

IN THE SUPREME COURT OF FLORIDA

MICHAEL S. STOLL,)
)
 Appellant,)
)
vs.)
)
STATE OF FLORIDA,)
)
 Appellee.)
_____)

CASE NUMBER 93,276

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY, FLORIDA
INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0267082
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	5
SUMMARY OF THE ARGUMENTS	20
ARGUMENTS	
<u>POINT I:</u>	22
IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CALL DANA MARTIN AS A REBUTTAL WITNESS.	
<u>POINT II:</u>	25
IN VIOLATION OF THE SIXTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 TO THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE A PRIOR STATEMENT OF A CO-DEFENDANT AS SUBSTANTIVE EVIDENCE OF GUILT OF THE APPELLANT.	
<u>POINT III:</u>	28
IN VIOLATION OF THE SIXTH, EIGHTH AND	

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ADMITTING AN AUTOPSY PHOTOGRAPH OVER OBJECTION WHERE THERE WAS NO RELEVANCE SHOWN TO THE PHOTOGRAPH.

POINT IV: 30

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE A PRIOR STATEMENT OF THE VICTIM.

POINT V: 33

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, THE DEATH SENTENCE IMPOSED UPON APPELLANT IS DISPROPORTIONATE.

POINT VI: 36

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 1, 12, AND 17 OF THE FLORIDA CONSTITUTION, APPELLANT'S DEATH SENTENCE IS IMPROPER AS WHERE THE TRIAL COURT'S FINDINGS REGARDING AGGRAVATING CIRCUMSTANCES ARE IN ERROR.

CONCLUSION	43
CERTIFICATE OF SERVICE	44

TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
<i>Akins v. State</i> 694 So. 2d 847(Fla. 4 th DCA 1997)	29
<i>Antone v. State</i> 382 So.2d 1205 (Fla. 1980) <i>cert. denied</i> , 449 U.S. 913 (1980)	35
<i>Bass v. State</i> 547 So.2d 680 (Fla. 1 st DCA 1989)	24
<i>Bates v. State</i> 465 So. 2d 490, 493 (Fla. 1985)	37
<i>Bonifay v. State</i> 626 So.2d 1310 (Fla. 1993)	41
<i>Chandler v. State</i> 702 So.2d 186, 197 (Fla. 1997)	26, 31
<i>Cheshire v. State</i> 568 So.2d 908 (Fla. 1990)	39
<i>Correll v. State</i> 523 So. 2d 562 (Fla. 1988) <i>cert. denied</i> , 488 U.S. 871 (1988)	23
<i>Douglas v. State</i> 575 So.2d 165 (Fla. 1991)	39
<i>Downs v. State</i> 574 So.2d 1095, 1098 (Fla. 1991)	23

<i>Dragovich v. State</i> 492 So.2d 350 (Fla. 1986)	31
<i>Gibbs v. State</i> 193 So.2d 460 (Fla. 2 nd DCA 1967)	24
<i>Glendening v. State</i> 536 So.2d 212, 221 (Fla. 1988) <i>cert. denied</i> , 492 U.S.907 (1989)	24
<i>Gordon v. State</i> 704 So.2d 107, 114 (Fla. 1997)	36
<i>Hazen v. State</i> 700 So.2d 1207 (Fla. 1997)	34
<i>Henry v. State</i> 700 So.2d 797 (Fla. 4 th DCA 1997)	24
<i>Herzog v. State</i> 439 So.2d 1372 (Fla. 1983)	40
<i>Jackson v. State</i> 648 So.2d 85, 89 (Fla. 1994)	36
<i>Kennedy v. State</i> 385 So.2d 1020 (Fla. 5 th DCA 1980)	23
<i>Maharaj v. State</i> 597 So.2d 786 (Fla. 1992)	37
<i>Marshall v. State</i> 604 So.2d 799 (Fla. 1992)	29
<i>Nixon v. State</i> 572 So.2d 1336, 1342 (Fla. 1990) <i>cert. denied</i> , 503 U.S. 854 (1991)	28

<i>Pardo v. State</i> 563 So.2d 77 (Fla. 1990)	37
<i>Pope v. State</i> 679 So.2d 710 (Fla. 1996)	29
<i>Puccio v. State</i> 701 So.2d 858 (Fla. 1997)	34
<i>Rodriquez v. State</i> 609 So. 2d 493, 500 (Fla. 1992)	26
<i>Santos v. State</i> 591 So.2d 160 (Fla. 1991)	39
<i>Slater v. State</i> 316 So.2d. 539, 542 (Fla. 1975)	34, 35
<i>Smith v. State</i> 407 So.2d 894 (Fla. 1981)	39
<i>Sochor v. Florida</i> 504 U.S. 527 (1992)	39
<i>State v. Bradford</i> 658 So.2d 572 (Fla. 5 th DCA 1995)	23
<i>State v. Dixon</i> 283 So.2d 1, 9 (Fla. 1973)	38, 39
<i>Tedder v. State</i> 322 So.2d 908, 910 (Fla. 1975)	38
<i>Tedder v. Video Elec. Inc.</i> 491 So. 2d 533, 535 (Fla. 1986)	31
<i>Thompson v. State</i> 619 So.2d 261 (Fla. 1993)	28

Williams v. State
622 So.2d 456 (Fla. 1993) 35

Wilson v. State
436 So.2d 908 (Fla.1983) 28

Zecchino v. State
691 So.2d 1197 (Fla. 4th DCA 1997) 24

OTHER AUTHORITIES CITED:

Section 782.04 (1)(a) 1, Florida Statutes (1993) 1

Section 90.106 (6), Florida Statutes (1993) 31

Section 90.402, Florida Statutes (1993) 31

Section 90.803 (3)(a)(1), Florida Statutes (1993) 23

Amendment V, United States Constitution 33, 36

Amendment VI, United States Constitution 22, 25, 28, 30, 33, 36

Amendment VIII, United States Constitution 28, 36

Amendment XIV, United States Constitution 22, 25, 28, 30, 33, 36

Article I, Section 1, The Florida Constitution 36

Article I, Section 12, The Florida Constitution 36

Article I, Section 16, The Florida Constitution 28, 30, 33

Article I, Section 17, The Florida Constitution 33, 36

Article I, Section 22, The Florida Constitution 22, 25

Article I, Section 9, The Florida Constitution 22, 25, 28, 30, 33

IN THE SUPREME COURT OF FLORIDA

MICHAEL S. STOLL,)
)
 Appellant,)
)
vs.)
)
STATE OF FLORIDA,)
)
 Appellee.)
_____)

