla. 5th DCA 1995). Counsel here made a legitimate, tactical, affirmative waiver to a defense. He was not, and is not, waiving consideration of a lesser offense to capital murder. The court had no authority to refuse his right to waive that inapplicable defense instruction. By giving the instruction -- which jurors could reread repeatedly in the jury room -- jurors were invited to infer that Andrew was claiming the murder was justifiable or excusable, which would be inaccurate and prejudicial. Giving an instruction that had no application was not only unlawful, it also must have been confusing to jurors. The instruction also helped to undermine appellant's defense theory, which was that he he did not commit first-degree murder, though he could be found guilty of a lesser degree of homicide. The judge's ruling was reversible error. See Smith v. State, 698 So. 2d 632 (Fla. 2d DCA 1997) (reversible error to instruct on justifiable use of nondeadly force on State's motion and over defense's objection when no evidence supports it).

V: WHETHER THE DEATH SENTENCE IS DISPROPORTIONAL WHERE
 THERE WAS LITTLE VALID AGGRAVATION, SUBSTANTIAL
 UNREBUTTED STATUTORY AND NONSTATUTORY MITIGATION, AND
 NO SIMILAR CASE HAS HAD A DEATH SENTENCE AFFIRMED.

Article I section 17 of the Florida Constitution mandates

proportionality review. See, e.g., Tillman v. State, 591 So. 2d 167 (Fla. 1991). “[P]roportionality review requires a discrete analysis of the facts.” Terry v. State, 668 So. 2d 954, 965 (Fla. 1996). Under the facts presented, and the heavy, un rebutted mitigating evidence proved and found, the death sentence is inappropriate in this case, especially when compared to other child murder cases.

One critical element in proportionality review is the Court’s ability to “conclusively determine on the record before us what actually transpired immediately prior” to the infliction of a mortal injury. Terry, 668 So. 2d at 965. On this record we do not know exactly what happened in the room when Gabrielle died. No State witness saw the homicide, and Andrew’s statements do not necessarily explain it.

We do know, however, that up to the moment she died, he felt great affection for Gabrielle, was given the authority to care for her, and was in fact taking care of her needs. There is no evidence Andrew felt any animus, hostility, spite, ill will, hatred, or contempt for Gabrielle or anyone else in the family, and he had no apparent motive to want to cause her death. There is no allegation or evidence of willful torture, malicious punishment, neglect, or unlawful caging. There is no allegation or evidence that Andrew caused Gabrielle to suffer any prior single act of abuse, or any long-term, repeated, or continuing abuse. Gabrielle could have been rendered unconscious immediately, and there is no evidence he intended or caused her pain or suffering. This homicide was not alleged or proved to be

heinous, atrocious or cruel; and was it not alleged or proved to be cold, calculated, and premeditated. It is also unrebutted that immediately after injuring Gabrielle, Andrew tried to resuscitate her.

This is a classic manslaughter case, not a capital murder. But even if this Court affirms the first-degree conviction, there is only one supportable aggravating circumstance, i.e., a single prior third-degree felony conviction. See Issues VI-IX, infra.

Balanced against this minimal aggravation is a mountain of unrebutted statutory and nonstatutory mitigation proved by the appellant and found by the trial court, including Andrew's immaturity; his substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; he had been raised in a dysfunctional home by an alcoholic father who physically abused him; he has a history of drug and alcohol abuse; as a young child he was repeatedly sexually abused by his uncle, causing him to become depressed and suicidal; and he was gainfully employed. Unrebutted expert testimony also showed Andrew suffers from four different mental disorders: intermittent explosive disorder; substance abuse, especially alcohol; post-traumatic stress disorder; and personality disorder with anti-social, immature, and borderline features. By no standard can these facts make this one of the most aggravated, least mitigated crimes deserving the death penalty, which it must be to affirm the sentence.

