IN THE SUPREME COURT OF FLORIDA

ANDREW MICHAEL GOSCIMINSKI,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC09-2234
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

INITIAL BRIEF OF APPELLANT ANDREW MICHAEL GOSCIMINSKI

On Appeal from the Circuit Court of the
Nineteenth Judicial Circuit of Florida
(St. Lucie County)

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STATEMENT OF THE CASE AND FACTS

A. *Jurisdictional statement.*

Andrew Michael Gosciminski was indicted for first degree muder, robbery with a deadly weapon and burglary with assault with a deadly weapon in the Nineteenth Judicial Circuit. He was convicted,, but a new trial was ordered in *Gosciminski v. State*, 994 So.2d 1018 (Fla. 2008). On remand, a jury found him guilty and recommended a death sentence by a 9-3 vote. R6 944, 982. He was sentenced him to death for the murder and to prison for the other crimes. R8 1279-87. The court found CCP, felony murder (merged with pecuniary gain) and HAC in aggravation and numerous mitigators. R8 1253-78. A motion for new trial was denied, and sentence was imposed November 6, 2009. R7 1041, R8 1243, R8 1279-87. Notice of appeal was filed November 25, 2009. R8 1297.

B. *Statement of the facts*.

1. The polygraph motion.

Appellant made a motion to present evidence that he passed a lie detector test in which he said he was innocent of the charges. R2 221-R232. The court conducted an evidentiary hearing at which each party presented an expert witness.

Dr. John Palmatier testified for the defense. He had been a Michigan State Police polygraph examiner for 16 years and obtained a Ph.D. at Michigan State in social sciences with general experimental science, statistics, and criminal justice. R10 144.

He was a scientist for the Chinese Academy of Sciences for several years and a consultant and researcher here and in China and other countries. R10 144-145. He has taught innovations in the polygraph process including new theoretical bases for it, and has been published in scientific periodicals. R10 149.

Palmatier said eleven high quality laboratory studies of the comparison-question test reveal overall 91% accuracy with guilty subjects, and 89% accuracy with innocent subjects. R10 156. Five high quality field studies show 99.6% accuracy for the guilty and 83.5% accuracy for the innocent. *Id*. Palmatier's apparatus is equipped to detect physical countermeasures like muscle contractions, and he detected no countermeasures in appellant's examination. R10 163. His equipment was designed by James Brown of Queen's University, Ontario, who created the penile plethysmograph used to test sexual offenders. R10 164. Palmatier uses software developed by the Defense Academy of Credibility Assessments, formerly the Department of Defense Polygraph Institute at Fort Jackson. R10 166. Polygraphs are used extensively by the US government and military, the FBI, the Secret Service, DEA. R10 166, R11 285. Florida uses polygraphs in monitoring sexual offenders, pre-employment testing, and in law enforcement and the Department of Corrections. R10 169, R11 286.

Palmatier differentiated two uses of the polygraph. One involves inquiry into a variety of areas. This is a screening test

used for employment or security screening. Its validity is in question. The other use involves inquiring into a specific factual issue and is called a specific incident test. Specific incident tests have above 90 percent accuracy both in the field and in the laboratory. R10 167-69.

Palmatier asked appellant if he took Joan's life, if he did anything physically to Joan to cause her death, and if he caused Joan's injuries leading to her death. Appellant said no to all the questions. Palmatier concluded that appellant was not being deceptive and was telling the truth. R10 173-74.

Palmatier testified there is widespread, general acceptance of polygraph testing in the relevant scientific community, scientists engaged in psychophysiological research. R10 176-77.

The defense presented a study showing that polygraphs are as accurate as such well-recognized diagnostic tools at CT scans and MRI exams. SR2 328.

Dr. Stephen Fienberg testified for the state. He is a professor of statistics and social science at Carnegie Mellon and has a Ph.D. in statistics from Harvard. He chaired a National Research Council (NRC) committee to review the scientific evidence of the polygraph. He was chosen because of his experience on other NRC committees and more importantly because he was not involved in polygraphy or assessment of its accuracy and appropriateness. The committee was chosen to represent the scientific

community at large, “and to my knowledge no polygraph examiners would have fallen within that category.” R10 186-89.

The committee concluded that most polygraph studies divide results into three categories: deceptive, non-deceptive, and inconclusive. The inconclusives are often substantial, and the polygraph literature typically discards them, which the committee unanimously considered fallacious. The committee included the inconclusives in its analysis, changing in some instances fairly dramatically the accuracy rates or error rates associated with the polygraph. R10 196-97.

The committee focused on the use of polygraphs for screening and not on forensic uses. A screening polygraph asks very broad questions, and a specific incidence polygraph focuses on a specific incident. Fienberg said there is no gold standard for how to do a good test because there is very little agreement about what constitutes a good test and therefore scientifically you cannot reproduce polygraph results validly. R10 199-202.

Fienberg said Palmatier’s table of data did not include inconclusive results, and if you include them the accuracy percentages go down dramatically. He said lab studies are unreliable because they’re trying to measure physiological responses from a fake criminal and try to associate it to the real world, and field studies are deeply biased largely because they focus on situations where one knows the truth, either that someone for

some reason confessed to guilt after conviction, or was exonerated, and as a consequence they discard the vast majority of cases where a polygraph was administered but where there is no information about guilt or innocence. R10 202-6.

The committee recommended against the use of the polygraph for security screening. R10 206-07.

Fienberg thought there was considerable consensus that the polygraph is not sufficiently accurate to rely on. He identified the scientific community as "those capable of reading the literature - it's scientific community relevant to the assessment of the accuracy of the polygraph, and that includes people from psychology and psychophysiology, and the set of scientists who are able to read and assess the validity of the studies that we reported on, or other related studies." R10 219-21.

Fienberg conceded that the Department of Defense continues to use polygraphs. R10 225-26.

The committee reached no conclusions about forensic polygraphs "because we were not asked about them." R10 229.

After hearing the evidence and argument of counsel, the court denied the defense's motion to admit the evidence that appellant passed the lie detector test. R11 302-29.

2. The guilt phase.

Joan Loughman was murdered on September 24, 2002 in a house in the South Beach area of Hutchinson Island across the Intra-

coastal from downtown Fort Pierce. The house belonged to her elderly father, Frank Vala. Vala had recently moved to Lyford Cove, a Fort Pierce assisted living facility where appellant was outreach director. Around 8:47 a.m., Loughman ended a phone conversation with her sister, Janet Vala-Terry, saying there was someone at the door. R26 2092, 212-13. Her body was found that evening by relatives who had flown down that day. R26 2127-28.

The medical examiner said the body temperature was consistent with a time of death between 8:50 a.m. and 4:50 p.m. R35 3458-60. The body was in full rigor mortis at 12:30 a.m., so that death occurred sometime between 12:30 a.m. and 12:30 p.m. on September 24. R35 3460-61. Livor mortis was constant, indicating the death occurred at least 8 to 12 hours before 12:30 a.m. on September 25. R35 3462-63.

The injuries were consistent with being caused by a large heavy statue-ashtray which apparently shattered in the attack so that a piece of glass sliced and cut her. R35 3413, 3418. (This object belonged to Mr. Vala. R35 3366.) Loughman did not respond to phone calls after 10:30 a.m. R28 2451. Her jewelry was missing, including a two carat diamond ring with baguettes on each side, and a diamond tennis bracelet. R26 2096-97. The house had no signs of forced entry. R24 1899. No physical evidence at the scene linked to appellant. R25 2047. No physical evidence matched him in the entire case. R25 2052. The state had no DNA

evidence, blood stains, or the like identifying the murderer.

On September 24, Lois Bosworth, a company executive, spoke with appellant on her cell phone around 8 or 8:15 a.m., and she met him at Lyford Cove around 12:30. R27 2327-31. He had on a well-worn black golf shirt, and what looked to be khaki Dockers. He was very calm, did not seem out of the ordinary at all, just normal Michael. R27 2331, 2338.

Pamela Durrance, appellant's ex-wife, testified that during their marriage appellant sold jewelry from a briefcase. R28 2352-53. He did this in the mid to late 90s. R28 2537.

Joan Cox said she spoke to appellant about placing her mother in Lyford Cove in June 2001. He thought it could be the right place, and wanted her to come for two weeks at no charge. He invited Cox and her granddaughter to have lunch to check out the food. At lunch he noticed her diamond ring. R28 2384-87.

Michael Studzinski, former head of maintenance at Lyford Cove, said he thought it was unusual how much time appellant spent with Loughman and Vala. Appellant said to take very good care of them because they were very wealthy, had a very beautiful home with very fine things. Appellant had him raise Vala's bed. Appellant would go the extra mile for certain people. It's a competitive business, facilities try to get people in. Appellant's job was to fill beds, and he did a good job of it. Going the extra mile was part of his job, to get them in and keep

them. Vala's comfort and raising the bed would be important to keeping him happy and a resident at Lyford Cove. R28 2394-2400.

Victoria Acquaro, a former nurse at Lyford Cove, was checking diabetic patients when appellant asked her to meet Vala and Loughman. It was inconvenient for her. He said he wanted to roll out the red carpet because they had big bucks. He told Loughman the facility could handle Vala. The director of nursing, Linda, was on vacation. Acquaro thought Vala needed more skilled care than they could provide. Vala was in a lot of pain. R28 2402-09.

Vala was moved to hospice on September 24. R28 2420.

Debra Flynn, Lyford Cove's director, said appellant came to the office around 1:30 p.m. on September 24. R29 2488. He came to morning staff meetings in the past, but his attendance had become erratic. R29 2479-80. That day, he wore a blue and white shirt, casual pants, and maybe boat shoes; it was not his usual attire, it wasn't as nice as it should have been. R29 2489-90.

After meeting Bosworth, appellant came to Flynn's office where she was working with Nicole Rizzolo. He was quiet, and Flynn was less friendly with him than usual. His hair looked a little wet, freshly slicked back. He didn't usually look that way in the morning; he was extremely fresh, like he just had a scrubbed shower and his arms were glowing pink. R29 2491-93.

He was in the process of moving at this time, and if he had been moving boxes that morning it would be natural for him to

shower before coming to work. R29 2516.

He said he had a ring for his girlfriend Debra Thomas, and pulled a ring from a tissue in his pocket. Flynn looked at it and handed it to Rizzolo. It was dark, like dirty, like it needed to be cleaned or was an antique, old and worn. He said Deb's into estate jewelry. The center diamond was round or a roundish hexagon with smaller diamonds on the sides; the ring was white. For a few months or a month he had been saying he was looking to get Deb a two carat diamond ring. R29 2494-97.

There was some black on the ring all around the grooves, in the prongs and around the stone on the bottom so you couldn't see the stone really good. He said he bought a whole estate, including other rings and jewelry. He mentioned a tennis bracelet, diamonds and emeralds in relation to the bracelet. R29 2501-03.

After September 24, appellant cut his hair, beard and mustache very short, according to Flynn. A few days after that he dyed his hair and beard. R29 2510-11.

Nicole Rizzolo said appellant arrived after lunch. He looked freshly showered, hair slicked back. He pulled a ring in a napkin out of his pocket. It was white gold or platinum with a big round diamond and smaller diamonds on the side; it was probably two carats. She looked at it for a second and did not think it was pretty. He said it was for his girlfriend. He said he had also got her a tennis bracelet. Rizzolo said appellant did not

have facial hair on the 24th. She told detectives the ring was really old and dirty looking. R29 2529-38.

Debra Thomas had been living off and on with appellant on Wakefield Circle in Port St. Lucie since 2000.[1] R31 2758. At some point she moved to Palm Bay, where she met Ben Thomas (who was not related to her) in the springtime. R31 2760-61. Ben Thomas and appellant were competing for her. R31 2766. She was married to a third person during this period. R31 2858.

She moved back in with appellant, but she went to Arizona in April 2002. She planned to move there permanently but moved back when she could not get her nursing license because her mail was tampered with. She moved back with appellant and then moved in with Ben Thomas but moved back with appellant because appellant threatened her, her family and Ben Thomas. R31 2766-75.

Several days before September 24, appellant said he would get her a two carat diamond ring in West Palm Beach. R31 2780.

Shortly before September 24, he pointed out the Vala house on South Beach. She had lived in that area eight or nine years before. He said he wanted to look at this house as an investment, it would be coming on the market soon because the person who had it was in his facility, was not doing well. R31 2775-76.

Thomas said that on September 24, appellant came home

[1] At the end of September 2002, they moved to the Fountains, a barrier island condo in Indian River Shores. R31 2771, 2820.

around lunchtime. R31 2790. She found him washing his upper body at the bathroom sink. R31 2792-93. He seemed to be washing blood off his upper body. R31 2796. His clothes were on the floor and had substantial or noticeable blood on them. R31 2797. He said he had collected money for his friend Dominic, and he had to rough somebody up to get it and he had to get rid of the clothes because of the blood. R31 2798. The clothes were Dockers and a button down shirt with tan palm trees on it. R31 2799. She did not see his shoes. R31 2800.

On October 2, 2002, Thomas told Det. Hickox that this incident happened around 1:00 p.m. She told Hicox on October 7, 2002 that the time was “Early afternoon.” On the witness stand she put the time as: “Early afternoon, around lunchtime.” At deposition, she put the time as “around one o’clock.” R31 2882-84.

Thomas testified at trial that appellant probably left “within an hour.” She had said at deposition that he left around 3:00, but she said at trial that defense counsel had suggested that time to her. R31 2885-86.

Appellant returned that evening and gave her a ring with a large clear stone on a white gold band with baguettes on the side. He said it was two carats. It was round with a rectangular baguette on each side. It was not in a box, he just handed it to her. It “looked old, it looked dirty.” R31 2808-11.

On September 25 and 26, she showed it to her friend Maureen

Reape. R31 2813, 2817. They discussed “how we didn’t trust Michael and didn’t know what he was capable of, and whatever he was involved with, I didn’t want any part of it.” R31 2813.

Reape said she went to Debra and appellant’s home while they were packing and getting ready to move about a week before the murder. Appellant mentioned getting Debra a diamond solitaire princess cut ring. On September 25 and 26, Debra came to her home and showed her a platinum or white gold ring; it was a couple of carats with two baguettes on each side. The center stone was a round solitaire diamond. R31 2895-2906.

Reape told the police the ring was two and a half to three carats. It was nice and clean, with no dirt. R31 2905-06.

On the evening of September 26, Debra Thomas and appellant met Steve Jurina. R31 2817-18. She showed Jurina the ring. *Id*.

Jurina said there was something like a ring on her finger but he did not notice the shape or anything. Appellant said it was almost a 2-carat perfect diamond worth about $15,000. He wanted to borrow Jurina’s trailer for their move to Indian River Shores because his credit card was maxed out. Jurina visited after they moved, and appellant and Debra got in a little argument and Debra said her brother was sick. R29 2547-48.

On October 1, appellant told officers he went to the Vala house on the 17th or 19th to pick up furniture. The furniture was in an alcove outside. On the 23rd he was working late at Lyford

Cove and Loughman came and spoke to him. After they talked, she asked him to carry a suitcase to her car. R26 2169-77, R29 2555.