CASE NUMBER 93,276

STATEMENT OF THE CASE

On November 22, 1994, the grand jury in and for Seminole County returned an indictment charging appellant and Christopher M. Stewart with the premeditated murder of Julie Stoll in violation of Section 782.04 (1)(a) 1, Florida Statutes (1993). (Vol. I, 12-13) On September 16, 1996, appellant filed a motion to suppress his statements made to law enforcement officers and a memorandum of law in support of the motion to suppress. (Vol. I, 129-131, 61-128) A hearing on the motion to suppress was conducted on February 19, 1998 before the Honorable Seymour Benson, circuit court judge. (Vol. VI, 752-887) Judge Benson denied the motion to suppress. (Vol. II, 337) On March 17, 1998,

appellant filed a motion in limine to prohibit the state from presenting evidence concerning a prior alleged battery committed by appellant on a former wife in 1991. (Vol. II, 344-345) On that same date, appellant filed a motion in limine to prohibit the state from death-qualifying the jury on the grounds that the evidence prohibits the death penalty from being imposed since the acknowledged trigger man was permitted to plead to second degree murder for a sentence of 50 years. (Vol. III, 346-488) The hearing on these motions in limine was conducted on March 17, 1998 by Judge Benson. (Vol. VI, 911-943) Judge Benson granted the motion in limine concerning the prior alleged battery but denied the motion in limine regarding the death qualification of the jury. (Vol. VI, 919, 939) Appellant proceeded to jury trial on April 6, 1998, with the Honorable Seymour Benson, circuit judge, presiding. (Vols. VIII - XIV) Prior to jury selection, defense counsel renewed his motion in limine to preclude the state from seeking the death penalty which the court denied. (Vol. VIII, 5-15) The state then requested that the court take judicial notice of the case file in case no. 94-6189 which the court granted as to the incident report filed by the victim in her own handwriting and the plea which was entered by appellant to the offense of battery. (Vol. VIII, 22-24) Defense counsel objected on the grounds that such documents constituted impermissible hearsay. (Vol. VIII, 24) The first witness who testified for the state

was the co-defendant, Christopher Stewart, who had entered into a plea bargain with the state whereby he would plea to second degree murder in return for a sentence of fifty years in exchange for his testimony against appellant. (Vol. X & XI, 535-648) Over defense objection, the state was permitted to recall Christopher Stewart for the purpose of playing one of his prior taped statements into evidence. (Vol. XII, 940-958) The state sought admission of this prior statement to rebut a charge of recent fabrication. (Vol. XII, 940-947) Defense counsel objected to the admission. (Vol. XII, 947) As its final witness in its case-in-chief, the state attempted to call Dana Martin who was going to testify that the victim had told her on a previous occasions that if anything happened to her that Martin should tell the police that appellant was responsible. (Vol. XII, 959-962) Defense objected on the grounds that the victim's state of mind was not relevant to any material issue at trial and the trial court agreed and refused to allow Martin to testify. (Vol. XI, 961) However, after the defense had put on its case, the trial court reversed itself and permitted the state to call Dana Martin in rebuttal over defense objection. (Vol. XIII, 1126-1127) Following deliberations, the jury returned a verdict finding appellant guilty as charged. (Vol. XIV, 1269)

On April 21, 1998, appellant proceeded to the penalty phase portion of his trial. (Vol. XV, 1-162) After the defense had presented its case, the state called

appellant's ex-wife as a rebuttal witness. (Vol. XV, 89-98) The prosecutor prefaced his decision to call this witness by stating that he was entitled to rebut the statutory mitigating factor that appellant had no significant history of criminal activity but then noted "I haven't really heard anything to rebut." (Vol. XV, 87) Nevertheless, the state called Ms. Linda Wise to testify. Following deliberations, the jury returned an advisory recommendation that appellant be sentenced to death by a count of seven to five. (Vol. XV, 157)

On May 12, 1998, Judge Benson conducted a hearing at which the parties presented additional evidence and argument regarding the propriety of the sentence to be imposed. (Vol. VII, 944-979) On June 9, 1998, appellant appeared before Judge Benson for sentencing. (Vol. VII, 980-985) Judge Benson adjudicated appellant guilty and sentenced him to death. (Vol. XII, 983) Judge Benson filed a written order setting forth his findings of fact in support of the death penalty. (Vol. IV, 605-614)

Appellant filed a timely notice of appeal on June 15, 1998. (Vol. IV, 619-620) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (Vol. IV, 630)

STATEMENT OF THE FACTS

Guilt Phase

Julie Stoll was killed on November 3, 1994 in her home. The body was examined by the medical examiner who observed considerable trauma to her neck and head, a fracture to the fourth cervical vertebra and petechial hemorrhaging behind her eyeball which is caused by a lack of oxygen. (Vol. XII, 804-805) Dr. Gore testified that the cause of death was strangulation due to severe head and neck trauma. (Vol. XII, 805) The injuries were consistent with someone placing the victim's neck over a wooden slat and pressing their knee into the back of her neck. (Vol. XII, 805) Although Dr. Gore stated that the victim could have taken from fifteen to thirty minutes to die, his findings did not indicate that the victim was conscious during the entire time. (Vol. XII, 817, 822)

When Christopher Stewart was seventeen years of age, he moved to the Central Florida area from Ohio and met appellant and his wife Julie through his aunt who was a friend of Julie's. (Vol. X, 536-537) Eventually Stewart moved in with appellant and his wife and worked with appellant for approximately two to three months at which time he returned to Ohio to finish high school. (Vol. X, 539-540) During the time that Stewart stayed with appellant he paid no rent and appellant paid him for the work that he did and fed him also. (Vol. X, 539-540) After finishing high school, Stewart entered the Air Force and stayed in for one

and one half years at which time he got a general discharge under honorable conditions and returned to Florida. (Vol. X, 541) Once again Stewart contacted appellant and his wife about working for appellant. (Vol. X, 542) Stewart moved in with appellant and his wife and Julie's son Mikey who also lived with them. (Vol. X, 544) Sometime during the last week of October, appellant appeared in court to answer a charge of battery against his wife. (State exhibit 16) Appellant entered a plea of no contest without benefit of a lawyer representing him. (Vol. XIII, 1038) On October 31, 1994 appellant went to the probation office and met with Jim Riley who explained the conditions of his probation to him. (Vol. XII, 852) Appellant told Riley that he wanted to withdraw his plea because his wife did not want to press the charge. (Vol. XII, 854, 858) Riley explained the procedure to appellant and told him that he had thirty days to move to withdraw the plea. (Vol. XII, 855) When appellant came back from the probation office, he told his wife he was going to get an attorney to get the matter straightened out. (Vol. XIII, 1037) When appellant told his wife this, she got very angry and told appellant that she would pack her bags and leave. (Vol. XIII, 1044-1045) Appellant replied that she did not have to leave but Julie replied that the marriage was over. (Vol. XIII, 1045) Appellant left the room and went out to his shed and as he did so, Julie turned to Chris Stewart and told him that he had better

straighten appellant out. (Vol. XIII, 1048) While appellant was in the shed, Stewart came out and asked if he was alright and asked what he was going to do. (Vol. XIII, 1049) Appellant stated that he was going to get an attorney and told Stewart that he did not understand Julie and how she could act that way when “the bitch is gonna die”. (Vol. XIII, 1050) Appellant meant not that Julie was going to be killed but rather that she only had a short period of time to live due to her medical condition and thus he could not understand her attitude. (Vol. XIII, 1051)