Moreover, a survey of this Court's death sentence decisions involving the murders of children under the age of 12 shows how

the sentence here is disproportional.¹⁶ This Court's affirmances of death sentences involving children under the age of 12 almost inevitably follow findings that the respective murders were committed in a heinous, atrocious, or cruel (HAC) manner, unlike the present case. See Davis (Toney) v. State, 23 Fla. L. Weekly S7 (Fla. Nov. 6, 1997); Banks v. State, 700 So. 2d 363 (Fla. 1997), petition for cert. filed, No. 97-7522 (U.S. Jan. 12, 1998); Davis (Eddie) v. State, 698 So. 2d 1182 (Fla. 1997), cert. denied, 118 S. Ct. 1076 (1998); James v. State, 695 So. 2d 1229 (Fla. 1997), cert. denied, 118 S. Ct. 569 (1997); Wike v. State, 698 So. 2d 817 (Fla. 1997), cert. denied, 118 S. Ct. 714 (1998); Henyard v. State, 689 So. 2d 239 (Fla. 1996), cert. denied, 118 S. Ct. 130 (1997); Henry v. State, 649 So. 2d 1361 (Fla. 1994); Cardona v. State, 641 So. 2d 361 (Fla. 1994); Carroll v. State, 636 So. 2d 1316 (Fla. 1994); Schwab v. State, 636 So. 2d 3 (Fla. 1994); Arbelaez v. State, 626 So. 2d 169 (Fla. 1993); Mann v. State, 603 So. 2d 1141 (Fla. 1992); Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990); Duckett v. State, 568 So. 2d 891 (Fla. 1990); Rivera v. State, 561 So. 2d 536 (Fla. 1990); Smith (Frank) v. State, 515 So. 2d 182 (Fla. 1987); Jennings v. State, 512 So. 2d 169 (Fla. 1987); Atkins v. State, 497 So. 2d 1200 (Fla. 1986); Roman v. State, 475 So. 2d 1228 (Fla. 1985); Adams v. State, 412 So. 2d 850 (Fla. 1982); Dobbert v. State, 375 So. 2d 1069 (Fla. 1979); LeDuc v. State, 365 So. 2d 149 (Fla. 1978); Goode v.

¹⁶ This survey has attempted to include every relevant case. If not complete, it is, at the very least, a good representation of the relevant decisions made by this Court.

State, 365 So. 2d 381 (Fla. 1978).¹⁷

Almost every one of these affirmances that found HAC also involved kidnapping and/or sexually assault, not caretakers who killed children in their charge. See Davis (Toney); Banks; Davis (Eddie); James; Wike; Henry; Henyard; Carroll; Schwab; Arbelaez; Mann; Sanchez-Velasco; Duckett; Rivera; Smith; Jennings; Atkins; Roman; Adams; LeDuc; Goode. The affirmances that did not involve sexual assault and/or kidnapping were extraordinary, heinous, atrocious, or cruel domestic child abuse cases characterized by months or years of willful torture and brutality preceding the homicides. See Cardona; Dobbert. Four of these affirmances involved multiple homicides or multiple victims in addition to being heinous crimes. See Banks; James; Wike; Dobbert. Not one of these affirmances even slightly resembles the present case.

In contrast, this Court has reversed death sentences and imposed life in a number of cases where the child murders had been heinous, atrocious, or cruel, including a proportionality reversal in a case markedly similar to, but far more horrible, than the present one, Smalley v. State, 546 So. 2d 720 (Fla.

¹⁷ The only exception known to appellant was Rose v. State, 461 So. 2d 84 (Fla. 1984). Rose kidnapped an 8-year-old child from a bowling alley, transported her in his van, and bludgeoned her with a hammer. The murder was motivated by Rose's jealousy regarding the child's mother. Rose was under sentence of imprisonment, committed the murder while engaged in a kidnapping, and had a prior violent felony conviction. Even so, the death sentence has been vacated and a new jury resentencing has been ordered. See Rose v. State, 675 So. 2d 567 (Fla. 1996). One other case, Witt v. State, 342 So. 2d 497 (Fla. 1977), affirmed the death sentence with facts suggesting heinous, atrocious, or cruel, but the opinion failed to enumerate the aggravators.

1989), as well as five jury override reversals, Reilly v. State, 601 So. 2d 222 (Fla. 1992); Jackson (Douglas) v. State, 599 So. 2d 103 (Fla. 1992) (murders of two children during five-murder episode); Buford v. State, 570 So. 2d 923 (Fla. 1990); Morris v. State, 557 So. 2d 27 (Fla. 1990); and Wasko v. State, 505 So. 2d 1314 (Fla. 1987).¹⁸ Smalley is particularly relevant here.

