IN THE SUPREME COURT OF FLORIDA

HARRY BUTLER,	:	
Appellant,	:	
vs.	:	Case No. 95,158
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF TYPE USED

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PRELIMINARY STATEMENT

In this brief, the volumes of the record on appeal will be referred to by a [V]. The appropriate page number will follow this symbol. For example, [V2:33] refers to page 33 of volume two.

STATEMENT OF THE CASE

In the Circuit Court for Pinellas County, the grand jury returned an indictment charging Appellant, Harry Lee Butler, with one count of the first degree murder of Leslie Fleming. [V1:6-7] This offense allegedly occurred on March 13 and 14, 1997. [V1:6] The state filed a notice of intent to seek the death penalty. [V1: 11] On June 23, 1998, Mr. Butler appeared for a jury trial, the Honorable Frank Quesada, circuit judge, presiding. [V11:1] The jury returned a verdict of guilty of the charged offense. [V4:745] The jury recommended a sentence of death by a vote of eleven to one. [V4:749]

Defense counsel filed two motions for a new trial. [V4:759-60,762] After conducting a hearing on these motions on August 7, 1998, the trial court denied the motions. [V5:851;V10:1700] On November 2, 1998, the court conducted a hearing under Spencer v. State, 615 So. 2d 688 (1993), during which the defense presented additional mitigating testimony. [V10:1730] The defense and the state submitted written sentencing memorandums. [V5:775-781,783-792] On January 11, 1999, the trial judge entered an order imposing the death penalty. [V5:829-836; Appendix 1] The court found only one aggravating circumstance, the heinous, atrocious, or cruel nature of the murder. [V5:831] In mitigation, the court found no statutory mitigators and four non-statutory mitigators. [V5:833-35] The court's findings of mitigating circumstances are as follows [V5: 833-35]:

> 1. He was reared without his natural mother. The defendant's father testified that the defendant was eight years old when his mother was murdered, and the father was charged with the murder, but was acquitted. The defendant was sent to live with his grandmother and cousins in Georgia. The defendant offered the testimony of a psychiatrist, who said the defendant's family history showed he was caught in a cycle of domestic violence. The Court finds that no evidence was presented that defendant's family circumstances included violence. His father testified that he was accused of defendant's mother's murder, but was acquitted. The Court does find that the defendant was reared without his mother, and gives that circumstance some weight. . . .
>
> 5. The defendant is a loving and good son. Again, the defendant cites the testimony of his father. The Court finds that this circumstance may reasonably exist, and gives it some weight. . .
>
> 6. The defendant is well-thought of by neighbors and co-workers. The defendant cites the testimony of one friend and the concrete supervisor who hired him from time to time. While this was not an outpouring of support, the Court finds that this circumstance exists, and gives it slight weight. . .
>
> 7. The defendant has a long-term substance abuse problem. The defendant cites his own testimony that he had a long-term substance abuse problem. The Court finds that this circumstance may exist, but give it slight weight.

Mr. Butler filed a timely notice of appeal on February 9, 1999. [V5:837]

Undersigned counsel, on December 20, 1999, filed in the trial court a motion to correct sentence under Florida Rule of Criminal Procedure 3.800. Counsel also filed with this court a notice of the filing of this motion. Following this court's decision in

Amendment to Florida Rules of Criminal Procedure 3.111(3), 3.800 and Florida Rules of Appellate Procedure 3.010(h), 9.140, and 9.600, case number 95,707 (Fla. January 13, 2000), in which this court held that the newly amended 3.800 rule does not apply to capital cases, undersigned counsel filed a motion to withdraw the previously filed 3.800 motion. (Appendix 2)

STATEMENT OF THE FACTS

I. The Victim's Death

Leslie Fleming lived in an apartment on Alpine Road in Clearwater. [V11:153] Leslie was also known as "Bay." [V12:169,172] Shawna Fleming, Leslie's sister, lived nearby. [V12:191-92] Shawna last spoke with Leslie by telephone at about 8:00 p.m. on Thursday, March 13, 1997. [V12:198] The next morning at 5:20, Shawna called Leslie as she did every morning. [V12:199-200] Leslie did not answer the phone. [V12:200] Steven Shine, Shawna's boyfriend, went to Leslie's apartment and tried unsuccessfully to contact her. [V12:200] Later at 7:15 a.m., Shawna also went to Leslie's apartment. [V12:200] After Shawna repeatedly knocked on the door, LaShara Butler opened the door. [V12:201] LaShara, who is the daughter of Mr. Butler and Leslie, was six years old. [V12:201] Shawna went inside and saw Leslie's body on the floor. [V12:201, 205] Shawna called the police. [V12:203]

LaShara Butler usually did not sleep in the same bedroom with her mother, but the child was asleep with her mother on the night of the murder. [V12:228-30] LaShara testified she knew the date was March 14th because her grandmother later told her this date. [V12:246,247,257-58] According to LaShara, Mr. Butler entered her mother's bedroom and moved her to her own bedroom. [V12:230,245] LaShara claimed she saw Mr. Butler's face as he carried her. [V12: 230,245] Later LaShara was awakened by her mother's scream. [V12:

230,249] LaShara was not sure when she woke up. [V12:255] LaShara testified she did see numbers on a cable television box when she woke up. [V12:257] However, John Dosher, an operations manager for a cable company, removed the cable box from the apartment on March 13th at about noon. [V15:801-02] The box was removed for non-payment. [V15:803] LaShara also alleged she heard her mother say "stop." [V12:231,242] But LaShara, in a deposition, related that her mother said nothing. [V12:243]

Getting up to use the bathroom, LaShara allegedly saw her mother and father in the living room. [V12:231-32,249] LaShara was on the inside of her room by her door when she made this observation. [V12:249,251-52] Her room was dark because LaShara did not turn on a light. [V12:251] She claimed that a light was on in the living room. [V12:259] LaShara testified, "I saw my mom's leg--one of my mom's down and my dad's leg on my mom's legs and one of her legs went up right high and then came down fast." [V12:232] In response to a question of how she knew it was her father's leg, LaShara stated, "Because it was big and it had a lot of hair on it because his leg has a lot of hair on it." [V12:233,254-55] LaShara did not hear Mr. Butler say anything, and she did not see his face or the back of his head. [V12:233,234,254] LaShara heard her mother screaming as if she were being hurt. [V12:234] Subsequently, LaShara heard the screen door close and steps on the outside of the apartment. [V12:235]

LaShara returned to bed. [V12:235] She woke up later when Shawna, her aunt, knocked on the door. [V12:235] Shawna asked

LaShara the identity of the body in the living room. [V12:235] LaShara said she did not know. [V12:235] LaShara picked up a pillow and a bag and saw her mother's face. [V12:235]

LaShara did not relate to Officer Terence Kelly, the first police officer on the scene, that her father was involved in her mother's death even though Officer Kelly asked her what she had heard and seen. [V12:238-39] In addition, LaShara did not tell Shawna anything about what had occurred. [V12:204] Officer Scott Ballard arrived at the apartment at 7:33 a.m. [V12:261] He transported LaShara to the police station. [V12:262] While inside the police car, LaShara told Officer Ballard, "My daddy hurt mommy." [V12:263] LaShara's statement was unprompted. [V12:263] Detective Wilton Lee later conducted an interview with LaShara on March 14th at about 10:30 a.m. [V14:696] Detective Lee videotaped the interview. [V14:697] This videotape was played to the jury. [V14:709][1]

LaShara admitted she wanted to make her grandmother, Vivian Harris, happy. [V12:241-42] Harris had told LaShara repeatedly that Mr. Butler was the murderer. [V12:241] Harris told LaShara that she did not want LaShara to like Mr. Butler. [V12:258] LaShara got angry about her mother's death just as her grandmother got angry. [V12:241] Harris testified she did not have any contact with LaShara between the time Leslie's body was discovered to the time LaShara was taken to the police department. [V13:547]

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[1] A transcript of the videotape is included in the appellate record. [V6:974]

II. The Investigation

A. The Crime Scene

Officer Terence Kelly responded to the scene at about 7:33 a.m. on March 14th. [V12:211-13] Officer Kelly noted that blood was splattered about the living room floor near the body. [V12:213, 219] A plastic bag and a pillow were near the deceased's head. [V12:212,216] The pillow was within a foot of her head. [V12:280] Officer Kelly testified he believed the plastic bag was on the body when he arrived at the crime scene. [V12:217] He did not move the bag. [V12:217] Both the bag and the pillow had blood stains on them. [V12:280]

An investigation of the crime scene ensued. [V12:268-69] Photographs were taken of the outside and inside of the apartment. [V12:272-76,279,282,287-88][2] A vacuum sweep of the apartment was conducted to gather fiber evidence. [V12:276-78,314] However, testing on the results of this vacuum sweep never resulted in any reports. [V15:860-62] The apartment was mostly undisturbed. [V12: 280,289] Photographs were taken of Leslie's body, including her face. [V12:287,290] Blood stains near the body were consistent with Leslie being in a supine position at the time of the attack. [V12:292] Photographs of these blood stains were taken. [V12:293, 296-99,318] Law enforcement also took samples from the blood stains. [V12:295,318-19] Fingerprint evidence was obtained. [V12-

[2] Copies of the photographs introduced into evidence by the state are found in volume five pages 865 to 913 and volume six pages 914 to 967.

300,301] The age of these latent fingerprints could not be determined. [V12:300]

Carol Davis, a latent fingerprint examiner, compared 113 fingerprints as part of the investigation. [V15:845] Of these prints, 84 were of no comparable value. [V15:845] Twenty-one of the prints could not be identified. [V15:845-46] The remaining eight prints belonged to Mr. Butler, Leslie, and a child Takisha Butler. [V15:846]

One of the investigators, Donald Barker testified that a person could see from the children's bedroom to the area where the body was found. [V12:306] Barker testified that this view was "partial." [V12:308] Photographs taken from the doorway and from the top bunk of the bunk bed revealed only the deceased's head, not her feet. [V12:323-24] Photographs showing the relationship of the bedroom to the area where the body was found were introduced into evidence. [V12:321-25]

Woodburn Miller performed luminol testing on the victim's apartment in order to detect any blood. [V15:851-52] Miller observed several shoe prints caused by someone tracking blood. [V15:852-53] Miller took photographs of the prints, which were given to Detective Lee. [V15:853,859] These prints were not compared to shoes that allegedly belonged to Mr. Butler and that were stained with the victim's blood. [V15:860] Miller was aware that testing could be done to make footprint comparisons. [V15:855-56] According to Miller, the discovered prints were inadequate to enable a comparison. [V15:856] Mr. Butler was arrested prior to

law enforcement's obtaining any hair, fiber, or footprints evidence. [V15:863]

B. The Autopsy

Dr. Marie Hansen, a pathologist, performed an autopsy on the victim. [V14:577] Leslie was 5'3" tall and weighed 105 lbs. [V12: 205] Dr. Hansen explained the difference between stab wounds and incised wounds. [V14:583-84] Stab wounds are deeper than they are wide, the opposite is true of incised wounds. [V14:583-84] Hansen testified Leslie suffered 25 stab wounds, nine incised wounds, and eleven wounds that could not be labeled. [V14:586] Dr. Hansen classified most of the wounds as "superficial." [V14:628] Of these eleven wounds, Hansen said some were of a defensive nature. [V14: 586] Photographs of the injuries were introduced into evidence. [V14:592] The deceased had some swelling on her face, and her jaw was fractured. [V14:593-94] Hansen testified that these injuries were consistent with Leslie being struck with blunt force. [V14:594-95]

Multiple stab wounds were discovered on the victim's neck. [V14:596-600,602] Dr. Hansen testified that these wounds were consistent with being inflicted by a single object. [V14:600-01] Dr. Hansen said this object could have been a blade or other sharp, thin instrument. [V14:601] Two of the wounds would have been fatal, causing Leslie to bleed to death or causing her lungs to collapse. [V14:607-08] Most of the wounds to the neck were on the right side. [V14:621] Dr. Hansen testified that these wounds were

more consistent with being inflicted by an individual who is left-handed, providing that the victim was on her back at the time the wounds were inflicted. [V14:621]

On her torso and lower abdominal area, Leslie suffered multiple small nicks from a sharp instrument. [V14:603,604] Dr. Hansen testified that these wounds were consistent with being "torturous wounds." [V14:625] Defensive wounds were present on her left arm and both hands. [V14:605,606,620] Two of the wounds appeared to be caused by Leslie grabbing something. [V14:606,620] On the neck the deceased also exhibited very small hemorrhages that were consistent with strangulation. [V14:608-09] However, these hemorrhages could be present even though the person did not ultimately die. [V14:611] The person would, however, become unconscious. [V14:619] Dr. Hansen testified that the plastic bag and the pillow found at Leslie's residence were consistent with causing asphyxiation. [V14:611]

Dr. Hansen determined that the cause of death was multiple stab wounds to the head, neck, and torso; blunt trauma to the head; and suffocation. [V14:613-14,619] In Dr. Hansen's opinion, the attack lasted at least ten minutes. [V14:616,618] Leslie could have been unconscious during some of this time. [V14:618] The blow to her jaw could have rendered her unconscious as well as the asphyxiation. [V14:618,619] All of the stab wounds except for the defensive ones could have occurred while Leslie was unconscious. [V14:620-21] Dr. Hansen testified the latest Leslie could have

been alive was 4:00 a.m. according to testing for vitreous potassium. [V14:615,624]

At the time of the autopsy, a hair was found in the victim's mouth. [V14:715] Detective Lee, the lead detective on the case, did not send this hair for analysis. [V14:715-16]

C. Evidence Located Near the Victim's Residence

Detective Green testified that Martisha Kelly told him on March 16th that she had knowledge of where the murder weapon was located. [V12:329-30,334;V16:1094] Kelly told Detective Green that the weapon was in one of the dumpsters near a food store. [V12:332: V16:1095] Kelly was not specific as to which dumpster. [V16:1098] Detective Green did not ask Kelly how she knew about the weapon, and Kelly did not tell the detective that Dennis Tennell told her about the weapon. [V16:1096] Kelly directed Detective Green to the food store. [V12:331-32]