Stewart testified that appellant began to talk about ways to kill Julie and decided to put medication in Julie’s coffee to make it appear as though she died of an overdose. (Vol. X, 548) Stewart observed appellant take some of Julie’s medication, crush it, and place it in a vial. (Vol. X, 549) On the morning that Julie died, appellant emptied the drug into some coffee and added Kahlua and gave it to Julie just as appellant and Stewart had discussed the night before. (Vol. X, 550) Although Julie drank half of the coffee, it had no effect on her. (Vol. X, 551) Appellant and Stewart went out to the garage and appellant told Stewart that the medication wasn’t working so he brought up the idea of staging a robbery. (Vol. X, 552) According to the plan, Stewart put on a pair of latex gloves and waited outside while appellant went in and hugged his wife. (T 555-556) As they

were hugging, Stewart walked in, went up behind Julie, placed his left arm over her shoulder and pushed her head over his arm with his right hand in an effort to break her neck. (Vol. X, 557) Stewart used as much force as he could and Julie fell to the floor but was not dead. (Vol. X, 558) Julie asked appellant why he was letting Stewart do this to her and she got up and ran to the front door, opened it, and tried to get out. (Vol. X, 558-559) Stewart and appellant ran after her, grabbed her, and pulled her back into the bedroom towards the bed which is approximately four to five feet from the door. (Vol. X, 559-560) Stewart pushed Julie down onto the large waterbed, grabbed her arms and shoulders while appellant grabbed Julie's legs until Stewart could put his knee onto her back. (Vol. X, 562) Stewart held Julie's head down into the bed trying to suffocate her and Julie struggled. (Vol. X, 563) With his knee on the small of her back, Stewart grabbed Julie's head, turned it clockwise until he could see her face at which time Julie stopped struggling. (Vol. X, 563-564) Stewart claimed that appellant left the room and returned with a large black trash bag, opened it, handed it to Stewart and told him to put it over Julie's head, which Stewart did. (Vol. X, 564) Apparently Julie chewed through the bag causing holes in the bag so Stewart pulled it off her head. (Vol. X, 565) According to Stewart, appellant and he lifted a cushion off the side of the bed exposing the wood railing and Stewart then

positioned Julie so that her head was across the rail with her neck resting on it. (Vol. X, 565-566) Julie was not struggling at this time and was face down. (Vol. X, 566) Stewart then placed his knee on the top of Julie's neck and applied full force. (Vol. X, 566) While Stewart was doing this, appellant left the room and collected things to make it look like a robbery occurred. (Vol. X, 567) According to Stewart, appellant and he then got into appellant's truck and went to work and on the way they stopped at various dumpsters where they threw away the items that they had collected from the home. (Vol. X, 569) They went to their job and finished laying carpet after which they headed home. (Vol. X, 570-571) They got home around 3:00 in the afternoon and entered through the rear door. (Vol. X, 572) Appellant called 911 to report his wife's death. (Vol. X, 572-573) When the police arrived, Stewart told them that they came home and found the house had been robbed and Julie was dead. (Vol. X, 584) Appellant and Stewart were taken to the police station where they were interviewed by several police officers. (Vol. X, 585) Stewart gave four separate statements to the police. In the first statement Stewart related the robbery scenario. (Vol. X, 585) In his second statement, Stewart told the officers that appellant had something to do with the murder but denied any participation on his part. (Vol. X, 585) In the next two statements, Stewart elaborated on the facts and ultimately admitted that he was the person who

actually killed Julie. (Vol. X, 586) Stewart admitted that his first two statements that he gave to the police were complete lies but maintained that the second two statements were the truth. (Vol. XI, 625) Stewart pled guilty to second degree murder and received a sentence of 50 years in return for his testimony against appellant. (Vol. XII, 592) Stewart admitted that he did all the acts which caused the death of Julie. (Vol. XI, 641) Stewart stated that he killed Julie because appellant told him to do so. (Vol. XI, 606) Stewart admitted that in all the time that he lived with appellant and Julie, he never saw appellant hit Julie or throw anything at her. (Vol. XI, 606)

Several police officers interviewed appellant at the police station over a period of approximately twelve hours. (Vol. XI, 657) Initially, appellant told the police that his wife had multiple sclerosis and had been diagnosed with a brain tumor. (Vol. XI, 663-664) When appellant left home that morning, Julie was in bed. (Vol. XI, 668) When appellant returned from work, he noticed that the back door was open and that a garbage can was overturned. (Vol. XI, 682) Appellant went inside and went to the bathroom and when he came out he saw Julie still on the bed and thought that she had blacked out. (Vol. XI, 682) Upon closer examination, appellant realized that something was wrong with Julie and called 911. (Vol. XI, 682-683) Appellant also related that Julie had been beaten by her

ex-husband and was jealous of Chris spending so much time with appellant. (Vol. XI, 686-687) One time, when Chris had been drinking, Julie got very angry and threatened to call the police and tell them that appellant hit her and that appellant was contributing to the delinquency of a minor by allowing Chris to have beer. (Vol. XI, 688) From that moment on, Stewart did not like Julie. (Vol. XI, 688)