Smalley was living with 28-month-old Julie Ann Cook, her two siblings, and their mother, Cecelia Cook. On the day of the murder, Smalley was baby-sitting Julie while Cecelia worked. Julie, who had been ill with a virus, began crying and whining. Smalley struck her to quiet her, but soon she began crying and whining again, so Smalley struck her again. This pattern went on throughout the day, with the following variation: On three separate occasions, Smalley repeatedly dunked Julie's head into water. After the third dunking, Smalley picked her up by her feet and banged her head on a carpeted floor several times. Julie lost consciousness. Smalley wrapped her in a sheet and put her on his waterbed. When he checked three hours later, Julie had quit breathing. Smalley tried to resuscitate her, but to no avail. She died of a cerebral hemorrhage after eight hours of abuse. Despite the finding of heinous atrocious and cruel, this Court vacated the death sentence because it was disproportional in light of substantial mitigating evidence Smalley presented.

¹⁸ See also Knowles v. State, 632 So. 2d 62 (Fla. 1993) (penalty for child murder not reached where Court reduced to 2d degree murder for fatally shooting 10-year-old three times, while affirming 1st degree conviction but reducing death to life sentence for contemporaneous murder of Knowles' father).

The facts of the murder in the present case pale in comparison to those in Smalley, whereas the mitigating evidence here is at least as great. Additionally, scores of decisions have approved trial court decisions to impose lesser sentences for far more horrible child murders than the one now under review. See, e.g., Nicholson v. State, 600 So. 2d 1101 (Fla. 1992) (4-year-old child died of starvation; mother pled to 3d degree murder and simple child abuse); State v. Law, 559 So. 2d 187 (Fla. 1989) (2d degree murder conviction where Law killed girlfriend's 3-year-old son by blunt trauma to head culminating 48 hours of abuse); Freeze v. State, 553 So. 2d 750 (Fla. 2d DCA 1989) (life sentence for 1st degree murder for mother who repeatedly beat and violently shook 18-month-old son to punish him). If the first-degree murder conviction is affirmed, this Court should vacate the death sentence and remand for imposition of a life sentence.

VI: WHETHER THE FELONY MURDER AGGRAVATOR CANNOT BE BASED ON A FELONY THAT CONSTITUTED THE SAME HOMICIDAL ACT RESULTING IN A SINGLE DEATH BECAUSE THERE WAS NO FELONY SEPARATE AND INDEPENDENT FROM THE HOMICIDE.

The court found in aggravation the murder was committed during the commission or attempted commission of aggravated child abuse. See § 921.141(5)(d), Fla. Stat. (Supp. 1996). The aggravated child abuse was predicated on precisely the same infliction of blunt trauma as the murder conviction. There was no accompanying felony separate and independent from the homicide to justify application of this aggravating circumstance. This case presents the unusual scenario the Court singled out for

differential treatment in Mills v. State, 476 So. 2d 172 (Fla. 1985), as fully explicated in Issue III(B), supra. See also Whalen v. United States, 445 U.S. 684 (1980). The rationale of Mills should bar the application of the aggravator under these facts. Applying the aggravator here bootstraps the very core of the homicide -- the infliction of a mortal injury -- to make this individual death qualified. The untenable circular logic required to apply the aggravator makes the factor automatic and duplicative. It would be like a finding a prior violent felony for a contemporaneous felony committed on the homicide victim, a practice not legally permissible. See, e.g., Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993). As applied, this aggravator fails to genuinely narrow the class of persons eligible for the death penalty, and does not reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. Appellant was denied due process, equal protection, and a fair penalty proceeding. See U.S. Const. amends. VIII, XIV; art. I §§ 2, 9, 16, 17, Fla. Const.

This Court recently discussed a different attack on automatic aggravating circumstances. See Blanco v. State, 22 Fla. L. Weekly S575 (Fla. Sept. 18, 1997). Blanco is the classic felony murder case in which the underlying felony was not the homicidal act itself, an armed burglary. The majority's rationale there does not control because these circumstances are unique and fit within the rationale of Mills.

In the event this Court disagrees, appellant continues to maintain the aggravating circumstance is unconstitutional. See

also V2R209-19. This Court should overrule its decision in Blanco for all the reasons expressed by Justice Anstead in his concurring opinion in Blanco, 22 Fla. L. Weekly at S576-77.

VII. WHETHER THE TRIAL COURT VIOLATED FLORIDA AND FEDERAL LAW BY RETROACTIVELY APPLYING THE NEW AGGRAVATING CIRCUMSTANCE OF MURDER COMMITTED WHILE ON FELONY PROBATION, THEREBY ERRONEOUSLY PERMITTING THE STATE TO INTRODUCE EVIDENCE TO PROVE IT, INSTRUCTING ON IT, AND FINDING IT PROVED.