On October 2, Det. Hickox secretly recorded an interview with appellant. Appellant said he might have met Loughman or talked to her on the phone the week before Vala was admitted, and he moved some furniture from Vala's house to Lyford Cove. R27 2291-94. Loughman said the maid was there to pick up keys, but he did not see her; the stuff was in the living room and part of it was outside, and Loughman came in later to do the paperwork. R27 2294-95. He saw her maybe once or twice at the facility, and met her Monday night. R27 2295-96. They talked about 10 or 15 minutes, and she asked him to put a suitcase in her car. *Id*. Asked about personal conversations, he said, "We talked about us, my move coming up, moving stuff like that." R27 2296-97. When they talked that night, she said her family was flying in and she was going home. R27 2299. He was asked if she had a lot of money and about her jewelry and he said he had no clue, he didn't get involved in that stuff, didn't pay too much attention to that stuff, it didn't matter. *Id*. When he picked up the furniture, it was piled by the door. R27 2300. *Id*. He said he would agree to give a DNA sample after talking to his lawyer and calling him on his cell phone. R27 2301-03. Asked again about the jewelry, he said he didn't "notice stuff like that. I deal with people, family members all day long that - it's irrelevant

to what dad or mom may be able to take care of, to us, which is why we do a confidential statement on what mom and dad can afford." R27 2305. He said he "could have commented" on her jewelry, but didn't pay a lot of attention to things like that, it was irrelevant to what he did. R27 2305-06. Hickox told appellant Joan was hurt Tuesday the 24th and appellant said that day he was packing stuff to leave, went to the bank, and then had a meeting. R27 2306. After a discussion of arranging about the DNA, he said he was nowhere to be found on the day of the murder until a meeting at his company around 11 with the head honcho. R27 2309. He worked at his house packing and went to the bank about 9:30 or 10 to make a deposit. *Id*.

While Hickox spoke with appellant, Dets. Bender and Hall spoke with Debra Thomas at her and appellant's home. She had a white ring with a large diamond in the middle and two small diamonds on the side. R29 2561. She said appellant gave her the ring in 2001. R29 2569, 2595; R30 2823.

Debra Thomas testified she lied to the officers about when appellant gave her the ring "Because I panicked. I didn't want to be implicated in whatever he had done, and I was scared." R31 2823. "I panicked and I was afraid of being implicated." R31 2871.

She said that, after Bender and Hall left, appellant telephoned and said Frankie called and said the ring's hot and he

had to get rid of it. She called her sister and told her to call and say she was needed for her brother, who was in the hospital with leukemia. Appellant came home, took the ring off the counter and went to the beach. R31 2824-26.

That evening, the Jurinas came and, as prearranged, Debra's sister called about the brother and Debra left. She went to the home of Ben Thomas. They went to the police station, where she told what had happened to the ring. Appellant was arrested that night (October 2) or the next morning. R31 2830-33.

At some time, Debra Thomas identified the Vala house and told Hickox how she knew where it was, but she did not tell him she had previously lived in the area. R27 2205.

Debra Thomas married Ben Thomas in 2003. R31 2833.

Before marrying Debra Thomas, Ben Thomas was married to Deborah Pelletier. She testified that in June or July 2002 Ben told her he was in love with Debra Thomas. In late July, Pelletier moved out of their home on Import Drive in Port St. Lucie for about a week. Ben and Debra Thomas briefly moved in. After they moved out, Pelletier moved back in on August 2. R34 3273-78, R30 2658.

On August 2, appellant came to Pelletier's house in a Sebring she had seen Debra Thomas drive in the past. He was friendly and chatty and they talked about Ben and Debra Thomas. He commented on her ring and said he wanted to buy a 2 carat diamond

ring for Debra. He came by two or three times a week and spoke to her on the phone about where Ben was and his efforts to get back with Debra. Pelletier had the impression he was part owner of Lyford Cove, he said he had been in business before with medical offices, that sort of thing, and said he was an enforcer. She met Jurina through him. R34 3278-85.

Around that time, there was an interruption in her water service. Utilities said everything was fine and she should go to the utility shed in a wooded area behind the house to check the valves. Appellant was at her house at the time. She gave him a flashlight to hold so she could find the valve. It turned out it was turned off, and she turned it back on. So far as she knows, it was the only time he was at the shed. R34 3286-88.

At 8:46 a.m. on September 24, Ben Thomas paid for breakfast at a cafe across the bridge from the murder scene. He worked for a diving equipment company, and testified he was in the area to visit a dive shop. He said he briefly visited the dive shop, then made a bank deposit at 9:05, and went to a Walgreens where he made a 99¢ purchase at 9:19. R30 2666-69.

He said he mailed a check at the post office, leaving at 10:25, and later went to Miami and flew to Atlanta. R30 2690-95.

After October 2, Det. Hickox told Ben: “We have a lot of circumstantial evidence but, as you know, we don’t have a smoking gun,” “We don’t have the jewelry, and especially we don’t

have the ring that he gave Deb," and "If we had that, this case would be a breeze and that's why we wanted to call Deb back in." R30 2710, 2714.

Appellant was already in custody when Det. Hickox had this "smoking gun" discussion with Ben Thomas. R30 2728.

Deborah Pelletier testified that, between appellant's arrest around October 2 and November 11, Ben Thomas came to the house with some friends and removed a bunch of stuff from the garage. There was a deputy present. Ben was at the house at least a couple of times during this period. R34 3311-14.

On November 11, Pelletier's father Joseph found a bag with Loughman's jewels, including a diamond tennis bracelet and a diamond and emerald tennis bracelet, in a shed behind the house. R34 3289-95; R35 3334-41. This discovery happened after Det. Hickox's "smoking gun" discussion with Ben Thomas. R30 2715-16.

While the Pelletiers were trying to arrange to deliver the jewels to Det. Hickox, Ben called Deborah Pelletier and said it was going to be the best Christmas of his life because she would be in jail with appellant. R34 3311.

On other occasions, Ben falsely charged her with stealing a credit card, and he called her and said she was going to end up in jail just like appellant. R34 3310.

Debra Thomas testified that when Det. Hickox called to tell her the jewels had been found, she asked if it was a small gray

flannel bag with a gold seam on it, and he said it was. She had bought appellant Geoffrey Beene Gray Flannel cologne packaged in that bag, and he kept it in his drawer. R31 2854.

In June 2002, while he was seeing Debra Thomas, Ben Thomas made a $64 purchase at Geoffrey Beene. R34 3305-06. He said he bought shorts. R30 2726-27.

When Pelletier told appellant about the discovery of the jewels in the shed, he was taken back and said something along the lines of, it's over, I'm done and told her not to visit him again. R34 3304.

In February 2003, Loughman's fanny pack was found near the intersection of I-95 and Martin Highway. R30 2627-28.

Hickox made a ring lineup. It had a replica of Loughman's ring at position three on the second row. R27 2210-12.

Debra Flynn said she could not identify any ring in the lineup as the one appellant showed her. R29 2508. Nicole Rizzolo said she picked up and looked at one of the rings but did not want to pick one because she couldn't be sure. R29 2534-35. Det. Hickox said Rizzolo picked out number 4 but she said she didn't see a ring that resembled the replica ring and number 4 had a bigger diamond in the middle than the one she had seen. R27 2253. Susan Powell could not pick out a ring in the lineup; she was the realtor that Debra Thomas picked the keys up from. R27 2260. Hickox did not recall if he showed Jurina the lineup. R27

2270. Ben Thomas was unable to pick a ring out. R27 2271.

Dets. Bender and Hall identified ring 3 as the one Debra Thomas was wearing on October 2. R29 2566, 2584. Maureen Reape and Debra Thomas also chose ring 3. Reape said the ring in the lineup was very similar to the ring on Thomas's finger. R31 2904. Debra Thomas said the ring in the lineup was "[a]lmost identical" to the ring appellant gave her, but it was newer and "[t]he other one was duller than this one. R31 2858.

Juan Portillo, a Nextel engineer, testified that calls to and from appellant's cell phone on September 24 passed through the sectors of various cell towers as follows: 6:31 to 8:03, Becker Road tower; 8:13 and 8:19, St. Lucie West; 8:24 and 8:25, St. Lucie Stadium; 9:12, 9:27 (voice mail access), and 9:28, Faber Cove sector 1; 10:23, Martin Highway; 10:36, Stuart; 11:29 and 11:39, Becker Road; 12:00, Thornhill; 12:07 and 12:16, St. Lucie West; 12:56 and thereafter, Fort Pierce Central. R32 3015-26. Appellant's home was in the coverage area of the Becker Road tower, the Vala home was in the Faber Cove area, and Lyford Cove was in the Fort Pierce Central area. *Id*.

For each cell tower, the coverage extended for a radius of five or six miles. R32 2982. The coverage began decreasing at about 4½ miles. R32 3047.

Portillo did not know if any of the towers was offline or had to be rebooted on the morning of September 24, 2002. R32

3074-76. If there was a problem with a tower covering downtown Fort Pierce, the call would go to another tower. R32 3076-77.

At some time, Portillo performed a drive test.[2] At the Aliceri Dress Shop in downtown, there was a tunnel effect so that the signal went straight from the Faber Cove tower. The first sector to be hit would be Faber Cove sector 2, and the next most likely sector was Faber Cove sector 1. R32 3041-42.

By the train tracks on Orange Avenue in Fort Pierce, the strongest tower was Fort Pierce Central followed by Faber Cove sector 2 and Faber Cove sector 1. R32 3043-44.

At US 1 and Delaware Avenue, Faber Cove sector 1 was the fourth strongest tower – the signal was very weak, getting weaker. At US 1 and Virginia, it was the third strongest, although it was weak. At US 1 and Midway, there was no longer a signal from Faber Cove. As to the calls at 9:12, 9:26 and 9:28 a.m., Portillo was positive that if the person made a call along the Ocean Drive or somewhere in the area of best service, which is Faber Cove, Sector 1, the person was in the island. He said it was possible, but "unlikely" that the phone was downtown at the

[2] Portillo said the only drive test he did specifically for this case was in 2009. R32 3064-65. He said at the trial (in 2009) that he had covered the South Florida area for two or three years. R32 2957. He said he was brought into the case in 2005. R32 3059. Defense counsel said at a bench conference that she understood that "these tests were done recently and they weren't done back in '02 or close to that time." R32 3035. The state did not dispute that, but said Portillo would say the Faber Cove tower was the same in 2002. *Id*.

time of the calls through the Faber Cove sector if the person was moving around. R32 3044-49.

On the drive test, Portillo did not go every other block and make calls, and did not go behind buildings and make calls. On the island, he made sure he had a clear path to make a call, but did not do so off the island. R32 3082-83.

Signals may be blocked or reflected by buildings, trees and the like. The signal from the nearest tower may be blocked, and another tower may pick up a call. Signals go farther over water. R32 3058-59. Portillo did not check to see what buildings were up on September 24. R32 3084. He said a couple of hurricanes came through in 2004. R32 3067.

Portillo based his conclusions in part on a software propagation tool called Wizard. R32 2965, 3053-55.

The program had information about natural topographic features but not about “trees, buildings, anything that’s a physical - that doesn’t allow the signal to go through, what we call clora data.” This information was not entered because the area changes every year and it would be expensive to do so. The company estimates an average for the clora data based on the Wizard output and the drive test. R32 3055-57.

Portillo said his information was “very approximate,” and “not absolute.” R32 3085-86. He said cell phones did not have GPS in 2002. R32 2992.

Appellant's bank records showed a $430 cash deposit at Harbor Federal Bank in Palm City at 10:08 a.m. and a $57 check deposit at Harbor Federal Bank in Darwin Square in Port St. Lucie at 11:04 a.m. on September 24. R31 2916-19, 2926. During the September billing period, the Harbor Federal account was in the red and there were overdraft fees. R31 2921-27. He was behind on payments on the electric bill, a credit card and his truck. R31 2848-49. He earned around $32,000 per year, and was also paid bonuses and expenses. R29 2513, 2527.

The state played for the jury a video of appellant's testimony from the first trial. He said his job entailed seeing to contacts and brochure stations at hospitals, doctor's offices and businesses. R33 3110-11.

On the evening of September 23, he spoke with Loughman at his office and she had him move a suitcase to her car. R33 3149-50. On September 24, he had an 8:00 a.m. appointment in Port St. Lucie; when he got there, the person was unavailable. R33 3153, 3158. He headed for his office, stopping to check brochures and see contacts. R33 3158-60. He stopped at an office, Hospice and the VA. R33 3160-61. He then was going to a display board at the Aliceri dress shop downtown and a convenience store by the marina. R33 3162-63. He went south to a Palm City nursing home. R33 3163. He made a cash bank deposit in Palm City, and went east. R33 3164. The cash was from a yard sale. R33 3140. He went to

Publix to get boxes for the move. R33 3165. He made more stops and went to another Publix for boxes. R33 3167-68. At Darwin Circle, he deposited a check he had forgotten. *Id*. He made stops until noon, then went to his office, meeting Bosworth around 12:30. R33 3168-71. He was not on South Beach on September 24. R33 3170. After leaving that morning, he did not go home until 3:00 or 3:30. R33 3172.

Debra had alcohol and drug problems, and was very fond of Xanax, Hydrocodone and OxyContin; not having her own prescriptions, she used his medicine, mixing drugs and alcohol. R33 3126-28. She took her mother's prescription medicine and stole medicine from work. R33 3220-21.

They broke up in April 2002, and she went to Arizona, but they got back together and she promised to stop. Her substance abuse returned in a few weeks. She went back to Arizona; the $217 ticket was on the credit card. She returned in August, saying she was sober, but he soon found it was untrue. R33 3127-31.

She wanted a new car, diamond ring, breast implants, wanted to be on the checking accounts and the house purchase option, to move to the beach. She took his Sebring to Arizona and was supposed to make the payments but never did. R33 3130-31.

She was a jewelry hound, he bought her many pieces, including four rings. The ring he gave her was closest to lineup ring 4, but it was bigger and a little wider than ring 4, which

was dark or dirty looking. Antique style rings sometimes look dirty. She liked antiques and wore only flush mount jewelry. He bought the ring from her brother in August. R33 3116-22.

After Debra went back to Arizona, he found the place at the Fountains. It was furnished, so they decided to clean out their place and start selling things. She returned from Arizona on September 15 at the latest. R33 3135-36.

He had started the yard sales while she was in Arizona, making close to $10,000. $4000 went to Debra's brother, $4000 went to a new First Union account to cover the first, last and security on the place at Fountains, and $430 was in the deposit at Harbor Federal on September 24. R33 3139-41.

Debra went with him to get his paycheck at his office right after her return; Joan Loughman met him, and Debra and he commented about her jewelry. They said they were looking for a larger diamond ring for Debra, even though they had bought the one ring. Arrangements were made for the furniture to be picked up the next day. That night, Debra wanted to see the beach at the new house, so they took a ride, and she offered to show where the Vala house might be on the island as he did not know the area and Debra had lived there before. R33 3141-44.

When he picked up the furniture at the Vala house, a small ottoman, a walker and a suitcase were next to the door outside. On the inside, a TV stand and television were pushed where there

was a little brick wall. Joan said the maid was there, but he did not see her. Joan's father fell in Lyford Cove, and was hospitalized September 23. Appellant contacted Joan and helped her move a suitcase to the car. R33 3145-50.