In a second taped statement that was played to the jury, appellant related that Chris had been upset with Julie since September because he believed that she was trying to divorce appellant and take everything. (Vol. XI, 740) Over the last two days, Stewart tried to kill Julie with pills but they did not work. (Vol. XI, 741) Appellant told Chris that he wanted no part of this but that if there is going to be a divorce he wanted it to be amicable. (Vol. XI, 742) On the morning of Julie's death, appellant's mother called around 8:00 after which appellant went out to load his truck for work. (Vol. XI, 742) While he was doing this, appellant heard screaming and heard Julie yell "Chris don't. Chris, no. Stop." (Vol. XI, 743) After Julie yelled his name, appellant heard nothing more and gathered all of his tools before going back inside. (Vol. XI, 743) As he was approaching the door, it flew open when Chris kicked it. (Vol. XI, 744) Chris was standing holding a bag containing several jewelery boxes and other items and told appellant "It's done. I took care of it." (Vol. XI, 744) When appellant asked him what he

was talking about, Chris replied “we have to go now.” (Vol. XI, 744) Appellant did not know that Chris had killed Julie and was so scared to ask but later Chris told him that he thought he had killed her. (Vol. XI, 744) Chris told appellant that he had twisted Julie’s neck and killed her. (Vol. XI, 745) On the way to work, Chris suggested that he made it look like a robbery so they threw away the items that Chris had taken from the house. (Vol. XI, 746-748) Although appellant stated that he did not know that Chris was going to kill Julie that morning he knew that eventually it might happen. (Vol. XI, 751) Although appellant helped Chris dispose of the property, he never laid a hand on Julie and did not kill her. (Vol. XI, 752-756)

In the final taped statement played to the jury, appellant said that after Mikey had gone to school, he went into the kitchen while Chris went out to the shed. (Vol. XI, 766) Chris came back in the house and went into the dining room and did whatever he did. (Vol. XI, 766) Julie screamed for appellant but he simply went outside. (Vol. XI, 766) Stewart grabbed Julie and they struggled in the dining room and then went into the bedroom. (Vol. XI, 767) Stewart killed Julie because she was trying to discredit appellant and make him look bad. (Vol. XI, 771) After the argument between appellant and Julie, Chris came out to the shed where appellant was. (Vol. XI, 777) Although appellant stated “the bitch

has to die, no other way around it,” appellant never told Chris to kill her. (Vol. XI, 777) Appellant maintained that he did not participate in the murder of his wife but that it was Stewart alone who killed her. (Vol. XI, 779)

Randy Myers met appellant in county jail. (Vol. XII, 877) Initially, Myers spent two and one half months in the same Pod with Chris Stewart before he was transferred to a different Pod where he met appellant. (Vol. XII, 877) According to Myers, appellant approached him and stated that he could be appellant’s “meal ticket” out of jail by stating that Myers could tell the authorities that Stewart admitted to everything. (Vol. XII, 879-880) Appellant offered him \$2,000 to \$3,000 if he would testify on his behalf. (Vol. XII, 880-881) Appellant began to tell Myers what he wanted him to say but Myers told him to write it down as he could not remember it. (Vol. XII, 881-882) Ultimately, appellant gave him a script that Myers was to follow. (Vol. XII, 881-882) Myers was released from jail and within a month he was contacted by an investigator who talked to him about what he knew. (Vol. XII, 882-883) The investigator took notes of what Myers was telling him and later returned with a typed affidavit to which Myers swore under oath. (Vol. XII, 882-883) Some of the affidavit was true and some of it was not. When Myers said that he met Stewart at jail and that on two occasions Stewart said he had killed Julie by snapping her neck that was true. (Vol. XII,

885) The allegations in the affidavit that Stewart claimed he had killed others and that he got off on killing others were not true and neither was the allegation that Julie had hired Stewart to take out appellant. (Vol. XII, 886-889) However, it was true that Stewart's nickname in jail was the chiropractor. (Vol. XII, 887) The allegations that the victim and Stewart were having an affair and that the victim wanted Stewart to get rid of appellant were not true. (Vol. XII, 892) Myers claimed that after he spoke to the investigator and signed the affidavit he had a change of heart and took the script that appellant had given him to the prosecutor. (Vol. XII, 896) Myers claimed that appellant told him that he helped to kill his wife but that Stewart never claimed to have helped kill Julie. (Vol. XII, 911) Stewart did brag to the people in the jail that he had broken people's necks. (Vol. XII, 919)

Appellant testified at trial that he did meet Randy Myers in jail and admitted that he did write the information that was in the so called script but testified that the information in it came directly from Randy Myers. (Vol. XII, 988-990) Appellant testified that Myers ran into appellant after they were both out of jail and Myers told him that the prosecutor was putting a lot of pressure on him and threatened to have his probation revoked if he testified for appellant. (Vol. XII, 994-995) Appellant denied ever offering any money to Myers for his testimony.

(Vol. XII, 997) Myers approached appellant in jail and told him that he had been in a cell with Stewart and could help appellant in his case. (Vol. XII, 997)

Although appellant said that that was alright, he never spoke to Myers about his case. Rather he gave Myers his attorney's card and told him to talk to him. (Vol. XII, 998) Appellant gave his statement to the officer at 9:55 p.m. wherein he told them that Stewart killed Julie. (Vol. XIII, 1057) Stewart did not give his statement to the police saying that appellant told him to kill Julie until 11:50 p.m., two hours later. (Vol. XIII, 1058) Appellant denied discussing with Stewart on the morning of Julie's death ways of killing her. (Vol. XIII, 1068-1072)

Appellant never attempted to poison Julie by putting drugs in her coffee. (Vol. XIII, 1075) Appellant admitted that he told the police that he felt responsible because he heard Julie screaming and did nothing to help her. (Vol. XIII, 1082)

Appellant was shocked when he found out that Stewart actually killed Julie but Stewart told him that if appellant told the police, Stewart would implicate appellant in the murder. (Vol. XIII, 1088-1089)

Over objection, the state called Dana Martin who testified that she and Julie were very close and when she heard that Julie was dead she immediately went to the house where she talked to Detective Barnes. (Vol. XIII, 1129-1130) Martin told Barnes that in August, Julie came to her house one Saturday morning very

upset and said that she and appellant had been fighting all night. (Vol. XIII, 1131) Julie told Martin that if anything happened to her she should go and tell police that appellant did it. (Vol. XIII, 1131) According to Martin, appellant had threatened to kill Julie more than once and Julie was certain that he would do it. (Vol. XIII, 1131) On another occasion, three weeks before that Saturday in August, Martin noticed a bruise on Julie and Julie told her that appellant had done it. (Vol. XIII, 1134) Martin took Julie back home and although appellant was there, he soon left. (Vol. XIII, 1134) Julie gathered up some her son's belongings and some of her papers and gave them to Martin for safekeeping. (Vol. XIII, 1135) Martin kept the items for several months until Julie retrieved them. (Vol. XIII, 1135) Martin knew that Julie was terminally ill. (Vol. XIII, 1137)

Penalty Phase

Dr. Gore testified that the victim showed considerable trauma to her neck and head. (Vol. XIV, 24) The victim had a black eye and her upper eyelid was swollen and she had definite markings on her neck. (Vol. XIV, 25) The injuries to Julie included hemorrhaging to the deeper tissues to the neck, a fracture of the fourth cervical vertebra, hemorrhaging in the vertebral canal which compressed the spinal cord in the neck region. (Vol. XIV, 27) The injuries were consistent with having a knee placed on top of her neck while it was on a hard surface. (Vol.