Months after the homicide, the Legislature created a new aggravating circumstance for murder committed by one on felony probation. In relevant part, the amendment provided:

- (5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:
 - (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

Ch. 96-302, § 1, Laws of Fla. (underscore in original) (codified at § 921.141(5)(a), Fla. Stat. (Supp. 1996); see also ch. 96-290, § 5, Laws of Fla.¹⁹

The defense objected to the retroactive application of that amendment, which was denied. See V1R82-84, V18R1329-32. The

¹⁹ See also Fla. H.R. Comm. on Crim. J., CS/HB207, Staff Analysis (June 4, 1996) (on file with Fla. Archives, Series 19, Box 2701); Fla. H.R. Comm. on Crim. J., CS/HB207, Staff Analysis (March 11, 1996) (on file with Fla. Archives, Series 19, Box 2701); Fla. H.R. Comm. on Crim. J., PCS/HB207, Staff Analysis (March 4, 1996)(on file with Fla. Archives, Series 19, Box 2701). Copies of the staff analyses are attached to this brief as Appendix C. The precise effective date of the amendment is questionable because chapter 96-302, section 2, Laws of Florida, made the amendment effective October 1, 1996, whereas chapter 96-290, section 11, Laws of Florida, made that chapter's amendment effective May 30, 1996. See also note 1 accompanying the codification of section 921.141(5)(a), Florida Statutes (Supp. 1996). The difference is immaterial here because both effective dates were well after the homicide occurred.

court permitted the State to introduce evidence to prove the circumstance, see V18T1372-81; the State argued it powerfully to the judge and jury, see V19R1588-90, V3R408; the court instructed the jury to consider the factor, see V19T1634, V3R396; and the court found and weighed it, albeit merged with the prior violent felony aggravator, see V12T1664-66, V3R418-19.

A. The statute was never intended to be retroactively applied

Initially, this factor has no application here because there is absolutely no indication in the language of the statute or its legislative history that the Legislature ever intended it to apply retroactively. The general rule of law strongly disfavors retroactive application of new statutes. See Landgraf v. USI Film Products, 511 U.S. 244 (1994); Lynce v. Mathis, 117 S. Ct. 891 (1997). Florida law presumes a new statute is intended to be prospective only, and that presumption may be overcome only when the Legislature has stated "expressly in clear and explicit language" its intent to apply the statute retroactively. See, e.g., State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983) ("It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively."); Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475, 477 (Fla. 1995) ("We have held that a substantive law that interferes with vested rights--and thus creates or imposes a new obligation or duty--will not be applied retrospectively."); Alamo Rent-A-Car v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994) (substantive statutes are prospective absent clear legislative intent to make them retroactive). No statute

could be more substantive and unsuited to retroactive application than one newly defining or creating an aggravating circumstance.

Since 1980, this Court consistently has held that being on probation is not being under sentence of imprisonment and does not qualify as aggravating circumstance under section 941.141(5)(a). See Peek v. State, 395 So. 2d 492 (Fla. 1980) ("Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase 'person under sentence of imprisonment' as set forth in section 921.141(5)(a)."); see also Pettit v. State, 591 So. 2d 618 (Fla. 1992); Trotter v. State, 576 So. 2d 691 (Fla. 1990) (Trotter I), receded from on other grounds, Trotter v. State, 690 So. 2d 1234 (Fla. 1996), cert. denied, 118 S. Ct. 197 (1997) (Trotter II); Bolender v. State, 422 So. 2d 833 (Fla. 1982); Ferguson v. State, 417 So. 2d 631 (Fla. 1982). This is consistent with the long-established tradition of Florida law distinguishing probation from substantially more harsh and severe custodial restraint measures including imprisonment and community control. See ch. 948, Fla. Stat. (1995); Skeens v. State, 556 So. 2d 1113 (Fla. 1990); State v. Mestas, 507 So. 2d 587 (Fla. 1987).

The present case is not like Trotter II, where the Legislature acted specifically and promptly to correct a new and recent interpretation of legislative intent, effecting a minor refinement of existing law. When the Legislature changed 16 years of uniform precedent to create an aggravating circumstance for felony probation in 1996, it made "a substantive change in

Florida's death penalty law." Trotter II, 690 So. 2d at 1237.

Moreover, due process requires penal statutes be strictly construed in favor of the accused. See U.S. Const. amend. XIV; art. I, § 9, Fla. Const.; Perkins v. State, 576 So. 2d 1310 (Fla. 1991). Judicially enlarging the statute under these circumstances violates due process. See Bouie v. Columbia, 378 U.S. 347 (1964); State v. Snyder, 673 So. 2d 9 (Fla. 1996).