A search of one of the dumpsters at the food store revealed a pair of blue shorts, a white t-shirt, a pair of underwear, a towel, and a pair of tennis shoes. [V12:339,341-47] The shoes had no laces. [V12:348] The items were located inside the dumpster, about halfway down. [V12:349] They were not packaged together. [V12:353] Photographs of the dumpster and the nearby area were introduced into evidence. [V12:349-53] Mr. Butler lived less than a mile from the food store. [V12:338] The area where the store was located was a highly commercial area trafficked by many people. [V12:354]

Officer Shawn Meeks testified that the tennis shoes were consistent with the ones that Mr. Butler wore prior to being arrested on March 11th for a domestic violence incident. [V13:528-30] Officer Meeks described these shoes as being blue, black, and white, with no laces in them. [V13:529] The shoes were loose-fitting. [V13:529] Officer Meeks could not, however, testify that the shoes found in the dumpster were the same shoes that Mr. Butler had on previously. [V13:530] He testified he was aware of the differences between the Nike logo (a swoosh) and the Converse logo (a star). In a deposition Officer Meeks said the shoes were made by Nike, not Converse. [V13:531-32]. The shoes, however, were in fact made by Converse. [V13:532]

Shawna testified that Mr. Butler usually wore sneakers with no laces. [V13:534] A home videotape made in December of 1996 showed shoes and shorts worn by Mr. Butler. [V13:535-38] Mr. Butler's shoes had no laces in them. [V13:540] This videotape was published to the jury. [V13:538-41] Still photographs of frames within the videotape were also introduced into evidence. [V13:552-53;V14:565] Vivian Harris, Leslie's mother, testified Mr. Butler wore his tennis shoes with no shoelaces. [V13:544,545] Measurements of Mr. Butler's feet were taken. [V14:570-74] Photographs of the measurements were introduced into evidence. [V14:572] Mr. Butler's foot was wider than average. [V14:572] His foot size was size eleven. [V14:574]

James Wood testified Mr. Butler did not wear shoes like the ones found. [V14:636-37] Wood testified Mr. Butler usually wore

shoes with laces in them even though they would not be laced up. [V14:639] Mr. Butler had worked with Wood for eight years. [V14: 637] Wood denied that the photographs of the shoes were ones that were shown to him by law enforcement. [V14:638-39] However, Detective Lee testified Wood identified the shoes as belonging to Mr. Butler. [V14:685-86] Detective Lee testified Wood told him that Mr. Butler's shoes were unlaced or had no laces. [V14:687]

D. Testimony Concerning DNA

Jeannie Eberhardt, a forensic scientist specializing in DNA serology, testified concerning DNA testing that was conducted on evidence in the case. [V13:375] The testing employed was PCR testing. [V13:380,385,481] Eberhardt testified that PCR testing was normally conducted when the test material had been degraded or the sample size was small. [V13:386-87,481] Eberhardt performed DNA testing on blood samples taken from Leslie and from Mr. Butler. [V13:394-95] A DNA profile was obtained for each of the samples. [V13:437-38]

Eberhardt conducted an examination of the tee-shirt found in the dumpster. [V13:443] She found the presence of blood on the shirt, but she was unable to confirm a DNA profile of the blood. [V13:444] The same result was reached with blood stains found on the denim shorts, towel, and boxer shorts. [V13:446-47,448-49] The blood was either of an inadequate amount or degraded. [V13:449,483] The dyes in the denim shorts inhibit DNA testing. [V13:508]

However, Eberhardt was able to develop a DNA profile for the blood found on one of the sneakers. [V13:449-53,482] The sneakers were size twelve Converse tennis shoes. [V13:449] Blood on the right sneaker was insufficient to develop a profile. [V13:453-54, 483] PCR testing on blood found on the outside of the left sneaker revealed a DNA profile. Eberhardt testified that this DNA profile was consistent with the DNA profile of Leslie. [V13:455,485,486] Testing on blood samples from the inside of the sneaker indicated an inconclusive blood profile. [V13:486-87] According to Eberhardt, the profile of the blood on the sneaker was inconsistent with Mr. Butler's DNA profile. [V13:456]

Eberhardt also conducted testing on other blood samples. Blood samples taken from the wall of Leslie's apartment and items within the apartment indicated a DNA profile consistent with Leslie's DNA. [V13:457-65] Blood samples taken from her fingernail clippings were also consistent with her own blood. [V13:465-66] The pillow and plastic bag found next to Leslie's head each had blood on them that matched her DNA profile. [V13:468-72] Mr. Butler's blood was not found on any of the samples. [V13:472] All of the blood samples for which Eberhardt was able to obtain a DNA profile matched Leslie's blood. [V13:473]

Testing on samples obtained from the door to the motel where Mr. Butler was staying indicated the presence of blood. [V13:473-74,490,521-22] This blood revealed two DNA profiles neither of which were consistent with Leslie's or Mr. Butler's DNA profiles. [V13:475-76,490] Law enforcement's efforts to find other blood

samples inside the motel room were unsuccessful. [V13:524; V15: 835,838] Eberhardt testified that the DNA profiles that were obtained could be expected to occur in one in 3,000 African Americans, 1 in 112,800 Caucasian individuals, and 1 in 538,000 Southeastern Hispanic individuals. [V13:479,498]

Eberhardt admitted that cross-contamination of samples during DNA testifying was a concern. [V13:494] Despite a recommendation from the National Research Council that a second test be performed at another laboratory, this recommendation was not followed. [V13: 496-97]

III. Testimony of Witnesses Associated with Mr. Butler

Mr. Butler worked for James Wood previously doing block construction work. [V14:634] Wood testified he visited Mr. Butler while Mr. Butler was in jail. [V14:635] When Wood asked Mr. Butler if he had killed Leslie, Mr. Butler replied that if he did commit the murder he did not remember it. [V14:635] Oran Pelham, who was present with Wood and Mr. Butler, testified Mr. Butler denied to Wood that he had killed Leslie. [V16:986]

Lola Young, who was incarcerated at the time of the trial below, lived across the street from Leslie. [V14:656-57] Young testified she was outside of her apartment between 3:30 a.m. and 4:00 a.m. on March 14th. [V14:659] Young was taking some items to the dumpster in her apartment complex. [V14:659,665] Young claimed she saw movement near some hedges that were near Leslie's apartment. [V14:660] The man was wearing a striped shirt, perhaps

green. [V14:678] Young said this shirt could have been of the brand Tommy Hilfiger. [V14:678] Young identified the person as Mr. Butler. [V14:661] Young had known Mr. Butler for many years. [V14: 658] She said Mr. Butler was in a "squat position" near the hedges. [V14:661] As Young walked back to her apartment, she saw a blue sports car come from behind Leslie's apartment building. [V14:662] In a deposition, Young described the car as being a blue RX7 with a black vinyl top. [V14:680] The car's lights were not on. [V14:663] According to Young, the car stopped and Mr. Butler got inside. [V14:663,666] The car drove away. [V14:664,665]

Young admitted the hedges were on the opposite side of the apartment building where Leslie's apartment was located. [V14:679] She told law enforcement she was outside between 4:30 and 4:45 a.m.; however, in a sworn statement to a prosecutor, she said the time was between 4:30 a.m. and 5:00 a.m. [V14:673,675,669] Young had been convicted of felonies six or seven times. [V14:667] Vivian Harris was one of her best friends. [V14:667]

On June 25, 1998, a day on which the trial was conducted below, Detective Lee went with his wife to the area described by Young. [V14:687-88,712-13] Detective Lee testified the lighting conditions "were not the best in the world." [V14:693] A couple of lights were in the area. [V14:693] Detective Lee stood near the dumpster, and his wife stood near the hedges. [V14:693] Detective Lee testified from where he was standing he could identify his wife. [V14:694,718] They could hear one another talking. [V14:694,

718] Detective Lee estimated the distance to be within eighty feet. [V14:694,712] However, Jim Ley, an private investigator, measured the distance from the dumpster to the hedges using a standard measuring wheel. [V15:773-74] Ley testified that the distance was 147.4 feet. [V15:774]

IV. Mr. Butler's Arrest and Questioning

After Detective Green was driving from the crime scene on March 14th, he saw Mr. Butler walking down a road. [V15:788-89] Detective Green knew Mr. Butler. [V15:788] Mr. Butler was with Dennis Tennell. [V15:789] Mr. Butler went with law enforcement voluntarily. [V15:790,798] Tennell, on the other hand, ran. [V15: 790] Detective James Steffens later questioned Mr. Butler. [V14: 724] Mr. Butler assented to the questioning. [V14:740] Mr. Butler was advised of his rights, and he signed a rights waiver form. [V14:724-25] Mr. Butler denied committing the murder. [V14:725, 727,740] He provided Detective Steffens with the names of people that he was with at the time of the murder. [V14:725-26] Mr. Butler told Detective Steffens that he had last been to Leslie's apartment the night preceding the offense between 9:45 and 10:30 p.m. [V14:726] Mr. Butler said he was with Carl Jeter. [V14:726] Mr. Butler and Jeter went to the residence in order to see a car that Leslie possessed but Mr. Butler owned. [V14:726-27]

During the interview, Detective Steffens noticed superficial cuts on Mr. Butler's hands. [V14:728,742] Mr. Butler said the cuts were caused from falling off a bicycle and from a broken bottle.

[V14:742] Photographs of Mr. Butler's hands were introduced into evidence. [V14:729] Law enforcement did find a broken beer bottle on the floor of Mr. Butler's room near the trash can. [V15:832,835-36] Mr. Butler had a beeper in his possession when he was arrested. [V14:729-30] The last number listed on the beeper was 461-1424, belonging to Martisha Kelly. [V14:730] The call was placed at 1:17 a.m. [V14:730]

Mr. Butler's tee-shirt and underwear were collected as evidence. [V14:732-33,734] The tee-shirt and underwear were similar in make and size to the ones collected from the dumpster. [V14:733-34,735] The shorts that Mr. Butler wore at the time of his arrest were a size 36. [V14:735-36] The shorts taken from the dumpster were a size 34. [V14:736-37] The shoes that Mr. Butler wore at the time of his arrest were a size 11 ½. [V14:737-38] This size was close to the size of the shoes taken from the dumpster. [V14:738]

Latwanda Allen testified that she, Kelly and Mr. Butler were cousins. [V16:1102] In March of 1997, Allen was living with Kelly. [V16:1102] On Sunday, March 17th, Kelly told Allen that Mr. Butler had killed Leslie. [V16:1103] Kelly told Allen not to tell anyone. [V16:1103] Kelly would not tell Allen how she knew about the crime. [V16:1103] Kelly allegedly told Allen that she stopped by Leslie's apartment. [V16:1104] Kelly said she saw Mr. Butler standing over Leslie. [V16:1104-05] Mr. Butler's shirt was full of blood. [V16:1105]

On April 2, 1997, Detective Steffens questioned Kelly. [V16: 1107-08] According to Detective Steffens, Kelly said that she had gone by Leslie's apartment. [V16:1108] She saw that Leslie was dead. [V16:1109] Kelly did not tell Detective Steffens that Mr. Butler was in the apartment covered with blood. [V16:1109] Kelly claimed that the apartment was "in disarray." [V16:1109,1110]

V. Testimony Concerning Collateral Incident

Shawna was close to Leslie. [V12:192-93] Shawna also knew Mr. Butler. [V12:193-94] According to Shawna, Leslie tried to end her relationship with Mr. Butler months before her death. [V12:195] Shawna testified Mr. Butler would not leave Leslie alone. [V12:195] When Leslie stayed with Shawna, Mr. Butler would call and arrive at the apartment, trying to get Leslie to come back to their apartment. [V12:196] On March 9th, Mr. Butler moved out of the apartment at Leslie's request. [V12:197] When Shawna went over to Leslie's apartment at about 3:00 p.m. on March 11th, Leslie told her to leave and to call the police. [V12:197] Mr. Butler was present at the apartment. [V12:197-98] Shawna did call the police. [V12:198] At about 3:03 p.m., Officers Philip Biazzo and Shawn Meeks went to Leslie's apartment in order to investigate the possible domestic incident. [V11:146-47;V13:525-26] After Leslie opened the door, she told Officer Biazzo that she was not okay. [V11:147] She was crying. [V11:147] While Officer Biazzo was questioning Leslie, Mr. Butler, who was inside the apartment, interrupted by talking and making motions with his hand. [V11:147]

Officer Biazzo went outside with Leslie where he observed red marks on her back. [V11:147-48] A photograph of the injuries was introduced into evidence. [V11:149] Leslie's shoulder was also injured. [V11:148, 154] Because of the incident, law enforcement arrested Mr. Butler. [V11:148,155-56] According to Officer Meeks, Mr. Butler put on tennis shoes prior to being removed from the apartment. [V13:528-29] Mr. Butler was booked into the jail at 7:21 p.m. on March 11th. [V11:158] The next evening at 7:21, Mr. Butler bonded out of the jail. [V11:159]

According to John Dosher, the employee of a cable company, Mr. Butler was present at Leslie's apartment when Dosher removed the cable box from the residence. [V15:802-03] Mr. Butler put his arm around Leslie who told him to sit down. [V15:803,805,806] Dosher testified Mr. Butler groped Leslie's breasts. [V15:806] Dosher believed he may have interrupted Mr. Butler and Leslie. [V15:806-07] Dosher did not observe any animosity between the couple. [V15:805]