XIV, 28) The cause of death was strangulation which is simply the constricting of the air passage resulting in the stoppage of oxygen flow. (Vol. XIV, 29) When asked how long before Julie lost consciousness, Dr. Gore opined that there was a wide window and that it could have been anywhere from a few minutes up to twenty minutes. (Vol. XIV, 30) If the person was conscious, she would be in considerable pain. (Vol. XIV, 32) However, Dr. Gore could not say that Julie was conscious and admitted that if she was not conscious she was not fearful. (Vol. XIV, 44) Dr. Gore could also not say when the other injuries to the neck occurred in relation to the fracture of the fourth cervical vertebrae. (Vol. XIV, 35)

Vivian Parker, Julie's mother, read a letter she wrote about what her daughter's death meant to her. (Vol. XIV, 46-52) Julie told her mother that she had a brain tumor and had only four months to live. (Vol. XIV, 53) Parker had very little contact with Julie from the age of three until she was sixteen, seeing her only six times. (Vol. XIV, 53-54)

Linda Stoll, appellant's mother, testified that appellant lived at home until he was eighteen years of age. (Vol. XIV, 60) Appellant was born with a cleft palate which required surgery at four months of age. (Vol. XIV, 61) Although the surgery was successful appellant always wondered why he looked different. (Vol. XIV, 61) When he was in kindergarten, appellant was attacked by a German

shepherd which tore out the side of his nostril which resulted in more surgery. (Vol. XIV, 61) Appellant hated school but ultimately got his high school diploma and started working with his father in the carpet business. (Vol. XIV, 62-63) Appellant got married and started his own business. (Vol. XIV, 64) Appellant and his first wife married, divorced and then remarried at which time they had a daughter. (Vol. XIV, 66-67) Appellant divorced his first wife a second time and then married Julie and treated her two sons as his own. (Vol. XIV, 69-73) During the twenty-three months of their marriage, Julie went to Chicago six or seven times staying anywhere from ten days to three weeks for medical treatment for her multiple sclerosis and brain tumor. (Vol. XIV, 76-77) Ms. Stoll called on the morning of Julie's death and spoke with appellant and with Julie. (Vol. XIV, 79) They spoke about Christmas presents that were going to be purchased and then Ms. Stoll spoke with appellant about meeting with her to measure some rooms for carpeting. (Vol. XIV, 80-82) Ms. Stoll acknowledged that there had been a problem between appellant and Julie the previous May which caused him to leave the house and to move back home. (Vol. XIV, 84) Ms. Stoll asked appellant not to return to Julie but appellant insisted that Julie was only like she was because of her illness and returned. (Vol. XIV, 85)

Linda Wise, appellant's first wife, testified that she and appellant were

together off and on from 1983 to 1991. Ms. Wise testified that on one occasion appellant mistakenly thought that she was with another man and struck her in the face with the back of his hand. (Vol. XIV, 90-91) She filed a police report against appellant and filed for divorce two days later. (Vol. XIV, 89-92) Wise testified that appellant once struck her when she was seven months pregnant which she reported to her doctor but not to the police. (Vol. XIV, 92-93) Wise testified that appellant beat her off and on during the entire time they were together but that there were too many instances for her to recall. (Vol. XIV, 93)

SUMMARY OF THE ARGUMENTS

Point I

A victim's prior expressions of a defendant are not inadmissible at trial and the victim's state of mind is not relevant to any material issue at trial. Such statements are hearsay and constitute the opinion of a witness as to the appellant's guilt.

Point II

Prior consistent statements are inadmissible to corroborate or bolster a witness' trial testimony.

Point III

It was error to admit into evidence an autopsy photograph of the victim where such photo was not relevant to any issue at trial.

Point IV

While a trial court may take judicial notice of its court files, such files must be relevant before being admissible into evidence.

Point V

A death sentence imposed on a non trigger man cannot be sustained where the actual trigger man received a deal from the state to a lesser sentence.

Point VI

The evidence at trial failed to support a finding beyond a reasonable doubt the murder of Julie Stoll was heinous atrocious and cruel for that it was committed in a cold calculated and premeditated fashion.

ARGUMENTS

POINT I

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CALL DANA MARTIN AS A REBUTTAL WITNESS.

After the defense rested, the state called Dana Martin in rebuttal. (Vol. XIII, 1126-1127) Defense counsel objected. His objection was overruled and Ms. Martin proceeded to testify. Defense counsel continued to object on the grounds that her testimony constituted impermissible hearsay and was again overruled. (Vol. XIII, 1126-1127, 1130) Ms. Martin then proceeded to testify that some three months prior to the date on which she was killed, Julie Stoll came to her house very upset and crying and told her that she and appellant had been fighting all night. Julie further told Martin that if anything should happen to her, Martin should tell the police that appellant did it. (Vol. XIII, 1131) Julie also told Martin that appellant had threatened to kill her on more than one occasion and that she knew that appellant would do it eventually. (Vol. XIII, 1131) Martin continued to testify that she had seen bruises on Julie Stoll some four months before the

incident and Julie told her that appellant had caused them. (Vol. XIII, 1134) Previously, the trial court had ruled that the state could not present this testimony during its case-in-chief. (Vol. XII, 959-962) Appellant asserts that the ruling by the trial court in permitting the state to present this testimony in rebuttal was clear error.