B. The statute as applied is an ex post facto law

Even if the Legislature had intended this new aggravating circumstance to apply retroactively, doing so here violates the ex post facto prohibitions of the United States and Florida Constitutions. See U.S. Const. art. I, § 10; Lynce v. Mathis, 117 S. Ct. 891 (1997); art. I, § 10, Fla. Const.; Dugger v. Williams, 593 So. 2d 180 (Fla. 1991).

Lynce did more than apply the ex post facto clause to a particular early release program. Rather, the United States Supreme Court unanimously corrected this Court's long-held general outlook on what kinds of law changes merit ex post facto protection. The Court made clear that any retroactively applied law that alters a determinant of a prisoner's punishment, produces a sufficient risk of increasing the measure of punishment attached to the covered crimes, or alters a prisoner's eligibility for lesser punishment, is an ex post facto law. Lynce expressly rejected this Court's artificially broad interpretation of what constitutes a "procedural" law not within the ex post facto prohibition. See 117 S. Ct. at 898 n.17.

An aggravating circumstance is the single major determinant

of a capital sentence. It is an essential element of a death sentence, and it must be proved beyond a reasonable doubt. Its availability defines eligibility for the death sentence. Its existence certainly increases the risk that one convicted of capital murder will get a death sentence. It could be the difference between a life and death recommendation and a life and death sentence. No law could be more substantive. Accord Bowen v. Arkansas, 911 S.W. 2d 555, 562-64 (Ark. 1995) (holding an aggravating circumstance is "a substantive provision that cannot be applied retroactively" under federal ex post facto clause), cert. denied, 116 S. Ct. 1861 (1996).

Likewise, Florida's ex post facto standard provides that even the retroactive diminishment of access to a purely discretionary or conditional advantage constitutes a violation of the Florida Constitution. See Williams, 593 So. 2d at 181. A life recommendation and a life sentence are advantages jeopardized by allowing cosentencers to consider, find, and weigh an inapplicable aggravating circumstance.

This Court's prior ex post facto aggravator decisions hold that minor refinements of existing law or changes that merely reiterated an element already present in the crime of first-degree murder are not ex post facto laws. See, e.g., Trotter II; Valle v. State, 581 So. 2d 40 (Fla. 1991) (law enforcement victim aggravator); Combs v. State, 403 So. 2d 418 (Fla. 1981) (premeditation). Appellant strongly disagrees with these cases and asks this Court to overrule them in light of Lynce. In any event, they are easily distinguished because a complete

abrogation of 16 years of settled law is no minor refinement, and being on felony probation is not a factor present in murder or any preexisting aggravating circumstance.²⁰

Andrew Lukehart was constitutionally entitled to rely on the law of punishment that existed when his offense occurred. The State cannot prove beyond a reasonable doubt the error did not affect the jury's or the judge's determinations. The jury was exposed to penalty phase testimony, strong argument, and instructions on this factor, and it certainly was weighed by each of the cosentencers. The error requires a new jury sentencing.

VIII: WHETHER COSENTENCERS ERRONEOUSLY DOUBLED AGGRAVATING CIRCUMSTANCES OF COMMITTED DURING AN AGGRAVATED CHILD ABUSE AND VICTIM UNDER 12 YEARS OF AGE.

The State urged the judge and jury to separately find and weigh the aggravators for murder committed during an aggravated child abuse and murder of a victim under the age of 12. See V19T1584-85, V12R1919-34, V3R408. Appellant objected to doubling during the charge conference, see V19T1561-69, but the trial judge instructed on both aggravators, see V3R396, V19T1634. Appellant again objected to doubling at the sentencing hearing, see V12R1919-34, but the judge separately found and weighed both, see V3R417-18, V12R1938-39. The instructing, finding, and weighing constituted impermissible doubling and rendered the sentencing recommendation and the sentence itself unconstitutional in violation of his right to due process, equal protection, a fair trial, and protection against cruel and/or

²⁰ A similar issue is pending before this Court in State v. Hootman, No. 91,105.

unusual punishment, requiring a new jury sentencing. See U.S. Const. amends VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.