Lakisha Miller, Mr. Butler's cousin, testified that she was Leslie's best friend. [V12:170-71] Miller was also known as "Red." [V12:169,172] Miller said Mr. Butler's relationship with Leslie began when Leslie was about sixteen. [V12:172] Leslie was twenty-three when she died. [V12:171,194] Mr. Butler and Leslie had children, and they lived together. [V12:172-73,194] In the early part of 1997, Mr. Butler and Leslie, as well as their children, lived in the apartment on Alpine Road. [V12:173,194] Mr. Butler moved out of the apartment on March 9, 1997. [V12:173-74] Miller

testified she spent the night at Leslie's apartment at Leslie's request on the night of March 12th. [V12:174,175,180] To the contrary, she said in a deposition that she spent the night in the apartment on the night Mr. Butler was arrested, March 11th. [V12: 179-80] Leslie's children were also inside the apartment. [V12: 174-75] The evening following her stay with Leslie, Miller spoke with Leslie at 8:00 p.m. [V12:175]

Miller testified that Mr. Butler did not like her. [V12:177] Mr. Butler, Miller claimed, told her that she was the cause of the troubles in his relationship with Leslie. [V12:177-78] Miller testified Mr. Butler was unhappy about the break-up in his relationship with Leslie. [V12:178] According to Miller, Mr. Butler said he knew that Leslie had an affair with Adonis Hartsfield. [V12:178-79] Mr. Butler was upset over this affair. [V12:179]

Terry Jackson worked with Mr. Butler and had known him for many years. [V12:183-84] On a Wednesday night in March, Mr. Butler asked Jackson to give him a ride. [V12:185] Jackson alleged that Mr. Butler said he was going to kill "Bay and Red." [V12:185,188] Because he did not believe Mr. Butler would carry out the threat, Jackson did not pay any attention to the statement. [V12:185-86, 188] Jackson was aware that Mr. Butler had recently bonded out of jail. [V12:186]

VI. Defense Testimony

Adonis Hartsfield had a romantic relationship with Leslie since the early 90's. [V15:808] Hartsfield had sexual relations with Leslie. [V15:809] On the Tuesday night before her death, Hartsfield spent the night with Leslie. [V15:812] That Tuesday was the night that Mr. Butler was arrested for domestic violence. [V15:812] Hartsfield admitted he wore striped Tommy Hilfiger shirts. [V15:813] Hartsfield denied killing Leslie, and he said he did not wear any of the clothing recovered from the dumpster. [V15: 813-14,817] Hartsfield testified he was with his girlfriend on the night of the murder. [V15:814] According to Hartsfield, Mr. Butler did not like him and was angry at their relationship. [V15:814-15] Mr. Butler had known about Leslie's relationship with Hartsfield for some time. [V15:816]

Theodore Dallas picked up Mr. Butler from jail on Wednesday, March 13th. [V15:818] Dallas drove Mr. Butler around for a couple of hours, running errands. [V15:819,821] Mr. Butler first went to his residence and then to Leslie's apartment. [V15:820-21] Mr. Butler went to Leslie's residence in order to pick up his beeper. [V15:830] Leslie was not home. [V15:830] Dallas testified Mr. Butler's attitude toward Leslie was no different than what it had been for years. [V15:819-20] Mr. Butler was not angry. [V15:820] Dallas was aware that Mr. Butler and Leslie had in the past separated and then got back together. [V15:829]

On cross-examination, the prosecution questioned Dallas concerning prior domestic violence allegedly committed by Mr. Butler. The prosecutor asked Dallas if he knew of a domestic

violence incident that occurred on March 11, 1997. [V15:822] Dallas responded he learned of the allegation after he drove Mr. Butler from the jail. [V15:822] In addition, the prosecutor asked Dallas if he knew that Mr. Butler "was accused of pushing her [Leslie] down, pushing her." [V15:822] After defense counsel objected to this questioning, Dallas said he had heard "rumors." [V15:822-27] Dallas had earlier indicated he had no knowledge of any violent exchanges between Mr. Butler and Leslie. [V15:820] The prosecutor continued questioning by asking, "Mr. Dallas, April 24, 1993, were you aware that Leslie Fleming claimed the Defendant pushed her down, pushed her in the back and later put his foot on her throat choking her?" [V15:825-26] Defense counsel objected to the state's admitting details of the prior offense. [V15:826] The court again warned the state to not go into the details of the prior incident. [V15:826-27] The prosecutor continued questioning by asking Dallas, "On June 21st of 1993 are you aware of the allegation that the Defendant punched and struck Leslie Fleming? A separate date June 21st of 1993. . ." [V15:827] Dallas responded negatively. [V15:827]

Willie Glasco had known Mr. Butler for almost twenty years and Leslie for about six years. [V15:878,883] Glasco testified Mr. Butler and Leslie got along okay despite two incidences of domestic violence. [V15:878-79] Glasco arranged for Mr. Butler to obtain a room at the Sunset Pines Motel. [V15:879,883]

On the Thursday evening prior to the murder, Glasco ate dinner with Mr. Butler. [V15:880] They spent more time together later in

the evening until about 10:00 p.m. when Glasco went to bed. [V15: 880-81] During this time, Mr. Butler did not express any anger toward Leslie, and he did not seem upset. [V15:881,882,884] Mr. Butler talked about Leslie, and Glasco told him that he needed to forget about her. [V15:885-87] Mr. Butler indicated he was going to continue making payments on furniture that was in Leslie's possession. [V15:881-82] The next morning at 6:00, Glasco knocked on Mr. Butler's window in order to awaken him as he usually did. [V15:880,881] Glasco heard Mr. Butler's voice. [V15:881,882]

Anthony Williams (aka "Biscuit") testified on Thursday, March 13th he was gathered at his house with others as part of a memorial service for a family member that had died. [V15:902-03,904] Mr. Butler was also present at the house between 7:00 and 9:00 p.m. [V15:888-89,903] Williams said Mr. Butler was in a good mood, laughing and joking. [V15:904] Earl Williams, Larry Mack, and Antonio Strappy were also present. [V15:888,907,909-10] Earl testified Mr. Butler was acting normally. [V15:907] Earl did not recall when Mr. Butler left the residence. [V15:908] Mack testified Mr. Butler left the home before 9:00 p.m. [V15:889] According to Mack, Mr. Butler seemed in good spirits, joking around. [V15: 889] Strappy testified Mr. Butler left the residence but returned at about 1:00 a.m. [V15:911-12] According to Strappy, Mr. Butler was then acting "kind of paranoid, like he needed some drugs or something." [V15:913,917] Strappy said Mr. Butler was still at the house when he left at about 1:15 a.m. [V15:914]

Williams' residence was .85 miles from Mr. Butler's residence at the motel, taking a little over two minutes of driving time. [V15:779,785] The distance between Williams' residence to Leslie's apartment was 2.55 miles with a drive time of between approximately 6 ½ to 7 ½ minutes. [V15:781,785]

Carl Jeter saw Mr. Butler between 11:00 and 11:30 p.m. on March 13th. [V15:891] Mr. Butler asked Jeter for a ride to get his beeper from "Sable." [V15:891-92] Jeter testified that he was driving an older model Cadillac. [V15:892,895] While inside the car, Mr. Butler told Jeter that he had broken up with Leslie. [V15: 892,895] Mr. Butler told Jeter that Leslie was seeing Adonis. [V15:895] After obtaining the beeper, Jeter and Mr. Butler went by Leslie's apartment where Mr. Butler wanted to show Jeter a vehicle. [V15:892-93,895] Jeter testified Mr. Butler did not seem upset, but he seemed "broken hearted." [V15:894,896-97] Mr. Butler called Adonis "a punk." [V15:897] According to Jeter, Mr. Butler's statements about Leslie were normal. [V15:894]

Latwanda Allen, also known as Gidget, lived in the Sable Apartments. [V15:899] Allen had possessed of Mr. Butler's beeper. [V15:899] While Allen was sleeping, someone picked up the beeper. [V15:900] Mr. Butler had earlier called Allen to arrange getting the beeper. [V15:900-91]

Dennis Tennell testified he first saw Mr. Butler at Williams' residence at about 9:15 p.m. on March 13th. [V15:919-20] Later at about 11:15 p.m., Mr. Butler returned to the house after leaving. [V15:920-21] Tennell testified Mr. Butler appeared "ance" (sic)

when he returned. [V15:943] Tennell testified Mr. Butler stayed at the residence for about an hour. [V15:921] While Mr. Butler was there, he asked for a pair of shoes to wear. [V15:934]

Mr. Butler and Tennell left and went to Mr. Butler's motel room. [V15:923] Mr. Butler had asked Tennell to stay at the room. [V15:943] It was raining. [V15:924,929] Mr. Butler and Tennell walked different routes to the motel. [V15:923] The route Mr. Butler took went by the dumpster near the convenience store. [V15: 940]

When Tennell arrived at Mr. Butler's room, Mr. Butler was already there, dressed only in boxer shorts. [V15:941] The shower was running hot water. [V15:941] Tennell testified he and Mr. Butler used cocaine that evening at the motel room. [V15:927,928] Tennell did not leave the room that night. [V15:926] Martisha Kelly arrived at the room about thirty minutes after Mr. Butler and Tennell. [V15:926,978] Mr. Butler spoke with Kelly outside the room. [V15:978] Tennell fell asleep on the bed. [V15:924] Tennell testified Mr. Butler stayed in the living room portion of the apartment throughout the night. [V15:924] While Tennell was sleeping, he would roll over and see Mr. Butler on the bed. [V15:928]

Tennell was watching a college basketball game while he was inside the room. [V15:936-37] This game began at 10:10 p.m. [V15: 937,938] Tennell fell asleep before the game was over. [V15:936, 938] During the night, Tennell heard a beer bottle breaking. [V15:924] Tennell did not know if Mr. Butler cut his hand, but he

(Tennell) did see Mr. Butler picking at his hand with a razor blade. [V15:924-25] Tennell did not see any blood on Mr. Butler that evening. [V15:928]

Later the next morning at daybreak, Tennell heard a knock on the window. [V15:930] Tennell and Mr. Butler got dressed and started walking. [V15:930-31] The police then stopped the two men. [V15:931] Tennell ran when the police arrived because he possessed cocaine. [V15:931-32,979]

Tennell said he allowed Mr. Butler to borrow a pair of his Nike sneakers the next morning because Mr. Butler's shoes were wet. [V15:928,935] Tennell identified the shoes found in the dumpster as ones belonging to Mr. Butler. [V15:935] Tennell testified that he had seen Carl Jeter driving a blue sports car. [V16:977,984] Tennell said Oran Pelham, after the murder, approached him and questioned Tennell about the case against Mr. Butler. [V16:980] Pelham asked Tennell why he (Tennell) was saying things against Mr. Butler. [V16:980] Tennell testified he felt intimidated by Pelham. [V16:980] Pelham denied threatening Tennell. [V16:985-86,988]

Jacent Blake went with Kelly to buy some cocaine. [V16:988-89,990,997] The two women first went to Williams' residence where Kelly asked for Mr. Butler. [V16:998] Kelly was told that Mr. Butler had left five minutes previously. [V16:998] Kelly purchased cocaine from Tennell. [V16:998] At about midnight, Blake waited inside the car while Kelly spoke with Mr. Butler at his motel room. [V16:989] Later at about 3:00 or 4:00 a.m., Blake and Kelly bought more cocaine at Mr. Butler's residence. [V16:990-91,995,999-1000]

Kelly testified she bought the cocaine from Tennell. [V16:1000] Blake and Kelly left. [V16:1001] Early that morning, Kelly returned to Mr. Butler's residence in order to look for her keys. [V16:1002] Kelly testified Mr. Butler and Tennell were dressed and awake. [V16:1002]

Kelly denied informing law enforcement where the bloody clothing could be found in the dumpster. [V16:1004-05] Kelly told the police to look in "every garbage can." [V16:1007] Kelly testified she mentioned where a weapon might be located because she was being intimidated by police. [V16:1006-07] Kelly denied telling Latwanda Allen that Mr. Butler had killed Leslie. [V16:1010]

Mr. Butler testified he first met Leslie in 1988. [V16:1014] He had three children with her. [V16:1014] Mr. Butler said he loved Leslie very much. [V16:1014] Although Mr. Butler admitted he had disputes with Leslie, he said he would never harm her. [V16: 1015] Mr. Butler got the room at Sunset Pines Motel about a week before her death because he tired of his and Leslie's arguing. [V16:1016] This room was 1.8 miles from Leslie's apartment with a drive time of a little over five minutes. [V15:779-80]

On the Tuesday prior to her death, Mr. Butler and Leslie argued. [V16:1020-21] Mr. Butler testified they resolved their arguments, but Leslie still maintained "a grudge." [V16:1024] While Mr. Butler and Leslie were sitting on the couch, Leslie told Shawna to call the police. [V16:1024] The police arrived. [V16: 1024; V16,1068]

On cross-examination, the prosecutor suggested that Mr. Butler had kidnapped and sexually battered Fleming. The prosecutor asked, "Isn't it a fact that she was alleging that you were kidnapping her?" [V16:1068] After Mr. Butler responded negatively, the prosecutor continued with two questions: "Isn't is a fact that she was alleging that you committed forcible rape against her?" and "She was screaming during that incident?" Defense counsel objected when the prosecutor noted that the domestic violence case "was being referred to the State Attorneys for the felonies of kidnapping and sexual battery." [V16:1070]

The prosecutor also questioned Mr. Butler regarding allegations of domestic violence allegedly committed by Mr. Butler in 1993 [V16:1073-74]:

> Sir, I would like to direct your attention to April 24, 1993. That's when you were arrested by law enforcement. Isn't it a fact you were arrested because you put your hands on her throat, choking her to the point of unconsciousness where she cannot breath anymore?