Linda was the director of nursing. She did a medical assessment of Vala at Lawnwood Rehab Center before his transfer to Lyford Cove. She said he was acceptable. R33 3148-49.

The Harbor Federal account was overdrawn because the car salesman wanted a $2000 deposit so they could take delivery immediately. They told the salesman the account was being closed, and he said he would hold the check. Somehow it slipped through the cracks. The salesman later called and apologized. R33 3231.

Appellant had two prior convictions on bad check charges. They arose when a pet business he had with his ex-wife went out of business. When they closed the business there were two outstanding checks and they and the accountant missed them completely. Appellant was put on probation and paid back everything. R33 3178, R33 3235-36.

Det. Hickox testified that in April 2005 he drove from the Wakefield Circle home at 8:00 a.m. to a place on I-95 near the Mets Stadium at 8:25, and then drove 18 miles from there to the Vala house in 25 minutes. R27 2218-29.

Hickox did not know what construction zones would have existed in September of 2002 on this route. He did not know if

there were changes in traffic devices such as yield signs, stop signs, street lights, speed limit signs, school zones between 2002 and April 2005. He did not know the speed limits in 2002. He took the most direct route he was familiar with. R27 2263-70.

Det. Hall testified he drove from the Vala house to the Palm City Harbor Federal Bank in Stuart in March 2005. He chose what he considered the most direct route. It took 42 minutes (from 11:45 a.m. to 12:27 p.m.). R29 2585-87. He did not know the weather, traffic, road conditions, or school zones on September 24, and did not measure the mileage. R29 2597-99.

In September 2009, Inv. Arens drove from Aliceri's Dress Shop in downtown Fort Pierce at 9:29 a.m. to Coastal Primary Care, where he stayed for two minutes, then to the former Mariner Cove Center, where he stayed for ten minutes, then to the Palm City Harbor Federal Bank, where he arrived at 10:28 a.m. This was the route in appellant's testimony. Arens did not know the weather or traffic conditions on September 24, 2002 or the school zones, construction, or stop signs and lights at that time. He thought the population was less in 2002 than in 2009. His total driving distance was about 35 miles. R34 3260-72.

Maria Creel, owner of Aliceri Dress Shop, said she had no specific recollection of September 24, 2002. She does not let people put announcements or posters in her windows and does not have room for brochures, cards or display boards in the shop and

does not allow them out front. She sometimes arrives at 9 a.m., but does not open the business until 10. She did not recall ever having a display board with Lyford Cove brochures. In 2002 a Harbor Federal Bank was a few steps from her door. R34 3244-47.

She said appellant could have dropped by the store on September 24 and she wasn't there or wasn't open. R34 3250-51.

Thomas Loughman, Joan's husband, said Joan had physical disabilities after a car accident. She could not carry laundry downstairs, could not lift more than twenty pounds. The furniture in the Vala house was heavy. The television was a big old heavy set on a cart. He didn't know if the cart had wheels. She could not have lifted or moved the television chair, the ottoman or the suitcase. She did not return his calls at 10:30 a.m. and later on September 24, which was unusual. R35 3353-62.

Loughman said Joan had $500 in cash when she came to Florida on September 17. An insurance company paid approximately $19,000 for the loss of the ring. Joan kept the two carat ring very clean. R35 3359, 3387-92.

Loughman's sister said Loughman kept her jewelry "[v]ery clean," she was meticulous about it. She said the ring in the lineup was not as stunning as Loughman's ring, there was a "big difference" because the lineup ring was a zirconia and Loughman's ring was a diamond. R26 2217-18.

The autopsy was performed by Dr. Diggs. He was ill at the

time of the retrial, and the state presented Dr. O'Neill, who based her testimony on Diggs' report. Loughman had blunt force trauma and cutting and stab wounds, including a cut to the left neck, which went deep into the muscle and severed the jugular, and a stab wound penetrating the right lung. A wound to the left hand indicated a defensive type wound. R35 3402-06.

Cutting and stab wounds could have been caused by a knife or by broken glass. R35 3418, 3420-21.

Dr. O'Neil said the defensive wound would have been caused by a part of the statue in that she "did not see anything else at the scene as far as any other instrument that was consistent with this wound." If that were the case, the statue had to have been broken before causing the injury. R35 3427-28.

A trail of blood indicated the body was dragged by the feet into the bedroom. R35 3439-40.

A sequence of events could not be established, but it was reasonable to assume she was bludgeoned until the statue broke before a defensive wound was made. There were injuries front and back, so there was some movement or struggle, and maybe the last injury was the cut to the neck. R35 3442-43.

It could not be determined whether the attacker was right-handed or left-handed, and the attacker's height, weight and gender could not be determined. There may have been more than one attacker. R35 3450, 3452-53.

It was not likely that Loughman was rendered unconscious by the first blow because she had the defensive wound, but the first blow could have caused the defensive wound and the second blow could have made her unconscious. R35 3454.

Susan Powell testified for the defense to meeting appellant and Debra Thomas several times in mid to late September about the condo rental. Debra had a diamond ring. A detective later showed her a box of rings, and she did not identify the ring in the box as the one on Debra's hand. R35 3492-94.

Bradley Perron, a defense investigator, testified to drives he made between 1 and 3:30 p.m. in October 2009. First he drove from the old Walgreens location (where Ben Thomas said he made the purchase at 9:19 on September 24) to the Vala residence and then to a post office in Fort Pierce. This trip covered 18.5 miles and took 39 minutes. He then drove from the Walgreens to the Vala home and then to a different post office in Fort Pierce. This second drive covered 11.4 miles and took 25 minutes. The time elapse between Ben Thomas's Walgreeens' receipt and post office receipt was 66 minutes. R36 3510-14.

David Snavely, an electrical engineer with extensive experience in the cell phone industry, testified for the defense. He said the phone records accurately matched appellant's testimony about his whereabouts. He took a conservative approach as to the coverage area of each cell tower. R36 3526-30.

Snavely said signals are bounced around by buildings. Shiny glass bank buildings and so forth have an extreme effect on propagation. In the Treasure Coast, a drive test made a few years earlier would certainly be different from a current drive test. A drive test in 2009 would not accurately describe conditions in 2002. R36 3534-38.

One can see a difference in the best serving tower by crossing a street, and it's not even necessary to move at all: "We've probably all experienced situations on cell phones where we go just in a single location, without moving at all, where we go from a fine call to a poor call because the phone happened to have handed its call off to a different base station just from a static standpoint, without even moving at all." R36 3539-40.

Cell towers can go out of service due to problems with T1 lines, and the tower will have to reboot. Such interruptions happen every single day in any system of any size. R36 3542-43.

Appellant could have been in downtown Fort Pierce at the time of the Faber Cove calls. R36 3546.

The strongest or best signal is not necessarily the closest signal that the phone can see because of a building between the cell phone and the tower. The absence of a building across the water to Faber Cove from downtown Fort Pierce would make it such that there was a clear shot to Faber Cove at an area where there's practically no signal from the Farmers Market tower. The

calls made through the Faber Cove base station are consistent with the locations in or near downtown Fort Pierce that appellant testified that he went that day. R36 3551-53.

It would be an misuse of a predictive propagation tool like Wizard or drive test data made after the fact to try to locate a subscriber at some date within a cellular system. R36 3555.

According to the drive test and plotted map from Nextel, Faber Cove sector 1 is the best server for some places in downtown Fort Pierce. R36 3603.

3. The penalty phase.

The state presented no evidence at the penalty phase as to aggravating circumstances, but it did present victim-impact statements by Loughman's family members. R39 3965-74.

Dr. Michael Riordan, a psychologist, testified for the defense. He said appellant had a very close relationship with his grandmother. She was his primary caretaker when he was very young and his parents were often not home. He felt emotionally unsupported by his parents and he felt unsupported and alone after his grandmother died. R39 4004-06.

He was hospitalized as a child with a bruised kidney. His mother was overly dramatic and he felt he didn't have a close relationship with her. When he lost his grandmother and her emotional support, it set the stage for someone who would really try to work hard to get the approval and the support of the par-

ents, which he never really felt he got. R39 4006-08.

In middle school, he suffered psychosomatic problems because of disapproval by a teacher. He still maintained good grades, showing a child trying to be a good kid and do his best and obtain the praise of adults in his life. He took part in school clubs and religious training and services. He felt alone and emotionally unsupported by his parents. R39 4008-11.

He was successful academically and attended some college, and earned certificates of proficiency as an employee. His military record showed exceptional job knowledge.[3] He had a daughter and married the girl's mother. The mother got involved with another man and moved away. Appellant was in the service and struggled to support his daughter. It was pretty upsetting for him and he got counseling. R40 4021-23.

Appellant's father died of a heart attack and appellant was hospitalized in 1995 for a suspected heart attack. He began to use alcohol excessively, and his mother said he had a very difficult time as a result of his father's death. R40 4026-28.

Appellant owned a business and worked for charitable organizations and did volunteer work. He received supervisory commendations for a strong work ethic. In the Air Force, he had high ratings when working in the mental health field, was rated out-

[3] Appellant was in the Air Force from January 1975 until his honorable discharge in October 1978. R39 3998; R40 4029.

standing, a credit to the Air Force, and exceptional job knowledge, and was praised for pursuing a college education in off duty hours. Because of his worth ethic, he had a good rehabilitation potential within the prison environment. R40 4029-30.

In the Air Force, appellant was diagnosed with a character disorder. Today it would be called a personality disorder. It involved insecurity about relationships that he did not feel were supportive. The disorder would cause particular difficulties and higher anxiety and depression around times such as the threat of a breakup in a relationship. R40 4030-32.

Appellant tested as being not likely to get in trouble in prison, and as being likely to obey rules and benefit significantly from mental health counseling. R40 4034.

He helped get the driver out of a burning truck in Tampa. He was a volunteer for the American Cancer Society, and was considered to be a great asset to the community. R40 4036.

Appellant had a superior or high average IQ, showing good rehabilitation potential. R40 4037-38.

Appellant was a suicide risk, which was consistent with his recurrent mental illness, his medical condition for which he sought treatment, his low self-esteem and personality disorder and adjustment disorder. R40 4039-44.

The Milan test showed a high histrionic scale indicating a desire for stimulation and affection, a social demeanor giving

the appearance of confidence and self assurance, but concealing fear of autonomy and being alone, and repeated signs of acceptance and approval. He had an elevated scale for being self-defeating. His third high scale was under antisocial, which did not necessarily mean antisocial acts, but values that others would feel were not socially appropriate like rubbing people the wrong way. This was consistent with descriptions as a hard worker and doing well, but not caring how coworkers felt about how he operated. This showed an abrasive aspect with coworkers or peers. R40 4046-47.

Appellant had an unspecified personality disorder with a mixture of disorder characteristics, histrionic at the top, antisocial, and schizoid. R40 4047-48.

Because of his intelligence and work ethic, he could be an asset to a prison environment and was likely to abide by prison rules and not present any behavioral problem. R40 4048-50.

Appellant did not have an antisocial personality disorder. His antisocial scale was more than average but not that high, and he did not meet other diagnostic criteria. R40 4055-56.

Appellant could be considered a model prisoner that would have a beneficial effect on other inmates. R40 4058.

The defense also presented the perpetuated testimony of Jack Raisch, an assistant jail chaplain. He counseled appellant frequently at the jail. Appellant was growing as a Christian,

made a big commitment, was pretty committed to his faith journey. He became very thirsty for the word of God, wanted to learn everything that he could about God and the Bible. He was committed and consistent, had a good positive attitude. R40 4120-23.

Dr. Gregory Landrum, the state's psychologist, did not meet or personally evaluate appellant. R40 4106.

Based on documents including Riordan's report, Landrum concluded appellant did not have a personality disorder although he had features of several. In the military records and Riordan's report were features of narcissistic personality and histrionic personality, but no formal diagnosis as to the four criteria of each individually. These features did not seem to impact his life in a significant or substantial way. Landrum said appellant tends to want others to please him, which was more of a self absorption, affability, self admiration. He did not find suicidal thoughts or behavior or a major depressive disorder. Persons with narcissistic features are really not suicidal. R40 4094-98.

Landrum agreed appellant has high intelligence and succeeded in school, the military and work. He would have a positive adjustment to prison. He "has the resources for positive adjustment, and what I mean by that is the intelligence, apparently the education, and I think a pretty good work ethic that's pretty well documented in his work history." He would make a positive adjustment in the future, and there was no indicator of

antisocial personality disorder. R40 4100, 4104-05.

SUMMARY OF THE ARGUMENT

I. The court erred by allowing Debra Thomas to testify on direct examination that she moved back in with appellant in August 2002 "[b]ecause I didn't want anyone to get hurt after he threatened me and my family and Ben."

II. The court erred by limiting appellant's cross-examination of Debra Thomas, the state's main witness.

III. The court erred by allowing Debra Thomas to testify to the effect that appellant stole or interfered with her mail.

IV. The court erred in refusing to grant access to the grand jury testimony of Debra Thomas, the state's main witness.

V. The court erred in refusing to instruct the jury on circumstantial evidence and in letting the state argue that defense counsel's accurate statement as to circumstantial evidence was not the law.

VI. The court erred by limiting appellant's cross-examination of Maureen Reape as to her place of residence.

VII. The court erred in allowing evidence that appellant noticed Joan Cox's ring in 2001, long before the murder.

VIII. The evidence does not support the convictions.

IX. The court erred in excluding evidence that appellant passed a lie detector test. The evidence was consistent with innocence.

X. The court erred in allowing Juan Portillo's testimony about the reach of cell towers to particular areas on September 24, 2002 when he was unaware of the relevant conditions on that date and did not perform a drive test until years later.

XI. The court erred in allowing in evidence Portillo's diagrams purporting to show the location and reach of cell towers in 2002.

XII. The court erred in allowing testimony of how long it took officers to drive to and from various locations long after the crime without showing substantial similarity in driving conditions.

XIII. The court erred in allowing the unauthenticated Walgreens receipt into evidence.

XIV. The court erred in allowing in evidence an irrelevant and prejudicial photograph of Joan Loughman with a baby in her arms.

XV. The court erred in finding CCP based on the stacking of inferences and speculation. The murder was not CCP under cases such as *Power v. State*, 605 So. 2d 856 (Fla. 1992).

XVI. CCP does not apply because the state did not prove an intent to kill before the fatal incident.

XVII. The court erred in finding HAC under *Elam v. State*, 636 So.2d 1312 (Fla. 1994).

XVIII. Florida's death penalty statute is unconstitutional.

ARGUMENT

I. THE COURT ERRED BY ALLOWING TESTIMONY THAT DEBRA THOMAS MOVED BACK IN WITH APPELLANT BECAUSE HE THREATENED HER, HER FAMILY AND BEN THOMAS.

Debra Thomas said she went to live with Ben Thomas in August 2002, but then moved back in with appellant. The state asked why, and she said: "Because he threatened me -" Appellant objected that there was no *Williams* rule notice[4] and the testimony was irrelevant. The judge overruled the objections, saying the testimony was "intricately intertwined, it goes to the sequence of events and motive" and the lack of a *Williams* rule notice was not "of any consequence in that, but we aren't going to make it a feature of the trial, and we're going to move on." The court let the state re-ask the question, and Thomas testified: "Because I didn't want anyone to get hurt after he threatened me and my family and Ben." R31 2773-75.