No two aggravating circumstances can be based on the same aspect of a crime. See, e.g., Provence v. State, 337 So. 2d 783 (Fla. 1976). The only reason either of these circumstances applied was the victim's age. The indictment itself demonstrates that the charged offense was an aggravated battery that became an aggravated child abuse only because of the victim's age, see V1R13, and the only act of abuse alleged and proved was the homicidal battery. These aggravators were unlawfully doubled, inflating the weight cosentencers applied, rendering the recommendation and judgment unreliable. Cf. Terry v. State, 668 So. 2d 954 (Fla. 1996) (aggravating circumstances arising from same incident have diminished weight).

The fact that a doubling instruction was given, see V19T1634-35, does not mitigate or eliminate the harm. The prosecutor argued in favor of double counting, and the judge made the unlawful doubled finding knowing the same law he told the jury. We must assume the jury did likewise.

IX: WHETHER THE AGGRAVATOR AND INSTRUCTION FOR A VICTIM UNDER 12 ARE UNCONSTITUTIONALLY OVERINCLUSIVE, ARBITRARY, AND AUTOMATICALLY APPLICABLE TO HOMICIDES COMMITTED AGAINST A HUGE PORTION OF THE POPULATION REGARDLESS OF THE CIRCUMSTANCES, UNLIKE ANY OTHER AGGRAVATOR.

Only a few aggravating circumstances are based on the status of the victims. Section 921.141(5)(j), Florida Statutes (1995), applies only to law enforcement officers killed while engaged in their official duties. Section 921.141(5)(k), Florida Statutes

(1995), applies only to elected or appointed public officials killed while engaged in their official duties and killed because of their official capacity. Contrary to those narrow provisions, section 921.141(5)(1), Florida Statutes (1995), making the killing of a person under the age of 12 an automatic aggravating circumstance, is vast, indiscriminating, and overinclusive. The statute and its instruction do not require the defendant to know the victim's age or youth, to intend to kill because of the victim's age, or to know the victim is present. They do not require a showing that the victim had an age-based vulnerability that played a role in the homicide. They arbitrarily cut off at 12. Cosentencers are given no discretion in finding this circumstance. Any unintended accidental killing of a child under any circumstance during a felony qualifies. This is a strict liability determinant of life or death, contrary to the common law tradition requiring some knowledge or intent and disfavoring strict liability in imposing severe punishments.

Additionally, every person who has ever lived fit within statute at some point, and about a fifth of the population are juveniles under the age of 12.²¹ Thus, a first degree murder against anyone in approximately one-fifth of the population automatically qualifies a defendant to die in the electric chair

²¹ Census data show that children of ages 0-14 years were 19.27% of the estimated 1996 population of Florida. See Florida Statistical Abstract 18 (1997). Nationwide, children under the age of 14 were 21.8 percent of the population. See Statistical Abstract of the United States 15 (1997). These census data did not break down the population at the age of 12.

irrespective of the circumstances surrounding the death.

This overbroad, overinclusive, automatically applicable factor, on its face, fails to "genuinely narrow the class of persons eligible for the death penalty," or "reasonably justify the imposition of a more severe sentence compared to others found guilty of murder," Zant v. Stephens, 462 U.S. 862, 877 (1983), thereby violating due process, equal protection, and appellant's protection against cruel and/or unusual punishment. See U.S. Const. amends. VIII, XIV; art. I §§ 9, 16, 17, Fla. Const.; Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 64, 70 (Fla. 1990) (overinclusive legislative classification violates Florida's equal protection clause). Even without objection below, the facial unconstitutionality of this factor and the instruction render the error fundamental.

X: WHETHER THE STATE IMPROPERLY MADE THE COLLATERAL CRIME THE OVERWHELMING FEATURE OF THE PENALTY PHASE AND USED IT TO INTRODUCE EVIDENCE OF AN UNCONSTITUTIONAL AGGRAVATOR.

The State made the sole focus of its penalty phase proceedings the details of a prior felony conviction of child abuse. In addition to the judgment and sentence, the State put on four witnesses including the investigating officer, the examining physician, the prosecutor, and a correctional probation specialist. Their evidence consumed 43 pages of the 44-page transcript. The evidence was offered to prove two aggravating circumstances, including an ex post facto one. See Issue VII, supra. The evidence was unduly prejudicial and shifted the cosentencers' focus from the instant crime to the collateral

crime rendering the jury's and judge's ultimate judgments unreliable. This violated appellant's rights to a fair penalty trial, due process, and protection against cruel and/or unusual punishment. U.S. Const. amends. VIII, XIV; art. I §§ 9, 16, 17, Fla. Const.