Mr. Butler responded that he remembered going to jail only one time in 1993. [V16:1074] The trial court did not permit him to explain further. [V16:1074]

Mr. Butler was taken to the police station on a misdemeanor charge. [V16:1025,1069] However, the police told Mr. Butler they were referring the case to be prosecuted as felonies. [V16:1072] Mr. Butler denied that he kidnapped or raped Leslie. [V16:1068-69, 1072] Mr. Butler testified that Leslie told the police that she wanted Mr. Butler to be prosecuted only for domestic battery, a

misdemeanor. [V16:1073] Mr. Butler bonded out of jail. [V16:1025] Mr. Butler recalled a police report that was filed in 1993 charging him with choking Leslie. [V16:1073-74]

On March 13th, Theodore Dallas picked up Mr. Butler and dropped him off at Williams' residence. [V16:1027] Later Terry Jackson gave Mr. Butler a ride. [V16:1028] Mr. Butler denied that he told Jackson that he wanted to kill Leslie. [V16:1029,1079] Jackson drove Mr. Butler to Leslie's apartment. [V16:1029] There Mr. Butler spoke with Leslie. [V16:1030-31] Mr. Butler gave her a house key and said he would talk to her later. [V16:1031] Leslie was going out that evening. [V16:1031]

The next day at about 11:30 a.m., Mr. Butler rode his bike to Leslie's house. [V16:1032-33] Leslie let Mr. Butler inside the apartment, and they kissed and hugged. [V16:1033] The cable company men arrived and removed the cable box. [V16:1033] Mr. Butler stayed at the residence for another few minutes and then he left. [V16:1034] He never saw Leslie again. [V16:1034] Mr. Butler returned to the motel room where he fell asleep. [V16:1034] He was awakened by Glasco. [V16:1034] Glasco and Mr. Butler had dinner together. [V16:1034] At about this time, Mr. Butler cut his hand on a broken beer bottle. [V16:1057]

At about 8:00 p.m., Mr. Butler left Glasco and went to Williams' house. [V16:1035] Mr. Butler stayed there until 11:00 p.m. [V16:1035-36] Leaving on his bicycle, Mr. Butler went to Kelly's house to get his beeper. [V16:1036] On the way, Jeter agreed to drive Mr. Butler. [V16:1036-37] Mr. Butler testified

that this car was a Cadillac, not a blue sports car. [V16:1039] After retrieving his beeper, Mr. Butler and Jeter went to Leslie's apartment to show him a vehicle. [V16:1038] Jeter then dropped Mr. Butler off near Williams' house. [V16:1039,1040]

At the house, Mr. Butler and others used cocaine. [V16:1041] Williams asked Mr. Butler to obtain more cocaine. [V16:1041-42] Williams, Tennell, and Mr. Butler then went to Mr. Butler's motel room and snorted cocaine. [V16:1042] They returned to Williams' house. [V16:1043] Later Mr. Butler again returned on his bicycle to his room for more cocaine. [V16:1043] When he returned to Williams' house, it started raining. [V16:1044] Mr. Butler denied acting strangely while at Williams' residence. [V16:1081]

After 2:00 a.m., Mr. Butler and Tennell started walking back to the motel room. [V16:1049,1083] On the way, Tennell decided to take the route of the bicycle trail. [V16:1050] Mr. Butler did not want to take this route because it was illegal to be on the trail at night. [V16:1050,1085] Mr. Butler arrived at the motel room first, about 2:30 a.m. [V16:1051] Mr. Butler denied that he went near the dumpster. [V16:1051,1086]

At the room, Mr. Butler and Tennell changed clothing. [V16: 1052-53] After Mr. Butler and Tennell consumed more cocaine, someone knocked on the door. [V16:1053] Tennell left the room for about an hour and then returned. [V16:1054-55] According to Mr. Butler, Tennell was on "a dope run." [V16:1055] Tennell then took a shower. [V16:1054] Mr. Butler denied that he took a shower. [V16:1087-88] Meanwhile, Kelly arrived. [V16:1055] She bought

cocaine from Tennell. [V16:1055-56] Mr. Butler and Tennell slept for about an hour before Glasgow woke them. [V16:1057,1058]

Mr. Butler asked Tennell what had happened to his (Mr. Butler's) shoes, the Converse shoes. [V16:1058-59] Mr. Butler had left the shoes by the door. [V16:1059] According to Mr. Butler, Tennell responded, "I'm on a mission with them." [V16:1059,1083] Mr. Butler told Tennell he would wear his shoes, the black Nike shoes. [V16:1059] Mr. Butler was wearing these shoes when he was arrested. [V16:1076] Mr. Butler and Tennell left the motel room. [V16:1060] They encountered the police, and Tennell ran away. [V16:1061-62] Mr. Butler was taken to the police department. [V16: 1063] At that time, he did not know that Leslie was dead. [V16: 1063]

Mr. Butler testified he had known about Leslie's relationship with Hartsfield since 1991 or 1992. [V16:1022] Mr. Butler testified this relationship was not a great problem for him. [V16: 1023] He responded to questioning [V16:1023],

> Q. It wasn't a problem for you?
>
> A. No sir, wasn't no problem.
>
> Q. You didn't kill Bay because she was having an affair with Adonis?
>
> A. No, sir. I would not kill Bay. There was nothing in the world that would make me do Bay the way I have seen those pictures.

Mr. Butler, who was right-handed, denied wearing a striped, Hillfiger shirt. [V16:1064] He denied killing Leslie or even entering her apartment during the night of her death. [V16:1064] He did not see Lola Young that morning. [V16:1065] Mr. Butler

denied telling Wood that if he killed Leslie he did not remember it. [V16:1079-80] Mr. Butler had been convicted of felonies ten times previously. [V16:1066]

VII. Defense Testimony Presented at the Penalty Phase

Junior Butler, Mr. Butler's father, testified Mr. Butler was a good son. [V17:1255,1258] When Mr. Butler was eight-years-old, Junior was accused of murdering Mr. Butler's mother. [V17:1255] Junior was acquitted of the charge. [V17:1263] At the time of his mother's death, Mr. Butler was living with her and Junior. [V17: 1256] Mr. Butler's family was poor, his father supporting the family on only fifty dollars a week. [V17:1257]

When Mr. Butler's mother died, Mr. Butler lived with his grandmother, Hatty Port. [V17:1258] Mr. Butler got along fine with his brothers and sisters. [V17:1259] Sandra Butler, Mr. Butler's sister, testified Mr. Butler protected her when she was a child. [V17:1270-71] When Mr. Butler's grandmother died, Junior took custody of Mr. Butler and his siblings. [V17:1261] Junior was living in Largo at the time. [V17:1261] When Mr. Butler turned eighteen, he moved out of his father's residence. [V17:1262]

IIX Defense Testimony Presented at Spencer Hearing

Dr. Michael Scott Maher, a psychiatrist, interviewed Mr. Butler with regard to his cocaine habit and psychiatric background. [V10:1735-36,1740] Mr. Butler informed Dr. Maher that he had used a lot of cocaine on the night of the murder although he denied

committing the murder. [V10:1740-41] Dr. Maher testified that one effect sometimes caused by cocaine was "perseveration" or irrational, repetitive action. [V10:1736] Dr. Maher stated that one experiencing perseveration engages "in behavior which is -- the phrase that comes to mind, unfortunately, is overkill, doing something again and again and again and again, past the point were it serves any reasonable, rational basis or purpose. The number of stab wounds in this case suggests that pattern of behavior." [V10:1738] Dr. Maher admitted he did not observe any indication that Mr. Butler had an obsessive personality other than his cocaine use. [V10:1741]

According to Dr. Maher, a young child whose mother dies as a result of violence faces a greater risk of participating in violent behavior "as an alternative to resolving conflicts." [V10:1738-39] The child, Maher said, would be "more at risk for becoming engaged in violent activities, particularly if they are involved with drugs and other dysfunctional social activities. . ." [V10:1739]

SUMMARY OF THE ARGUMENT

The trial court committed six reversible errors in this case. Three of these errors occurred during the guilt phase of the trial below and require the remand of this case for a new trial. With regards to the first error, the trial court erred in permitting the prosecutor to make repeated references to prior acts of violence allegedly committed by Mr. Butler. These collateral acts, which were wholly unproven, were irrelevant to any material facts in this case. To the extent that the evidence was relevant only to show Mr. Butler's bad character or propensity for violence, the collateral evidence is inadmissible under section 90.404, Florida Statutes (1997). In the alternative, the evidence is inadmissible under section 90.403, Florida Statutes (1997), because the danger of unfair prejudice from the evidence far exceeds its probative value.

Secondly, the trial court erred in admitting the DNA testimony of Ms. Jeannie Eberhardt, a forensic serologist. Ms. Eberhardt's testimony concerning the DNA did not meet the legal standard of admissibility that this court has established in Murray v. State, 692 So. 2d 157 (1997), and Brim v. State, 695 So. 2d 268 (Fla. 1997). Contrary to the requirements in these decisions, Eberhardt displayed no knowledge, either personal or otherwise, of the data base she used to make her statistical conclusions. In the absence of this knowledge, Eberhardt's testimony provides no assurances of reliability; consequently, her testimony was inadmissible.

The last issue concerning the guilt phase involves the state's failure to provide the defense with a copy of a probation violation report. This report established that a key prosecutorial witness, Lola Young, suffered from cocaine-induced hallucinations. Contrary to the requirements under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, the prosecution withheld this exculpatory evidence from the defense. The trial court's failure to grant Mr. Butler a new trial following the withholding of this evidence is reversible error because the absence of the evidence from the trial below undermines confidence in the verdict of guilty.

The trial court also committed three errors during the penalty phase of the proceedings. First, the court gave an erroneous instruction to the jury that informed them that the evidence had established the single aggravating factor in this case, the heinous, atrocious, or cruel nature of the crime. This instruction improperly relieved the state of its burden to prove the aggravating circumstances supporting the death penalty and denied the jury of the role as the fact-finder. A second error concerns the trial court's failure to consider in the written sentencing order a statutory mitigating circumstance of the impairment of the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. The failure of the lower court to extend its review of mitigating factors to evidence indicating impairment violates the requirement that a trial court give weight to all mitigating evidence. Finally, the sentence of death under the facts of this case is disproportionate

to the sentences of life imposed in other cases with similar facts. This court has only rarely upheld a death sentence for a murder occurring in a domestic violence context. The present case, where the death sentence is founded only on a single aggravating factor, does not present any extraordinary facts that would support treating this case any different from other domestic violence cases where a sentence of life was imposed.

ARGUMENT

ISSUE ONE

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT TESTIMONY CONCERNING PRIOR ACTS OF VIOLENCE ALLEGEDLY COMMITTED BY MR. BUTLER.

Over the strenuous objections of defense counsel, the trial court permitted the prosecutor to repeatedly interject into the trial references to prior domestic violence allegedly perpetrated by Mr. Butler against Leslie Fleming. The admission of these collateral acts, which were unsupported by anything other than insinuation by the prosecutor, was highly improper. Because the collateral evidence was relevant only to show Mr. Butler's bad character and propensity for violence, the trial court should have excluded the evidence under section 90.404, Florida Statutes (1997). In the event the evidence has any marginal relevance to a material issue, the probative value of the evidence is far outweighed by the danger of unfair prejudice; therefore, the evidence is inadmissible under section 90.403, Florida Statutes (1997).

Prior to the trial below, defense counsel filed a written motion in limine seeking to exclude "Any mention of any prior allegations of abuse, physical or emotional, towards Leslie Fleming by the Defendant." [V4:657] The motion specifically sought the exclusion of any evidence suggesting that Mr. Butler had committed a kidnapping or sexual battery on the victim on March 11, 1997. [V4:657] The trial court conducted a pre-trial hearing on the

motion. [V11:13] During this hearing, the defense noted Mr. Butler had been arrested for a domestic battery, which occurred on March 11, 1997. [V11:17,18] Defense counsel pointed out to the court that law enforcement contemplated charging Mr. Butler with kidnapping and sexual battery, but these charges were not filed. [V11:17] Defense counsel argued that testimony concerning the serious felony charges would constitute hearsay and would unfairly prejudice Mr. Butler. [V11:17-19] Although defense counsel conceded that the allegation of a domestic battery was relevant to the case, he argued that the alleged kidnapping and sexual battery had no such relevance. [V11:19] When the court asked the prosecutor if it intended to introduce evidence concerning the sexual battery and kidnapping, the prosecutor responded, "No, because he was actually not arrested for those things. He was arrested for the battery." [V11:19-20]

The court ruled, "So as to the allegations of sexual battery or as to an allegation of a kidnapping, again, my only--I will grant the Defense motion to the extent that I'll caution the State against mentioning it during opening statement." [V11:20] The court postponed a ruling regarding the admissibility of the evidence under section 90.403, Florida Statutes (1997), requesting that an objection be made at the time of the admission of the evidence. [V11:20] The defense noted the state might introduce additional unsubstantiated allegations of abuse. [V11:21-22] The court again requested that an objection be made contemporaneously. [V11:22]

Defense counsel did subsequently object to the state's references to alleged prior acts of violence. On cross-examination of Officer Marvin Green, the prosecutor asked, "Now, sad enough, but a true fact is, isn't it, that many times, not many times, but when a murder occurs to a woman sometimes and it's the night before, two nights before there is a domestic violence incident, you automatically--don't you look--" V15:795] Defense counsel objected to the relevancy of this question. [V15:795] The court overruled the objection but warned the state "to stay away from the allegations of the nature of the previous offenses." [V15:796] The state then continued the questioning: "[I]t's fair to say that if a victim is killed, a woman, and she has been the victim of domestic violence, you would naturally look at the perpetrator of those domestic violence cases?" [V15:797] Officer Green responded affirmatively. [V15:797]

The state also interjected more allegations concerning domestic violence incidents during the questioning of Theodore Dallas. The prosecutor asked Dallas if he knew of the incident that occurred on March 11, 1997. [V15:822] More specifically, the prosecutor asked Dallas if he knew that Mr. Butler "was accused of pushing her [Leslie] down, pushing her." [V15:822] Defense counsel objected to this questioning as being irrelevant. [V15:822-24] The court overruled the objection after the state argued the questioning was permitted as a test of Dallas' knowledge of Mr. Butler's prior acts. [V15:823-25] Dallas had earlier indicated he

had no knowledge of any violent exchanges between Mr. Butler and Leslie. [V15:820]

The court did rule that the prosecutor should limit the scope of the questioning. [V15:825] Nonetheless, the prosecutor continued questioning by asking, "Mr. Dallas, April 24, 1993, were you aware that Leslie Fleming claimed the Defendant pushed her down, pushed her in the back and later put his foot on her throat choking her?" [V15:825-26] Defense counsel objected to the state's admitting details of the prior offense. [V15:826] The court again warned the state to not go into the details of the prior incident. [V15:826-27] The prosecutor continued questioning by asking Dallas, "On June 21st of 1993 are you aware of the allegation that the Defendant punched and struck Leslie Fleming? A separate date June 21st of 1993. . ." [V15:827]

On cross-examination of Mr. Butler, the state returned to allegations of domestic violence allegedly committed by Mr. Butler in 1993 [V16:1073-74]:

> Sir, I would like to direct your attention to April 24, 1993. That's when you were arrested by law enforcement. Isn't it a fact you were arrested because you put your hands on her throat, choking her to the point of unconsciousness where she cannot breath anymore?