The court erred in allowing this testimony.

Although this Court reviews rulings on evidence for an abuse of discretion, judicial discretion "is limited … by the rules of evidence, [cit.], and by the principles of stare decisis." *McDuffie v. State*, 970 So.2d 312, 326 (Fla. 2007). Under any standard, the evidence was inadmissible at bar. It was not probative of whether appellant committed the crime and hence was

[4] *Williams v. State*, 110 So.2d 654 (Fla. 1959); § 90.404(2)(c), Fla. Stat.

irrelevant. It constituted evidence of collateral bad acts or character and the state did not dispute that it did not give the written notice required by section 90.404, Florida Statutes.

The jury had to decide whether the state proved appellant committed the crimes on September 24. It did not have to decide why Debra Thomas moved back with him in August. "In determining relevance, we look to the elements of the crime charged and whether the evidence tends to prove or disprove a material fact." *Johnson v. State*, 991 So.2d 962 (Fla. 4th DCA 2008). For instance, it would be clearly relevant for a witness to describe a person leaving a crime scene as such testimony would be either consistent or inconsistent with the person accused of the crime. *Hendrix v. State*, 908 So.2d 412, 420 (Fla. 2005). The evidence of the threats had no such direct probative value here.

The evidence was also not inextricably intertwined with the murder. Evidence is inextricably intertwined if it "is necessary to admit the evidence to adequately describe the deed." *Sliney v. State*, 944 So.2d 270, 286 (Fla. 2006). In *Floyd v. State*, 18 So.3d 432 (Fla. 2009), Floyd was charged with the murder of his wife's mother. The state showed he made murderous threats against his wife and then murdered her mother after she intervened in the dispute. The threats to the wife were admissible as inextricably intertwined with the murder of her mother.

At bar, Debra Thomas testified to threats made to herself,

her family and Ben Thomas a month before the crime, and before appellant ever met Loughman. These threats were not necessary to adequately describe the events of September 24. They were irrelevant and prejudicial.

The state had no physical evidence or eyewitness evidence. It had only a circumstantial theory of guilt that rested on Debra Thomas's credibility. It used the irrelevant alleged threats in final argument as part of its circumstantial case for guilt:

> Members of the jury, this is what he wanted, this two carat diamond platinum engagement ring with the four prongs. And he wanted this because he desperately wanted to hold onto Debra Thomas. He was competing with Ben Thomas.
>
> When she tried to move away from him the first time in Palm Bay, you remember how it started, flowers, calls, sending over jewelry, escalated to taking the car, and finally **the threats to make her move back in**.

R37 3692 (e.s.).

> That she wears the ring for eight days, but then she's afraid when the two policemen come. Yeah, she had been wearing the ring. It wasn't until they came to the house and told her that she started making that connection, and she did become afraid.
>
> She should have given them the ring. No question. She should have. But she didn't, and she was afraid. Remember, **he had already threatened her, threatened her family**. She was afraid. Doesn't matter there was two big guys there, they're going to be leaving.
>
> So, no, she didn't show them the ring or tell them the truth. She was afraid. It was not necessarily the right thing to do, but that's what she did.

R38 3840-41 (e.s.). (In fact, Debra Thomas said only that she lied to the officers because "I panicked and I was afraid of be-

ing implicated." R31 2871.)

The able and experienced prosecutors at bar determined that the evidence would affect the verdict. Under these circumstances, the convictions should be reversed and new trial should be ordered because the state will not be able to show beyond a reasonable doubt that the error did not so affect the verdict.

II. THE COURT ERRED IN LIMITING THE DEFENSE CROSS-EXAMINATION OF DEBRA THOMAS.

Debra Thomas said on direct examination that she went to Arizona in April and planned to move there permanently but moved back when she was not able to get her nursing license because her mail was tampered with. She said she moved back with appellant and then moved in with Ben Thomas but moved back with appellant because of appellant's threats. R31 2766-75.

Appellant wanted to confront her with the fact that she had an ongoing alcohol and drug problem during this period and appellant threw her out for this reason, and he allowed her to move back with him because of her promises to reform. The court refused to allow this legitimate cross-examination based on the state's incorrect representation that the matter had been decided in its favor at the first trial:

> MR. HARLLEE [APD]: There are some matters that I wish to go into that may draw objection. I'd rather clear them up here.
>
> I'm going to ask her if my client kicked her out of the house because she was having serious drug and al-

> cohol problems, which we have a good faith basis for; she's been into rehab, she spent time in Savannas Hospital, she's gone through AA many times, so I intend to ask her about that.
>
> MR. TAYLOR [ASA]: This was all hashed out in the prior trial, Judge. It was deemed irrelevant under the -
>
> THE COURT: Under the holding of *Edwards* and *Green* -
>
> MR. TAYLOR: Yes.
>
> THE COURT: - regarding alcohol abuse at a time unrelated.
>
> MR. TAYLOR: Yes, and that distinction was made at the time.
>
> THE COURT: Okay. Has it - has *Edwards* and *Green* changed since then?
>
> MR. HARLLEE: Not, to my knowledge, no. The way I'd like to handle it then so that we're not holding up the jury, I'd like to make that proffer at the end after they leave. Or during a break. We made a proffer in the first trial.
>
> THE COURT: Will you stipulate that the proffer made in the first trial -
>
> MR. HARLLEE: We'll stipulate to the proffer in the first trial.
>
> MR. TAYLOR: Yes.

R31 2879-80.

The court was misled by the state. In fact, the state did not obtain a definitive ruling on these issues as to the cross-examination of Debra Thomas at the first trial and there was no discussion of any *Green* and *Edwards* case. Prosecutor Taylor was apparently referring to proffers made during the testimony of appellant and Debra Flynn at the first trial.

At the first trial, the defense sought to bring out appellant's testimony that: He and Debra broke up in April, and Debra went back to drinking and using drugs from places she worked, including Oxycodone, Xanax, and Hydrocodone. She mixed these with alcohol and was dual addicted. She would disappear for a day or two due to severe anger. She was fired for taking a number of drugs. They broke up again in September when she was finalizing an agreement for DUI probation. For her nursing license they wanted her to go into a program for impaired nurses. It was not true that she reunited with him because he threatened her or other people. After the April breakup he would not take her back until June, when she said she would return to the programs that kept her sober. It didn't happen and they split again. She told him she had met Ben Thomas, but was no longer going to see him and that's why she wanted to come home. Within a week he found out she was seeing Ben. She kept drinking and then used drugs. They broke up again and she moved in with Ben. She asked him to take her back. That was the second reuniting in late June. She then went back to Ben Thomas, but after two weeks she asked to come back. Drug and alcohol problems continued, even that last time that she was with him and he sent her to Arizona again to take care of her daughter who was having surgery. When she got back, it was right back to the same thing. SR2 186-96.

The state argued the evidence was irrelevant hearsay. De-

fense counsel replied that the door had been opened by Debra's testimony that she had returned to appellant because of threats:

> MR. HARLLEE: Okay. Ms. Thomas opened the door here, Judge. **She told this jury that she came back to Mr. Gosciminski because he threatened her**.
>
> As contradictory as that sounds, now we should be permitted to put on evidence which rebuts that testimony that had nothing to with threats, but everything to do with his tolerance for someone who is an alcohol and drug abuser.
>
> She was permitted to put on that type of evidence about the threats without any corroboration whatsoever.
>
> … .
>
> MR. HARLLEE: What he did was, he would receive assurances from Ms. Thomas and/or these other attorneys, although that may be hearsay, but at least, from Debra Thomas, that she was off the drugs and alcohol, that she was sober again and please take me back. So, it's in direct contradiction of her trial testimony.
>
> You know, right now, the jury - Mr. Gosciminski's been portrayed as this threatening person who's going to hurt Debra Thomas and her family members and Ben Thomas and everyone else. We should be permitted to contradict and rebut that allegation.

SR2 224-25 (e.s.). Counsel further argued the evidence would go to the state's evidence about appellant's financial straits in that it would explain that she put him in that position with her drug and alcohol use and purchases. SR2 226.

The court ruled appellant could testify to these matters so long as he did not base the testimony on hearsay. The state said he should be allowed to testify only to statements from her and things he actually saw, and the judge agreed, ruling he was "not going to be allowed to testify to what other people said to him,

other than Debra Thomas." SR2 227-31.

A related issue arose in Debra Flynn's testimony at the first trial. Defense counsel asked if she knew why Debra Thomas lost her job at Crystal Palms. The state objected, and defense counsel said he wanted to bring out that Debra Thomas had a major drug problem for years, got into a financial mess many times, became dependent on appellant for money, support, car, house, everything, she mooched on everyone, all of which went to her credibility, bias and truthfulness. He said it went to her ability to remember things and her credibility because she was behind the eight ball financially, so she was going to do and say whatever she needed to do. He said long time drug abuse and alcohol abuse affects memory, she had multiple DUI's, had her nursing license suspended over and over again in various states because of her alcohol and drugs. Debra Flynn said on the proffer she did not know why Debra Thomas left her employment at Crystal Palms and the defense said it could pursue the matter no further with her. SR1 121-36.

From the foregoing, defense counsel sought to refute Debra Thomas' testimony about appellant's finances and the course of the relationship over the months leading up to September 24. He especially sought to refute her testimony that she moved back in with appellant the last time because he threatened her, her family, and Ben Thomas. Her testimony along these lines amounted to

an attack on appellant's character.

The state had raised these issues on Debra's direct examination. Counsel sought to confront her by showing she was the source of appellant's financial problems because of her out of control drug and alcohol abuse and her mooching off of appellant. He sought to show she reconciled with appellant out of her own financial need arising from this behavior and not because of any supposed threats. Evidence that appellant threw her out went directly to her motive to testify against him. The state was able to present evidence of appellant's finances in order show a motive. Appellant was entitled to ask about her financial instability and its causes to show a motive on her part.

"[W]here a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecution witness regarding matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error." *Coxwell v. State*, 361 So.2d 148 (Fla. 1978).

In *Coxwell*, this Court quoted and relied on the following from *Coco v. State*, 62 So.2d 892 (Fla. 1953):

> a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege,

> which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree. . . . Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error.

Coxwell, 361 So.2d at 151 (ellipses in *Coxwell*). Further, "cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief." *Id*. (ellipses in *Coxwell*). *See also McDuffie*, 970 So.2d at 324-25 (citing and following *Coxwell* and *Coco*).

The state's case hung on a single thread: Debra Thomas's credibility. She testified that on the day of the murder appellant arrived home with blood on him, he gave her a ring like the victim's ring, and he got rid of the ring on the day the police asked for a DNA sample. Appellant had an absolute right to a full and complete cross examination of her under the Confrontation and Due Process Clauses of the state and federal constitutions. Art. I, §§ 9, 16, Fla. Const.; Amends. VI and XIV, U.S. Const. A new trial should be ordered.

III. THE COURT ERRED IN ALLOWING DEBRA THOMAS'S TESTIMONY THAT SHE WAS UNABLE TO GET HER NURSING LICENSE IN ARIZONA BECAUSE HER MAIL WAS INTERCEPTED AND IT WAS SENT TO THE HOME WHERE APPELLANT WAS LIVING.

Debra Thomas testified she applied for a nursing license in Arizona but could not get her license because her mail "was intercepted." R31 2766-67. She said the mail was sent to the Wakefield Circle address, and she said only appellant was living there. *Id*. Defense counsel objected that it was "speculation on the part of the witness as to where the letter was sent, who was living in the house at the time and whether they were living there alone." *Id*. Counsel also objected to the characterization of intercepting mail, a federal crime, and said it was evidence of bad character. R31 2768-69.

The court overruled appellant's objection that the witness did not know who was living at the house. As to the testimony the mail was intercepted, the court said there "was no contemporaneous objection made at the time, I don't know how to go back in time and fix it." The court said appellant had as much right to mail addressed to the house as anyone else and it did not think there would be argument that appellant violated federal mail law. The state said the claim was that he didn't tell her about it and she therefore didn't get her license and mail, and said it would ask her about that, but defense counsel asked that the state not do so because it was speculative. The witness then

testified she did not get her license. R31 2769-70.

The court erred in overruling appellant's objection.

First, as defense counsel noted, it was entirely speculative as to where the supposed correspondence was sent. No one from the relevant Arizona agency testified that any correspondence was sent out, much less that it was properly stamped and addressed to the Wakefield Circle house. *Cf. Brown v. Giffen Indus., Inc.*, 281 So.2d 897, 900 (Fla. 1973) (to prove receipt, party must show mail was properly addressed, stamped and mailed); *accord Star Lakes Estates Ass'n, Inc. v. Auerbach*, 656 So.2d 271, 274 (Fla. 3d DCA 1995); *Thorne v. Dept. of Corr.*, 36 So.3d 805, 806-07 (Fla. 1st DCA 2010).

Second, Debra had gone to Arizona and put down money on a home with the intent of permanently relocating there. R31 2766. She did not know who was living with appellant after she left. The judge posited a situation in which he would know who was living at his house while he was away: "I can go to Ohio and I know who's living in my house. People generally know who's living in their house; they don't have to be physically in the house." R31 2768-69. But the facts here do not support the analogy. The house was appellant's home and Debra was moving in and out at various times and was in the process of moving permanently to Arizona. She would not know who was at the house while she was in Arizona.

Third, the evidence amounted to an irrelevant attack on appellant's character. The state presented evidence of an alleged dishonest misdeed by appellant five months before he even met Loughman. This evidence did not go to prove any element of the crime and merely attacked appellant's character.

Finally, the court erred in saying appellant objected too late. An objection is sufficiently timely if it is made during the same line of testimony. In *Jackson v. State*, 451 So.2d 458 (Fla. 1984), the state questioned witness Dumas at length about a conversation with Jackson. In response to one question, Dumas said Jackson bragged of being a "thoroughbred killer." In response to the next question, he said Jackson was a killer in his heyday. In response to the following question, he said Jackson threatened him with a gun. In response to the next question, he said the gun was a .44. Only after all of this did Jackson's attorney object to the relevancy of the line of questioning.

This Court held the objection was timely to preserve the claim that the "thoroughbred killer" testimony was inadmissible:

> An objection need not always be made at the moment an examination enters impermissible areas of inquiry. In *Roban v. State*, 384 So.2d 683 (Fla. 4th DCA), *review denied*, 392 So.2d 1378, 1379 (Fla.1980), objection to an impermissible gratuitous comment by a witness was made several questions after the objectionable testimony. The district court found the objection timely because the question put to the witness was within the time frame for a contemporaneous objection. In the case now before us, objection was made during the impermissible line of questioning, which is sufficiently

> timely to have allowed the court, had it sustained the objection, to instruct the jury to disregard the testimony or to consider a motion for mistrial.