Some evidence of a collateral crime may be introduced to prove a valid aggravating circumstance. But the State is not permitted to introduce evidence to prove an unlawful or unconstitutional aggravating circumstance, nor it is permitted to emphasize a collateral crime to the point of making it a feature of the penalty phase, because such evidence is unduly prejudicial and distorts the entire process. See Finney v. State, 660 So. 2d 674, 683 (Fla. 1995); Hitchcock v. State, 673 So. 2d 859, 861 (Fla. 1996) (reversible error to make feature of penalty phase pedophilia and sex crimes committed upon the juvenile sister of the murder victim); Wuornos v. State, 676 So. 2d 966, 971 (Fla. 1995) (error to prove CCP aggravator relying entirely on collateral crime evidence); Duncan v. State, 619 So. 2d 279, 282 (Fla. 1993) (error to introduce photo of collateral murder victim when collateral crime had been proved through judgment and officer's testimony); Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1989) (error to introduce statement of collateral crimes victim when crimes proved through judgment and officer's testimony); Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990) (spouse of collateral crime victim should not have been permitted to testify to prove prior felony conviction).

Defense counsel objected to any reference to felony

probation because it was predicated on an ex post facto aggravating circumstance. See V18T1330. Nonetheless, the judge permitted the State to introduce evidence from two witnesses (the prosecutor and the probation specialist) to prove that factor; it was argued heavily to the jury, see V19R1588-91; and both cosentencers weighed it. Defense counsel also expressed concern about the possible introduction of excessive details of the collateral crime victim's injuries. See V18T1333-38. Counsel did not make a feature objection, but none is needed where the error is fundamental, going to the heart of the fairness of the penalty determination, as it did here. The collateral crime was argued heavily to the jury. See V19T1577-80. The Court should remand for a new jury sentencing.

XI: WHETHER PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT OF THE PENALTY PHASE CREATED FUNDAMENTAL ERROR BY DEROGATING SIGNIFICANT MENTAL MITIGATION, UNDERMINING INDIVIDUALIZED SENTENCING, APPEALING TO FEAR, AND SUGGESTING A MESSAGE OF INTOLERANCE OF CRIME BE SENT.

In the prosecutor's closing penalty argument, she said:

It's not an easy thing for you to do, you probably will be very depressed when you leave here, nobody said it was going to be easy, we told you it was going to be tough. It wasn't easy for me to sit and watch Missy Smith on the stand yesterday, it was difficult to get up and question somebody that's usually a State witness because she's been victimized. But where do you take that victimization? How do you fit it into what's going on here? Is every single person that's been victimized in this country going to be excused from a crime that they've committed? We can't do that, ladies and gentlemen. We will have absolute chaos and lawlessness if we allow every person who feels they've been victimized to go out and rectify that by committing other crimes. We simply cannot tolerate that.

V19T1605 (emphasis supplied). Further discussing the evidence of

victimization in his family, the prosecutor said, "How many generations are we going to go back? Where is the cycle of violence going to stop? It stops here and it stops now because there are no more excuses." V19T1604. Later she said, "you can't excuse this man because he was raped or because his father was an alcoholic." V19T1607.

The entire argument was strewn with blatantly improper, erroneous, emotional, inflammatory, unsupported appeals. She told jurors Gabrielle and Jillian "were preyed upon by this defendant." V19T1578. Time after time she argued not that the aggravators outweighed the mitigators, but that Andrew deserves to die: "It's got to stop, ladies and gentlemen. And it has to stop here and it has to stop now. Andrew Lukehart deserves to die," V19T1578; "Andrew Lukehart deserves to die," V19T1579; "this man deserves the electric chair," V19T1581; "he deserves to die," V19T1582; "this man deserves to die," V19T1582; "It's what he did to Jillian that makes him deserve to die," V19T1591; "this defendant deserves to die for what he's done," V19T1596.

These statements went beyond the bounds of law, reason, and fairness, casting grave doubt on the penalty determination and depriving appellant of a fair sentencing determination, thus requiring a new jury sentencing. See U.S. Const. amends. VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

Clearly Andrew had been a victim of child abuse, both by physical and emotional abuse inflicted by his immediate family, and by repeated sexual abuse inflicted by his uncle. His victimization was among the most substantial mitigation. It is

lawful mitigation and has been relied on by juries and judges many times. But the prosecutor here minimized and denigrated the significance of this kind of victimization as mitigation evidence. Rather than looking at Andrew's own victimization and its effects, the prosecutor instead painted all child abuse victims with a broad brush; suggested Andrew was looking to be excused for his crime; invoked jurors' fears of a world full of victims free to go out and rectify their own victimization by committing crimes; and implied that the jury should send a message to child abuse victims that "[w]e simply cannot tolerate" their unlawful behavior.