The state had earlier insinuated that Mr. Butler had kidnapped and sexually battered Fleming. The prosecutor asked, "Isn't it a fact that she was alleging that you were kidnapping her?" [V16:1068] After Mr. Butler responded negatively, the prosecutor continued with two questions: "Isn't is a fact that she was alleging that

you committed forcible rape against her?" and "She was screaming during that incident?" Defense counsel objected when the prosecutor noted in full hearing of the jury that the domestic violence case "was being referred to the State Attorneys for the felonies of kidnapping and sexual battery." [V16:1070] The court overruled a general objection and rejected defense counsel's request to approach the bench. [V16: 1070] The prosecutor again questioned Mr. Butler concerning the possibility of felony charges. [V16:1071,1072] Subsequently, Mr. Butler raised the issue of the admission of the collateral incidents of domestic violence in a motion for a new trial, which the court denied. [V4:759-60,762-63;V5:851]

The prosecutor's repeated efforts to interject into the trial prior violent acts allegedly committed by Mr. Butler constituted an attack on Mr. Butler's character and a demonstration of his propensity to commit violence. This strategy was unlawful. Whether evidence of criminal acts occurring outside of the circumstances of the instant offense--collateral evidence--is admissible is fundamentally a question of relevancy. See generally, Sexton v. State, 697 So. 2d 833 (Fla. 1997) (This court begins a consideration of collateral evidence by noting that all relevant evidence is admissible unless prohibited by a rule of exclusion.). Relevant evidence is defined as "evidence tending to prove or disprove a material fact." §90.401, Fla. Stat. (1997). Falling short of this requirement of relevancy, the collateral evidence presented by the prosecutor in this case is evidence that tends to

prove immaterial facts, facts that are specifically excludable by section 90.404, Florida Statutes (1997).

The evidence of Mr. Butler's alleged violent acts committed against Leslie are relevant only to show the immaterial facts of Mr. Butler's bad character or propensity to commit violence. Section 90.404 excludes similar-fact evidence that is relevant only to these immaterial issues. Williams v. State, 621 So. 2d 413 (Fla. 1993); Heuring v. State, 513 So. 2d 122 (Fla. 1987); Peek v. State, 488 So. 2d 52 (Fla. 1986). This rule of evidence addresses the concern that a conviction will be based on aspects of a defendant's character, not on proof of the charged offense. Heuring v. State, 513 So. 2d at 124. This court has stressed the danger of collateral evidence:

> Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty.

Nickels v. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925).

The collateral evidence of Mr. Butler's alleged prior violent acts falls within the rule of exclusion provided by section 90.404. First, the allegations constitute similar fact evidence. As this court stated in Sexton v. State, 697 So. 2d at 837, similar fact evidence has a "logical resemblance to the crime for which the defendant is being tried." The collateral evidence in this case resembles the charged murder in that both involve violence allegedly committed by Mr. Butler against the same victim. Although the murder was more extreme violence than the alleged

earlier incidences of violence, the two differ more in degree than in kind. Injurious violent acts are the common denominator of both.

The second requirement necessary to invoke the exclusionary provision of section 90.404 is that the collateral evidence be relevant only to show Mr. Butler's bad character or propensity to commit violence. For evidence that is otherwise relevant, the materiality required under section 90.402 is met; in other words, a defendant's bad character or propensity toward violence are not material facts in a criminal prosecution. Again the collateral evidence at issue meets this requirement. The evidence, by depicting Mr. Butler as prone to outbursts of violent acts committed against Leslie, tends to prove his bad character and his propensity for violence. The evidence has relevancy but relevancy only to prove immaterial facts. Thus the collateral evidence fails to meet the materiality requirement of section 90.402 and, at the same time, falls within the rule of exclusion provided by section 90.404.

Section 90.404 permits the introduction of similar fact evidence if the evidence is "relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . ." Collateral evidence is also admissible if it is "inextricably intertwined" with the charged crime. Griffin v. St., 639 So. 2d 966, 967 (Fla. 1994), cert. denied, 514 U.S. 1005 (1995); See, Foster v. State, 679 So. 2d 747 (Fla. 1996), cert. denied, 520 U.S.

1122 (1997) (Collateral evidence was admissible in murder prosecution to show "complete picture of criminal episode."). Only a small portion of the collateral evidence at issue in this case falls within these categories. Mr. Butler concedes, as did defense counsel below, that evidence surrounding the March 11th domestic violence incident was admissible, being relevant to identity and motive. This evidence includes Leslie's allegation of abuse, Mr. Butler's subsequent arrest and incarceration, and his threat against Leslie made to Terry Jackson.

On the other hand, evidence indicating the state attorney's contemplation of kidnapping and rape charges as well as evidence of the 1993 domestic dispute between Mr. Butler and Fleming are not relevant to any of the material issues listed in section 90.404. They are not relevant, in part, because they are wholly unproven. Before evidence of a collateral offense can be admitted under section 90.404, clear and convincing evidence must show that the former offense was actually committed by the defendant. State v. Norris, 168 So. 2d 541, 543 (Fla. 1964); Chapman v. State, 417 So. 2d 1028 (Fla. 3d DCA 1982). In the trial below, the prosecutor insinuated that Mr. Butler had kidnapped and sexually battered Leslie on March 11th by questioning Mr. Butler regarding his awareness of the state attorney's office's contemplation of filing these charges. The prosecutor made this serious allegation despite the complete lack of any supporting testimony indicating the commission of these felonies. The only introduced evidence of the March 11th incident indicated that Mr. Butler may have battered

Leslie resulting in red marks on her back and an injured shoulder. [V11:147-48,154] The tenuous proof of these collateral charges is highlighted by the state's failure to actually charge Mr. Butler with the felony offenses. By suggesting that Mr. Butler was guilty of kidnapping and raping Leslie, the prosecutor introduced into the trial a collateral element consisting of unsubstantiated hearsay and attempted to stamp this evidence with legitimacy by refering to the prosecutorial agency's position on the matter.

In addition, the 1993 allegations of domestic violence are not relevant to the charged murder because they are, temporally, too remote from the murder. See, Griswold v. State, 77 Fla. 505, 82 So. 44 (1919) (holding that it is reversible error to admit evidence that is misleading or confusing and so remote as to be legally irrelevant). Years, not months, passed from the time of the alleged violence to the time of the murder during which Mr. Butler and Leslie continued their relationship. Even if the claimed incident in 1993 had been established, this proof says nothing about the subsequent murder, anymore than a bouquet of roses reveals the quality of a marriage, years later.

The collateral evidence in this case is similar to the excluded evidence in Suarez-Mesa v. State, 722 So. 2d 843 (Fla. 2d DCA 1998). In that case, the defendant was charged with the murder of his estranged wife. During the defendant's trial, the prosecution submitted to the jury a videotape of the defendant's prior bond hearing on collateral charges concerning the defendant's arrest for the sexual battery and aggravated assault of his

estranged wife. Id. In this videotape, the defendant was dressed in prison clothes. Id. On appeal the district court ruled that the collateral evidence of the videotape was "clearly inadmissible as evidence of other crimes." Id. at 844. The court found that the evidence was relevant only to show the defendant's bad character or propensity to commit crimes.

Like the prosecution in Suarez-Mesa, the prosecution in the instant case suggested Mr. Butler's commission of prior crimes against the victim as a means of showing his bad character and propensity for violence. The cases are similar too in the superficial assurances of guilt that were suggested by the collateral evidence. In Suarez-Mesa the defendant's commission of the prior crimes was suggested by his wearing prison clothing. Similarly, the jury in the instant case could conclude Mr. Butler was guilty of a prior kidnapping and sexual battery by the prosecutor's suggestion that these charges were considered by his office.

Keen v. State, 504 So. 2d 396 (Fla. 1987), is also similar to the present case. In Keen the prosecutor asked the defendant, who was charged with murder, about an unrelated incident occurring years earlier when allegedly Keen and his brother attempted to murder Keen's brother's wife by hitting her in the head with a rock. Id. at 401. At trial defense counsel objected to the question as being inflammatory and prejudicial. This court agreed with the objection, ruling that the comment was so unfairly prejudicial as to require a new trial because it was relevant only

to show the defendant's bad character or propensity for violence. Id. at 402.

Even if the collateral evidence in this case has some marginal relevance to a material issue, this relevancy is outweighed by the danger of unfair prejudice. "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. . ." §90.403, Fla. Stat. (1997). Even though the collateral evidence is found to be relevant to a material issue, section 90.403 must still be addressed. Sexton v. State, 697 So. 2d 833. Under this section, the trial court must "balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice." Id. at 837. This section "is directed at evidence which inflames the jury or appeals improperly to the jury's emotions." Ehrhardt, Florida Evidence §403.1 (1998 Edition).

The prosecutor in the trial below certainly appealed to the jury's emotions by phrasing emotionally charged questions such as the following: suggesting that Mr. Butler had "put his foot on her [Leslie's] throat choking her"; "choking her to the point of unconsciousness where she cannot breath anymore?"; "Defendant punched and struck Leslie Fleming?"; "Isn't is a fact that she was alleging that you committed forcible rape against her?"; and "She was screaming during that incident?" [V15:825-26,827;V16:1070,1073-74] These questions encouraged the jury to convict Mr. Butler for conduct that was unrelated to the charged offense. See, Pulliam v. State, 446 So. 2d 1172 (Fla. 2d DCA 1984) (Court finds that the

relevancy of the prosecutor's comments regarding an ongoing drug investigation involving the defendant was outweighed by the danger of unfair prejudice.).

Under either section 90.404 or 90.403, the admission of the collateral evidence was not harmless. The state cannot demonstrate beyond a reasonable doubt that the admission of the improper evidence did not affect the verdict. State v. Diguilio, 491 So. 2d 1129 (Fla. 1986); See also, Goodwin v. State, 24 Fla. L. Weekly S583 (Fla. Dec. 16, 1999), (Harmless error standard set forth in Diguilio applies despite the enactment of the Appellate Reform Act, section 924.051, Florida Statutes (Supp. 1998)). The improper questioning by the prosecutor characterized Mr. Butler as violent in his relationship with Leslie. When a final act of violence was committed on Leslie, Mr. Butler became more than a suspect: he became--as the prosecutor stated--"automatically" a target for a conviction. However, this type of guilt by association, without regard to the facts of the case, is the very prohibition guarded against by sections 90.404 or 90.403. Contrary to these rules of evidence, the admission of the collateral evidence permitted the jury to convict Mr. Butler on the basis of unfairly prejudicial and irrelevant evidence. This conclusion is all the more likely in a case where the evidence of the identity of the perpetrator was not compelling. One bloodstain on a tennis shoe found in a dumpster and the weak testimony of a child witness constitute the only substantial evidence of guilt in this case.

In addition, the jury may have improperly considered the evidence in reaching its advisory sentence. As argued in issue six of this brief, Leslie's death resulted from a violent act of passion and jealously. The prosecutor's suggestion of prior acts of violence, however, encouraged the jury to view the murder as just one more example of Mr. Butler's violence against Leslie. Thus the prosecutor's comments, in effect, advocate a death sentence as punishment for the murder and long-term abusive behavior. This result is fundamentally unfair. See Castro v. State, 547 So. 2d 111 (Fla. 1989) (Admission of improper collateral evidence was harmless as to the guilt phase of the trial but not as to the penalty phase.). Under these circumstances, this court should correct the trial court error in permitting the introduction of the irrelevant evidence by granting Mr. Butler a new trial.

ISSUE TWO

THE TRIAL COURT ERRED IN PERMITTING AN UNQUALIFIED EXPERT WITNESS TO TESTIFY CONCERNING DNA EVIDENCE.

During the trial below, DNA evidence established that blood found on one of the sneakers recovered from the dumpster belonged to the victim. Other evidence suggested that this sneaker belonged to Mr. Butler. The highly inculpatory evidence linking Mr. Butler to the victim's blood came from a single expert witness, Ms. Jeannie Eberhardt. Eberhardt's testimony concerning the DNA, however, does not meet the legal standard of admissibility that this court has established in Murray v. State, 692 So. 2d 157 (1997) and Brim v. State, 695 So. 2d 268 (Fla. 1997). The state did not demonstrate Eberhardt's expertise on the statistical import to be given to the DNA identification. Eberhardt had no knowledge, either personal or otherwise, of the data base she used to make her statistical conclusions. Consequently, the trial court error in permitting the DNA testimony over the objection of defense counsel is reversible error.