Id. at 461. *See also Fittipaldi USA, Inc. v. Castroneves*, 905 So.2d 182 (Fla. 3d DCA 2005) (objection after four to five questions: "Because of the closeness in time between Miller's testimony and counsel's objection, we believe that the objection was timely and that the issue is preserved for appellate review."; citing *Jackson*); *Sharp v. State*, 605 So.2d 146, 147-48 (Fla. 1st DCA 1992) (objection timely even though "before defense counsel objected to the above-quoted exchange and moved for a mistrial, the state had completed its direct examination, and the defense conducted a voir dire of the witness"; citing *Jackson*); *Barrett v. State*, 649 So.2d 219, 221 (Fla. 1994) (discovery objection not made until after direct examination ended and cross-examination began).

The state had a weak case, and its case was almost nonexistent if the jury did not believe Debra Thomas. The state determined to portray her as a collateral victim of appellant, presenting her testimony that he kept her mail from her and threatened her, her family and Ben Thomas.

The error was also prejudicial because appellant was unable to cross-examine Debra about her chronic alcoholism and drug use, which would have been highly relevant to explaining other reasons she may have had trouble obtaining her nursing license.

The state will have to prove beyond a reasonable doubt that the jury was not influenced by this evidence in reaching its verdict under the principles of *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986). It cannot do so here.

IV. GOSCIMINSKI IS ENTITLED TO DEBRA THOMAS'S GRAND JURY TESTIMONY.

Debra Thomas testified that on the afternoon of the murder she found appellant in the bathroom washing off blood and that his bloody clothes were on the floor. The credibility of this account depends on when Thomas said it occurred. According to the state's other witnesses and the cell phone records, appellant was well away from his home by 12:07 p.m. and was at his office a considerable distance away at 12:30.

On October 2, 2002, Thomas told the lead detective this occurred around one p.m. R31 2882. On October 7, 2002, she told him it was "Early afternoon." R31 2882-83. At deposition, she put the time as "around one o'clock." R31 2884. At the 2009 retrial, she said it was at lunchtime and "Early afternoon, around lunchtime," and appellant probably left "within an hour." R31 2790, 2884-85. She was confronted with her deposition testimony that Gosciminski left around 3:00, and replied that counsel had suggested that time to her and she was confused. R31 2885-86.

Defense counsel moved pretrial for review and disclosure of grand jury testimony. R2 64-70, R11 330-35. The court said it

would review the grand jury testimony of Debra Thomas. R12 366-70. Later that day, it signed an order denying disclosure of her grand jury testimony, saying it found no evidence of perjury, and there were no material inconsistencies, and the witness simply did not know the exact time of appellant's alleged arrival and departure. A copy of the order is appended to this brief.[5]

Section 905.27(1), Florida Statutes, provides for disclosure of grand jury testimony (a) to ascertain whether it is consistent with the witness's testimony before the court or (b) to determine whether the witness is guilty of perjury, or (c) in the interest of "[f]urthering justice." *See Murray v. State*, 3 So.3d 1108, 1119 (Fla. 2009). Thus, to obtain grand jury testimony, a party must show a particularized need sufficient to justify the revelation of grand jury testimony, such as by showing that an important state witness has made contradictory statements. *Keen v. State*, 639 So.2d 597, 600 (Fla. 1994). Once a grand jury investigation ends, disclosure is proper when justice requires it. *Id*.

[5] The order was not in the original record on appeal. Appellant moved to supplement the record with, among other things, the order and the grand jury testimony reviewed by the court. The state opposed the motion only as to the grand jury issue. It attached the judge's order to its response. This Court entered orders on September 23 and November 15, 2010 granting the motion except as to the grand jury issue, as to which it directed the clerk to seal the testimony and transmit it only to this Court under seal. Apparently the clerk included the order in this sealed record – in any event, it is not in the supplemental record available to counsel.

At bar, Debra Thomas was the state's main witness. She made statements putting the incident at a time when it could not have occurred. She explained some discrepancies by saying that defense counsel pressured and confused her at deposition. Such could not have been the case before the grand jury. The grand jury testimony perforce would have conflicted with one or another of her accounts of the time of this incident, and hence was subject to disclosure under section 905.27(1)(a).

Disclosure was in the interest of justice under section 905.27(1)(c). There is no great interest in grand jury secrecy at bar. The grand jury proceedings occurred years ago, close to the date of the crime. "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *Dennis v. U.S.*, 384 U.S. 855, 869-70 (1966). In such a situation, "the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility" presents a "particularized need where the secrecy of the proceedings is lifted discretely and limitedly." Id.

Debra Thomas is no secret confidential informant with a unique interest in keeping secret her testimony. She figured prominently in the arrest affidavit, which was signed and filed on October 3, 2002, nineteen days before the case was first presented to the grand jury. She has testified in deposition and in two trials, and has made police statements. There is no compel-

ling reason to keep secret her grand jury testimony.

The denial of access to Debra Thomas's grand jury testimony violates section 905.27, Florida Statutes, and the Due Process and Confrontation Clauses of the state and federal constitutions. A new trial should be ordered.

V. THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE AND IN LETTING THE STATE TELL THE JURY THAT APPELLANT'S ARGUMENT AS TO CIRCUMSTANTIAL EVIDENCE WAS "NOT THE LAW."

Defense counsel requested an instruction on circumstantial evidence. The court denied the request, citing *Holland v. U.S.*, 348 U.S. 121 (1954) (no error in refusing give instruction on circumstantial evidence as instruction was made unnecessary by reasonable doubt instruction), *In re Standard Jury Instructions in Criminal Cases*, 431 So.2d 594 (Fla. 1981) (eliminating standard instruction but stating courts still have discretion to instruct on circumstantial evidence) and *Wadman v. State*, 750 So.2d 655 (Fla. 4th DCA 1999) (reversing where judge told jury state could prove element of crime by circumstantial evidence but did not define circumstantial evidence for jury). R36 3614-22, 3635. (At bar, the state mentioned circumstantial evidence in voir dire, R20 1396, and the court instructed the jury the state could prove intent by circumstantial evidence. R38 3874.)

Defense counsel said that, even if the court did not give the instruction, he would still read it to the jury from a post-

er to illustrate the state's burden of proof. R36 3619-20. The court said counsel could do so. R36 3617-22.

In final argument, defense counsel discussed the reasonable doubt instruction the judge would give. R37 3747-48. He then discussed his poster regarding circumstantial evidence:

> Also, we're going to be talking about circumstantial evidence. Circumstantial evidence is legal evidence. A crime or any fact may be proved by such evidence. A well connected chain, a well connected chain of circumstances is as conclusive in proving a crime of fact as is positive evidence. Its value is dependent upon its conclusive nature and its tendency.
>
> Circumstantial evidence is sufficient to convict the Defendant guilty of crimes charged if - if the circumstantial evidence proves each element of each crime charged beyond and to the exclusion of every reasonable doubt.
>
> And the circumstantial evidence rebuts every reasonable hypothesis of innocence. Now, what does that mean? It's a special standard that you've got to apply in a case such as this where we don't have any scientific evidence. We don't have any, as they describe it up here, positive evidence.
>
> If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other of innocence, you must accept that construction indicating innocence. So there's no confusion, if there are at least two, two ways to construe the evidence, one that he's guilty and one that he's innocent, you've got to go with the innocent. You're required to.

R37 3748-50. The state did not object to this argument.

In its rebuttal, the state said:

> Now, Mr. Harllee had up a poster over here about circumstantial evidence, and he referred to it at least once as the law. It is not the law. The Judge is not going to give -

R38 3853. Defense counsel objected, but the court overruled his objection and allowed the state's argument based on the belief that defense counsel had told the jury that it "was the law":

> (Sidebar conference, as follows:)
>
> MR. HARLLEE: Judge, I believe it is the law. It may not be a jury instruction or something that you may instruct them on, but I don't know of any case law which says that's not the law.
>
> THE COURT: Well, there's case law saying it's an erroneous and misleading part of the law, that's why the Florida Supreme Court said it's not going to be given. It's fairly embraced within, so the law is it ain't the law.
>
> And I know I said you could argue it, but I think once you did refer to it as law, and it's in kind of the format of a jury instruction, so again with one of those invited responses I'll let her explain that that's an argument that you can fairly make, but it's not the law, and I'm not going to instruct them on that.
>
> MR. HARLLEE: Okay.
>
> (Open Court resumed, as follows:)
>
> MS. PARK: That was not the law. You all are the triers of fact. You listened to the testimony. You weigh the testimony, you weigh the evidence, you're the triers of fact.

R38 3853-54. In fact, counsel did not say his reasonable doubt poster was "the law." Instead, he had said just previously that a reasonable doubt "may arise from the evidence itself, from a conflict in the evidence, or from a lack of evidence" and "I'm going to ask you to keep your eyes and ears open as **to these three areas** in looking for reasonable doubt, because that's your

job as jurors. You took an oath that you would follow the law, this the law." R37 3747-48 (e.s.).

Regardless, this Court has held judges have discretion to instruct on circumstantial evidence if they feel it is necessary. *In re Standard Jury Instructions in Criminal Cases*. At bar, the instruction was necessary and the court abused its discretion.

The instruction was necessary because the state based its case for guilt on argument that it had a sufficient mass of "coincidences" to amount to proof of guilt. From page R37 3724 to R37 3744 (twenty pages), it used the word "coincidence" 24 times in laying out its case. Over the same twenty pages, it used the expression "Just so happens" 27 times. Starting in jury selection, the state based its case on the stacking of coincidences:

> The more you add, the less likely it is coincidence; correct? I mean, it's just - when I asked you in jury selection, I said will you use your common sense in this trial? What's more likely, what's less likely? These are every day common sense. At some point, ladies and gentlemen, the coincidences cease to be coincidences because it just gets too ridiculous.

R37 3725.

It was vitally important for the jury to understand it could not base its verdict on coincidences and "Just so happens" unless the state established a case which was not only consistent with guilt but also inconsistent with innocence.

The state made the instruction yet more important because of its rebuttal argument that defense counsel's formulation was "not the law." In fact, defense counsel simply used the old standard instruction in his argument. *Compare* the old standard instruction as quoted in *Wadman*, 750 So.2d at 657, to counsel's remarks at R37 3748-50. Counsel accurately stated the law governing circumstantial evidence.

In *In re Standard Jury Instructions in Criminal Cases,* this Court did not hold inaccurate the old standard instruction. It only held it was unnecessary because it was adequately covered by the reasonable doubt instruction. At bar, the state turned this Court's logic on its head: it suggested the circumstantial evidence standard was "not the law" because it conflicted with the reasonable doubt instruction given by the court.

From the state's argument (and the fact that the judge allowed it), the jury would conclude it was **not** the law that the circumstances needed to be both consistent with guilt and inconsistent with innocence and if there were two reasonable constructions, one indicating guilt and the other innocence, the jury had to accept the construction indicating innocence.

The court erred in overruling appellant's objection and letting the state argue the circumstantial evidence standard was "not the law." The state may not make "a false statement of the law" to the jury, and the court may not give such argument "a

stamp of approval by … overruling the defense objection." *Profitt v. State*, 978 So.2d 228, 230 (Fla. 4th DCA 2008).

The judge based his ruling at bar on a misunderstanding of what defense counsel said. He thought counsel "did refer to it as law." R38 3854.

Further, the judge said he would let the state explain "that that's an argument that [defense counsel] can fairly make, but it's not the law, and I'm not going to instruct them on that." *Id*. In fact, the state did not tell the jury that it was an argument that counsel could fairly make. It left the jury with the impression that counsel had misrepresented the law, and that the standard for circumstantial evidence was "not the law."

The instruction was necessary for the jury to understand its task of evaluating the state's case. The state misled the jury by saying counsel's correct statement of this important principle of law was "not the law." One can have no confidence that the errors did not affect the verdict, much less can the state prove beyond a reasonable doubt that it did not affect it. A new trial should be ordered.

VI. THE COURT ERRED IN LIMITING APPELLANT'S CROSS-EXAMINATION OF MAUREEN REAPE.

Maureen Reape testified that she owned a home. R31 2894. Debra Thomas met her at this home after September 24 and showed her a diamond ring. R31 2897.

The defense sought to cross-examine Reape about her residence at the time of trial: the county jail. The defense also wanted to bring out that she was in jail for her fifth DUI, and that she had reason to curry favor with the state because of her conviction and incarceration. R31 2841-46, 2890-93. The judge refused to allow the cross-examination because more than 60 days had passed since Reape's sentence so that her sentence could not be modified under rule 3.800(c) and the DUI was not a felony or crime involving dishonesty. *Id*. He also said the prejudicial effect would outweigh the probative value. *Id*.

The court erred. In *Alford v. U.S.*, 282 U.S. 687 (1931), Alford's former employee testified against Alford at his trial for mail fraud. The judge refused to allow cross-examination questions as to the witness's residence despite Alford's argument "that the jury was entitled to know 'who the witness is, where he lives and what his business is.'" *Id*. at 688-89. Alford sought to show the witness was "now in the custody of the Federal authorities." *Id*. 689-90. The judge ruled the witness's residence in jail was admissible only if he was convicted of a felony, and refused to allow the cross-examination. *Id*.

The Supreme Court found error and wrote that Alford could question the witness about his residence "as a matter of right." *Id*. at 691-92.

The Court followed *Alford* in *Smith v. Illinois*, 390 U.S.

129 (1968). At Smith's trial, an informant testified his name was James Jordan. He admitted on cross that that was not his real name. Smith was not allowed to ask him for his real name or his address. The Supreme Court held: "we follow the standard of *Alford* and hold that the petitioner was deprived of a right guaranteed to him under the Sixth and Fourteenth Amendments of the Constitution." *Id*. at 133.

Under the foregoing authorities, error occurred at bar. As a jail inmate, Maureen Reape lived under the control of law enforcement officials. Officials controlled every aspect of her life and could make it more or less bearable in uncountable ways subject to no real review by any outside authority.

The state cannot show beyond a reasonable doubt that the error did not affect the verdict. Reape corroborated Debra Thomas's claim that appellant gave her a ring similar to Loughman's ring on September 24. She said appellant and Debra discussed appellant getting Debra a ring shortly before September 24 and on September 25 Debra had a ring like Loughman's. Flynn and Rizzolo, appellant's coworkers, did not identify the ring appellant had on September 24 as resembling Loughman's. Dets. Bender and Hall identified the ring on Debra's finger on October 2, but she told them that appellant gave her the ring in 2001. R29 2569.

The court denied appellant his absolute right to a full and complete cross-examination of Reape, a major state witness. This

Court should order a new trial.

VII. THE COURT ERRED IN ALLOWING JOAN COX'S TESTIMONY THAT GOSCIMINSKI NOTICED HER DIAMOND RING IN 2001.

Joan Cox testified she spoke to appellant about placing her mother in Lyford Cove in June 2001. He invited Cox and her granddaughter to have lunch to check out the food. At lunch he noticed her diamond ring. R28 2384-87.

Appellant objected that this evidence was irrelevant and was inadmissible *Williams* rule evidence for which the state had not given the required statutory notice. The state argued the evidence did not involve a collateral crime and it was relevant to appellant's police statement that he did not pay a lot of attention to such stuff with clients. R28 2371-76.

The judge ruled the evidence was not *Williams* rule evidence because it involved an "innocuous" remark and it tended to "relate back to a statement to law enforcement where he's asked did you notice the jewelry, no I don't notice stuff like that, it's irrelevant. I don't pay attention to things like that, it's irrelevant to what I do totally. R28 2379-82.