A victim's prior expressions of fear of a defendant are not admissible under Section 90.803 (3)(a)(1), Florida Statutes (1993) because a victim's state of mind is not relevant to any material issue at trial. *State v. Bradford*, 658 So.2d 572 (Fla. 5th DCA 1995) *Correll v. State*, 523 So. 2d 562 (Fla. 1988) *cert. denied*, 488 U.S. 871 (1988) Such evidence has been ruled inadmissible because the state is attempting to use the victim's statement improperly to prove the defendant's state of mind. *Downs v. State*, 574 So.2d 1095, 1098 (Fla. 1991) While there are some situations in which a victim's prior expressions of fear of the defendant are admissible, courts have developed three rather well-defined categories in which the need for such statements overcomes almost any possible prejudice. *Kennedy v. State*, 385 So.2d 1020 (Fla. 5th DCA 1980) The court explained that these three examples occur when the defendant: (1) claims it was self-defense, or (2) claims the victim committed suicide, or (3) claims the death was accidental. Then the hearsay statements are admissible to rebut the defendant's claim as to how the

murder happened. None of these situations exist in the instant case. Furthermore, the testimony by Dana Martin rebutted nothing that was presented during the defense case. In essence, the state presented this testimony as the opinion of a lay witness as to appellant's guilt. This is absolutely prohibited. It is clear that error is occasioned where a witness, including a lay witness, is permitted to offer her opinion about the guilt of the defendant. *Zecchino v. State*, 691 So.2d 1197 (Fla. 4th DCA 1997); *Gibbs v. State*, 193 So.2d 460 (Fla. 2nd DCA 1967); *Glendening v. State*, 536 So.2d 212, 221 (Fla. 1988), *cert. denied*, 492 U.S.907 (1989) Where identity is at issue, the admission of such highly prejudicial testimony is harmful error. *Zecchino, supra*. The state's case against appellant depended almost exclusively on the testimony of Chris Stewart, the man who actually killed Julie Stoll. Dana Martin's testimony could have been used by the jury to improperly bolster Chris Stewart's testimony, thus increasing the likelihood that the error was harmful. *See Henry v. State*, 700 So.2d 797 (Fla. 4th DCA 1997); *Bass v. State*, 547 So.2d 680 (Fla. 1st DCA 1989) (improper evidence may be prejudicially harmful in a two witness "swearing match" where there is little or nothing to corroborate the testimony of the witnesses) Appellant is entitled to a new trial.

POINT II

IN VIOLATION OF THE SIXTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 TO THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE A PRIOR STATEMENT OF A CO-DEFENDANT AS SUBSTANTIVE EVIDENCE OF GUILT OF THE APPELLANT.

Chris Stewart and appellant were arrested at the same time and charged with the murder of Julie Stoll. On the day of the murder, Stewart and appellant were both taken to the police station and questioned at some length. Stewart gave four statements to the police each differing somewhat from the other. In the first two statements Stewart denied any participation in the murder of Julie Stoll. In the third and fourth statements, Stewart admitted that he actually killed Julie Stoll but stated that it was done at the request of appellant. At trial, Stewart testified as the main state witness against appellant. In return for his testimony, Stewart was allowed to plead to second degree murder for a sentence of fifty years in prison. Stewart was cross-examined extensively concerning his plea bargain as well as the previous statements that he made to the police. Stewart admitted that the first two statements were complete lies but claimed the third and fourth statements were substantially true. He also opined that what he was testifying to at trial was the

truth. At a point later in the trial, the state recalled Chris Stewart for the purpose of playing the fourth statement given by Stewart to the police on the day of the murder. (Vol. XII, 940-947) The state's purpose in seeking to admit the statement was to rebut a claim of recent fabrication. However, defense counsel objected and stated that they never claimed any recent fabrication. The trial court overruled the objection and permitted the testimony. (Vol. XII, 947) Appellant asserts that this was error.

As a general proposition, prior consistent statements are inadmissible to corroborate or bolster a witness' trial testimony. *Chandler v. State*, 702 So.2d 186, 197 (Fla. 1997) However, prior consistent statements are considered non-hearsay if the following conditions are met: the person who made the prior consistent statement testifies at trial and is subject to cross-examination concerning that statement; and the state has offered the prior statement to "rebut and express or implied charge...of improper influence, motive, or recent fabrication." *Rodriguez v. State*, 609 So. 2d 493, 500 (Fla. 1992) In the instant case, Stewart testified in his original appearance at trial to the fact that he made four different statements to the police on the day that Julie Stoll was murdered. He acknowledged that the first two statements were completely false but the third and fourth were substantially true. However, there were several differences

between these statements and his trial testimony. It was fully explored on cross examination as well as by the state on its own direct examination that Stewart was given a deal by the state, whereby he would plead to second degree murder in exchange for a sentence of 50 years in return for his testimony against appellant at trial. Interestingly, the state never sought to admit the actual prior statements of Stewart during his testimony. Subsequently, as their final witness, the state recalled Christopher Stewart for the sole purpose of playing the prior statement. The defense had not argued that there was recent fabrication of the witness' trial testimony. Indeed, defense counsel acknowledged the prior statement of Stewart whereby he substantially implicated appellant in the same way that he did at trial. Defense counsel's argument was that this fourth statement was made after appellant had given a statement implicating Stewart. (Vol. XIII, 1057-1058) The prior statement was clearly hearsay, not admissible under any exception to the hearsay rule, and not admissible to rebut a charge of recent fabrication. The error cannot be deemed harmless since the state's case against appellant relied almost exclusively on the testimony of Christopher Stewart. The improper bolstering of his trial testimony was clear error which entitles appellant to a new trial.

POINT III

IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ADMITTING AN AUTOPSY PHOTOGRAPH OVER OBJECTION WHERE THERE WAS NO RELEVANCE SHOWN TO THE PHOTOGRAPH.

At trial, the medical examiner, Dr. Gore, testified as to the cause of death. Over objection, the state was permitted to introduce a photograph of the victim which was taken at the morgue during the autopsy. (Vol. XII, 815) Appellant asserts that this was error.

The test for admissibility of photographic evidence is relevancy rather than necessity. *Nixon v. State*, 572 So.2d 1336, 1342 (Fla. 1990), *cert. denied*, 503 U.S. 854 (1991) Generally, the admission of photographic evidence is within trial court's discretion and the trial court's ruling on this issue will not be disturbed on appeal unless there is clear showing of abuse. *Wilson v. State*, 436 So.2d 908 (Fla.1983) However, this Court has previously determined that the admission of autopsy photographs may be improper where other photographs are adequate to support the issues at trial. *Thompson v. State*, 619 So.2d 261 (Fla. 1993) (autopsy photographs were improperly introduced when they were not essential given the

other photographs introduced were more than adequate to support the claim that the murder was heinous, atrocious, or cruel. By their very nature, autopsy photographs are gruesome. Understandably, persons of common sensibilities will find such photographs disturbing. Therefore, this Court has cautioned trial judges to carefully scrutinize photographs for prejudicial effect. *Marshall v. State*, 604 So.2d 799 (Fla. 1992)

In the instant case, state's exhibit 8, the autopsy photograph admitted during the testimony of Dr. Gore, the medical examiner. Traditionally, autopsy photographs have been admissible where it is shown that such photographs assist the medical examiner in his explanation of the victim's wounds and the cause of death. *Akins v. State*, 694 So. 2d 847(Fla. 4th DCA 1997); *Pope v. State*, 679 So.2d 710 (Fla. 1996). However, in the instant case, Dr. Gore himself testified that the picture in question was not necessary to his determination of the cause of death or his testimony at trial. (Vol. XII, 815) Therefore, the photograph simply had no relevance. The trial court should not have permitted the state to admit this photograph into evidence which did nothing except inflame the jury's passions. Appellant is entitled to a new trial.