Eberhardt, a forensic serologist, testified concerning the DNA evidence. [V13:374-75] During her testimony, defense counsel objected that she was not qualified to give an ultimate opinion on the DNA evidence. [V13:396] Defense counsel's voir dire of Eberhardt revealed that she was not a statistician. [V13:398] Her only educational background concerning statistics was a "status class as an undergraduate." [V13:398] Eberhardt had no involvement in the creation of the data bases supporting the statistical

conclusions of her testimony. [V13:399] Eberhardt was unaware of the basis for the data base that she used other than what was published in a single article published in 1995. [V13:399-400] She attempted no independent verification of this data base. [V13:400] Eberhardt knew of no published accounts disputing this article. [V13:400] Although Eberhardt knew of other data bases, she did not compare her results using these data bases. [V13:402] Eberhardt was unable to testify to anything concerning a 1996 report by the National Research Counsel. [V13:411-12]

Eberhardt testified that she used the product rule calculation in determining her statistics. [V13:405] According to Eberhardt, the product rule was accepted by other experts. [V13:424] To use the product rule, Eberhardt said one must "multiply the frequency from each allele set that we find." [V13:405] She testified concerning her use of the product rule in this case: "For the testing I took the frequency of finding those types at each of the six different alleles and the six different locations, and then I multiplied them together and that's the product rule." [V13:423]

Based on Eberhardt's testimony, defense counsel objected that she was not qualified to give an opinion relating to statistical analysis under Murray v. State, 692 So. 2d 157, and Brim v. State, 695 So. 2d 268. [V13:402] The court expressly declined to conduct a hearing under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). [V13:407,416] Defense counsel objected to this position arguing that the statistical analysis must meet the Frye standard. [V13:408] The court concluded that the product rule calculation

satisfied the requirements under Frye. [V13:416,427] Counsel renewed his objections when Eberhardt testified before the jury. [V13:455,477]

During the proffered testimony, Eberhardt indicated that the DNA present in the blood on the discovered sneaker was consistent with a known DNA sample from Leslie. [V13:422] She then offered a statistical calculation concerning how common that type of DNA profile would be found in any given population. [V13:422-23] Eberhardt testified that the DNA profile of both samples occurred in "approximately one in 3,000 in the African American population, approximately one in 112,800 individuals of the Caucasian, and approximately one in 538,000 in the Southeastern Hispanic population." [V13:423,479] Eberhardt used the product rule calculation to determine the statistical basis. [V13:423]

Beginning in Hayes v. State, 660 So. 2d 257 (Fla. 1995), and continuing in a series of cases, this court has recognized the general admissibility of DNA evidence provided the DNA testing and statistical results of this testing ensures reliability. In Hayes 660 So. 2d at 264, this court ruled "that DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the Frye test to protect against false readings and contamination." Under the Frye test, the proponent of the expert testimony has the burden to prove "the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the

case at hand." Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995). Accordingly, the trial court must find an expert qualified before the opinion evidence can be admitted. Id.

In Brim v. State, 695 So. 2d 268, this court noted that the DNA testing process usually involved two distinct steps. The first step, which entails principles of molecular biology and chemistry, determines whether two DNA samples match. Id. at 270. The second step provides a probability significance to the match by using principles of statistics and population genetics. Id. This court has emphasized the importance of this second step by quoting from a 1992 report by the National Research Council (NRC): "[t]o say that two patterns match, without providing any scientifically valid estimate (or, at least, an upper bound) of the frequency with which such matches might occur by chance, is meaningless." Murray v. State, 692 So. 2d (at 162). Given the importance of the probability calculations forming the basis of the second step of DNA testing, this court ruled in Brim that the second step, as well as the first step, must meet the Frye test of reliability. Brim v. State, 695 So. 2d at 270. This court concluded, "We heed the NRC's warning that we should be cautious when using standard statistical principles in the field of DNA testing." Id. at 271.

After noting that the appellate review of a Frye determination was one of a matter of law, this court in Brim found that the record failed to show the complete details of the calculation methods used to determine the probability frequencies. Id. at 275. This omission prevented the court from properly evaluating whether

the methods used to calculate the statistics would satisfy the Frye test. Id. This court remanded the case for an evidentiary hearing on the method used to determine the statistics.

The expert in Murray v. State, 692 So. 2d 157, testified concerning the PCR testing of the defendant's DNA and the DNA from the crime scene. The expert concluded to the jury that the defendant's DNA matched the DNA sample and that over ninety percent of the population would have a different DNA type. Id. at 163. Defense counsel objected that neither the PCR testing nor the probability calculations met the Frye test. While stating the probability calculations were based on a published study, the expert admitted he had no knowledge of the data base that formed the basis of the study. Id. at 159,164. He opined that PCR analysis of DNA is generally accepted in the scientific community. Id. The lower court admitted the evidence ruling that any deficiencies in the evidence concerned the weight of the evidence as opposed to its admissibility. Id at 160-61.

On appeal of the trial court's ruling, this court began by emphasizing the requirement in Brim that DNA probability calculations meet the Frye standard. Id. This court stated, "This standard requires a determination, by the judge, that the basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community." Id. at 163. The trial court in Murray, this court held, had failed to apply the Frye standard to the expert testimony. Id. Even if the trial court had applied the Frye standard, the deficient

information offered by the expert could not meet the standard. Id. This court ruled that the expert's testimony regarding the probability calculations was "unenlightening." Id. Specifically, this court stated, "[T]his expert was simply not qualified to report the population frequency statistics at issue here because the expert had no knowledge about the database upon which his calculations were based." Id. This court further found,

> this expert must, at the very least, demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources. Such a knowledge was not demonstrated. In fact, this expert had no insight into the assembly of the relevant database. The qualification of this expert witness was clearly erroneous.

Id. at 164; accord, Miles v. State, 694 So. 2d 151 (Fla. 4th DCA 1997) (Court finds record insufficient to determine whether testifying witness was qualified as an expert to testify concerning population frequency statistics.).

The decisions in Brim and Murray are controlling in the present case. Eberhardt--like the expert in Murray-- was not involved in the creation of the population frequency data base, and she was unaware of the basis for the data base other than what was published in a single article. [V13:399-400] Without either personal involvement in the creation of the used data base or any indication of a study of other authorities addressing the data base, Eberhardt has hardly "demonstrate[d] a sufficient knowledge of the database grounded in the study of authoritative sources" as required in Murray. Murray v. State, 692 So. 2d at 694; See also, Jordan v. State, 694 So. 2d 708 (Fla. 1997) (The record did not show the qualifications of a proposed expert on offender profile

evidence where the witness had not conducted an adequate study of the relevant scientific literature.).

The data base used by Eberhardt is hearsay, which is not supported by any assurances of reliability. An expert can testify regarding matters that are not based on firsthand knowledge because of an assumption that "the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." Daubert v. Merrell Dow Pharmaceuticals,Inc., 509 U.S. 579, 590 (1993). Eberhardt, untrained in statistics, has demonstrated neither the knowledge nor the experience necessary to be qualified as a witness on DNA population frequencies. Eberhardt attempted no independent verification of the data base. [V13:400] Furthermore, she did not cite any authorities establishing the reliability of the data base. Although Eberhardt knew of other data bases, she did not compare her results using these databases. [V13:402]

Although Eberhardt testified she used the product rule in determining the statistics, the use of this rule does not automatically validate her statistical conclusions. Undersigned counsel acknowledges the acceptance in other jurisdictions of the product rule. See, Clark v. State, 679 So. 2d 321 (Fla. 3d DCA 1996) ("DNA match probability calculations under the product rule are admissible in this district."); People v. Soto, 981 P. 2d 958 (Cal. 1999) (DNA probability calculations under the product rule are admissible.). However, the product rule is used after allele frequencies are obtained by using a data base. See, U.S. v. Shea, 957 F. Supp. 331 (D.N.H. 1997) ("The product rule can be applied

reliably in the manner described above only if the estimate of allele frequencies is reasonably accurate.") Eberhardt explained her use of the product rule [V13:426]:

> If I told you that you're a type AB so your blood type is AB and then I performed some traditional enzyme marker testings, for example, PGM, and let's say that as an AB you are approximately four percent of the Caucasian population, then the PGM, say you are a type 1,2, say, that is three percent of the population, the product rule allows me and everyone that use this rule to multiply that four percent by that, say, the other one was three percent to actually come up with a statistical frequency that shows how common it is to find you as an AB and a 1, 2 PGM type.

Eberhardt's above use of the product rule is only valid if the percentages used in the final multiplication are correct. The percentages actually used in this case were from the data base which is of unknown reliability.

The state has not met its burden of establishing Eberhardt's qualifications as an expert on DNA population frequency statistics. Therefore, the trial court erred in permitting Eberhardt to testify concerning this aspect of the DNA testing. A new trial is required because as in Murray "the State completely failed to offer a proper expert witness or to demonstrate the reliability of the DNA processes and calculations utilized." Murray v. State, 692 So. 2d 194. This trial court error cannot be deemed harmless. As stated above, a DNA match is meaningless without statistical evidence indicating the frequency of a particular DNA within a population. Thus Eberhardt's testimony that the sampled DNA was one in thousands has no probative value. Furthermore, the inadequacies of

her testimony render her testimony completely inadmissible rather than merely going to the weight of the evidence. Brim v. State, 695 So. 2d 270.

The DNA evidence in this case was critical evidence linking Mr. Butler to the murder. Without the DNA testimony of Eberhardt, the state cannot establish whose blood was on the sneaker found in the dumpster. Without this evidence, the state's case would hinge on the reliability of LaShara Butler, a young child witness whose questionable identification of Mr. Butler was based on her seeing his leg, identifying the leg as his "[b]ecause it was big and it had a lot of hair on it." [V12:233,254-55] LaShara's claimed identification of her father as the perpetrator is suspect for several reasons beyond her inability to articulate that she clearly saw him commit the murder. The child testified she saw numbers on a cable television box when she woke up at the time of the murder. [V12:257] However, this cable box was removed from the apartment on March 13th at about noon, a time prior to the murder. [V15:801-02] LaShara also alleged she heard her mother say "stop" at the time of the murder, but the child, in a deposition, related that her mother said nothing. [V12:231,242,243]

That what LaShara may have seen on the night of the murder differs from her later claims is consistent with her failure to relate to Officer Terence Kelly, the first police officer on the scene, that her father was involved in her mother's death even though Officer Kelly asked her what she had heard and seen. [V12:238-39] In addition, LaShara did not tell Shawna Fleming, her

aunt, anything about what had occurred immediately after the murder. [V12:204] Only later did LaShara incriminate Appellant. One possible explanation for this sudden shift from complete silence regarding the murder to claims of being an eyewitness is the influence of LaShara's grandmother Vivian Harris. LaShara admitted she wanted to make her grandmother happy. [V12:241-42] Harris had told LaShara repeatedly that Mr. Butler was the murderer. [V12:241] Harris had also told LaShara that she did not want LaShara to like Mr. Butler. [V12:258]

LaShara's weak identification of Mr. Butler as the murderer and the absence of other direct evidence of guilt underscores the significance of the DNA testimony. Under these circumstances, an error concerning the reliability of the DNA testimony is not harmless. The state cannot demonstrate beyond a reasonable doubt that the admission of the improper DNA testimony did not affect the verdict. State v. Diguilio, 491 So. 2d 1129 (Fla. 1986); See also, Goodwin v. State, 24 Fla. L. Weekly S583 (Fla. Dec. 16, 1999), (Harmless error standard set forth in Diguilio applies despite the enactment of the Appellate Reform Act, section 924.051, Florida Statutes (Supp. 1998)); State v. Lee, 531 So. 2d 133 (Fla. 1988) (The DiGuilio standard of harmless applies to issues involving the erroneous admission of collateral crimes evidence.).

ISSUE THREE

THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR A NEW TRIAL FOLLOWING THE DEFENSE'S DISCOVERY OF A PROBATION VIOLATION REPORT THAT WAS UNDISCLOSED BY THE STATE.

Contrary to Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, the prosecution during the trial below withheld exculpatory evidence from the defense. This evidence consisted of a violation of probation report that revealed that Lola Young, a state witness, suffered from drug-induced psychosis and hallucinations. The significance of this report was great in light of Young's claim of observing Mr. Butler outside of the victim's residence at around the time of the offense. The state's non-disclosure of this important evidence mandates a reversal of this case. The state cannot show that the state's suppression of the evidence does not undermine confidence in the resulting verdict.

On July 10, 1998, defense counsel filed a motion to compel. [V4:761] This motion requested the disclosure of a probation violation report regarding Young. [V4:761] In a motion for a new trial filed on July 9, 1998, defense counsel raised the issue of the state's non-disclosure of this report. [V4:762] On August 7, 1998, the lower court conducted a hearing on the motion for a new trial. [V10:1698]

Defense counsel, at this hearing, argued that the state had committed a discovery violation by failing to reveal that Young had been arrested prior to the jury trial but after her deposition. [V10:1702-03] A violation of probation report, dated May 15, 1998,

indicated that Young had, for a period of eight years, a "history of intense and chronic crack cocaine use with bouts of cocaine-induced psychosis." [V10:1704] Young had hallucinations as a result of her cocaine addiction. [V10:1705] Defense counsel argued the report would have been beneficial to the defense on the cross-examination of Young. [V10:1705,1723] The report was not provided to Mr. Butler until after the filing of the motion to compel. [V10:1704] Defense counsel had not learned of Young's arrest until a prosecutor informed him during the trial of the arrest. [V10:1718-19]

In response, the prosecutor maintained that he had not learned of the violation until well after the jury trial. [V10:1719] The prosecutor read from portions of Young's deposition, which was conducted on December 12, 1997: [V10:1722]

> Okay. What kinds of things have you been arrested for?"
>
> Sale and possession
>
> Okay. Are you on probation right now?
>
> Yes, I am. I'm in treatment. I'm in a drug treatment now.
>
> Do you have an attorney this last time?
>
> Michael Toole, public defender.
>
> When was the last time you went to court?
>
> September the 22nd.
>
> So how may times do you think you've been you have been convicted of a felony?
>
> Six, seven.