Defense counsel said that the remark was not innocuous in the context used by the state because the state had no evidence of motive "except … circumstantial evidence saying that because he's so interested in jewelry and because he would've been interested in her jewelry, he must have been interested in Joan

Loughman's jewelry and that would be his motive to kill her. So this isn't just, you have nice hair, you have nice nails or, you have a nice ring, this goes much further in this specific case." The court again ruled the evidence admissible. R28 2437-38.

The state relied on the evidence in final argument:

> Just so happens the Defendant denies noticing the jewelry. I don't pay attention to things like that. Just so happened, the Defendant noticed Debra Pelletier's diamond ring, Joanne Cox's diamond ring when he was placing her relative at Lyford Cove. And of course the victim's diamond ring; he says I briefly noticed it in his 2005 statement.

R37 3727-28. The defense argued that the remark was just part of appellant's job to develop rapport with clients. R37 3769-70. Thereafter, the state again stressed the evidence:

> Mr. - he mentioned Joanne Cox. Joanne Cox was an older lady that came in, and she told you that when she went to Lyford Cove and had an appointment with the Defendant, that he suggested, you know, she could put her mother there for a couple of weeks, see if they liked it, have lunch. So she and her granddaughter stayed for lunch. And as they were having lunch, the Defendant commented on her ring, a favorable comment, which she found unusual. But she's not the only one that said that.
>
> And the Defendant has said I don't know jewelry. And then he said, well, I do know jewelry. I didn't notice jewelry. Well, you couldn't help but notice the jewelry.
>
> But Debra Pelletier said that when he was coming to her house and showing a little interest, feeding her all the information about Ben and Debbie, that he asked about her diamond ring as well, and it had been her mother's ring.

R38 3847-48.

The court erred in allowing the evidence. The state said it served to rebut appellant's police statement. Appellant said in the police statement that he didn't pay a lot of attention to jewelry because it was not part of the financial screening, and he may have commented on her jewelry. R27 2299, 2305-06. We can see that this statement concerned financial screening, and was not rebutted by Cox's testimony. When appellant spoke to Cox in June 2001, long before the murder, he was simply making conversation. This occurred more than a year before he met Loughman.

"Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. At bar, the jury had to decide whether appellant committed the murder in September 2002. The June 2001 conversation had nothing to do with that issue.

Similar fact evidence of "other … acts" is admissible when relevant to prove a material fact, but it may not be used solely to prove propensity. § 90.404(2), Fla. Stat. Evidence of a specific incident to prove a character trait is irrelevant unless the character trait is an essential element. "For example, testimony that a person exceeded the speed limit on a limited number of occasions is not admissible to prove that the person exceeded the speed limit at the time in question." *Bulkmatic Transport Co. v. Taylor*, 860 So.2d 436, 447 (Fla. 1st DCA 2003).

Further, although the state argued that the evidence went only to rebut the police statement, it used it in final argument

as substantive evidence of an on-going pattern of paying attention to the jewelry of women, raising the specter that he was a long-term predator. In effect, Joan Cox appeared as a stand-in for Joan Loughman. The state will not be able to show that this evidence, which it emphasized in final argument, could not have affected the verdict. A new trial should be ordered.

VIII. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

The state's case against appellant was entirely circumstantial. Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must be inconsistent with innocence." *Lindsey v. State*, 14 So.3d 211, 214-15 (Fla. 2009).

The state may not stack or pyramid inferences. *See Miller v. State*, 770 So. 2d 1144, 1149 (Fla. 2000) ("the circumstantial evidence test guards against basing a conclusion on impermissibly stacked inferences"); *Gustine v. State*, 97 So. 207, 208 (Fla. 1923) (conviction reversed because "only by pyramiding assumption upon assumption and intent upon intent can the conclusion necessary for conviction be reached"); *Brown v. State*, 672 So. 2d 648, 650 (Fla. 4th DCA 1996) ("circumstantial evidence is insufficient when it requires pyramiding of assumptions or infe-

rences in order to arrive at the conclusion of guilt"); *Collins v. State*, 438 So. 2d 1036 (Fla. 2d DCA 1983) (pyramiding inferences lacks conclusive nature to support conviction); *Chaudoin v. State*, 362 So.2d 398, 402 (Fla. 2d DCA 1978).

> An impermissible pyramiding of inferences occurs where at least two inferences in regard to the existence of a criminal act must be drawn from the evidence and then stacked to prove the crime charged; in that scenario, it is said that the evidence lacks the conclusive nature to support a conviction.]

Kennedy v. State, 781 So.2d 421, 423 (Fla. 4th DCA 2001).

This rule rests on a powerful idea:

> The finger of suspicion implicit in circumstantial evidence is a long one and may implicate both the innocent and guilty alike. Persons caught in a web of circumstances may often appear guilty upon first impression, but in fact be entirely innocent as surface appearances are frequently deceiving. A person ought not be convicted of a crime, it is thought, and his freedom taken from him based on such tenuous and ambiguous evidence. To avoid, then, convicting entirely innocent people based on suspicion and innuendo, the law has long demanded a high standard of proof when reviewing convictions based entirely on circumstantial evidence. Given our long-standing commitment to the ideal of individual freedom, this result seems both fair and reasonable. As has been often stated, "[o]ur responsibility in such circumstances-human liberty being involved-is doubly great," *Head v. State,* 62 So.2d 41, 42 (Fla. 1952), because "[t]he cloak of liberty and freedom is far too precious a garment to be trampled in the dust of mere inference compounded." *Harrison v. State,* 104 So.2d 391, 395 (Fla. 1st DCA 1958).

Luscomb v. State, 660 So.2d 1099, 1103-04 (Fla. 5th DCA 1995); *accord Jackson v. State*, 736 So.2d 77, 81 (Fla. 4th DCA 1999).

In *Ballard v. State*, 923 So. 2d 475, 483 (Fla. 2006), the

hypothesis was that Ballard

> was not guilty, and that another individual, including perhaps a member of the gang that had shot into [the victims'] apartment a week prior to the murders, or some other unknown assailant, committed the murders.

Forensic evidence put Ballard on the scene of the murder, but he had often been there in the past. At bar, appellant's hypothesis was that he was not guilty, and some unknown person committed the murder. No forensic evidence linked him to the crime. The state had the burden to show appellant was guilty and no one else committed the crimes.

The state based its case on the stacking of inferences.

It inferred, from the fact that Loughman told appellant on September 23 that her family was flying in and she was going home, R33 3206-07, that he concluded that the jewelry was "slipping out of his fingers. … . He finds that information out the night of September 23rd. Just so happens, she is killed and robbed the next morning. It's not a coincidence," R37 3744, and "he knew she was leaving the next day. Her family was coming in that very same night. This was his last opportunity to get that ring for Debra. He was desperate to have her, and he was willing to do whatever." R38 3860. In fact, there was no evidence that appellant knew Loughman was "leaving the next day." She did not say when her family was arriving or when she was leaving. R33 3206-07.

It inferred from the fact that appellant passed within miles of the Pelletier-Thomas home on September 24 that he went there and left the jewels in the shed. R37 3708, 3735-36.

From the fact that on September 24 appellant showed coworkers a ring somewhat like Loughman's and said he had bought estate jewelry including a tennis bracelet, the state inferred that appellant stole them from Loughman, saying: "What are the chances? What are the chances?" R37 3710-11. In this regard, the state argued that appellant said he bought a "diamond tennis bracelet." R37 3711-12. In fact, the coworkers said only that he mentioned a tennis bracelet. R29 2503 (Flynn), 2534 (Rizzolo). Also, in response to a leading question, Flynn said at most that appellant mentioned diamonds and emeralds "in relation to the tennis bracelet." R29 2503. Neither Flynn nor Rizzolo identified the ring in the ring lineup.

From the fact that appellant told the police in October what he was doing on the morning of September 24, the state inferred that he knew she was murdered that morning and that he was therefore the murderer. R37 3715-16. In fact, the record shows the murder had been discussed by people at Lyford Cove and Loughman's family, and nothing indicated the approximate time of death was kept secret.

It inferred from the fact that appellant said he had been confused about when he got the ring that he was therefore the

murderer and stole the ring from Loughman. R37 3717-18.

From the fact that appellant passed within miles of the Stuart Highway tower on September 24, it inferred that he therefore left Loughman's fanny pack at the Stuart Highway interchange where it was found many months later. R37 3725, 3732-33.

From the fact that appellant discussed getting Debra a two carat ring in the days before the murder, the state inferred that his desire to get a ring was caused by seeing Loughman's ring and he therefore killed Loughman to get the ring. R37 3725-26. In fact, Debra Flynn said appellant had been talking about getting such a ring for Debra for a few months or a month, R29 2497, and Deborah Pelletier said he was talking in early August about getting Debra Thomas a two carat diamond ring. R34 3281.

In inferred from appellant's minor financial problems and the fact that Loughman wore a lot of jewelry that appellant decided to kill her to solve his financial problems. R37 3726-27. (In fact, the evidence was that Loughman wore her jewelry all the time and she came into contact with persons at the hospital, Lyford Cove, hospice and the neighborhood around the house. Any such person could have had financial problems and had a motive to kill her for her jewels.)

It inferred from the fact that there was no forced entry that Loughman knew her assailant and the assailant was appellant. R37 3727.

It inferred from the fact that appellant was in the **several square mile** coverage area of the Faber Cove tower that he went to the Vala house and committed the murder. R37 3728.

It inferred from the facts that there was blood at the scene of the murder and appellant had blood on his arm around lunchtime and later seemed freshly clean that there was blood on the murderer and that person was appellant. R37 3729-30.

The state inferred appellant committed the murder from the fact that he came to work late: "Just so happens that he was late the morning of the murder. Coincidence? No." R37 3731. (In fact, appellant had been missing the morning meetings for several weeks before the murder. R29 2480.)

The state inferred that appellant stole Loughman's money from the facts that Loughman's husband gave her $500 when she left Connecticut on September 13 and appellant made a bank deposit of $430 on September 24. These facts are not probative of guilt. *Cf. J.L.J. v. State*, 367 So.2d 699 (Fla. 2d DCA 1979) (evidence did not support adjudication for stealing six one dollar bills from teacher's wallet; defendant had been behind teacher's desk shortly before theft and later in the day told a friend to hold six one dollar bills, saying he had found them in a locker).

It inferred that appellant was guilty from the fact that he told Jurina that Debra's ring was worth $15,000 and the insur-

ance company paid $19,000 for the loss of the ring: “Is that a coincidence? It’s got to cease at some point.” R37 3735.

It inferred guilt from appellant’s ambiguous remark to Deborah Pelletier of “I’m done. Don’t visit me anymore.” R37 3736.

It made a number of inferences about appellant’s picking up furniture at the Vala house: Loughman could not lift furniture, hence the furniture could not have been outside, hence appellant lied about picking up furniture outside, hence appellant was guilty of the murder because he was attempting to limit any admission of having ever been in the house. R37 3737-38.

The facts about the furniture were this: Appellant said a small ottoman, a walker and a suitcase were outside the door. R33 3146. Inside were a TV stand and TV. R33 3146-47. Loughman told him a maid was at the house. R33 3147. Det. Hickox confirmed that there was a maid who cleaned the house. R26 2160. Two days after the murder a woman called and identified herself as the person who cleaned the Vala house. R26 2146. This maid could have moved the small ottoman, walker and suitcase or helped Loughman move it. Likewise, she could have moved the TV stand and TV by herself or with Loughman.

The state made a number of inferences from the facts that appellant said he assigned Linda to assess Vala and Linda supposedly did not do so: appellant knew Vala should not be at Lyford

Cove, he nevertheless wanted him admitted because the family had money and he could have "access to Joan." R37 3738-39.

From testimony that appellant wore a blue shirt the day of the murder and a blue thread was seen at the murder scene, it inferred that appellant wore the blue shirt "over to commit the murder." R37 3741. In fact, the thread was not compared with anything. R25 2050-51. There was no testimony that the thread was even shirt material or was the same kind of blue as appellant's shirt, much less was there evidence directly linking the thread to appellant.

The state inferred from the facts that appellant had been to the house one time that "[o]nly the Defendant knew that that statute [sic] was inside the house and could be used as a weapon to kill Joan Loughman." R37 3743. There was no evidence that only appellant knew the statue was in the house much less that he had considered the statue could be used as a weapon. It was speculative that he saw the statue when he got the furniture.

The state inferred guilt from the fact that in his statement to Det. Hickox appellant "makes himself to be" the last person to see Loughman alive: "What are the chances of that? It's not a coincidence." R37 3743-44. In fact, it was Det. Hickox who told appellant that he was "the last person that, as far as we could tell" that had contact with her before the murder. R27 2285-86, 2193; R26 2177.

The state thus stacked inferences to cobble together a case for guilt. The state's evidence was not "inconsistent with innocence" and the trial court erred in denying appellant's motion for judgment of acquittal.

> IX. THE COURT ERRED IN REFUSING TO LET APPELLANT PRESENT EXCULPATORY EVIDENCE THAT APPELLANT'S POLYGRAPH RESULTS WERE CONSISTENT WITH INNOCENCE.

The court erred when it ruled appellant could not present evidence that he passed a polygraph test which showed he was truthful when he said he was innocent. The court erred in its ruling as to the relevant scientific community and in its interpretation of the testimony of the state and defense experts.

The court summarized its findings as follows:

> So the findings of the Court are that the polygraph examinations are not accepted within the realm of the scientific community. That the Defense has failed to meet its burden of proof for the admission of the polygraph generally.

R11 326.

This court has ruled that the admission of scientific evidence by the state in Florida is governed by the "*Frye* test":[6]

> **In keeping with the State's burden in a criminal trial (i.e., the State must prove each element of the charged offense beyond a reasonable doubt)**, this Court has continued to use the *Frye* test when evaluating novel scientific evidence proposed by the State even though the United States Supreme Court, in a civil case, has adopted a different rule.

Ramirez v. State, 810 So.2d 836, 843 (Fla. 2001) (e.s.). The

[6] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

state's burden in a criminal trial is imposed by the Due Process Clause, which guarantees that **the state** may not deprive **individuals** of their life, liberty or property with due process of law. Art. I, § 9, Fla. Const.; Amend. XIV, U.S. Const.

When the state presents evidence under *Frye*, it must show the scientific theory has been sufficiently tested and accepted by the relevant scientific community. *Ramirez*, 810 So.2d at 844. This Court reviews a *Frye* ruling de novo. *Id*. at 844-45.

The relevant scientific community is "scientists active in the field to which the evidence belongs." *Id*. at 851 ("We conclude that the State has failed to show by a preponderance of the evidence that Hart's procedure is generally accepted by scientists active in the field to which the evidence belongs.").

At bar, Dr. Palmatier testified for the defense that the relevant scientific community is scientists engaged in psychophysiological research. R10 176-77. Dr. Fienberg testified the relevant scientific community as "those capable of reading the literature - it's scientific community relevant to the assessment of the accuracy of the polygraph, and that includes people from psychology and psychophysiology, and the set of scientists who are able to read and assess the validity of the studies that we reported on, or other related studies." R10 219-21. The trial court accepted Dr. Fienberg's assessment of the relevant scientific community. R11 315.

The court erred under *Ramirez*. Dr. Fienberg's grouping ranged far beyond the community of "scientists active in the field to which the evidence belongs."

It also erred in assessing the evidence about inconclusive test results. Palmatier said eleven high quality laboratory studies of the comparison question test reveal overall 91% accuracy with guilty subjects, and 89% accuracy with innocent subjects. R10 156. Five high quality field studies show 99.6% accuracy for the guilty and 83.5% accuracy for the innocent. *Id*.

Fienberg criticized Palmatier's statistics on the ground that they excluded inconclusive test results. He said inconclusives are often substantial in studies, and the typical form of reporting in the polygraph literature is to discard the inconclusives, which his committee considered fallacious. The committee included the inconclusives in its analysis, changing in some instances fairly dramatically the supposed accuracy rates or error rates associated with the polygraph. R10 196-97.

Testifying from Palmatier's data, Fienberg said that if the inconclusives are included in the calculations, the results are no better than flipping a coin. R10 203-204. The court agreed with Fienberg that the inconclusives should be included in the results. R11 320-21.

The judge thus accepted a view that would rule out a wide variety of valid scientific evidence. For instance, consider

fingerprints. Imagine considering all attempts to collect fingerprints at a crime scene or to compare such prints to known exemplars, including those attempts that produce no conclusive results: one could readily conclude that fingerprint evidence is valueless. (In fact, the National Research Council has also severely criticized fingerprint evidence. *See* Nat'l Research Council of the Nat'l Acads., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) 102-06, 123, 136-45.) The approach of Dr. Fienberg and his NRC colleagues would essentially eliminate most forensic evidence now in use.

At bar, the crime scene officer testified to extensive efforts to develop fingerprints or other evidence to identify the murderer, to no avail. Such inconclusive results are exceedingly common and well known to anyone who reads many trial transcripts. The relevant inquiry is not whether such inconclusive results render the evidence inadmissible. The proper question is whether the conclusive results are reliable.

Dr. Fienberg collapsed three different results into two: he merged false results and inconclusive results into a single category of inaccurate results. But there is an obvious qualitative difference between an inconclusive result and a false result. He would abolish this difference. He thus created a false analogy with the classic either/or result of a coin toss.

Appellant was deprived of a necessary element of a fair

trial. "[W]here evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission. § 90.404(2)(a), Fla. Stat. (1985)." *Rivera v. State*, 561 So.2d 536, 539 (Fla. 1990); *accord Wynkoop v. State*, 14 So.3d 1166 (Fla. 4th DCA 2009) (citing and discussing prior cases). This right to present evidence arises from the Compulsory Process and Due Process Clauses of the state and federal constitutions. *Wynkoop*; Art. I, §§ 9, 16, Fla. Const.; Amends. VI, XIV, U.S. Const.; *State ex rel. Brown v. Dewell*, 167 So. 687 (Fla. 1936) ("the defendant is entitled to compulsory process under section 11 of the Bill of Rights of the Florida Constitution, to have brought into the trial court any material evidence shown to be available and capable of being used by him in aid of his defense."; citing *United States v. Aaron Burr*, 25 Fed.Cas. 30 (C.C.Va. 1807)). A new trial should be ordered.

X. THE COURT ERRED IN ALLOWING JUAN PORTILLO TO TESTIFY ABOUT THE REACH OF THE CELL TOWERS TO PARTICULAR AREAS ON SEPTEMBER 24, 2002 WHEN HE WAS UNAWARE OF THE RELEVANT CONDITIONS ON THAT DATE AND DID NOT PERFORM A DRIVE TEST UNTIL YEARS LATER.

The state contended appellant was in the South Beach area of Hutchinson Island and not in downtown Fort Pierce at the time of the murder. It based its claim on the location of the cell towers receiving appellant's calls.

Juan Portillo, a Nextel engineer, testified to the reach of cell towers to various locations in the area. The defense ob-

jected that he performed his tests recently and did not know the conditions in 2002, and conditions had changed since that time. The court overruled the objection based on the state's claim that Portillo would testify the cell towers had the same height and power as they did in 2002. R32 3035-36.

The court erred. Both Portillo and the defense expert (Snavely) testified cell phone signals are radically affected by the presence of trees, buildings and other large landscape items so that, for instance, the tower on the island would receive calls from some parts of downtown Fort Pierce even though there were closer towers. R32 304,-42, 3058 (Portillo); R36 3534-37, 3547, 3551-53 (Snavely).

Portillo was not familiar with the conditions on September 24, 2002. He did not know what buildings were in the area on that date. R32 3084. He admitted that hurricanes had passed through the area since 2002. R32 3067.[7] He did not know if there were outages of any of the cell towers that day, a crucial matter for trying to determine appellant's location. R32 3074-77.

"It has always been the rule that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data." *Husky Industries, Inc. v. Black*, 434 So. 2d 988, 992–93 (Fla. 4th DCA 1983). At bar, Portillo did not have enough data to support his opinion. The court abused its discre-

[7] Hurricanes Frances and Jeanne devastated the area in 2004.

tion and erred in allowing his testimony as to where appellant was at the time the calls hit the Faber Cove tower.

This evidence was stressed in the state's final argument. R37 3694-97, 3700, 3702-04, 3708-09, 3725, 3728, 3740; R38 3835-36, 3850-52. It was a major part of its case. It will not be able to show beyond a reasonable doubt that the error did not affect the jury, and a new trial should be ordered.

XI. THE COURT ERRED IN ALLOWING INTO EVIDENCE DIAGRAMS MADE BY JUAN PORTILLO PURPORTING TO SHOW THE LOCATION AND REACH OF CELL TOWERS IN 2002.

During Juan Portillo's testimony the state put in evidence exhibits 185 and 191, diagrams made by Portillo purporting to show the location and reach of cell towers in 2002. Appellant objected on various grounds, including that the information in the diagrams was hearsay because Portillo did not have personal knowledge of the location of the towers. The court admitted the exhibits over objection. R32 3001-08.

The court erred. Normally, the admission of a diagram or map is not a problem if it is based on unvarying geographical features. But here the state sought to prove the locations of the cell towers that received appellant's calls on September 24, 2002. Cell towers can be relocated and reconfigured. Portillo never testified that he himself knew where the cell towers were in 2002. The trial was in 2009, and he testified that he covered the area "in the last two to three years." R32 2957.

A map or diagram will be inadmissible if it is based on hearsay. *See Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000) ("While he also testified as to physical landmarks (trees, air conditioning units, etc.) and distances in the diagram which he personally observed and measured, Detective Rice lacked personal knowledge of the most relevant parts of the subject matter of the diagram. His testimony, as it was illustrated in the diagrams, concerning where persons were located at the time of the shooting was based on hearsay and should not have been admitted.").

At bar, the court erred in allowing the diagrams into evidence. They played a major part of the state's case, and the state will be unable to show beyond a reasonable doubt that they did not affect the verdict. A new trial should be ordered.

> XII. SINCE THE MURDER WAS IN 2002, THE COURT ERRED IN ALLOWING TESTIMONY AS TO THE TIME IT TOOK FOR DET. HICKOX TO DRIVE FROM APPELLANT'S HOME TO THE MURDER SCENE IN 2005, FOR DET. HALL TO DRIVE FROM THE MURDER SCENE TO A BANK IN STUART IN 2003, AND FOR INV. ARENS TO DRIVE FROM DOWNTOWN FORT PIERCE TO A BANK IN PALM CITY IN 2009.

Over objection,[8] Det. Hickox said that in April 2005, he drove from appellant's home at 8:00 a.m. to near the stadium on I-95, and then drove 18 miles from there to the murder scene in 25 minutes. R27 2218-29. He did not know what construction zones

[8] Defense counsel objected to such testimony in limine, R23 1812-14, and also during Hickox's testimony. R27 2219-25. The issue was also discussed at R28 2439-40.

existed in September 2002 along his route. R27 2263-64. He did not know if there were changes as to traffic signs, street lights, speed limits, school zones, between 2002 and April 2005. R27 2264. He did not know the speed limits in 2002. *Id*. He took the most direct route he was familiar with. R27 2270.

Defense counsel argued such testimony was inadmissible because the route was based on an assumed route taken by appellant and was irrelevant and did not assist the jury, and this area was ruined during that time period and Hickox could not lay a proper foundation as to traffic conditions, traffic lights, stop signs, construction and the like and could not say what conditions were in September 2002. R27 2219-21. He argued the state had not shown substantial similarity between conditions in September 2002 and 2005. R27 2224-25.

Det. Hall testified over objection[9] that he drove from the scene of the murder to the Palm City Harbor Federal Bank in Stuart in March 2005. R29 2585. He chose what he considered the most direct route, and it took him 42 minutes (from 11:45 a.m. to 12:27 p.m.). R29 2585-87. He did not know the weather, traffic or road conditions, or school zones on September 24. R29 2597-99. He did not measure the mileage. R29 2599.

[9] When Hall testified, defense counsel renewed the objections made regarding Hickox's testimony. R29 2577-79.

Finally, Inv. Arens testified over objection[10] that in September 2009 he drove from Aliceri's Dress Shop in downtown Fort Pierce at 9:29 a.m. to Coastal Primary Care, where he stayed for two minutes, then to the former Mariner Cove Center, where he stayed for ten minutes, then to the Palm City Harbor Federal Bank, where he arrived at 10:28 a.m. R34 3260-67. This was the route described in appellant's testimony. *Id*. Arens did not know the weather or traffic conditions, school zones or construction, or if there were stop signs or stop lights on September 24, 2002. R34 3268-71. He thought the population was less in 2002 than in 2009. R34 3270. His total driving distance was about 35 miles. R34 3272.

No Florida case is directly on point, but this evidence falls under the heading of an experiment. Under our law, "the results of an experiment are inadmissible if conducted under dissimilar circumstances." *Goodyear Tire & Rubber Co., Inc. v. Ross*, 660 So.2d 1109, 1111 (Fla. 4th DCA 1995). For instance, in the related field of test crashes, it is required that "the important factors … be similar to those involved in the subject accident." *See Dempsey v. Shell Oil Co.*, 589 So.2d 373, 380 (Fla. 4th DCA 1991).

The state did not meet these requirements at bar. It showed

[10] Appellant renewed his earlier objections to drive-time testimony before Arens testified. R34 3252-55.

no similarity of road conditions on September 24, 2002 and the days the officers drove. It presented no evidence on this point despite appellant's objection. Without such a showing, the evidence had no probative value, it was irrelevant and its prejudice outweighed any probative value.

Rulings on evidence are reviewed for an abuse of discretion, but discretion "is limited … by the principles of stare decisis." *McDuffie*, 970 So.2d at 326). The judge abused his discretion at bar.

Because error occurred, the state must show beyond a reasonable doubt that it did not affect the verdict.

> The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). It will not be able to sustain that burden at bar because the evidence purported to establish the timeline underlying its entire case.[11]

> XIII. THE COURT ERRED IN ALLOWING IN EVIDENCE STATE'S EXHIBIT 186, THE UNAUTHENTICATED WALGREENS RECEIPT.

Over objection, the court admitted as a business record

[11] The court inquired as to how the matter had been raised at the first trial, then ruled "I'll stick by Judge Conner's original ruling on the motion in limine on that issue." R23 1814. At the first trial, Judge Conner originally ruled the evidence inadmissible, but then reversed himself when the state argued it was "crucial to our case. If we can't prove this, we have no argument in closing argument." SR1 6.

state's exhibit 186, the purported Walgreens cash register receipt for Ben Thomas's alleged 99¢ purchase at 9:19 a.m. on September 24. R30 2670-89, 2725-50. (The exhibit is at R5 788.) The defense argued Walgreens' custodian of records had said it could not be authenticated, and it was not kept in the regular course of business. *Id*. The state called no one from Walgreens to authentic the exhibit, and there was no evidence it was kept in the regular course of business except so far as Ben Thomas said he had kept it as a business deduction "for my own tax purposes." R30 2679. Thomas was not even aware that he had the receipt until he found it in his old tax records when preparing for his testimony. R30 2725.

The judge said that, based on the color of the ink, the watermark and the printing, "authenticity is not the issue." R30 2672. He ruled Thomas kept the exhibit in the course of his business in that he kept it for tax purposes so that it was not hearsay. R30 2681-82. He said the defense had failed to show the exhibit was not trustworthy or authentic. R30 2683.

It was highly irregular for the judge to rule on the authenticity of the Walgreens receipt based on his personal opinion about the printing where (1) the proponent of the evidence presented no one from Walgreens to testify and (2) the defense contended that Walgreens' custodian **could not** authenticate the exhibit. The state had an affirmative duty to authenticate the

exhibit through a proper custodian of records from the business that produced the record. § 90.803(6), Fla. Stat. For instance, *Armstrong v. State*, 42 So.3d 315 (Fla. 2d DCA 2010), held that the state had to present the testimony of a bank custodian of records to authenticate a customer's bank records and it was not enough for the customer to identify them as her records that she had downloaded and printed.

At bar, the state merely presented a customer, Ben Thomas, who testified that he kept the exhibit for his own tax purposes. Something kept for one's own affairs is not "kept in the course of a regularly conducted business activity." *See* C. Ehrhardt, FLORIDA EVIDENCE, § 803.6, p. 872 (2009 Ed.) (noting that business records do not include personal records).

The state failed to present a predicate for admission of the exhibit, which it used to bolster the testimony of this important witness. R38 3837. A new trial should be ordered.

XIV. THE COURT ERRED IN ALLOWING IN EVIDENCE STATE'S EXHIBIT 110, A PHOTOGRAPH SHOWING JOAN LOUGHMAN WITH HER GRANDCHILD AND FAMILY MEMBERS.

During Mr. Loughman's testimony, the state sought to put in evidence exhibits 109 and 110, two photographs of Joan Loughman wearing jewelry taken in the robbery-murder. The defense objected to exhibit 110 on the ground that there was unrefuted testimony that the jewelry belonged to Loughman so that the exhibit had no probative value and solely evoked sympathy and emo-

tion because it showed grandchildren and other family members. R35 3372. (The exhibit is at SR9 1563.) The state said Loughman wore the jewelry all the time and the picture showed what appellant saw when he met her, and some of the jewels were shown in one picture and some were shown in the other. R35 3372-73. The court overruled the objection to exhibit 110, saying it showed a better view of the jewelry and it was an issue in the case what appellant could have seen when he met Loughman. R35 3373.

Mr. Loughman testified that exhibit 109 showed his wife's diamond and emerald pendant, but exhibit 110 did not. R35 3374-75. Also, exhibit 110 did not show the two carat diamond ring. R35 3389. He said exhibit 110 was taken in 2000. R35 3389.

The alleged purpose of exhibit 110 was to show what appellant Loughman was wearing in 2002. The exhibit was not competent evidence of this fact. It only showed Loughman wearing jewelry on a family occasion two years before the murder. Further, as defense counsel noted, there was no dispute about the fact that Loughman owned the jewelry. The photograph served only as an emotional appeal, showing Loughman at a happier time with a baby in her arms. The court erred in admitting the photograph and the state will have the burden of proving beyond a reasonable doubt that it did not affect the jurors' verdict.

XV. THE COURT ERRED IN STACKING INFERENCES AND RELYING ON SPECULATION TO FIND CCP. THE STATE DID NOT PROVE CCP UNDER CASES SUCH AS *POWER V. STATE*.