This Court has long recognized that closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985); see also, e.g., Campbell v. State, 679 So. 2d 720, 724-25 (Fla. 1996); Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). Some prosecutorial arguments so deeply implant seeds of prejudice, confusion, emotion, error, and denigration of lawful defenses, that reversal is required despite the defendant's failure to object at trial because the error vitiates the fairness of the proceeding. See Pait v. State, 112 So. 2d 380 (Fla. 1959); see also Wilson v. State, 294 So. 2d 327 (Fla. 1974); Grant v. State, 194 So. 2d 612 (Fla. 1967); cf. Garron (reversing for prosecutorial misconduct during penalty phase, notwithstanding curative instructions).

The prosecutor's argument denigrating Andrew's lawful mental mitigation and suggesting that the evidence was offered as an "excuse" was inaccurate, misleading, and improper. See Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) (error to impugn lawful defense); Garron, 528 So. 2d at 357 (repeated criticism of legitimate and lawful defense was reversible error); Riley v. State, 560 So. 2d 279, 280 (Fla. 3d DCA 1990) (prosecutor "may not ridicule a defendant or his theory of defense"); Rosso v. State, 505 So. 2d 611, 613 (Fla. 3d DCA 1987) (same).

The argument invoking jurors fears, suggesting they send a message about society's intolerance for crime, was improper. See, e.g., Campbell (error to argue "[t]he death penalty is a message sent to a number of members of our society to choose not to follow the law"); Bertolotti ("Anything less [than death] in this case would only confirm what we see running around on the bumper stickers of these cars, and that is that only the victim gets the death penalty"); Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984) (error for prosecutor to argue "This is our county, this is our nation, it's time to send 'em - send criminals a message we're not going to tolerate it any more"); Hines v. State, 425 So. 2d 589 (Fla. 3d DCA 1982) ("tell the community you are not going to tolerate the violence" is error).

By repeatedly pounding the inflammatory theme that he "deserves to die," the prosecutor effectively and improperly invited jurors to consider extra-legal moral considerations, implying that some high moral force says he deserves to die, whereas this is supposed to be a legal weighing process.

XII: WHETHER THE NONCAPITAL SENTENCE AND RESTITUTION ORDERS
 VIOLATE FLORIDA LAW AND DUE PROCESS GUARANTEES.

The trial court imposed a concurrent 15-year prison sentence on count II, aggravated child abuse, but did not fill out a guidelines score sheet. See V12T1670, V3R415, V3R423-24. This was error. If the noncapital offense is affirmed, the noncapital sentence should be vacated and a guidelines sentence imposed. See Gibson v. State, 661 So. 2d 288, 293 (Fla. 1995); Owens v. State, 598 So. 2d 64 (Fla. 1992).

On the day of sentencing the court filed two written restitution orders, one for \$400 payable to David Hanshaw, see V3R425-26, and another for \$870 payable to the Victim Compensation Trust Fund, see V3R427-28. Both were form orders specifying they were issued upon motion of the State. However, no restitution motions were filed, no restitution hearing was held, no restitution evidence was taken, no restitution orders were orally pronounced, and there is no entity in Florida called the "Victim Compensation Trust Fund." The orders violate due process and Florida law, and should be stricken. See U.S. Const. amend. XIV; art. I, § 9, Fla. Const., § 775.089, Fla. Stat. (1995); Shipley v. State, 528 So. 2d 902 (Fla. 1988); Gilmore v. State, 668 So. 2d 1092, 1093 (Fla. 1st DCA 1996); Sumter v. State, 570 So. 2d 1039, 1041 (Fla. 1st DCA 1990).

CONCLUSION

For the reasons expressed above, the judgments of convictions and sentences should be reversed and the cause remanded for a new trial or for resentencing.

CERTIFICATE OF SERVICE

I certify that a copy of this initial brief of appellant has been furnished by delivery to Richard Martell, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301, and a copy has furnished by mail to appellant Richard Andrew Lukehart, on this ____ day of _____, 1998.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

ANDREW RICHARD LUKEHART,

Appellant,

vs.

CASE NO 90,507

STATE OF FLORIDA,

Appellee.

_____ /

APPENDIX TO INITIAL BRIEF OF APPELLANT

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