Following the state's argument, the trial court denied the motion for a new trial without explanation. [V10:1724]

Florida Rule of Criminal Procedure 3.220 sets forth the state's obligation to provide the defense with exculpatory evidence:

> As soon as practicable after the filing of the charging document the prosecutor shall disclose to the defendant any material information within the state's possession or control that tends to negate the guilt of the defendant as to any offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations.

This rule is one of constitutional magnitude. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that: "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The due process requirement of disclosure under Brady applies regardless of a defense request for the evidence, and the requirement extends to impeachment evidence. Strickler v. Greene, 527 U.S. 263 (1999); Young v. State, 739 So. 2d 553 (Fla. 1999). A Brady violation has three components: first, the undisclosed evidence must be exculpatory or impeaching; second, the prosecution must have willfully or inadvertently suppressed the evidence; and three, the non-disclosure must have resulted in prejudice to the defense. Strickler v. Greene, 527 U.S. at 1948.

The non-disclosed evidence of Young's probation violation report meets the above requirements of a Brady violation. As

impeachment evidence, the content of the violation report is favorable to the defense. The violation report's exculpatory nature as well as the resulting prejudice from its non-disclosure is clear given Young's role as a critical eyewitness in the trial below. Only a single adult witness, Young, observed Mr. Butler at or within the immediate vicinity of the victim's residence around the time of the murder. Young, who lived across the street from the victim, claimed she saw Mr. Butler behaving suspiciously near some hedges that were near the victim's apartment. [V14:656-57,660,661] According to Young, she made this observation during the early morning hours of March 14th. [V14:659] Young maintained she identified Mr. Butler despite lighting conditions that another state witness described as "not the best in the world." [V14:693] In addition, a defense witness testified that Young, when she made her identification, would have been about 147 feet away from the person she claimed was Mr. Butler. [V15:774]

The evidence contained in the probation violation report would have dealt the final blow to Young's already questionable identification of Mr. Butler. The report indicated that Young was a chronic crack cocaine user who experience cocaine-induced psychosis and hallucinations. [V10:1704,1705] As stated by defense counsel below, this information would have benefitted the defense's cross-examination of Young, severely questioning her ability to identify Mr. Butler on the night of the murder. Furthermore, this evidence may have led to further exculpatory evidence that would have undermined Young's role as a key prosecutorial witness.

Without Young's testimony, the state would have no credible, adult eyewitness that could place Mr. Butler near the victim's residence around the time of the offense. The importance of Young's testimony prevents the state from meeting its burden of showing that the non-disclosure of the evidence eroding her credibility did not prejudice Mr. Butler. See generally, Richardson v. State, 246 So. 2d 771, 775 (Fla. 1971) (The State must prove the defendant was not prejudiced, and "the circumstances establishing non-prejudice ... [must] affirmatively appear on the record."). In order to satisfy the requirements of a Brady violation, the degree of prejudice from non-disclosure need not result in evidence that is legally insufficient. Kyles v. Whitley, 514 U.S. 419 (1995). Rather, the prejudice must be such that the nondisclosed evidence "reasonably could be taken to put the whole case in a different light so as to undermine confidence in the conviction." Id. at 435. In this case, the evidence of Young's cocaine-induced hallucinations and psychosis so damage her testimony that the case appears in a different light in which no credible witness has placed Mr. Butler at or near the scene of the crime.

This case is similar to State v. Gunsby, 670 So. 2d 920 (Fla. 1996), where this court found a Brady violation. In Gunsby the state failed to disclose in a murder case that a key eyewitness had adjudication withheld on four criminal charges in exchange for his testimony, that he was arrested on new burglary charges before trial, and that another important witness was arrested for

violating probation before she testified. Id. at 922. This court ruled that the state's non-disclosure required a reversal for a new trial. See also, Roman v. State, 528 So. 2d 1169 (Fla. 1988) (The failure to disclose a witness' prior statements indicating that the defendant was drunk around the time of the commission of the crime when that witness testified to the contrary at trial was reversible error despite the introduction of other evidence impeaching the witness.).

The state may argue that the record does not establish the prosecutor's awareness of the violation report. However, neither actual awareness nor willful suppression of the exculpatory evidence are prerequisites to a Brady violation. The state is charged with constructive knowledge and possession of evidence withheld by other state agents. Gorham v. State, 597 So. 2d 782 (Fla. 1992); Antone v. State, 355 So. 2d 777 (Fla. 1978). In Antone this court stated, "Just as there is no distinction between different prosecutorial offices within the executive branch of the U.S. Government for purposes of a Brady [footnote omitted] violation, there is no distinction between corresponding departments of the executive branch of Florida's government for the same purpose." Antone v. State, 355 So. 2d at 778. In the present case, the state is charged with the knowledge of the report that was prepared by probation authorities, other agents of the state. See, Whites v. State, 730 So. 2d 762 (Fla. 5th DCA 1999) (The state had constructive knowledge and constructive possession of a ballistics report for the purposes of rule 3.220 because the report

was contained in the records of the police department.). Even though the suppression of this report may not have been deliberate, Mr. Butler has, nonetheless, sustained prejudice from its absence at trial. See, Young v. State, 739 So. 2d 553 ("Under Brady an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.").

The probation report was valuable evidence to the defense. By referring to this report, trial counsel for Mr. Butler could have severely undermined Young's credibility. The state had constructive possession of this report but failed to notify defense counsel of its existence until after the trial. The state's failure to produce the probation document deprived Mr. Butler of a fair trial where all exculpatory evidence known to the state was available to the defense. This court should correct this injustice by reversing the lower court's judgment and sentence and remanding this case for a new trial.

ISSUE FOUR

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THE ONLY PROPOSED STATUTORY AGGRAVATOR HAD BEEN ESTABLISHED BY THE EVIDENCE.

Only a single statutory aggravator supports the death sentence in this case, the "heinous, atrocious or cruel" nature of the murder. Following the presentation of evidence during the penalty phase, the court instructed the jury, "The aggravating circumstance that you may consider is limited to the following that is established by the evidence: The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel." (emphasis added) [V17:1314] This instruction expressly informed the jury that the one aggravator under consideration had been established by the evidence. Contrary to the state and federal guarantee of due process, the instruction relieved the state of its burden of proof to establish the aggravating factor and usurped the jury's fact-finding role to determine aggravators. The trial court's instruction is, consequently, in error.

Arbitrariness and capriousness should have no part in the imposition of the death penalty. The Supreme Court in Proffitt v. Florida, 428 U.S. 242, 258 (1976), emphasized the legal guidance necessary in death penalty cases:

> It appears incontestable, then, that to a large extent "the sentencing authority's discretion (must be) guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Guidance in the form of instructions to the jury that permit the jury to properly determine and weigh aggravating and mitigating circumstances is paramount to the proper administration of the death penalty. Pangburn v. State, 661 So. 2d 1182 (Fla. 1995). The great weight that the trial court must give the jury's advisory sentence emphasizes the significance of correct jury instructions during the penalty phase. Id. at 1188.

The trial court's instructions concerning the sole aggravator in this case offered guidance but only of a misleading nature. At the outset, the court correctly stated that the jury must first determine "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty. . ." [V17:1314] This instruction presented two questions for the jury: one, whether aggravating circumstances exist; and two, whether the existing circumstances justify the death penalty. Unfortunately, the trial court quickly answered the former question for the jury by instructing them that the heinous, atrocious, and cruel aggravator had been established by the evidence.

This instruction was improper because it relieved the state of its burden to prove beyond reasonable doubt the existence of the aggravating circumstance. As such, the instruction also constituted an impermissible judicial comment on the evidence. See, Whitfield v. State, 452 So. 2d 548, 549 (Fla. 1984) ("Especially in a criminal prosecution, the trial court should take great care not to intimate to the jury the court's opinion as to the weight, character, or credibility of any evidence adduced.").

The instruction established the only aggravating circumstance without regard to proof. Absent sufficient proof of the single aggravating circumstance, the defendant's sentence of death cannot stand. See, Sawyer v. Whitley, 505 U.S. 333 (1992) (An absence of aggravating factors would result in "actual innocence" of the death penalty.).

The instruction given by the trial court is not one contained in the standard jury instructions. The applicable standard jury instruction does not contemplate a singular aggravator: "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:" Standard Jury Instructions in Criminal Cases No. 96-1, 690 So. 2d 1263 (Fla. 1997). The standard instruction does have an interpretation of limiting the weighed aggravators to those "that have been established by the evidence." The instruction differs from the one in the present case where the jury is told in effect that only a single aggravator is under consideration and that it has been established by the evidence. Having two different instructions implying two different evidentiary standards, one for cases involving a single aggravator and one for multiple aggravator cases, results in a suggestion of a different level of proof in the two cases, disadvantaging the defendant facing a single aggravator. This inconsistency introduces the forbidden elements of arbitrariness and capriousness into the administration of the death penalty. An appropriate instruction in a case involving a single aggravator would provide for the fact-finding role of the jury.

For example, the instruction could read, "The aggravating circumstance that you may consider is limited to the following circumstance, if you find that it is established by the evidence." Unfortunately, this instruction was not given in the court below. The court gave a deficient instruction that is, at best, contrary to the clarity of instruction that this court has called "the yardstick by which jury instructions are measured." Perriman v. State, 731 So. 2d 1243, 1246 (Fla. 1999).

In the court below, defense counsel did not object to the inappropriate instruction. However, the jury instruction given by the trial court is an error so significant that its commission amounts to fundamental error and a violation of due process. In regard to jury instructions, "[F]undamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982). The error must amount to a denial of due process. State v. Johnson, 616 So. 2d 1 (Fla. 1993). A jury instruction erroneously establishing the only aggravating factor in a death case is basic to the decision under review and is a denial of due process. Sawyer v. Whitley, 505 U.S. 333; See, Sarduy v. State, 540 So. 2d 203 (Fla. 3d DCA 1989) (An instruction that effectively directs a jury to find an essential element of a crime violates due process.). In this case, the erroneous instruction directs the jury to find an essential element of the death sentence, the only aggravating factor; therefore, the unlawful instruction constitutes fundamental error. This error requires this court to reverse the

sentence of death and remand this case for a new penalty phase before a jury.

ISSUE FIVE

THE TRIAL COURT ERRED IN FAILING TO CONSIDER A STATUTORY MITIGATING CIRCUMSTANCE PROPOSED BY THE DEFENSE DURING THE PENALTY PHASE OF THE TRIAL BELOW.

During a conference on the jury instructions to be given during the penalty phase, defense counsel requested an instruction on the statutory mitigator concerning the impairment of the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. [V17:1277-78] The state did not object to the giving of this instruction. [V17:1280] The court, subsequently, gave the instruction. [V17:1316] Absent, however, from the trial court's written sentencing order is a consideration of this mitigating factor. The only statutory mitigator that the court considered was Mr. Butler being under extreme mental or emotional disturbance. [V5:832-33] The failure of the lower court to extend its review of mitigating factors to evidence indicating impairment is error.

When applying the death penalty, a trial court must give weight to all mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982); Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988). Mitigating evidence requires trial court consideration if it is found anywhere in the record. Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996); Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993). The court must find a statutory mitigator if it is established by the greater weight of the evidence. Jackson v. State, 704 So. 2d 500 (Fla. 1997).

One of the enumerated statutory mitigators in section 921.141(7), Florida Statutes (199), concerns whether the defendant's capacity "to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of law was substantially impaired." This mitigator recognizes that a defendant's mental condition is very significant in the consideration of mitigation. Hoskins v. State, 702 So. 2d 202 (Fla. 1997). Accordingly, evidence of a defendant's mental impairment is relevant if it has some bearing on the crime or the defendant's character. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). If the evidence of impairment is relevant, the trial court must weigh the evidence when accessing the appropriateness of the death penalty. Id. at 912. The weighing of the evidence of impairment must occur even though the disturbance is not so extreme as to constitute the statutory mitigator. Id.

The defense, in the court below, did present evidence suggesting that Mr. Butler's mental capacity was impaired by his use of cocaine on the night of the offense. Testimony established that Mr. Butler used cocaine on multiple occasions during this time. Dennis Tennell testified he and Mr. Butler used cocaine that evening at the motel room where Mr. Butler was staying. [V15:927, 928] Mr. Butler confirmed this cocaine usage and indicated he also ingested cocaine at William's residence. [V16:1041,1042,1043,1053] Not surprisingly then, Antonio Strappy testified that Mr. Butler was acting, while at Williams' residence, "kind of paranoid, like he needed some drugs or something." [V15:913,917]

In addition, the defense presented expert testimony linking cocaine usage to the manner of violence that resulted in the victim's death. Dr. Michael Scott Maher, a psychiatrist, interviewed Mr. Butler with regard to his cocaine habit and psychiatric background. [V10:1735-36,1740] Mr. Butler informed Dr. Maher that he had used a lot of cocaine on the night of the murder. [V10:1740-41] Dr. Maher testified that one effect sometimes caused by cocaine was "perseveration" or irrational, repetitive action. [V10:1736] Dr. Maher stated that one experiencing perseveration engages "in behavior which is -- the phrase that comes to mind, unfortunately, is overkill, doing something again and again and again and again, past the point were it serves any reasonable, rational basis or purpose. The number of stab wounds in this case suggests that pattern of behavior." [V10:1738]

Despite the presentation of the above evidence of cocaine usage and its effects, the trial court, in its written sentencing order, gave no consideration to the defendant's compromised capacity as a statutory mitigator. This omission violates the requirement that the trial court expressly consider in the written sentencing order each mitigating circumstance proposed by the defense. Campbell v. State, 571 So. 2d 415 (Fla. 1990); Ellis v. State, 622 So. 2d 991 (Fla. 1993). The absence of an express written ruling on the mitigator provides no assurances that this court considered this important mitigation evidence when imposing the death penalty. The absence of consideration of the mitigator also deprives an appellate court of a meaningful review of the

imposed death penalty. See, Jackson v. State, 704 So. 2d at 506 (The requirement of a written consideration of aggravators and mitigators is necessary for meaningful appellate review of the death sentence).