The court stacked a number of inferences and relied on speculation in finding the CCP aggravating circumstance.[12]

To establish CCP, the state must show: (1) "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold)"; (2) "the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)"; (3) "the defendant exhibited heightened premeditation (premeditated)"; (4) "the defendant had no pretense of moral or legal justification." *Williams v. State*, 37 So.3d 187, 195 (Fla. 2010).

A finding of an aggravating circumstance will be upheld if the court applied the correct rule of law and its ruling is supported by competent, substantial evidence. *Almeida v. State*, 748 So.2d 922, 932 (Fla. 1999). Competent, substantial evidence means legally sufficient evidence. *Id*.

"While circumstantial evidence can be used to support CCP, 'the circumstantial evidence **must** be inconsistent with any reasonable hypothesis which **might** negate the aggravating factor.'" *Williams*, 37 So.3d at 196-97 (e.s.). Further, "the circumstantial evidence test guards against bas-ing a conviction on imper-

[12] "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." § 921.141(5)(i), Fla. Stat.

missibly stacked inferences." *Miller*, 770 So.2d at 1149. More generally:

> Where two or more inferences in regard to the existence of criminal intent and criminal acts must be drawn from the evidence and then pyramided to prove the offense charged, the evidence lacks the conclusive nature to support the conviction.

Collins, 438 So.2d at 1038 (citations omitted). *Accord Graham v. State*, 748 So.2d 1071 (Fla. 4th DCA 1999).

Speculation cannot support CCP. In *Hamilton v. State*, 547 So.2d 630 (Fla. 1989), Hamilton murdered his wife and stepson with a series of shotgun blasts. This Court found the judge's findings of aggravation were speculative:

> ... . Although the trial court provided a detailed description of what may have occurred on the night of the shootings, we believe that the record is less than conclusive in this regard. Neither the state nor the trial court has offered any explanation of the events of that night beyond speculation. Nonetheless, the court found that the crimes were heinous, atrocious, or cruel and that they were committed in a cold, calculated manner with a heightened sense of premeditation. There is no basis in the record for either of these findings. Aggravating factors must be proven beyond a reasonable doubt. The degree of speculation present in this case precludes any resolution of that doubt.

Id. at 633-34. *See also McKinney v. State*, 579 So.2d 80, 84-85 (Fla. 1991) (striking HAC and CCP where record "unclear on the exact sequence of events that led to" the murder).

The state must prove the circumstances beyond a reasonable doubt, and the sentencer

> may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the State has not met its burden. [Cit.]

Robertson v. State, 611 So. 2d 1228 (Fla. 1993).

At bar, the court stacked inference on inference in finding the CCP circumstance. R8 1254-58.

To begin with, the evidence was that the murder weapon was the statue-ashtray, hardly a weapon to be chosen for a CCP murder. Further, there was no evidence the murderer was armed beforehand. Nonetheless, the judge wrote: "The court finds that Michael Gosciminski armed himself with a knife or a knife-like object in order to commit the murder either before he went to the residence or after he arrived at the residence." R8 1257. This finding was contradictory and speculative.

The court made a number of such speculative findings as to events before the murder.

From the fact that appellant wanted an engagement ring for his girlfriend, the court inferred that he decided to kill Loughman for her ring. R8 1254.

From the fact that appellant picked up furniture at the Vala house, the court inferred that he noticed the layout and that most of the storm shutters were down. From these inferences it apparently inferred that he decided to kill her inside the house. R8 1254-55.

From the fact that appellant carried the suitcase to the

car for Loughman, the court inferred that appellant knew she was physically impaired, and from this inference it apparently inferred that she would not be able to resist an attack. R8 1255.

From the fact that Mr. Vala was moved to Hospice, it inferred that appellant "was aware that the opportunity not to see Ms. Loughman in the future was rapidly coming to an end." *Id*.

From the fact that appellant spoke with Bosworth at 8:15 a.m., the court inferred that he was engaged in "an effort to create an alibi." *Id*.

Thus, the court cited a number of facts about events before the murder and gave them a forced reading in favor of a conclusion that appellant planned to commit the murder for several days. A forced reading of the facts is the opposite of what a court should do in applying the circumstantial evidence rule. A court should not engage in speculation and stack inferences in order to reach a chosen result.

The court also speculated that appellant's activities after the murder proved CCP.

From the fact that appellant appeared freshly scrubbed and showered at noon and was subdued, the court inferred that the murder was CCP. R8 1255-56.

From the timing of appellant's activities during the morning, the court inferred that the murder occurred between 8:47 a.m. and 10:08 a.m., and from that inference it apparently also

inferred that the murder was CCP. R8 1256.

From the fact that appellant made phone calls as he moved about the area during the morning, the court inferred that he was engaged "in an attempt to maintain an alibi." *Id*.

In these circumstances, the court's finding of CCP was not supported by substantial competent evidence.

This Court has struck CCP in cases involving more evidence of planning and cold-bloodedness than at bar.

In *Power v. State*, 605 So. 2d 856 (Fla. 1992), Power armed himself with a gun, went to the home of a 12 year-old girl who was waiting for a ride to school. He made the terrified girl tell her ride to leave without her, then abducted her, beat her, assaulted her anally and vaginally, hog-tied and double gagged her, and then stabbed her and let her bleed to death over 10 to 20 minutes. He casually walked away eating her school lunch, and, when he encountered an armed deputy, robbed the deputy of his weapon and briefly spoke with the deputy before fleeing. *Id*. at 858-60, 863-64. He left no fingerprints at the scene and had a pair of gloves when arrested several days later. *Id*. at 859-60. The murder occurred on October 6, 1987, *id*. at 858, and the judge found that he had announced the intent to commit such a murder two weeks before, on September 23, 1987. *Id*. at 864.

This Court struck CCP:

> … . None of the facts recited above establish that

> Power had a prearranged plan to kill Angeli Bare. Rather, the evidence establishes, at best, a plan to rape. Furthermore, even if it were permissible for a judge to rely on the circumstances of previous crimes to support the finding of an aggravating factor, such evidence, standing alone, can never establish, beyond a reasonable doubt, that the murder at issue was so aggravated. In any case, it is significant that none of the previous crimes committed by Power resulted in the death of the victim. It is thus impossible to infer that Power had a premeditated design to kill the victim in this case. Lastly, the eating of the victim's sandwich, an event that occurred **after** the commission of the murder, cannot sustain the necessary finding of heightened premeditation before the murder. Consequently, we hold that the trial court erred in finding this aggravating circumstance.

Id. (emphasis and ellipses in original). At bar, the state did not show the level of coldness, calculation, and premeditation found in *Power*, where when Power went into the home, waited while the terrified girl turned away a potential rescuer saying their lives were in danger, then abducted, bound, gagged, raped and stabbed her in order to make her bleed to death.

Further, *Power* makes clear that even the most cold-blooded acts mere minutes **after** the murder do not establish CCP.

In *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994) (*Wyatt I*), two escaped convicts from North Carolina armed themselves with guns and entered a pizzeria. One stayed in front while Wyatt had the manager (William Edwards) open the safe. William's wife Frances and another employee (Bornoosh) were locked in the bathroom. Wyatt raped Frances, then shot all three. *Id*. at 1338. They "were subjected to at least twenty minutes of abuse prior

to their deaths." *Id*. at 1340. After seeing his wife raped, William

> begged for his life and stated that he and Frances, his wife, had a two-year-old daughter at home. Wyatt shot him in the chest. Upon seeing her husband shot, Frances Edwards began to cry and Wyatt then shot her in the head while she was in a kneeling position. Having witnessed the shooting of his co-workers, Michael Bornoosh started to pray. Wyatt put his gun to Bornoosh's ear and before he pulled the trigger told him to listen real close to hear the bullet coming. When Wyatt realized William Edwards was still alive he went back and shot him in the head.

Id. at 1340-41. This Court struck CCP because the state did not prove "calculation prior to the murder, i.e., a careful plan or prearranged design to kill." *Id*. At bar, the state did not show the cold-blooded premeditation involved in *Wyatt I* when Wyatt shot a man begging in front of his wife, then shot the wife, then shot a clerk, saying he could hear the bullet coming, and then went back to finish the first man off.

In *Wyatt v. State*, 641 So. 2d 355 (Fla. 1994) (*Wyatt II*), after committing the crimes in *Wyatt I* as part of a "crime spree throughout Florida," *Id*. at 357, Wyatt abducted a woman from a bar near Tampa and drove her across the state to Indian River County, where he shot her in the head and left her body in a ditch. *Id*. at 357-58. He explained to a cellmate that he killed her "to see her die." *Id*. at 359. This Court struck CCP for reasons similar to those in *Wyatt I. Wyatt II* at 359.

At bar the state did not show facts comparable to *Wyatt II*

where Wyatt, who had already murdered three people, abducted a woman across the state and shot her in a ditch "to see her die."

In *Thompson v. State*, 619 So.2d 2613 (Fla. 1993) (*Thompson II*), Thompson and Surace deliberately and slowly tortured and beat a girl to death. *Id*. at 263 (quoting facts from prior opinion). (The prior opinion also showed Thompson formed the intent to kill early in the ordeal: "at the time of the initial beating of the victim, the appellant left the bedroom and told the witness, Barbara Savage, that he (appellant) was so angry he 'felt like killing Sally (the victim).'" *Thompson v. State*, 389 So. 2d 197, 200 (Fla. 1980) (*Thompson I*). At Surace's trial, Thompson took responsibility for the entire incident. *Id*.)

This Court struck CCP because the state did not "establish that the defendant planned or prearranged to commit the murder prior to the commencement of the conduct that led to the death of the victim." *Id*. at 266. At bar, the state showed nothing comparable to this deliberate torturing of a girl with lighted cigarettes and brutal sexual assaults with pieces of furniture.

In *Green v. State*, 583 So. 2d 647 (Fla. 1991), Green stabbed Mr. and Mrs. Nichols, his landlord and landlady, after they had brought eviction proceedings against him. He selected the largest butcher knife in his house, went to the Nichols home, and stabbed Mrs. Nichols 14 times. He then murdered Mr. Nichols in the bedroom, stabbing him 28 times and stuffing bed

covers into his mouth. *Id*. at 649. He went home, changed his clothes, went to a bar, and made his way from Tampa to Fort Lauderdale. *Id*. This Court struck CCP. *Id*. at 652-53. At bar the state did not show more calculation than in *Green* where Green selected his weapon and took it to the house and methodically killed the husband after killing the wife.

The speculation at bar shows at most a careful plan to rob or burglarize, which does not establish CCP. *See Barwick v. State*, 660 So.2d 685, 696 (Fla. 1995) (citing cases), *receded from on other grounds Topps v. State*, 865 So.2d 1253 (Fla. 2004); *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988).

In *Vining v. State*, 637 So.2d 921 (Fla. 1994), Vining used a false name to contact a woman selling diamonds, shot her at least twice, stole her jewels and dumped her body. This Court struck CCP:

> However, we find that the murder was not cold, calculated, and premeditated because the State has failed to prove beyond a reasonable doubt that Vining had a "careful plan or prearranged design" to kill Caruso. *Rogers*, 511 So.2d at 533. The sentencing order addresses this aggravating circumstance by concluding that the "only explanation of this murder is as a cold and calculated act, far beyond mere premeditation." However, as we explained in *Rogers*,"[w]hile there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of 'calculation.'" *Id*. Although there is evidence that Vining calculated to unlawfully obtain the diamonds from Caruso, there is insufficient evidence of heightened premeditation to kill Caruso. Thus, we find that the

> trial court erred in finding the cold, calculated, and premeditated aggravating circumstance.

Id. at 928.

The record does not support CCP. The sentence violates the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. Resentencing should be ordered.

XVI. CCP DOES NOT APPLY BECAUSE THE STATE DID NOT PROVE AN INTENT TO KILL BEFORE THE FATAL INCIDENT.

The jury must determine that the defendant had a careful plan or prearranged design to commit murder before the fatal incident as part of the "calculated" element of CCP. *See Hudson v. State*, 992 So.2d 96, 115-15 (Fla. 2008) ("the jury must determine … that the defendant had a careful plan or prearranged design to commit murder before the fatal incident"). This requirement has been part of our law for 20 years. *See, e.g., Evans v. State*, 800 So.2d 182, 192 (Fla. 2001) ("the jury must determine … the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)"); *Gordon v. State*, 704 So.2d 107, 114 (Fla. 1997) ("jury must determine … the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)"); *McKinney v. State*, 579 So.2d 80, 85 (Fla. 1991) ("the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began"); *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990) ("the evidence must prove beyond a

reasonable doubt that the defendant planned or arranged to commit murder before the crime began"; citing earlier cases).

At bar, the state did not prove this fundamental element. The court erred in applying CCP. The sentence violates the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order resentencing.

XVII. HAC WAS IMPROPERLY APPLIED AT BAR UNDER *ELAM v. STATE*.

In *Elam v. State*, 636 So.2d 1312 (Fla. 1994), the victim was killed by repeated blows to the head with a brick, and had defensive wounds. This Court struck HAC (*id*. at 1314):

> … . We find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel inapplicable. Although the defendant [sic] was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute, maybe even half a minute"), the defendant [sic] was unconscious at the end of this period, and never regained consciousness. There was no prolonged suffering or anticipation of death.

At bar, the state had no more evidence of HAC than in *Elam*. The medical examiner hypothesized that Loughman was conscious when the first blow was struck based on the assumption that a wound to her hand was a defensive wound. R35 3454. Nonetheless, the medical examiner said it was possible that Loughman may have been unconscious after that. *Id*.

Even if one accepts as proven that the wound to the hand was a "defensive wound," it would only show that Loughman was

conscious of an imminent attack for the split second necessary for someone to reflexively lift up a hand to ward off a blow.

Further, "events occurring after [the] victim loses consciousness may not be considered in finding HAC." *Cherry v. State*, 781 So.2d 1040, 1055 (Fla. 2000); *Jackson v. State*, 451 So.2d 458, 463 (Fla. 1984) ("when the victim becomes unconscious, … further acts contributing to his death cannot support" HAC).

The state did not prove Loughman was conscious for longer than the victim in *Elam*. *See also Halliwell v. State*, 323 So.2d 557, 561 (Fla. 1975) (striking HAC when defendant beat victim to death with breaker bar in violent rage). This Court should strike HAC. The sentence violates the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions, and this Court should order resentencing.

XVIII. FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584 (2002), in that it does not require a jury determination of facts required for death qualification. Appellant's death sentence is not constitutionally reliable because there is no unanimous jury finding of "sufficient aggravating circumstances" to support the sentence. Appellant acknowledges that this Court

has rejected such arguments. See, e.g., *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002); *King v. Moore*, 831 So.2d 143 (Fla. 2002). Nonetheless, he contends that the statute operates in an unconstitutional and the death sentence must be reversed at bar.

CONCLUSION

The convictions and sentences should be reversed, and the case remanded with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Initial Brief has been furnished by first class US Mail on Celia Terenzio, Assistant Attorney General, Counsel for Appellee, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299, on December _____, 2010.

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Attorney for Appellant

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier, a font that is not spaced proportionately.

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