POINT IV

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE A PRIOR STATEMENT OF THE VICTIM.

Prior to trial, the state requested the trial court to take judicial notice of the case file in case no. 94-6189 which was a misdemeanor battery charge against appellant wherein Julie Stoll, the victim of the homicide, was also the victim. (Vol. VIII, 22-24) Defense counsel objected on the grounds that such documents were impermissible hearsay. (Vol. VIII, 24) The trial court overruled the objection took judicial notice of the court file but limited the documents to the actual incident report written by Julie Stoll in her own handwriting and the actual plea and sentence. (Vol. VIII, 22) Thereafter, during the testimony of Vivian Parker, Julie Stoll's mother, the state attempted to seek admission of the court documents and to have Ms. Parker read the incident report. (Vol. XII, 836-837) Defense counsel objected on the grounds that there was no predicate and that the prejudicial impact would far outweigh any probative value to having Parker read the incident report. The trial court acknowledged the objection and stated that

although he would take judicial notice of it he would not permit Ms. Parker to read the document. (Vol. XII, 836-837) Thereafter in accordance with the court's ruling the state admitted the documents and published them to the jury. (Vol. XII, 841-842) Appellant asserts that the ruling of the trial court was error.

A court may take judicial notice of court records. Section 90.106 (6), Florida Statutes (1993). However, the test for admissibility of any evidence must be relevancy. Section 90.402, Florida Statutes (1993). It is clear, that at any trial, a prior consistent statement of a victim is generally inadmissible to corroborate or bolster the trial testimony and that such statements are usually hearsay. *Chandler v. State*, 702 So.2d 186 (Fla. 1997). The prior statement of the victim to the police particularly by way of an incident report, is not generally subject to cross-examination. Thus, such incident reports are clearly hearsay and not admissible at trial. However, by taking judicial notice of such clearly inadmissible statements, the court in essence did indirectly what it could not do directly. This is clearly error, whether done by the trial court, *Tedder v. Video Elec. Inc.*, 491 So. 2d 533, 535 (Fla. 1986) or by the state. *Dragovich v. State*, 492 So.2d 350 (Fla. 1986)

In the instant case, appellant entered a plea of no contest to the offense of a misdemeanor battery on Julie Stoll. A plea of no contest does not admit the facts or guilt. The complaint filed by Julie Stoll is without question hearsay that is not

admissible under any recognized exception to the hearsay rule. Appellant timely objected to such admission and was overruled. Notwithstanding its inadmissibility as hearsay, appellant questions the relevancy, if any, of this affidavit. The evidence at trial shows that appellant was going to attempt to withdraw his plea. In order to do this, it would be necessary to have the assistance of Julie Stoll. Thus, appellant had no motive to kill Julie on this basis. However, despite the lack of any readily apparent relevancy, the evidence in question was extremely prejudicial to appellant. It showed nothing more than a mere propensity on appellant's part to harm his wife. Again, it is important to note that appellant did not physically murder Julie Stoll. Christopher Stewart did. Thus, the admissibility of this prior plea to battery simply had no relevance. The admission was error which requires a new trial.

POINT V

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, THE DEATH SENTENCE IMPOSED UPON APPELLANT IS DISPROPORTIONATE.

Defense counsel filed pretrial motions to preclude the state from seeking the death penalty on the grounds that it was prohibited as being disproportionate since the actual murderer had received a deal to plead to second degree murder in exchange for 50 years. The trial court denied the motion and following presentation of all evidence and the jury's recommendation, imposed the death penalty for appellant's conviction for first degree murder. In so doing, the trial court found two aggravating circumstances, the murder was especially heinous, atrocious and cruel and that the murder was committed in a cold calculated premeditated fashion without any pretense of moral or legal justification. The trial court accorded the plea bargain given to Christopher Stewart, the actual murderer no weight in determining the propriety of the sentence. (Vol. IV, 605-614) The death sentence imposed on Michael Stoll cannot stand.

Soon after the re-enactment of our death penalty statute in Florida, this Court recognized certain basic tenets applicable to death penalty jurisprudence:

We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same the law should be the same.

Slater v. State, 316 So.2d. 539, 542 (Fla. 1975) This Court has continued to adhere to this basic principle of proportionality. *Hazen v. State*, 700 So.2d 1207 (Fla. 1997) A trial court's determination concerning the relative culpability of co-perpetrators in a first degree murder case must be supported by competent substantial evidence. *Puccio v. State*, 701 So.2d 858 (Fla. 1997) Generally, a death sentence imposed on a non trigger man will not be sustained where the actual trigger man received a deal from the state to a lesser sentence. *Hazen, supra., Puccio, supra.*

In the instant case, there is absolutely no doubt but that Christopher Stewart killed Julie Stoll with his own hands. Stewart admitted to doing so. Although Stewart said he did it simply because appellant told him to do it, there is no evidence that appellant in any way threatened him, paid him, or otherwise forced him to commit the murder. Stewart himself admitted that he simply did not know why he did it. Stewart's culpability is every bit as equal to if not greater than appellant's culpability. The trial court's finding of fact in this regard is simply unsustainable under the facts. In several cases where this court has affirmed a

death sentence on a non trigger man, the court has pointed to the fact that such murders were contract killings or enforcement-style killings as part of a criminal organization. *Williams v. State*, 622 So.2d 456 (Fla. 1993); *Antone v. State*, 382 So.2d 1205 (Fla. 1980) *cert. denied*, 449 U.S. 913 (1980). These facts are not present in the instant case. Not only did appellant not provide any financial motivation to Stewart to kill his wife he did not even provide the means to kill her to Stewart. Rather, Stewart used his bare hands and knees to effect the death of Julie Stoll. His culpability cannot be minimized. To allow someone with such great culpability to plead to second degree murder in return for a sentence of 50 years (which all parties agree will be substantially less time actually served) renders imposition of the death penalty on appellant totally unconstitutional. To allow this death sentence to stand would make a mockery of our system of justice which as noted by Justice Overton in *Slater, supra* we take great pride in. Appellant's sentence must be reversed.

POINT VI

IN VIOLATION OF THE FIFTH, SIXTH,
EIGHTH, AND FOURTEENTH AMENDMENTS
TO THE UNITED STATES CONSTITUTION
AND ARTICLE I, SECTIONS 1, 12, AND 17 OF
THE FLORIDA CONSTITUTION,
APPELLANT'S DEATH SENTENCE IS
IMPROPER AS WHERE THE TRIAL COURT'S
FINDINGS REGARDING AGGRAVATING
CIRCUMSTANCES ARE IN ERROR.