Defense counsel did not list the statutory mitigator in its written sentencing memorandum. This absence, however, did not permit the trial court to ignore this evidence. As stated above, a trial court must consider all mitigating evidence found anywhere in the record. The defendant's impairment in this case is evident in the above-mentioned facts that were a part of the record. In addition, the defense argued this mitigator during closing argument. [V17:1308] Defense counsel also apprised the court of the statutory mitigator when requesting an instruction on it. [V17: 1277-78] The court granted the request for an instruction without an objection from the state. [V17:1280] The granting of the instruction is in accordance with the rule requiring instruction on a proposed mitigator when the evidence supports the mitigator. Bryant v. State, 601 So. 2d 529, 533 (Fla. 1992). The court correctly gave the instruction, and the mitigator was properly before the jury. Whether or to what extent the mitigator was considered by the court is, however, unknown.

In Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990), the court stated, "[T]he defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. [emphasis added]" Undersigned counsel contends that this burden has been met by trial counsel's request

for a jury instruction on the statutory mitigator in question. In the alternative, the rule established in Lucas does not apply to statutory mitigators. This court in Consalvo v. State, 697 So. 2d 805 (Fla. 1996), distinguished between statutory and non-statutory mitigation in the context of the Lucas rule. Because non-statutory mitigation is largely undefined, this court found that defense counsel had a burden to notify the trial court of potential non-statutory mitigators. Id. at 818. This court in Consalvo, however, failed to express such a requirement for statutory mitigators and noted that these mitigating factors were defined by statute.

The evidence of Mr. Butler's impairment from cocaine usage was significant. The trial court's sentencing order provides no assurances, however, that this evidence was considered when determining the sentence. Because of this failure to consider all mitigating evidence in this case, this court must reverse Mr. Butler's sentence and remand this case for resentencing.

ISSUE SIX

MR. BUTLER'S DEATH SENTENCE IS EXCESSIVE, DISPROPORTIONATE, AND IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.

Mr. Butler's sentence of death is a unique punishment, one that is irrevocable and heedless of rehabilitation. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). Because of the unusual finality of a sentence of death, the law affords a more intensive level of judicial scrutiny over a death sentence than lesser penalties. Porter v. State, 564 So. 2d 1060 (Fla. 1990). This court's proportionality review is one aspect of this scrutiny. This court has described proportionality review as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Tillman v. State, 591 So. 2d 167, 168 (Fla. 1991). Proportionality review is necessary to ensure that a sentence of death is not imposed based on facts where in a similar case the death penalty was deemed improper. Id. Such inconsistency would violate the constitutional prohibition against unusual punishments. Id.; Art. I, Sec. 17, Fla. Const. The recognition that the death penalty is a unique penalty, "requiring a more intensive level of judicial scrutiny," also provides a basis for proportionaltiy review.

Tillman v. State, 591 So. at 168; Sinclair v. State, 657 So. 2d 1138 (Fla. 1995).

Proportionality review is a recognition that the death penalty is "reserved only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So. 2d 954 (Fla. 1996); See also, State v. Dixon, 283 So. 2d at 8 (The legislature intends that the death penalty is only appropriate for "the most aggravated, the most indefensible of crimes."). Proportionality review requires a weighing of all of the circumstances of a case, not simply a calculation of the number of aggravating and mitigating circumstances. Terry v. State, 668 So. 2d 954; Porter v. State, 564 So. 2d 1060 (Fla. 1990). In the consideration of proportionality in the present case, a thoughtful study of the all of the facts results in two conclusions that greatly outweigh any arguable justification for a death sentence: one, only a single aggravator is present and only tenuously so; two, the murder in this case was a crime of passion resulting from long-term domestic strife as were the murders in many cases where this court has found the death penalty inappropriate.

This court has declared that a sentence of death based on a single aggravating factor is only appropriate in those cases where there is little or no mitigation. Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994). This ruling is consistent with the reservation of the death penalty for the most aggravated and least mitigated of cases. Terry v.

State, 668 So. 2d at 965 (Death sentence was disproportionate where supported by only a single aggravator even though little was presented in mitigation.); See also, Hardy v. State, 716 So. 2d 761 (Fla. 1998) (Single aggravating factor of victim being law enforcement officer did not support death penalty.).

In the court below, the state argued for and the court found only a single aggravating factor, the "heinous, atrocious or cruel" (HAC) nature of the murder. Although undersigned counsel does not maintain that the finding of this aggravator was improper as a matter of law, the imposed death sentence indicates that this factor was given too much weight. In Orme v. State, 677 So. 2d 258 (Fla. 1996), this court held that a defendant's mental or emotional defects do not affect the application of this aggravator. However, Orme recognized that a defendant's mental condition is used to weigh against the total case in aggravation. One suffering from a mental infirmity may have difficulty forming the torturous intent required for the HAC aggravator. See, Jones v. State, 332 So. 2d 615 (Fla. 1976) (Death sentence not warranted in case where victim was stabbed 38 times as a result of psychosis even though HAC aggravator was found.). In Buford v. State, 403 So. 2d 943 (Fla. 1981), this court held that killings committed in an "emotional rage" were not heinous, atrocious, or cruel. Similarly, this court has reversed death sentences where the heinousness of the murder resulted from the defendant's drug or alcohol intoxication. Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Ross v. State, 474 So. 2d 1170 (Fla. 1985).

What diminishes the weight of the HAC aggravator in this case is two-fold: Mr. Butler, a long-term cocaine user, was intoxicated by the narcotic on the night of the offense, and he acted consistently with an emotional rage brought about by jealously and the pain of separation from the victim. If the murder had been accomplished by only a single stab wound, the HAC aggravator would not apply because of a lack of evidence establishing that the defendant intended that the victim suffer unnecessary pain or mental anguish. See, Amoros v. State, 531 So. 2d 1256 (Fla. 1988) (HAC not present where cornered victim shot three times after trying to flee); Cheshire v. State, 568 So. 2d 908 (Fla. 1990) (HAC not evident where the defendant shot a second victim within minutes of shooting another person within sight of the second victim.). Expert testimony established an explanation for the multiple stab wounds suffered by the victim. Dr. Maher testified that one effect sometimes caused by cocaine was "perseveration" or irrational, repetitive action. [V10:1736] Stabbing over forty times--many times beyond what was necessary to act on an intent to kill--certainly constitutes the perseveration described by Dr. Maher. Thus the multiple stabbings that arguably establish the HAC aggravator also diminish the aggravator's weight in a consideration of proportionality.

A second consideration undermining the significance of the single aggravator in this case and placing the circumstances of the case firmly within a category of cases in which this court has found the death penalty disproportionate is the emotional character

of the murder. A murder occurring during heated passion within a domestic violence context has rarely if ever been cause for imposition of the death penalty. Indeed, many cases have found an absence of premeditation altogether, thereby reducing the crime to second degree murder, where the killing occurred when the accused acted from uncontrollable passion. Febre v. State, 30 So. 2d 367 (Fla. 1947), is one such case.

As in the instant case, the defendant in Febre discovered his wife with a nude man in their house. The defendant had been separated from his wife for a month. Id. at 367. The defendant shot and killed the nude man. Id. at 368. In reversing the defendant's first degree murder conviction, the court quoted the decision in Collins v. State, 88 Fla. 578, 102 So. 880,882 (Fla. 1925): "The act of the seducer or adulterer has always been treated as a general provocation. Sexual intercourse with a female relative of another is calculated to arouse ungovernable passion, especially in the case of a wife." Id. at 369. The court concluded insufficient evidence supported premeditation although the defendant did not testify that he acted in the heat of passion. The court stated, "[the defendant's] actions speak louder than any testimony he might have given." Id. at 369; See also, Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983) (Court holds that the defendant's repeated beating and subsequent murder of the stepfather of the defendant's estranged wife was as consistent with showing an absence of an intent to kill as it was showing premeditation); Douglas v. State, 652 So. 2d 887 (Fla. 4th DCA

1995) (Defendant's chopping of his wife to death with a machete in the midst of a heated argument sustained conviction of second-degree murder.).

In conducting proportionality review in capital cases, this court has placed great significance on the mitigating nature of a murder's occurrence as an act of passion within a domestic setting. "[T]his Court [has] stated that when the murder is a result of a heated domestic confrontation, the death penalty is not proportionally warranted." Garron v. State, 528 So. 2d 353, 361 (Fla. 1988). Consistent with this position, this court has ruled the death penalty disproportionate in numerous cases involving domestic violence. In Blakely v. State, 561 So. 2d 560 (Fla. 1990), the defendant bludgeoned his wife to death with a hammer. The trial court found two aggravating factors, that the murder was heinous, atrocious, or cruel, and that it was committed in a cold, calculated, and premeditated manner. Id. The court found only one mitigating circumstance of no significant prior criminal activity. Id. This court, after comparing the facts of the case with other cases involving domestic violence, concluded the death sentence was disproportionate. Id. at 561. This court noted that the murder of Blakely's wife was "the result of a long-standing domestic dispute." Id.

Wilson v. State, 493 So. 2d 1019 (Fla. 1986), is another domestic violence case where this court found the death sentence disproportionate, and this case is factually similar to the instant case. In Wilson this court found that the HAC aggravator was

satisfied by the defendant's brutal beating and final shooting of the victim while the victim attempted to defend himself. Id. at 1023. Despite the presence of no mitigation, this court concluded that the sentence of death was not proportionate because "the result of a heated, domestic confrontation and that the killing, although premeditated, was most likely upon reflection of a short duration." Id.

As in Wilson and Blakely, Mr. Butler's actions, although brutal and unwarranted, were a passionate outburst directed at Leslie with whom Mr. Butler had maintained an intense personal relationship. The violence was the culmination of years of domestic disputes, heightened by the victim's relationship with another man, Adonis Hartsfield. Mr. Butler's relationship with Leslie spanned about seven years prior to her death. [V12:171,172,194] Mr. Butler and Leslie had three children together, and they lived together as a family, sometimes in the apartment where Leslie was later murdered. [V12:172-73,194;V16:1014] Mr. Butler testified that he loved Leslie very much. [V16:1014]

The relationship was not to last, however. Months before her death, Leslie attempted to end her relationship with Mr. Butler. [V12:195] During this period of a breakup, Shawna Felming testified that Mr. Butler would not leave Leslie alone. [V12:195] Mr. Butler tried to get Leslie to come back to their apartment. [V12: 196;V15:816] Attempts at reconciliation were unsuccessful; Mr. Butler moved out of the apartment on March 9, 1997. [V12:173-

74] Mr. Butler was unhappy about the break-up of the relationship. [V12:178]

In the midst of this stormy relationship was Adonis Hartfield. Mr. Butler knew that Leslie had been having an affair with Adonis. [V12:178-79;V15:816] Adonis had in fact maintained a sexual relationship with Leslie since the early 90's. [V15:808,809] On the Tuesday night before her death, Hartsfield spent the night with Leslie. [V15:812] Mr. Butler was upset over this affair. [V12:179] According to Hartsfield, Mr. Butler did not like him and was angry at their relationship. [V15:814-15]

In the final days before the murder on the night of March 13th, the already tumultuous relationship between Mr. Butler and Leslie exploded. On March 9th, Mr. Butler moved out of the apartment at Leslie's request. [V12:197] On March 11th, the same night that Leslie spent with Hartsfield, Mr. Butler was arrested for domestic violence. [V15:812] When he got out of jail on March 13th, Mr. Butler was "broken hearted" and angry at Adonis. [V15: 818,894,896-97] Mr. Butler made threats directed at the victim. [V12:185,188] The frenzied violence that ensued occurred on the night of the following day shortly after Mr. Butler had repeatedly ingested cocaine.

Like the victims in Wilson and Blakely, Leslie died at the hands of someone whose passion and anger had become ungovernable. Compounding Mr. Butler's extreme emotional state was his use of cocaine. Intoxication at the time of the murder occurring as the result of a domestic dispute supported a finding of

disproportionality in Ross v. State, 474 So. 2d 1170 (Fla. 1985); See also, White v. State, 616 So. 2d 21 (Fla. 1993) (In finding the death sentence disproportionate, this court notes that the defendant had a cocaine addiction and was under the influence of the drug when he murdered a woman he had been dating.).

Undersigned counsel is mindful that no per se rule prohibits application of the death penalty for murders occurring as domestic violence. Pooler v. State, 704 So. 2d 1375 (1977). However, in at least two cases this court has found the death penalty proportional in a domestic violence setting only when the defendant had committed prior murders. Spencer v. State, 691 So. 2d 1062 (Fla. 1996); Lemon v. State, 456 So. 2d 885 (Fla. 1984), cert. denied 469 U. S. 1230 (1985). In Spencer this court noted in comparing that case to the facts of Lemon, "both defendants killed women with whom they had a relationship and both had a previous conviction for a similar violent offense." Id. at 1065. Mr. Butler, however, murdered no one prior to the instant offense.

In short, nothing distinguishes Mr. Butler's case from the many cases involving domestic violence in which this court has found the death sentence disproportionate. The murder in this case was an act of passionate rage. The long-term intense relationship between Mr. Butler and Leslie and the manner of the murder do not suggest otherwise. Under these circumstances, the sentence of death is simply not an appropriate penalty, and imposing death in this case after reversing death sentences in cases similar to the

present one would contravene the principals that this court has established in regard to proportionality.

CONCLUSION

Based on the above arguments and authorities, Appellant respectfully requests that this court grant the following relief: as to issues one, two, and three of this brief, reverse the judgment and sentence of the lower court and remand this case for a new trial; as to issues four and five, reverse the lower court's sentence and remand for resentencing; as to issue six, reverse the lower court's sentence and remand with directions to enter a sentence of life imprisonment.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of May, 2002.

Respectfully submitted,

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