In imposing the death sentence, the trial court found two aggravating circumstances have been proven beyond a reasonable doubt. Appellant contends that neither of these aggravating circumstances can be sustained.

A. Cold, Calculated and Premeditated.

To establish that a murder was cold calculated and premeditated:

[T]he jury must first determine that the killing was a product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification.

Gordon v. State, 704 So.2d 107, 114 (Fla. 1997) (quoting *Jackson v. State*, 648 So.2d 85, 89 (Fla. 1994)).

In the instant case, the evidence arguably supports a finding of premeditated

murder. The evidence presented through Christopher Stewart arguably supports that there had been a plan to commit this murder. However, such plan could hardly be characterized as a careful plan or a prearranged design. According to Christopher Stewart, the decision to kill Julie Stoll was not made until the evening before the murder. The murder to be accomplished by placing drugs in the victim's coffee. This failed. At this point, the decision to have Stewart kill Julie was made. That this was not carefully thought out is borne out by what actually transpired. Under the "plan" Stewart was to come up to Julie from behind, grab her and break her neck. This did not occur. Rather than being the product of cold and calculated plan, the instant case was nothing more than a frenzied attempt to effect the death of Julie Stoll. This was not the type of heightened premeditation necessary to sustain the finding of cold calculated and premeditated. This aggravating factor is not to be utilized in every premeditated murder prosecution but is reserved primarily for "those murders which are characterized as execution or contract murders or witness elimination murders. (citation omitted)" *Bates v. State*, 465 So. 2d 490, 493 (Fla. 1985); *Maharaj v. State*, 597 So.2d 786 (Fla. 1992); *Pardo v. State*, 563 So.2d 77 (Fla. 1990).

While the absence of motive is not fatal to a conviction for first degree murder, appellant suggests that the lack of motive should preclude a finding that

the murder was cold calculated and premeditated. Because it is a heightened premeditation that is necessary to prove this factor beyond a reasonable doubt, the total lack of any motive for a murder militates against a finding of this aggravating circumstance. The record in the instant case contains no motive for the murder of Julie Stoll. There is no showing that appellant was to get any insurance proceeds. She was not going to be eliminated as a witness in any criminal matter against appellant. Indeed by everyone's testimony she had only four months to live. While this fact certainly does not minimize the tragedy of her death, it merely points out that the aggravating factor of cold calculated premeditated is missing in this case. This factor must be stricken.

B. Heinous Atrocious or Cruel.

This Court has defined the aggravating circumstance of heinous atrocious or cruel in *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973):

It is our interpretation that heinous means extremely wicked or strikingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent

that the aggravating circumstance applied only to crimes and **especially** heinous, atrocious, or cruel.

What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless less or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, supra at 9.

As this Court has stated in *Santos v. State*, 591 So.2d 160 (Fla. 1991) and *Cheshire v. State*, 568 So.2d 908 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a desire to inflict a high degree of pain or an utter indifference to or enjoyment of the suffering of another. *See e.g., Douglas v. State*, 575 So.2d 165 (Fla. 1991) (torture murder involving heinous acts extending over several hours).

The United States Supreme Court in *Sochor v. Florida*, 504 U.S. 527 (1992), noted that this Court has consistently applied the heinous, atrocious and cruel to strangulation murders. However, this Court has never ruled that all strangulation murders are *per se* heinous, atrocious, and cruel. In *Smith v. State*, 407 So.2d 894 (Fla. 1981), this Court affirmed the finding of heinous, atrocious and cruel involving a strangulation murder. However, in doing so, this Court

noted that the heinous, atrocious and cruel aspect of the killing deals more with the manner in which the victims are strangled. In that case, the defendant described how both women struggled, shook spasmodically and looked into his eyes as he choked them. Certainly that is not present in the instant case. In *Herzog v. State*, 439 So.2d 1372 (Fla. 1983), this Court recognized that not every strangulation murder is heinous, atrocious and cruel. In that case, there was evidence that the defendant had argued with the victim on the day of the homicide and had beaten her that day. In addition, eyewitnesses testified as to the manner of death. After an unsuccessful attempt at smothering the victim, the defendant wrapped the telephone cord around her neck and strangled her. Despite these facts, this Court found them insufficient to support a finding of heinous, atrocious and cruel since it was unclear whether or not the victim was fully conscious at the time the death occurred.

In the instant case, Julie Stoll certainly had no foreknowledge of the attack upon her. The murder was intended to be carried out in a very swift fashion whereby Christopher Stewart would approach Julie Stoll from the rear, and break her neck. There was no intent on the part of Stewart to unnecessarily torture the victim. The record is not clear as to how long the victim was actually conscious. From the evidence, it is fairly certain that at the time that the victim actually died

she was in fact unconscious. Although Dr. Gore testified that the victim could have taken from fifteen to thirty minutes to die, his findings did not indicate that Julie Stoll was conscious until she died. (Vol. XII, 817, 822) The evidence does suggest that after Stewart initially attacked Julie, Julie screamed for appellant and asked him why Chris was doing this to her, but this fact does not elevate the crime to heinous, atrocious and cruel status. In *Bonifay v. State*, 626 So.2d 1310 (Fla. 1993) the evidence showed that the defendant and a co-defendant each shot the victim once in the body before entering the store where the victim worked. Bonifay himself testified that the victim did not die from these two shots but begged for his life. Despite this, Bonifay went up to his victim and shot him twice in the head killing him. While noting that the murder was vile and senseless, this Court reversed a finding that the murder was heinous atrocious and cruel and noted that the record failed to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture his victim. “The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering.” *Id. at 1313*. The murder of Julie Stoll was indeed senseless. However, in the light most favorable to the state, the evidence shows that appellant always intended the murder to be as swift and painless as

possible. There was never any intent on his part to inflict a high degree of pain or to unnecessarily torture Julie Stoll. The finding that this murder was heinous atrocious and cruel cannot be sustained.

CONCLUSION

Based on the foregoing reasons and authority, appellant respectfully requests this Honorable Court to vacate a judgement and sentence and remand the cause for a new trial. In the alternative, appellant respectfully requests this Honorable Court to vacate his sentence of death and remand the cause for re-sentencing to life.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0267082
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Mr. Michael S. Stoll, #E03861, Florida State Prison, P.O. Box 747, Starke, FL 32091-0747, this 19th day of April, 1999.

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER