IN THE SUPREME COURT OF FLORIDA

MICHAEL PETER FITZPATRICK, :

Appellant, :

vs. : Case No. SC01-2759

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record on appeal herein consists of twenty-one (21) volumes and a total of five (5) supplemental volumes, as well as a presentence investigation report that is not paginated. Only four of the supplemental volumes bear volume numbers. In this brief, references to the original record on appeal will be indicated by volume number and page number(s). References to the supplemental volumes which bear volume numbers will be indicated by "SR," followed by the volume number and page number(s). References to the supplemental volume which does not bear a volume number will be indicated by "SR," followed by the page number(s).

STATEMENT OF THE CASE

On February 7, 1997, a Pasco County grand jury returned a two-count indictment against Appellant, Michael Peter Fitzpatrick. (Vol. I, pp. 1-2) Count one charged premeditated murder of Laura Romines by cutting her throat with a sharp object. (Vol. I, p. 1) Count two charged sexual battery of Laura Romines with actual physical force likely to cause serious personal injury. (Vol. I, p. 1) Both offenses allegedly occurred on August 18, 1996. (Vol. I, p. 1)

This cause initially went to trial on November 27-28, 2000, but ended in a mistrial. (SR Vol. I, p. 2069-SR Vol. III, p. 2468; Vol. XIX, p. 1203)

The case was retried before a different jury beginning on March 26, 2001 with the Honorable Maynard F. Swanson, Jr. presiding. (Vol. XIII, p. 1-Vol. XXI, p. 1619) On March 30, 2001, Appellant's jury found him guilty of first-degree murder and sexual battery with great force, as charged in the indictment. (Vol. VI, pp. 1035-1036; Vol. XXI, p. 1484)

A penalty phase was held on April 5, 2001, at which the State presented evidence, while Appellant declined to present evidence in mitigation. (Vol. XXI, pp. 1498-1607) Appellant's jury returned a recommendation by a vote of ten to two that Appellant be sentenced to death. (Vol. VI, p. 1034; Vol. XXI, p. 1601) The court ordered that a comprehensive presentence investigation be done. (Vol. VI, pp. 1030, 1109-1110; Vol. XXI, pp. 1500-1501)

A Spencer[1] hearing was held on September 7, 2001, at which several people spoke on Appellant's behalf. (Vol. IX, pp. 1567-1592)

On November 2, 2001, Judge Swanson imposed a sentence of death upon Appellant, finding the following aggravating circumstances: (1) Appellant was under sentence of imprisonment (conditional/control release) when the murder was committed (which the court gave "great weight"; (2) Appellant had previously been convicted of a violent felony (aggravated battery) ("moderate weight"); (3) the murder was committed while Appellant was committing an involuntary sexual battery on the victim ("little weight"); and (4) the murder was especially heinous, atrocious, or cruel ("great weight"). (Vol. VII, pp. 1162-1166; Vol. XII, pp. 2012-2016) The court considered a number of factors in mitigation, finding some to exist, and rejecting others. (Vol. VII, pp. 1167-1175; Vol. XII, pp. 2017-2025) The court gave "great weight" to the following circumstances: (1) Appellant's good family background (Vol. VII, p. 1169; Vol. XII, pp. 2018-2019); (2) Appellant's role as a surrogate father to his girlfriend's children (Vol. VII, pp. 1172-1173; Vol. XII, pp. 2021-2022); (3) Appellant's long-term relationships with three women showed that he was not a "sex-starved maniac[,]" and that his crime in this case seems more of an aberration than as a common course of conduct" (Vol. VII, p. 1174; Vol. XII, pp. 2022-2023); and (4) the loyalty of Appellant's family and friends showed him to be "generally a friendly, warm, considerate person." (Vol. VII, pp.

[1] Spencer v. State, 615 So.2d 688 (Fla. 1993).

1174-1175; Vol. XII, p. 2023) The court gave "moderate weight" to the following circumstances: (1) Appellant was doing well at his job (Vol. VII, p. 1170; Vol. XII, p. 2019); (2) Appellant "had a long history of alcoholism and drug addiction and was apparently making strides to combat it" (Vol. VII, pp. 1170-1171; Vol. XII, pp. 2019-2020); (3) Appellant's mental problems, including a suicide attempt in 1995, and "in 1995 a diagnosis of adjustment disorder with depressed mood and situational depression and alcohol and marijuana dependency" (Vol. VII, pp. 1171-1172; Vol. XII, pp. 2020-2021); and (4) Appellant's remorse. (Vol. VII, pp. 1173-1174; Vol. XII, p. 2022)

On December 21, 2001, Judge Swanson sentenced Appellant to 30 years in prison on the sexual battery count. (Vol. VII, pp. 1205-1209; Vol. XII, pp. 2002-2006)

This appeal follows.

STATEMENT OF THE FACTS

Guilt Phase

State's Case

In August of 1996, Stephen Kirk was living at the Water's Edge Apartments in Land O' Lakes with Barbara Simler and her two children. (Vol. XVI, pp. 641, 645) He was employed as a security guard by Wells Fargo, and was working at the Motel 6 at Fowler and I-275 from 9:00 p.m. to 5:00 a.m. (Vol. XVI, pp. 642-643) Kirk met Laura Romines at the Motel 6, where she was staying with her boyfriend, Joe Galbert. (Vol. XVI, pp. 643-644)[2] One night when Kirk came to work, the police were there, and he learned that Romines had been beaten up by her boyfriend, who had dropped a bed on her head, and who was later arrested for domestic battery. (Vol. XVI, pp. 644, 670) Kirk tried to get Romines into a shelter, but was unable to do so, and so he invited her to stay with him and his roommate. (Vol. XVI, pp. 644-645) It was stipulated that Romines was to have no contact with Galbert, and there would be no drugs and no excessive drinking. (Vol. XVI, pp. 645-646) Romines had gotten a job at a Farm Store. (XVI, p. 671; Vol. XVII, pp. 873-875) During the time she stayed with Kirk, he believed she had a crush on him, and she made advances toward him, but he never had sex with her, although they shared a bed. (Vol. XVI, p. 672) Romines stayed with Kirk and Simler for about two or two and one-half weeks, but on August 17, she was asked to leave. (Vol. XVI, p. 646) She had

[2] Elsewhere in the record, Romines' boyfriend is referred to as Joseph Samuel Galbreath. (Vol. XVII, p. 876)

broken a promise she made to Simler to stop drinking, and was getting the children to lie for her. (Vol. XVI, p. 646) She was intoxicated that night; her speech was slurred and her breath stank. (Vol. XVI, p. 673) Two sheriff's deputies arrived and made calls to try to get Romines into a shelter or detox, but were unsuccessful. (Vol. XVI, pp. 646-647) She left with the deputies. (Vol. XVI, pp. 647, 674) Romines was very upset with Kirk, blaming him for being thrown out. (Vol. XVI, pp. 674-675)

Corporal Jeff Smedley of the Pasco County Sheriff's Department was one of the deputies dispatched to the Water's Edge Apartments on August 17, 1996 at approximately 6:00 p.m. in reference to an un-wanted guest. (Vol. XVI, pp. 679, 682) According to Smedley, Romines did not appear to be intoxicated, although she had been drinking. (Vol. XVI, pp. 684-685) Smedley also felt that the people in the apartment were not angry with Romines, they just wanted her out of there, and that Romines was not angry with Kirk, although she was upset with her situation. (Vol. XVI, pp. 685-686)[3] Smedley testified that he found an alcoholic treatment center that would allow Romines to stay there, but she did not want to go. (Vol. XVI, p. 680) Instead, Smedley drove Romines to a 7-11 store just inside the Hillsborough County line, where he dropped her off at approximately

[3] Smedley wrote in his report that Romines had lived at the Waters Edge apartment for about a week. (Vol. XVI, pp. 683-684)

7:30 or 8:00 p.m. (Vol. XVI, pp. 680-681)[4] Romines had a laundry basket and about seven or eight plastic garbage bags full of her belongings. (Vol. XVI, p. 681) Smedley then returned to Pasco County. (Vol. XVI, p. 681)

Appellant, Michael Fitzgerald, was working at Pro Pizza the night of August 17, 1996. (Vol. XVI, pp. 727-728) He had worked there for a couple of years, and was a good employee. (Vol. XVI, pp. 733, 738, 751) The night of August 17 was a busy one for Pro Pizza. (Vol. XVI, pp. 728, 738) At one point during the night, Fitzpatrick was gone on a delivery longer than usual. When he returned to the shop around 8:00, he told the owners he had picked up a young lady at a convenience store in Hillsborough County and taken her to the Sunny Palms Motel. (Vol. XVI, pp. 728, 734, 739) Later, Gene Degele, one of the owners of the business, went out to make a delivery, saw Fitzpatrick at the Sunny Palms Motel at about 9:30, and told him to get back to work, because they were getting "slammed." (Vol. XVI, pp. 728-729, 739-740, 744) Fitzpatrick left work that night at 11:45 and took a pizza with him. (XVI, p. 729)

Jessica Ann Kortepeter was at the Sunny Palms Motel when Laura Romines was dropped off by a person driving a Pro Pizza truck. (Vol. XVI, pp. 760-761) Romines had a bunch of bags with her. (Vol. XVI, pp. 763-764) Romines told Kortepeter that she (Romines) was looking for a place to stay. (Vol. XVI, p. 763) Kortepeter told Romines that a friend of hers, A. J. Howard, might have a place for her to stay

[4] A surveillance tape from the 7-11 showed Romines entering the store at 8:12 p.m. (Vol. XVII, p. 882)

until she got on her feet. (Vol. XVI, p. 763) Kortepeter had known Howard for 20 years. (Vol. XVI, p. 765) He had a lot of teenage women living with him at various times, and had a lot of sexual contact with the girls who lived in his house.
(Vol. XVI, p. 770) Cindy Young was present during the discussion between Kortepeter and Romines, and went across the street to call A. J. Howard. (Vol. XVI, p. 763) Howard subsequently arrived and picked up Romines. (Vol. XVI, p. 764) The Pro Pizza truck showed up again later that evening. (Vol. XVI, p. 764)

Sally Goodin, who was Jessica Kortepeter's mother, was also at the Sunny Palms that evening, and subsequently went to A. J. Howard's house. (Vol. XVI, p. 785) Goodin had dated Howard years ago, when she was 18, and Howard was "probably 55 to 60." (Vol. XVI, pp. 786-787) While Romines was at the motel, she was drunk and obnoxious, and Goodin declined to give her a ride. (Vol. XVI, p. 789) The person who was at Sunny Palms in the Pro Pizza truck later arrived at Howard's residence. (Vol. XVI, pp. 785-786) At the time of Appellant's trial, Goodin could not remember the person that was driving the truck. (Vol. XVI, p. 786) When she was shown a photopack in 1996, she could not pick out the pizza man. (Vol. XVI, p. 790)

A. J. Howard testified that it was perhaps almost 9:00 when he arrived at the Sunny Palms Motel. (Vol. XVII, p. 803) Laura Romines told him that she was "just kind of waiting on her boyfriend to come back and pick her up[,]" but she decided to go with Howard to his place. (Vol. XVII, p. 804) She had a number of plastic grocery bags with her clothes jammed in them. (Vol. XVII, p. 804) At his house,

where a birthday party was taking place, Howard introduced Romines around, and Romines put her clothes in Howard's room. (Vol. XVII, pp. 802, 806) A pizza man showed up at Howard's house with a pizza. (Vol. XVII, p. 805) As he had just ordered a pizza, Howard asked the man how much he owed him, but the pizza man said that it was free, that it was for Laura. (Vol. XVII, pp. 805-806) Howard identified Appellant in court as the pizza man he saw at his house on August 17 of 1996. (Vol. XVII, pp. 806-808) The man and Laura Romines talked, then they left together "arm and arm." (Vol. XVII, pp. 806, 808) Romines' bags were put into the man's pickup truck. (Vol. XVII, p. 808) It was close to midnight. (Vol. XVII, p. 809)

Melanie Yarborough was one of those present at A. J. Howard's residence on the night of August 17. (Vol. XVII, 839-840) She was about 21 years old at the time. (Vol. XVII, p. 851) There was a party going on; there was a party every night at Howard's house for people her age. (Vol. XVII, p. 850-851) Yarborough identified Appellant at trial as the Pro Pizza man who arrived at Howard's house in a truck that night wearing a Pro Pizza shirt and hat, although she acknowledged that he looked "a little different" at trial than he did that August night. (Vol. XVII, pp. 844-846) She testified that the man left with Laura Romines about 11:00, although it could have been a little later. (Vol. XVII, p. 846) Yarborough said that she did not

drink, and so was not drinking that night, but Romines was drinking beer. (Vol. XVII, pp. 851-852)[5]

In the early morning hours of August 18, 1996, Kyle Lester Hughes, who worked in the Corrections Bureau of the Pasco County Sheriff's Office, was returning with some friends to Pasco County after having been at a bar in Tampa when they observed a nude woman (who was later identified as Laura Romines) standing on the side of Parkway Boulevard. (Vol. XV, pp. 448-449, 451, 459-460, 467) She was covered in blood and her throat had been slit. (Vol. XV, pp. 449, 460) The woman "was real scared" when Hughes and the others first approached her, and "appeared to be in shock," but calmed down somewhat after Hughes showed her his identification and let her know that he worked for the sheriff's department. (Vol. XV, pp. 449-450) When Hughes asked Laura Romines who did that to her, she gave the name "Steve." (Vol. XV, p. 450) When Hughes asked her where Steve lived, she said, "Water's Edge." (Vol. XV, pp. 450, 455-456) Some members of Hughes' party drove to a Majik Market and called 911. (Vol. XV, pp. 449-451, 468-469)

Lieutenant paramedic William Arnold of Pasco County Fire Rescue was dispatched to Parkway Boulevard and arrived at the scene at 3:46 a.m. (Vol. XV, pp. 482-483) He observed a female with a considerable

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[5] According to Detective Stacie Morrison of the Pasco County Sheriff's Office, when she interviewed Melanie Yarborough in Georgia on October 10, 1996, Yarborough said that she had been consuming alcohol on the evening of August 17, but did not feel she was intoxicated. (Vol. XVIII, pp. 1072-1073) Yarborough identified a picture in a photopack as depicting the person who picked up Laura Romines at A. J. Howard's house that night. (Vol. XVII, pp. 846-848; Vol. XVIII, pp. 1070-1071)

amount of blood around the neck area and a lot of blood on the ground. (Vol. XV, pp. 483-484) Her neck was basically cut from one side to the other. (Vol. XV, p. 484) She was in and out of consciousness. (Vol. XV, pp. 484-487) Arnold asked her who had done that to her, and got the name, "Steve." (Vol. XV, p. 486) Arnold asked her repeatedly if it was "Steve" who cut her throat, and she shook her head yes repeatedly. (Vol. XV, p. 490) Arnold also got from her that her assailant was a white male, approximately 30 years old, who lived at Water's Edge Apartments. (Vol. XV, pp. 491-492) Arnold felt that the woman had been stabbed relatively close to the time he was treating her due to the blood loss. (Vol. XV, pp. 493) His report indicated that she had possibly arrived at the location in a vehicle. (Vol. XV, pp. 492-493)

When Deputy William Tierney of the Pasco County Sheriff's Office arrived on the scene at approximately 4:00 a.m., Laura Romines was in the ambulance. (Vol. XV, p. 476) She whispered to Lieutenant Arnold that "Steve" did this to her, and that he lived at Water's Edge Apartments. (Vol. XV, pp. 476-477, 479-480) Romines also indicated that she was cut at the location where she was found, and that she arrived at the location in a vehicle. (Vol. XV, p. 480)

Rita Hall, an advanced registered nurse practitioner, came into contact with Laura Romines at St. Joseph's Hospital on the morning of August 18, 1996. (Vol. XV, pp. 522, 524) Romines was in the recovery room, having just come from surgery. (Vol. XV, p. 525) Romines could not relate what happened to her because she was unconscious, and so Hall obtained from an officer what information he had. (Vol. XV, pp.

526-528) Hall examined Romines, but was not able to look at her back. (Vol. XV, p. 528) There was a blood-covered garment around Romines' waist near her breasts which Hall initially thought might be a sports bra, but which turned out to be
panties. (Vol. XV, pp. 525-526) Hall cut this off and put it into evidence. (Vol. XV, p. 525) Hall also took fingernail scrapings. (Vol. XV, pp. 532-533, 551) There was puffiness around Romines' head. (Vol. XV, p. 529) Because of the surgery, Hall was not able to see Romines' neck. (Vol. XV, p. 529) Romines' breasts were a deep purple color, and there was a penetrating wound in the breast area that Hall could not identify if it was a stab wound or a bite mark. (Vol. XV, p. 529) There were some red areas and bruises on Romines' arms, and dried blood in numerous places. (Vol. XV, p. 529) There was a round area below the knee that may have been a cigarette burn. (Vol. XV, pp. 529-530, 552-553) Romines' legs were covered with scratches, but there were no injuries to the bottoms of her feet, although she did have a fungus infection. (Vol. XV, p. 530) It appeared to Hall that Romines had had a case of a sexually transmitted disease called "crabs," which showed up as "[l]ittle, brown, grayish, circular things," and her pubic hair had been shaved off, probably by Romines herself. (Vol. XV, pp. 529, 539-540, 553) Hall used swabs to collect fluid from Romines' vaginal vault and anus, both of which exhibited increased color indicative of pressure from something penetrating. (Vol. XV, pp. 531-532) However, the trauma, redness that Hall observed could have been caused by Romines falling on something, although this was not likely. (Vol. XV, p. 550) The

redness that Hall saw did not match what she usually saw in a forced entry. (Vol. XV, p. 350) When the prosecutor asked if Hall had an opinion as to whether Romines "was violently sexually assaulted," Hall responded: "I can say that she
definitely had sex with someone, and the sex was a penis in the vagina and a penis in the anus." (Vol. XV, p. 537)[6] Hall found no vaginal lacerations and could not tell if the sex was forced or not. (Vol. XV, pp. 547-548) In about 50 percent of cases of forcible intercourse, Hall did not find any redness or signs of penetration. (Vol. XV, p. 556) Hall opined that the sex had occurred "within a fairly close proximity of time, like an hour or two at the max," because of the amount of fluid still present in Romines. (Vol. XV, pp. 535, 546) Hall had known sperm to be found as much as five days after intercourse, although that was "the far extreme." (Vol. XV, p. 544) In the 24 to 72 hour range, one would usually find sperm heads and very few tails, because the tails disappear first. (Vol. XV, p. 545)

Detective Peter Weekes and Detective Jeffrey Bousquet went to St. Joseph's Hospital on August 18, 1996 to attempt to interview Laura Romines in the ICU. (Vol. XV, pp. 566, 592-593) At that time, the suspect was Stephen Kirk, and Bousquet went to the hospital in order to obtain incriminating evidence against Kirk. (Vol. XV, p. 593) Romines' responses to specific questions were in the form of nods or shaking of the head, as she was intubated and was not able to

[6] Later in her testimony, Hall indicated that an object about the size of a penis could have been used. (Vol. XV, p. 549)

talk. (Vol. XV, pp. 566-567, 594) She was in and out of consciousness during the very brief interview as a result of being medicated. (Vol. XV, pp. 575, 601-602) When asked if she knew who did this to her, Romines initially shook her head "yes," then shook her head, "no." (Vol. XV, pp. 568-569, 595) When asked if Steven had done it, she shook her head, "no." (Vol. XV, pp. 569, 595) When she was asked if she got there by vehicle, Romines shook her head, "yes." (Vol. XV, pp. 569, 596) The detectives were unable to ascertain the color of the vehicle from their questioning of Romines, but she indicated that it was a two-door vehicle. (Vol XV, pp. 569-570, 596)[7] The interview was stopped when Romines began "getting agitated." (Vol. XV, p. 570)

Laura Romines died on September 5, 1996. (Vol. XVII, p. 912) Lee Robert Miller, Associate Medical Examiner for Hillsborough County, conducted an autopsy on September 5. (Vol. XVI, p. 630) The main thing he noted was that Romines had "two incised or stab, wounds, slash wounds of the neck." (Vol. XVI, p. 632) One of them had penetrated the larynx, and the other had penetrated the esophagus. (Vol. XVI, p. 632) The neck wounds had been surgically repaired, and were almost healed by the time Miller saw Romines. (Vol. XVI, pp. 632, 639) Miller also noted some hemorrhaging between the skull and brain caused by a blunt object that might not have happened

[7] During Bousquet's testimony, he noted that at one point during the interview, Romines held out two fingers, and it was unclear whether she was indicating that the vehicle in which she had been transported had two doors, or was indicating that she had been assaulted by two people. (Vol. XV, pp. 607-608)

at the time of the assault that resulted in the wounds to the neck. (Vol. XVI, pp. 637-638) This could have occurred a week before Romines was hospitalized, and could have been caused by someone dropping a bed on her head. (Vol. XVI, pp. 638-639) There were long scratches on the legs that ended where
shoes and socks would have been worn. (Vol. XVI, pp. 632, 637) Dr. Miller also noted that Romines "had fairly advanced liver disease secondary to alcoholism[.]" (Vol. XVI, pp. 634, 640) Dr. Miller opined that the cause of death was "hemorrhage and aspiration of blood due to incised wounds of the neck penetrating the larynx and esophagus." (Vol. XVI, p. 634) She might have survived if she had received medical attention immediately after receiving the wounds. (Vol. XVI, pp. 634-635)

During the week after Laura Romines was attacked, Gene Degele saw an article in the paper about it, and asked Appellant if that was the girl he had picked up at the 7-11. (Vol. XVI, p. 741) Appellant initially said it was not the girl, but the next day when Degele came to work, Appellant approached Degele and said that that was the girl he had taken to Sunny Palms. (Vol. XVI, pp. 741, 749-750)

There were many knives at Pro Pizza, however, Appellant always carried his own pocketknife that he sometimes used. (Vol. XVI, pp. 729, 735, 740, 745) The owners of the business did not see this knife after Laura Romines was killed, but they were not certain when they stopped seeing it. (Vol. XVI, pp. 729, 735, 745-746) When Gene Degele confronted Appellant about the knife, he said he did not think

it would be a very smart idea to carry a knife when there was a murder investigation going on. (Vol. XVI, p. 752)

On September 19, 1996, Detective Bousquet's investigation began to focus on Michael Fitzpatrick, who was residing at Water's Edge Apartments, as well as Steve Kirk. (Vol. XVIII, pp. 954-955, 964) Bousquet contacted Appellant at his apartment, and told him he needed to speak with him at the sheriff's office in New Port Richey. (Vol. XVIII, pp. 956-957) Appellant drove there with his girlfriend, Diane Fairbanks. (Vol. XVIII, pp. 956-957, 965) At the station, Bousquet asked Appellant if he had picked up a hitchhiker in Hillsborough. (Vol. XVIII, p. 957) Appellant initially said "no," but when Bousquet said that he knew Appellant had picked her up, he acknowledged that he had picked her up at the 7-11 Store and driven her to the Sunny Palms Motel. (Vol. XVIII, pp. 957-958) Appellant stated that he was afraid, because he knew he was the last one with her. (Vol. XVIII, pp. 957-958) He said he never saw her again. (Vol. XVIII, p. 958) He went back to the Sunny Palms later to check on her, but she had already gone. (Vol. XVIII, p. 959)[8] When Bousquet asked Appellant if he had "any type of sexual intercourse with the victim," Appellant said he had not. (Vol. XVIII, p. 959)

[8] During Bousquet's testimony, there was a defense objection and motion for mistrial when the witness referred to Appellant having mentioned that he thought he needed an attorney. (Vol. XVIII, pp. 959-963)

Bousquet and Appellant spoke again on September 21 in the parking lot of the Pro Pizza Shop. (Vol. XVIII, pp. 966, 968-973)[9] Appellant explained that he had stopped for gas and cigarettes at the 7-11 when he observed Laura Romines there, crying. (Vol. XVIII, pp. 969-970) He had seen her the day before at the Farm Store. (Vol. XVIII, p. 970) Appellant described her clothing, and said she had plastic grocery bags and a laundry basket, which was filled. (Vol. XVIII, p. 970) When he dropped Romines off at the motel, she told him she had enough money to stay there. (Vol. XVIII, p. 970) Appellant learned that Romines was from Colorado, and she told him that she knew no one in the area. (Vol. XVIII, p. 970) When Appellant went back to the motel one or two hours later to check on Romines, "a guy with dark curly hair said she was gone." (Vol. XVIII, pp. 970-971) Appellant further stated that Romines had been drinking in his vehicle, and again denied ever having sex with her. (Vol. XVIII, pp. 971-972)

Bousquet met with Appellant at the sheriff's office again on September 30, 1996, and discussed whether Appellant would be willing to give his blood, as this was the way Bousquet could eliminate him. (Vol. XVIII, pp. 985-986) Appellant asked if he could use his own doctor for the taking of the blood, and Bousquet replied that he did not care who took it, as long as he (Bousquet) was present. (Vol.

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[9] The defense had filed a pretrial motion to suppress Appellant's statements (SR 2471-2473), and lodged a contemporaneous objection to any further statements of Appellant coming in. (Vol. XVIII, pp. 968-969) The court subsequently granted the defense a standing objection regarding statements of Appellant. (Vol. XVIII, pp. 984-985)

XVIII, pp. 986-987) Appellant said that he wanted to talk to his sister, who worked for a doctor's office, and would get back with Bousquet at 5:00, but he did not call. (Vol. XVIII, pp. 987-988, 990)

Dawn Moore, Appellant's sister, testified that she was working as a nurse at Tampa Medical Group in 1996, and became aware, through her brother, that he was a suspect in the death of a young lady in Pasco County. (Vol. XVI, p. 754) Appellant asked her for two vials of blood, explaining that he was scared the detectives were going to tamper with his blood samples, but she told him she could not get any blood samples. (Vol. XVI, pp. 754-755, 757) Appellant also asked her whether she would be able to tell if blood had been tampered with, and she said she would not. (Vol. XVI, p. 758) Appellant told his sister that he was scared of the police and did not trust them, and asked if she could be the one to draw his blood in the presence of the police. (Vol. XVI, pp. 756-759) Appellant also told Dawn that he did not kill the girl. (Vol. XVI, p. 756)

On October 2, 1996, Appellant agreed to give blood, and a sample was drawn that day at the Pro Pizza Shop by EMS Sergeant Duncan Hitchcock. (Vol. XVIII, pp. 992-996)[10]

On October 11, as a result of interviewing James Fitts, an employee of Little Caesar's Pizza, Bousquet ascertained that it was

[10] Defense counsel unsuccessfully objected to the introduction into evidence of State's Exhibit Number 66, a consent form Appellant signed for the taking of his blood, on the ground that it was involuntary, which had been raised in a pretrial motion. (Vol. XVIII, p. 994)

Little Caesar's that delivered the second pizza to A. J. Howard's residence on the night in question. (Vol. XVIII, pp. 1000-1003)

On November 18, Bousquet received a phone call from Billie Shumway of the Florida Department of Law Enforcement, "who stated the DNA taken from Mr. Fitzpatrick did match with Laura Romines." (Vol. XVIII, pp. 1006-1007)

Bousquet interviewed Appellant again on December 5, 1996. (Vol. XVIII, p. 1008)[11] Appellant initially again denied having sexual intercourse with Romines. (Vol. XVIII, pp. 1008-1011) However, after Bousquet informed him of the DNA evidence, and said there was "no question" that Appellant had sex with her, Appellant acknowledged that he did have sex with Romines after approaching her at the dumpster at the Water's Edge Apartments when she was taking out the garbage. (Vol. XVIII, p. 1012)[12] The intercourse took place on August 17, 1996 between 9:00 a.m. and noon while Diane Fairbanks was at work, and he paid Romines $25. (Vol. XVIII, pp. 1012-1014) When Bousquet confronted him "about knowing why his semen was dripping from the victim's vagina when she was found[,]" Appellant did not

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[11] Although the record reflects that the prosecutor referred to the date of this interview as "the 5th of November, 1996," (Vol. XVIII, p. 1008), the actual date had to have been December 5. This is the date Bousquet gave at the hearing on Appellant's motion to suppress, and later during his trial testimony he gave the date of the interview as December 5. (Vol. X, pp. 22-23; Vol. XVIII, pp. 1020, 1046-1047) Furthermore, Bousquet referred to informing Appellant of the DNA test results (Vol. XVIII, p. 1011), which Bousquet did not receive until November 18.

[12] On cross-examination, Bousquet testified that Appellant said it was Romines who approached him about the sexual transaction. (Vol. XVIII, p. 1047)

know how to explain this. (Vol. XVIII, p. 1016) Appellant continued to maintain that he was not involved in killing Romines. (Vol. XVIII, p. 1017)

A consent search of Appellant's truck was conducted while he was being interviewed. (Vol. XVIII, pp. 1008, 1050-1051)

On February 7, 1997, Appellant was arrested pursuant to a warrant for the murder and rape of Laura Romines. (Vol. XVIII, p. 1022)

Mary Ruth McMahan was a senior crime lab analyst with the Florida Department of Law Enforcement, working in the serology, DNA section of the Tampa Regional Crime Laboratory. (Vol. XIX, pp. 1080-1081) She testified that the entire undergarment cut from Laura Romines was stained with blood, but tested negative for semen. (Vol. XIX, pp. 1086-1089) On direct examination, McMahan said that, if semen were present, she would have been able to find it, even though it would have been "much diluted by the blood." (Vol. XIX, p. 1089) However, on deposition McMahan had said that the bloodstaining could have overpowered and covered up the semen, resulting in the negative presumptive tests. (Vol. XIX, pp. 1121-1122) The vaginal swabs from Romines were presumptively positive for semen using the acid phosphatase test, while the anal swabs were negative. (Vol. XIX, pp. 1087, 1090, 1094-1095) Based upon her observations under a microscope of motile and nonmotile sperm, McMahan opined that the very longest the cells could have been present in the vagina before they were removed was 15 hours. (Vol. XIX, pp. 1090-1096) However, there are numerous factors involved in the breakdown of sperm, and calcu-

lating a time period is not an exact science. (Vol. XIX, pp. 1126, 1131) Although McMahan stated that she was "familiar with" the time for the breakdown of sperm, she had "not made a study of it[.]" (Vol. XIX, p. 1127)

Using the RFLP method, McMahan ascertained that the DNA present on the vaginal swabs from Laura Romines was consistent with the DNA profile developed from the known blood standard of Michael Fitzpatrick. (Vol. XIX, pp. 1100, 1105) The probability of finding someone unrelated in the Caucasian ethnic group with the same DNA profile as was found on the vaginal swabs would be one out of 612 million. (Vol. XIX, p. 1105) In the black population, the probability would be one out of 5.9 billion. (Vol. XIX, p 1105) And in the Hispanic population, the probability would be one out of 3.3 billion. (Vol. XIX, p. 1105) McMahan also compared the DNA profile of Stephen Kirk that had been prepared from his blood with the profile from the vaginal swabs and found that the two were not consistent; it was not his sperm. (Vol. XIX, pp. 1106-1107)

As part of its case in chief, the State put on what was essentially a mini-case in defense of Stephen Kirk. Kirk himself denied stabbing or sexually assaulting Laura Romines. (Vol. XVI, p. 650)[13] And the State put on five witnesses who said they saw the security

[13] Kirk did acknowledge that he vacuumed out his vehicle on the morning of August 18 when his shift ended. (Vol. XVI, p. 659) He also acknowledged that, when the police came to his residence and seized certain knives, they did not get all the knives. (Vol. XVI, p. 675) According to Crime Scene Technician William Joseph, a box cutter and a folding knife taken from Kirk's bedroom had hair on them. (Vol. XV, pp. 518-519)

guard at the Motel 6 at various times on the night of August 17/early morning of August 18 to show that he did not leave the premises during his shift. (Vol. XVI, pp. 687-720)

Defense Case

Mary Ruth McMahan testified that neither she nor anyone else at FDLE, as far as she knew, did anything with pubic hair combings and fingernail scrapings that were taken from Laura Romines at the hospital and placed into a SAVE bag. (Vol. XIX, pp. 1151-1153)

Robyn Lynn Ragsdale, a crime laboratory analyst with FDLE, testified that she did not analysis of the fingernail scrapings that were in the SAVE kit. (Vol. XIX, pp. 1154, 1157) When defense counsel attempted to ask her about other fingernail scrapings or clippings, specifically, those obtained at the autopsy, he was prevented from doing so by a State objection that the trial court sustained. (Vol. XIX, pp. 1154-1158)

Cindy Leah Young testified that she was residing at the Sunny Palms Motel on August 17, 1996. (Vol. XIX, p. 1159) She was there when Laura Romines was dropped off by the pizza man, and when she was picked up by A. J. Howard, with whom Young had lived around 9:00 or 9:30. (Vol. XIX, pp. 1162-1163, 1185)[14] Romines "was crying and

[14] Young testified that she was in middle school when she lived with A. J. Howard. (Vol. XIX, pp. 1174-1175) Howard asked Young for sexual favors quite a few times, but she refused. (Vol. XIX, pp. 1172, 1175) Life at Howard's was one big party, with all the drinking and drugs the young women could want. (Vol. XIX, p. 1204) Howard sometimes gave Young money to buy drugs, and he condoned drug and

stuff[,]" and "had a little buzz going" from drinking. (Vol. XIX, p. 1180) Young was expecting her boyfriend, Ken, to arrive at the motel shortly after 3:00 a.m. (Vol. 1166-1167) Young was hanging out in her room with Jessica Kortepeter and Jeff Cole,
and she asked Jessica to tell her the time when she went to her own room to check on her baby. (Vol. XIX, pp. 1167-1168) When Jessica returned, she said it was a little after 3:00, and Young asked her guests to leave. (Vol. XIX, pp. 1167-1168) Young lay down for a few minutes and was starting to doze off, but got up and looked out the window when she heard a car pulling in to the gravel parking lot. (Vol. XIX, pp. 1168, 1189-1190) She saw A. J. Howard's car parked in front of the manager's door. (Vol. XIX, pp. 1168, 1193) Laura Romines got out of the car, walked across in front of the headlights, knocked on Al's door, received no answer, got back in the car, and they left. (Vol. XIX, pp. 1168, 1194-1196)

Young's boyfriend showed up about 4:00 or 4:15, and the two of them went to the Kash n' Karry in Land O' Lakes. (Vol. XIX, p. 1171)

Jessica Kortepeter told Young that A. J. Howard was burning something that she believed to be clothes at his house later that day. (Vol. XIX, pp. 1169-1170) Young had not seen any pile of brush or anything that needed burning when she was at Howard's house a

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alcohol abuse by children in his home. (Vol. XIX, p. 1205) Melanie Yarborough's drug of choice was crack cocaine. (Vol. XIX, pp. 1205-1206)

couple of days before and a couple of days after August 17/18. (Vol. XIX, pp. 1169-1170)

Detective Stacie Morrison testified regarding showing A. J. Howard a driver's license photograph of Michael Fitzpatrick on September 20 [1996], [which Howard did not remember when he testified during the State's case (Vol. XVII, pp. 827-835)], and Howard's identification of Fitzpatrick's picture in a photopack he was shown on September 23. (Vol. XIX, pp. 1212-1217)

Detective Bousquet testified regarding the 7-11 tape, including the fact that the tape showed Laura Romines entering the store at 8:12 p.m. (Vol. XIX, pp. 1220-1228) However, defense counsel was precluded from asking Bousquet to identify specific things and persons on the tape when the court sustained State objections that the tape spoke for itself. (Vol. XIX, pp. 1223-1227)

Diane Marie Fairbanks was assistant manager for Water's Edge Apartments in Land O' Lakes in August, 1996. (Vol. XX, pp. 1246-1247) She lived there with Michael Fitzpatrick, who was her boyfriend. (Vol. XX, p. 1247) On the evening of August 17, 1996, Fairbanks went to visit a girlfriend, Carol Hall, in New Port Richey. (Vol. XX, pp. 1248-1249, 1256) She remembered that weekend because it was her birthday weekend, and she had hoped her boyfriend would take her to a concert, but he did not. (Vol. XX, pp. 1248, 1250, 1267 She arrived back at her apartment just before 12:30. (Vol. XX, p. 1249) Appel-lant came home from work between 12:30 and 1:00. (Vol. XX, p. 1249) He took his clothes off, as he normally did. (Vol. XX, p. 1250) He was wearing shorts and a white T-shirt with a design pattern on it

that night. (Vol. XX, p. 1254) Fairbanks did not see any blood or scratches or anything unusual about Appellant. (Vol. XX, pp. 1250-1251) When defense counsel attempted to have Fairbanks identify Appellant on the 7-11 surveillance tape, a State objection that "the tape speaks for itself" was sustained. (Vol. XX, pp. 1251-1253, 1255, 1269)

There were four "Steves" living at Water's Edge while Fairbanks was assistant manager there. (Vol. XX, pp. 1265-1267) She gave copies of her files pertaining to these "Steves" to Detective Bousquet in 1996. (Vol. XX, pp. 1266-1267) One of the "Steves" broke his lease, moved out of his apartment, and left the state before Bousquet asked Fairbanks for her records. (Vol. XX, p. 1266)

State's Rebuttal

Detective Bousquet testified in rebuttal that Diane Fairbanks never told him that Appellant was with her from 12:30 a.m. on August 18, 1996, throughout the rest of the night. (Vol. XX, p. 1285) After detailing their case for Fairbanks, Bousquet asked for her assistance in locating Laura Romines' clothing. (Vol. XV, p. 1284) She took them to a place on the water that she and Appellant called their "private place," and said that was the place to look if there was anything. (Vol. XX, pp. 1284-1285) The area was searched, and members of the Pasco County Sheriff's Office Dive Team went into the lake, but nothing was found. (Vol. XX, pp. 1285-1287)

Penalty Phase

Near the outset of the penalty phase that was held on April 5, 2001, defense counsel announced that he had been instructed by his client "to present no mitigation in this case." (Vol. XXI, p. 1502) Upon being requested to do so by the court, defense counsel addressed some broad potential areas of mitigation, including Appellant's childhood, work history, family history, drug and substance abuse issues, and mental mitigators. (Vol. XXI, pp. 1509-1510)

The court inquired of Appellant if it was his decision to forego presentation of mitigating evidence, and Appellant confirmed that it was. (Vol. XXI, pp. 1512-1513)

Defense counsel noted that Appellant was considering waiving a jury recommendation, but the court would not accept a waiver. (Vol. XXI, pp. 1511-1514)

The court directed the State "to present to the jury all mitigating circumstances available to the State Attorney's Office[.]" (Vol. XXI, pp. 1513-1514)

The court acknowledged that, if no mitigation was presented, he would not give "great weight" to the jury's recommendation. (Vol. XXI, pp. 1515-1516)

George Kranz, a senior probation officer, testified for the State that Appellant entered a plea to aggravated battery and grand theft in 1993 after striking James Schwab "several times in the head with a hammer, causing injury during an unprovoked attack." (Vol.

XXI, pp. 1521-1525)[15] He was originally sentenced to two years community control with a suspended sentence of three and one-half years in state prison. (Vol. XXI, pp. 1525, 1528) However, he violated the terms of his community control, was sentenced to prison on December 3, 1993, and was released on controlled release on June 14, 1994. (Vol. XXI, pp. 1528-1529) Kranz began supervising Appellant on May 6, 1996. (Vol. XXI, pp. 1528-1529) Appellant had a problem with alcohol and drugs. (Vol. XXI, p. 1532) He stated that he had a serious alcohol problem, and that at the time of the aggravated battery, he had blacked out due to alcohol consumption and really did not recall what had happened. (Vol. XXI, pp. 1534-1535) On April 21, 1995, Appellant attempted suicide by slitting his wrists and, reportedly, taking rat poison. (Vol. XXI, p. 1535) While under supervision, Appellant tested positive for marijuana on January 3, 1997. (Vol. XXI, p. 1534) Kranz testified briefly regarding Appellant's family history and work history. (Vol. XXI, pp. 1535-1537) With regard to how Appellant was doing while under supervision, Kranz indicated that it "was an up-and-down affair. Besides the suicide attempt, there was some unstableness in his employment and not having a stable residence." (Vol. XXI, p. 1537)

The State also introduced into evidence judgments and sentences showing Appellant's convictions for the aggravated battery and grand theft. (Vol. XXI, pp. 1519-1520, 1542)

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[15] There were several defense objections during Kranz's testimony. (Vol. XXI, pp. 1521-1542)

SUMMARY OF THE ARGUMENT

The evidence adduced by the State at Appellant's trial was insufficient to prove that he was the perpetrator of the assault upon Laura Romines. No motive for Appellant to kill Romines was shown. There was no physical evidence to link Appellant with her killing, no confession, and no eyewitness who identified Appellant as the killer. And the victim herself identified someone else--someone named "Steve"--as her attacker.

The State's evidence was inadequate to show that Laura Romines was killed either from a premeditated design to effect her death or during the course of a sexual battery. The circumstances which led up to the killing are completely unknown, and there was no evidence that whoever killed Romines had a fully-formed, conscious purpose to effect her death. With regard to the alleged sexual battery, the medical evidence was not inconsistent with a consensual sexual encounter, and the State failed to rebut Appellant's reasonable hypothesis that he had engaged in consensual sex with Romines on the morning of August 17, 1996.

The statements Appellant made to law enforcement should have been suppressed, along with the blood sample he gave and the DNA evidence resulting therefrom. Appellant was never informed of his Miranda rights during questioning until he was arrested, and the police did not scrupulously honor his request to see a lawyer. In addition, Appellant's statements did not constitute a "free will offering," and his consent to the blood draw was not voluntary, because Appellant was being "squeezed" by his probation officer,

who led Appellant to fear that he would go back to prison if he did not cooperate with the authorities. In addition, Detective Bousquet deluded Appellant as to his true position by falsely suggesting that the police had satellite pictures of Appellant with Laura Romines, and overstating the number of people who had selected Appellant's picture from a photopack.

The court below should not have allowed Appellant's jury to consider hearsay evidence as to the interview law enforcement officials conducted with Laura Romines when she was in the intensive care unit of the hospital. The statements Romines supposedly made during this interview were even more unreliable than ordinary hearsay, as they were made while she was under medication, and relied upon the officers' interpretation of the nods and shakes of the head that Romines was using to communicate.

The court below should have granted Appellant's motion for mistrial when Detective Bousquet testified in front of the jury that Michael Fitzpatrick mentioned that he thought he needed an attorney during the first interview, which took place on September 20, 1996. This was an improper and prejudicial comment on Appellant's right to remain silent and right to counsel.

For several reasons, the court below should have granted Appellant's motions to exclude the in-court and out-of-court identifications of Appellant made by A. J. Howard and Melanie Yarborough. Howard had limited opportunity to view the pizza man, and there were many distractions at this house on the night in question. A considerable period of time had passed between that

night and the day Howard viewed a photopack. Moreover, Howard was shown a single photo of Appellant before being asked to view the photopack. And Howard had described the pizza man as clean-shaven, but was shown a photopack with all bearded men. His in-court identification was further tainted when Stacie Morrison of the sheriff's department told him on the day of the hearing on Appellant's motions that he had picked out the right photo. Yarborough's identifications suffered from some of the same problems, as well as the fact that she was drinking alcohol that night. Furthermore, it was unclear whether she ever gave a description of the pizza man to law enforcement and, if so, what that description was. Yarborough's identification was improperly bolstered when she listened to a tape of her interview with Stacie Morrison on the day of the suppression hearing and once again viewed the photopack. And on the day she testified at Appellant's trial, she looked a newspaper article about Appellant which contained his picture. In addition, both witnesses seemed hesitant of their identification of Appellant in court, noting that he had "changed" and "looked different."

The trial court erroneously refused to admit evidence that was critical to Appellant's defense: evidence that Laura Romines had DNA from an unknown person under her fingernails and testimony identifying Appellant on the surveillance videotape from 7-11. The former testimony would have gone to the issue of whether someone else was involved in killing Romines. The latter testimony would have shown that Appellant was not wearing a Pro Pizza uniform on the evening in

question, contradicting the testimony of State witness Melanie Yarborough.

The court below committed several missteps in imposing the death penalty upon Appellant, and the sentence must not be allowed to stand. The State should not have been permitted to introduce evidence at penalty phase as to the non-statutory aggravator of Appellant's prior conviction for grand theft, and should not have been allowed to introduce hearsay as to the details of Appellant's prior conviction for aggravated battery which Appellant was not in a position to rebut. Nor should the court have thwarted Appellant's desire that no evidence in mitigation be presented at the penalty trial by requiring the prosecutor to present so-called mitigation, which sounded more like aggravation in the way it was presented. The trial court also erred in sentencing Appellant without benefit of a completed presentence investigation; the court proceeded to sentencing even though requested military records had not arrived. Finally, the court should not have submitted to Appellant's penalty phase jury nor found in his sentencing order that the instant homicide was committed during the course of a sexual battery, as the evidence did not support this factor.

Pursuant to Ring v. Arizona, 122 S. Ct. 2428 (2002), Florida's scheme of capital punishment violates principles of due process of law and the right to trial by jury, and Appellant's sentence of death imposed under such a scheme cannot be permitted to stand.

The court below erred in sentencing Appellant for the non-capital crime of sexual battery without benefit of a sentencing guidelines scoresheet.

ARGUMENT

ISSUE I

THE COURT BELOW SHOULD HAVE GRANTED APPELLANT'S MOTIONS FOR A JUDGMENT OF ACQUITTAL, AS THE EVIDENCE WAS INSUFFICIENT TO PROVE HIS IDENTITY AS THE PERPETRATOR OF ANY OFFENSE AGAINST LAURA ROMINES.

When the State rested its case, Appellant moved for a judgment of acquittal, which the court denied. (Vol. XIX, pp. 1137-1145) Appellant unsuccessfully renewed his motion after he presented his case at guilt phase and the State put on its rebuttal witness (Vol. XX, pp. 1288-1289), and filed a written Renewed Motion for Judgment of Acquittal on April 9, 2001. (Vol. VI, pp. 1041-1045), which the court heard on September 7, 2001, and denied. (Vol. IX, pp. 1507-1526, 1545-1566) Appellant's motions should have been granted. The evidence against him was purely circumstantial. There was no eyewitness who saw him commit the crime, no confession, and no other evidence to conclusively establish his guilt.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Appellant's convictions violate the Due Process Clause and as a matter of law the judge erred in denying the motions for judgment of acquittal because the circumstantial evidence was legally insufficient to overcome the presumption of innocence.

Under Florida law, where there is no direct evidence of guilt and the state seeks a conviction based wholly upon circumstantial evidence, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The basic proposition of our law is that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt, and it is the responsibility of the state to carry its burden. It would be impermissible to allow the state to meet its burden through a succession of inferences that required a pyramiding of assumptions in order to arrive at the conclusion necessary for conviction. Torres v. State, 520 So. 2d 78, 80 (Fla. 3d DCA 1988). See Posnell v. State, 393 So. 2d 635, 636 (Fla. 4th DCA 1981) ("Where the state fails to meet its burden of proving each and every necessary element of the offense charged beyond a reasonable doubt the case should not be submitted to the jury and a judgment of acquittal should be granted."); Kickasola v. State, 405 So. 2d 200, 201 (Fla. 3d DCA 1981) ("[E]vidence which furnished nothing stronger than a suspicion, even though it tends to justify the suspicion that the defendant committed the crime, is insufficient to sustain a conviction.") (emphasis added).

A case such as this one that rests exclusively on circumstantial evidence must exclude all reasonable hypotheses of innocence.

> It is the responsibility of the State to carry its burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence not only be con-

> sistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. (citations omitted).
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So. 2d 629, 631-32 (Fla. 1956) (emphasis added). See also McArthur v. State, 351 So. 2d 972 (Fla. 1977) and Heiney v. State, 447 So. 2d 210 (Fla. 1984).

Of extreme significance is the fact that, apparently soon after the attack upon her, the victim herself, Laura Romines, identified someone else--someone named "Steve"--as the person who assaulted her. At no time did she identify Michael Fitzpatrick as her assailant.

Furthermore, there was direct evidence that Appellant was at his residence before 1:00 a.m., long before Laura Romines was found beside the road, and that there was no blood on him, no scratches, and nothing unusual.

In addition, there was testimony from an independent witness, Cindy Leah Young, that Laura Romines was with someone else, A. J. Howard, a short time before she was discovered naked and bleeding.

Appellant would also note that he did not attempt to flee after Laura Romines was found, as a guilty person might, but continued to work at Pro Pizza until he was arrested. (Vol. XVI, p. 730)

Appellant consistently told the police that he did not see Laura Romines again after dropping her off at the Sunny Palms Motel. With regard to the two State witnesses who provided the only evidence that contradicted Appellant's story by testifying that Appellant was the Pro Pizza man who picked up Laura Romines at A. J. Howard's house, Melanie Yarborough and A. J. Howard himself, Appellant would urge this Court to scrutinize their testimony very carefully to ascertain its level of probative value. The identifications of Appellant in the courtroom made by both witnesses seemed tenuous at best; Howard said that Appellant had "changed" since he saw him some four and one half years before (Vol. XVII, p. 806) and Yarborough said he looked "different." (Vol. XVII, pp. 845-846) Furthermore, for the reasons discussed in Issue VI below, the identifications were tainted and untrustworthy. In addition, neither witness was certain of the time line involved in this case, which was critical. Yarborough thought that Laura Romines left with the pizza man around 11:00, but, when prompted by the assistant state attorney, she testified that it could have been a little later. Howard testified that it was between 8:30 and 9:00 when he arrived at the Sunny Palms Motel. (Vol. XVII, p. 815) He talked to Laura Romines there for perhaps 15-20 minutes, and was back at his house with Romines around 9:00 or shortly thereafter, when it was "about dark." (Vol. XVII, p. 816) Although at Appellant's trial, Howard seemed uncertain as to whether Romines was at

his house for longer than one hour, he had previously testified that she was there for no more than one hour. (Vol. XVII, pp. 818-820) This would have had Romines leaving with the pizza man well before 10:30, and was inconsistent with Howard's other testimony that the two left together around midnight. Deborah Ann Bradford, the co-owner of Pro Pizza was sure that Appellant left work at 11:45 on the night in question (Vol. XVI, pp. 729, 733). Therefore, if Laura Romines left Howard's house much before midnight, she left with someone else, and Howard and Yarborough were mistaken in their identifications or not telling the truth. Howard had a motive to finger someone else as the person last seen with Laura Romines, in light of Cindy Young's allegation that Howard was with Romines at the Sunny Palms Motel shortly before she was attacked. And Yarborough was impeached on the issue of whether she was consuming alcohol on the night of August 17, 1996, calling into question not only her veracity, but her ability clearly to observe and recall what happened that evening.

Also relevant is that the police dropped the ball on certain aspects of the investigation in this case, for example, by not having the knives from Stephen Kirk's apartment that had hair on them analyzed, and by not investigating the burn pit in A. J. Howard's

yard where he may have been burning clothing.[16] (Laura Romines' clothing was never found.)[17]

In addition, the result of this case might have been different if Appellant had been permitted to present all the defensive evidence he sought to present, as discussed in Issue VII.

At any rate, taking all the evidence in the light most favorable to the State, the prosecution proved at most that Appellant had consensual sex with Laura Romines (see Issue II. B. below) and picked Romines up at A. J. Howard's house after he got off work at 11:45 p.m. on August 17, 1996. There was nothing that linked Appellant with whatever happened to Laura Romines in the early morning hours of August 18. The State did not introduce any physical evidence to tie Appellant to Romines' murder, such as hair or fiber evidence or fingerprints. There was no confession and no eyewitness. Or, more accurately, the only eyewitness, Laura Romines herself, exonerated Appellant by saying that "Steve" assaulted her.

Another factor that this Court should consider is assessing the evidence is that the State failed to establish a motive for Appellant to kill Laura Romines, with whom he apparently had a good relationship, albeit of short duration. Although the State may not have been

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[16] Detective Bousquet testified that he did not even know that A. J. Howard was burning anything at his house the day Laura Romines was found; he never talked to Jessica Kortepeter. (Vol. XVIII, p. 1057-1058)

[17] Appellant filed a posttrial motion for costs for an investigator to examine the burn pit on Howard's property, or to require the Pasco County Sheriff's Office to examine the pit. (Vol. VI, pp. 1123-1124)

legally required to establish motive, this is something that should be considered, as it affects the strength of the evidence as a whole. Jackson v. State, 511 So. 2d 1047, 1050 (Fla. 2d DCA 1987) ("where, as here, the evidence is entirely circumstantial, the lack of any motive on the part of the defendant becomes a significant consideration. [Citation omitted.];" Daniels v. State, 108 So. 2d 755, 759 (Fla. 1959) ("Where proof of the crime is circumstantial motive may become both important and potential. [Citations omitted.]")

Taken altogether, the evidence was inadequate because it did not lead to a reasonable and moral certainty that only Appellant and no one else committed the charged offense, and created "nothing more than a strong suspicion that the defendant committed the crime...." Cox v. State, 555 So. 2d 352, 353 (Fla. 1990).

"In reviewing a motion for judgment of acquittal, a de novo standard of review applies. [Citation omitted.] Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. [Citations omitted.]" Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). Here there was not "competent, substantial evidence" to support Appellant's convictions.

Convictions that rest on such slender evidence violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Accordingly, the convictions must be reversed and Appellant discharged.

ISSUE II

THE COURT BELOW SHOULD HAVE GRANTED APPELLANT'S MOTIONS FOR A JUDGMENT OF ACQUITTAL, AS THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE KILLING OF LAURA ROMINES WAS PREMEDITATED OR OCCURRED DURING A SEXUAL BATTERY.

The indictment returned in this case charged Appellant with premeditated murder and sexual battery. (Vol. I, pp. 1-2) As to the murder charge, at trial the State proceeded on theories of both premeditation and felony-murder, with sexual battery as the underlying felony. (Vol. XX, pp. 1335-1341; Vol. XXI, pp. 1454-1456) The jury returned a general verdict which did not specify the theory of murder upon which Appellant was convicted. (Vol. VI, p. 1035; Vol. XXI, p. 1484)

Apart from the issue of the sufficiency of the evidence to establish that it was Appellant who perpetrated the assault upon Laura Romines, which is discussed in Issue I above, and in the alternative to the argument in Issue I, the evidence was insufficient to establish that the killing of Laura Romines was either premeditated or was committed while Appellant was engaged in a sexual battery.

A. Premeditation

Premeditation, as an element of first-degree murder,

> is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which

premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned.

Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981) (citations omitted), cert. denied, 456 U.S. 984 (1982), overruled on other grounds, Pope v. State, 441 So. 2d 1073 (Fla. 1983); see also Hoefert v. State, 617 So. 2d 1046, 1049 (Fla. 1993) (evidence consistent with unlawful killing insufficient to prove premeditation); Holton v. State, 573 So. 2d 284, 289 (Fla. 1990), cert. denied, 500 U.S. 960 (1991); Mungin v. State, 689 So. 2d 1026 (Fla. 1995). The premeditation essential for proof of first-degree murder requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986). See also Brown v. State, 444 So. 2d 939 (Fla. 1984); Peavy v. State, 442 So. 2d 200 (Fla. 1983); Fisher v. State, 715 So. 2d 950 (Fla. 1998); Carpenter v. State, 785 So. 2d 1182 (Fla. 2001).

There was no direct evidence of premeditation adduced at Michael Fitzpatrick's trial; any evidence of premeditation was purely circumstantial. Where, as here, the State seeks to prove premeditation circumstantially, the evidence relied upon must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). And if "the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained.

[Citation omitted.]" Hoefert, 617 So. 2d at 1048. Accord, Norton v. State, 709 So. 2d 87 (Fla. 1997).

In Kirkland v. State, 684 So. 2d 732 (Fla. 1996), the State asserted that evidence of numerous slash wounds, blunt trauma, use of both a cane and knife, and the defendant having been sexually tempted by the victim was sufficient for premeditation. Kirkland, 684 So. 2d at 734-735. This Court found, however, that this evidence was insufficient for premeditation because: (1) "there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide"; (2) "there were no witnesses to the events immediately preceding the homicide"; (3) "there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide"; and (4) the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan." Id. at 735. These considerations are all applicable to the present case. Particularly noteworthy is the lack of any evidence regarding what led up to the assault upon Laura Romines, as well as the fact that, according to the State's witnesses, Appellant and Laura Romines were getting along famously when they left A. J. Howard's residence together.

In Coolen v. State, 696 So. 2d 738 (Fla. 1997), the victim died from six stab wounds, two of which were defensive in nature. Despite the fact that there was evidence that Coolen had threatened another person with the knife earlier in the evening, and that the victim

tried to fight Coolen off, this Court found the evidence of premeditation insufficient to support a first degree murder conviction.

In Green v. State, 715 So. 2d 940 (Fla. 1998), this Court found that the evidence failed to prove premeditation, even though the victim was stabbed three times, beaten, and manually strangled to death, and witnesses had overheard Green threaten to kill the victim the afternoon before the murder. This Court noted:

> There were no witnesses to the events immediately preceding the homicide. Although Kulick had been stabbed three times, no weapon was recovered and there was no testimony regarding Green's possession of a knife. Moreover, there was little, if any, evidence that Green committed the homicide according to a preconceived plan.

Green, 715 So. 2d at 944. In the instant case, as in Green, there were no witnesses to the events immediately proceeding the homicide, no weapon was recovered, and there was no evidence that Laura Romines was killed according to a preconceived plan.

In People v. Hoffmeister, 229 N.W. 2d 305 (Mich. 1975), the prosecutor argued that the number and nature of the wounds was sufficient evidence from which the jury could reasonably infer premeditation and deliberation. Quoting from LaFave & Scott, Criminal Law, § 73, at 565 (1972), the court rejected that argument and noted that the brutality of stab wounds is just as likely to be the result of impulse rather than premeditation:

> The brutality of a killing does not itself justify an inference of premeditation and deliberation. "The mere fact that the killing was attended by much violence or that a great many wounds were inflicted is not relevant (on the issue of premeditation and deliberation), as

> such a killing is just as likely (or perhaps more likely) to have been on impulse."

Hoffmeister, 229 N.W. 2d at 307.

Similarly, in Austin v. United States, 382 F. 2d 129 (D.C. Cir. 1967), overruled in part on other grounds sub nom., United States v. Foster, 785 F. 2d 1082 (D.C. Cir. 1986) (en banc), the evidence showed a killing caused by 26 major stab wounds, but the court ruled that the evidence was as consistent with an impulsive and senseless frenzy as with premeditation, and did not permit a reasonable juror to find beyond a reasonable doubt that there was premeditation. The court observed that a brutal murder is more likely to result from a depraved mind than from premeditation.

Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983), which involved a stabbing, and which was cited by this Court in Wilson illustrates the heavy burden the State must carry on the matter of premeditation when it seeks to prove this element by way of circumstantial evidence. Even though there was evidence in Tien Wang that the defendant chased the victim down the street and struck him repeatedly, resulting in his death, and the appellate court acknowledged that the testimony was "not inconsistent with a premeditated design to kill," the court nevertheless reversed the conviction for first-degree murder, because the evidence was "equally consistent with the hypothesis that the intent of the defendant was no more than an intent to kill without any premeditated design." 426 So. 2d at 1006.

In Norton this Court observed that, while motive is not an essential element of homicide, it may become important where proof of the crime rests on circumstantial evidence. The Court found lack of motive in Norton to constitute "further proof of the absence of evidence of premeditation..." 709 So. 2d at 92. Similarly, in the instant case, the State failed to establish a motive for the killing of Laura Romines.

One of the most compelling facts negating any inference of premeditation is that Romines was not killed at the scene, but lived for a number of days before expiring in the hospital. Surely, if the person who committed the assault upon Romines was intent upon killing her, he could have done so.

B. Sexual Battery

The State failed to prove that Laura Romines was sexually battered, at least by Appellant. Although Appellant at first denied to the police that he had engaged in sex with Romines (which may have been understandable in light of the fact that Appellant was living with his girlfriend, Diane Fairbanks, at the time) he eventually acknowledged that he had engaged in consensual sexual intercourse with Romines on August 17, and that accounted for his DNA being found in her. The prosecution was unable to disprove Appellant's reasonable hypothesis that he was not guilty of raping Laura Romines. Romines herself never mentioned having been sexually assaulted. There was no testimony from a physician that there was any evidence of rape. The only medical testimony came from a nurse, Rita Hall, who found no vaginal lacerations, and

could not tell if anyone had forced Romines to have sex. Indeed, any redness that Hall found in Romines sexual organs did not match what she usually saw in a forced entry. When asked by the prosecutor whether Hall had an opinion as to whether Romines "was violently sexually assaulted," essentially all Hall could say was that Romines definitely had sex with someone; she did not express any opinion that Romines had been "violently sexually assaulted," nor did any other witness offer such an opinion.

The State attempted to cast doubt on Appellant's statement to the police that he had had sex with Romines before noon on August 17 by introducing some imprecise testimony regarding how long semen and/or motile sperm could remain in a woman after intercourse. Suffice it to say that this rather confusing testimony from people with little or no expertise in the particular subject fell far short of tending to contradict Appellant's version of events.

Finally, it should be noted that Appellant and Laura Romines were on very friendly terms; she even referred to him as her "boy-friend." This fact, especially when coupled with what we know about Romines' lifestyle, which included serious alcohol abuse and a rather rootless existence, tends to corroborate Appellant's story to Detective Bousquet.

Conclusion

When an appellate court reviews a ruling on a motion for a judgment of acquittal, a de novo standard applies. An appellate court ordinarily will not reverse if there is competent, substantial evidence to support the conviction. Pagan v. State, 830 So.

2d 792, 803 (Fla. 2002). Applying this standard to Appellant's cause, this Court should conclude that the court below should not have submitted the charges of murder in the first degree and sexual battery to Appellant's jury, as the evidence was insufficient to support them, and Appellant's convictions must be reversed.

ISSUE III

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTIONS TO SUPPRESS STATEMENTS HE MADE AND TANGIBLE EVIDENCE SEIZED FROM HIM.

On September 8, 2000, Appellant, through counsel, filed a "Motion to Suppress Statements of the Accused." (SR, pp. 2471-2373) On September 14, 2000, Appellant filed a "Motion in Limine to Determine Admissibility of Statements of the Accused." (SR, pp. 2464-2475)

A hearing on the motions was held before the Honorable Wayne L. Cobb on October 19-20, 2000. (Vol. X, pp. 1594-Vol. XI, pp. 1622) Corporal Jeff Bousquet of the Pasco County Sheriff's Office testified that Michael Fitzpatrick was developed as a suspect in the death of Laura Romines, and Bousquet conducted numerous interviews with him. (Vol. X, pp. 1604-1606) Appellant was never in custody during the interviews, and Bousquet never threatened or coerced him. (Vol. X, p. 1606) On a number of occasions, Appellant called Bousquet, and on a number of occasions Appellant voluntarily came to the sheriff's office and drove away after the interview. (Vol. X, p. 1607) Appellant was not arrested until February, 1997, after the grand jury

returned an indictment and a warrant was issued. (Vol. X, pp. 1607, 1617)

Prior to the first interview with Appellant on September 20, Bousquet told him that he was free to leave at any time. (Vol. X, p. 1678, 1681) During the course of the interview, Appellant asked if he was going home that night, and Bousquet replied that he did not know. (Vol. X, p. 1677) As part of that interview, Bousquet advised Appellant that he had some satellite photographs or satellite imaging, which he did not actually have in this case. (Vol. X, pp. 1679-1680, 1685-1690, 1699-1700; SR, p. 2495-2496) When Appellant said, "Maybe I need to talk to a lawyer[,]" Bousquet recognized that Appellant was done, he did not want to talk to him anymore. (Vol. X, pp. 1692-1699; SR, p. 2501) However, Bousquet acknowledged that he "possibly" thereafter asked Appellant about parole, and about Diane [Fairbanks], and invited him to recontact Bousquet. (Vol. X, pp. 1701-1702)

On September 21, Bousquet was at Appellant's place of employment to make some measurements, and spoke with Appellant again. (Vol. X, pp. 1703-1706) According to Bousquet, it was Appellant who approached him while Bousquet was in the parking lot; Bousquet did not go inside Pro Pizza on that date. (Vol. X, pp. 1703-1706) They had a conversation inside Bousquet's vehicle, which was taped, during which Appellant said he was scared because he was on parole, but had nothing to hide, and would speak with the detective at any time. (Vol. X, p. 1705)

On September 23, Appellant called Bousquet and left a message, and Bousquet called him back. (Vol. X, p. 1706) Appellant had made contact with his probation officer, George Kranz, and had called Bousquet to tell him "that they were coming down on him in regards to the blood and in regards to the polygraph." (Vol. X, p. 1706) Appellant said they were squeezing him, and were going to violate him if he did not cooperate with Bousquet. (Vol. X, p. 1706) Appellant agreed to take the polygraph, but said he did not know about the blood. (Vol. X, p. 1707)

Appellant called again on September 25, and Bousquet returned his call. (Vol. X, pp. 1707-1708) They discussed the polygraph, and Appellant said he was still thinking about the blood draw, but wanted to do the polygraph first. (Vol. X, pp. 1708-1709)

Bousquet met with Appellant on September 30 for the polygraph. (Vol. X, p. 1709) Appellant told Bousquet he failed it, and that he knew the polygraph was not admissible. (Vol. X, pp. 1709-1710) Bousquet had a rather lengthy conversation with Appellant about giving blood, telling him that was the only way they could eliminate him. (Vol. X, p. 1714-1715)

The blood was actually drawn on October 2. (Vol. X, pp. 1712-1715)

Bousquet next talked with Appellant on December 5 from 4:50 until 6:10 p.m., while his vehicle was being processed. (Vol. X, pp. 1716-1717) At that time, Bousquet had been made aware of the DNA results. (Vol. X, p. 1716) He falsely represented that the other pizza delivery man who at A. J. Howard's on the night in

question had picked Appellant out of a photopack, and that he had multiple witnesses who had picked Appellant out of a photopack. (Vol. X, pp. 1721-1722)

Bousquet's last conversation with Appellant was on February 7, after he was arrested and given Miranda. (Vol. X, pp. 171-1718) Appellant said he was not changing his story, and did not want to answer any more questions until he saw his attorney. (Vol. X, p. 1718)

Stacie Morrison was a homicide detective in 1996 with the crimes against persons unit of the Pasco County Sheriff's Office and assisted Bousquet. (Vol. X, pp. 1619-1620) She testified similarly that Michael Fitzpatrick was developed as a suspect on or prior to September 20, 1996, that he was not in custody during the interviews, but was free to leave, and that she never threatened or coerced him. (Vol. X, pp. 1620-1621)

The sheriff's deputies contacted Appellant at his residence at 12:30 a.m. on September 20 [1996]. (Vol. X, p. 1622) They interviewed both Appellant and Diane Fairbanks at the New Port Richey office. (Vol. X, p. 1623) Appellant was not advised of his Miranda rights or asked to sign a waiver. (Vol. X, p. 1624) There was some conversation between Bousquet and Appellant regarding satellite photographs, and at some point during the interview Bousquet showed a picture to Appellant. (Vol. X, p. 1626)

Morrison contacted Appellant's parole officer, George Kranz, on September 23, 1996, to tell him that the deputies "were interested in getting a blood draw for a DNA comparison[,]" and

Kranz agreed "to see if Mr. Fitzpatrick was interested in providing this." (Vol. X, pp. 1628-1629) Morrison testified that in her contacts with Kranz it was made clear to him that Appellant "should-n't feel pressured in doing anything." (Vol. X, pp. 1631-1632)

On October 2, 1996, Appellant signed a consent for his blood to be drawn at the Pro Pizza Shop. (Vol. XI, pp. 1747-1748, 1752-1753)

Kranz testified that the deputies asked him if he could talk with Appellant, who was a suspect in a homicide case. about making a statement in reference to this case. (Vol. X, pp. 1637-1638, 1641) As a result of that call from the sheriff's department, Kranz spoke with Appellant on September 20 and told him to be in the parole office at 9:00 a.m. on September 23, if he was not arrested before that. (Vol. X, pp. 1731-1732) Appellant had been compliant with Kranz's request during the time Kranz was supervising him, and had not been a problem. (Vol. X, p. 1643) Appellant did make a statement which, according to Kranz, was given freely and voluntarily. (Vol. X, p. 1638) Kranz denied threatening or coercing Appellant. (Vol. X, p. 1639) While Kranz denied telling Appellant that if he did not cooperate, Kranz was going to violate his parole, but Kranz did advise Appellant that "the best course of action was for him to be truthful in all matters, and that it would be reported." (Vol. X, p. 1639) Appellant was told that, as a parolee under investigation, he was required to be truthful and answer the questions posed to him, and a report would be made to the parole commission. (Vol. X, pp. 1647-1648) Nine times out of 10, Kranz told Appellant, parolees who cooperated would be "left on the street," unless they were actually

charged with something. (Vol. X, pp. 1649-1650) If Appellant did not cooperate, or did not answer truthfully, the parole commission would be advised, and it would be up to them whether to withdraw Appellant's parole. (Vol. X, p. 1650) Kranz discussed with Appellant taking a polygraph exam and giving a blood sample, and told him it would be in his best interest to show the parole commission that he was cooperating with law enforcement. (Vol. X, pp. 1653-1654) He instructed Appellant that he would not be sent back to prison as long as he cooperated with the blood test and polygraph. (Vol. X, p. 1735) Kranz took one of Appellant's cigarette butts into evidence and contacted the sheriff's department about it. (Vol. X, pp. 1652-1653, 1725-1726) He contacted Appellant at his job on one occasion, because his employer wanted to know if he was still under investigation. (Vol. X, p. 1655) Kranz noted in writing that Appellant seemed more afraid of going back to prison rather than the fact he murdered someone. (Vol. X, p. 1734)

After hearing arguments of counsel, Judge Cobb ruled that any statements Appellant made at the interview on September 20 after he invoked his right to counsel would be inadmissible, but all other statements could come in, however, the tapes of the interviews themselves would not be admitted because of their poor quality, but could possibly be used by either side for impeachment purposes. (Vol. XI, pp. 1807-1820)

On November 27, 2000, Appellant filed a Motion to Suppress Tangible Evidence Obtained from the Accused. (Vol. VI, pp. 948-950) This motion dealt with the blood drawn from Appellant and the DNA

results, and was predicated on the evidence that came in at the October 19-20 suppression hearing. (Vol. XI, pp. 1888-1889)

For several reasons, the trial court erred in admitting the statements Appellant made to law enforcement authorities, as well as the DNA results from the blood sample drawn from Appellant.

It was the State's burden to establish that Appellant's statements were made freely and voluntarily, and that he knowingly and intelligently waived his rights. Lego v. Twomey, 404 U.S. 477 (1972); Roman v. State, 475 So. 2d 1228 (Fla. 1985); Brewer v. State, 386 So. 2d 232 (Fla. 1980); Drake v. State, 441 So. 2d 1079 (Fla. 1983); Reddish v. State, 167 So. 2d 858 (Fla. 1964); Snipes v. State, 651 So. 2d 108 (Fla. 1995); Williams v. State, 441 So. 2d 653 (Fla. 3d DCA 1983); Fillinger v. State, 349 So. 2d 714 (Fla. 2d DCA 1977). And the determination as to the voluntariness of a confession must be arrived at by examining the totality of the circumstances that surrounded its making. Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960); Traylor v. State, 596 So. 2d 957 (Fla. 1992); State v. Dixon, 348 So. 2d 333 (Fla. 2d DCA 1977); Roman; Snipes.

Appellant would first note that he was never advised of his Miranda[18] rights until he was arrested on February 7, 1997. "Miranda warnings are required whenever the State seeks to introduce against a defendant statements made by the defendant while in custody

[18] Miranda v. Arizona, 384 U.S. 436 (1966),

and under interrogation." Davis v. State, 698 So. 2d 1182, 1188 (Fla. 1997) (emphasis in original). With regard to whether Appellant was ever in custody while he was being questioned, thus triggering the need for Miranda warnings to be given, if, under all the circumstances, a reasonable person in Appellant's position would have believed he was not free to leave, then he was seized within the meaning of the Fourth Amendment to the Constitution of the United States. Florida v. Bostick, 501 U.S. 429 (1991); Hill v. State, 561 So. 2d 1245 (Fla. 2d DCA 1990). During the course of the first interview with Bousquet, Appellant asked if he would be going home that night, and Bousquet's response was equivocal. Certainly, Bousquet did all that he could to suggest that the police had strong evidence against Appellant in order to attempt to induce a confession, thus suggesting to Appellant that his arrest might be imminent. And at the December 5 interview, Appellant could not have left if he wanted to, as the police were processing his vehicle. In spite of the absence of Miranda warnings at the first interview with the police, Appellant did invoke his right to counsel. As the court below recognized, regardless of whether Appellant technically had a right to appointed counsel, he certainly was "entitled to a lawyer any time he want[ed] one" (Vol. X, p. 1696) if he chose to hire counsel. The notion that Appellant wanted to deal with the police through counsel was further evidenced by the fact that, once Appellant was

properly Mirandized upon being arrested, he (again) invoked his right to counsel.

The central holding of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378, 386 (1981) is that an accused who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police." The trial court erroneously concluded that Appellant initiated further contacts with the police following the interview in the early morning hours of September 20. Bousquet testified that he went to Appellant's place of employment, Pro Pizza, to make some measurements, and that Appellant approached him in the parking lot. However, in light of the detective's provocative action in going to the place where Appellant worked, it can hardly be said that it was Appellant who initiated this encounter. Furthermore, Bousquet had implicitly indicated to Appellant at the September 20 interview that he was not going to honor his request for counsel by continuing to ask him questions after Appellant said he wanted a lawyer.

In Drake v. State, 441 So. 2d 1079 1081 (Fla. 1983) this Court wrote:

> The station-house setting of an interrogation does not automatically transform an otherwise noncustodial interrogation into a custodial interrogation. [Citation omitted.] Yet, an interrogation at a station house at the request of the police is inherently more coercive than an interrogation in another less suggestive setting, and it is a factor that should be considered in evaluating the totality of the circumstances of a given case.

The interrogation on September 20 became even more coercive when Bousquet presented Appellant with trumped-up evidence suggesting that he had a satellite image of Appellant with Laura Romines. (Apparently, Bousquet had an aerial photograph of some type, but it certainly did not depict Appellant or Romines.)[19] While police deception does not necessarily render a confession involuntary, Bousquet crossed the line of acceptable behavior in this case by presenting Appellant with official-looking documents calculated to delude him as to his true position. State v. Cayward, 552 So. 2d 971 (Fla. 2d DCA 1989).

Further coercion upon Appellant came in the form of pressure from his parole officer, George Kranz, who indicated that Appellant needed to cooperate with the investigation if he wanted to remain "on the street." Detective Morrison had contacted Kranz about seeking a blood sample from Appellant for DNA comparison. Appellant felt that his parole officer was "coming down on him," and "squeezing" him. Appellant clearly wanted to avoid going back to prison at all costs, and the not-so veiled threats from Kranz that he would likely go back if he did not cooperate weighed heavily upon Appellant's mind.

In Frazier v. State, 107 So. 2d 16, 21 (Fla. 1958), this Court observed as follows:

> Unquestionably, to be admissible in evidence a confession, and statements in the na-

[19] Bousquet continued deceiving Appellant at the December 5 interview when he misrepresented the number of people who had identified Appellant from photopacks, including a false representation that the other pizza man who was at A. J. Howard's on the night in question had picked Appellant out of a photopack.

> ture thereof, must be freely and voluntarily made. This requires that at the time of the making the confession the mind of the defendant be free to act uninfluenced by hope or fear.

(Emphasis supplied.) In Bram v. United States, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 2d 568 (1897), the Supreme Court of the United States reasoned that any degree of influence that is exerted upon the accused will render his subsequent confession inadmissible, because the law cannot measure the force of the influence used or decide upon its effect on the mind of the prisoner. The Fourteenth Amendment requires the choice to confess to be the "voluntary product of a free and unconstrained will." Haynes, 10 L. Ed. 2d at 521. Put another way, any incriminating statement that is to go before the jury must have been a "free will offering." Williams v. State, 188 So. 2d 320, 327 (Fla. 2d DCA 1966), modified, 198 So. 2d 21 (Fla. 1967); see also Jones v. State, 709 So. 2d 512, 533-534 (Fla. 1998) (test for admissibility is "voluntariness, or free will" and declarant must be "uninfluenced by fear or hope" and not deluded as to his true position). Appellant's statements could not have been the product of his unconstrained free will where they were influenced by his fear of going back to prison if he did not cooperate with the authorities.

With regard specifically to the blood drawn from Appellant, warrantless searches and seizures are per se unreasonable both under the Fourth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 12 of the Constitution of the State of Florida. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); Norman v. State, 379 So. 2d 643 (Fla.

1980); Lockwood v. State, 470 So. 2d 822 (Fla. 2d DCA 1985). Where, as here, the State seeks to justify use of evidence seized without a warrant, the prosecutor bears the burden of demonstrating the applicability of one of the few specifically established and well-delineated exceptions to the warrant requirement. Raffield v. State, 351 So. 2d 945 (Fla. 1977); Hornblower v. State, 351 So. 2d 716 (Fla. 1977); Norman. In order to rely upon the consent exception to justify a warrantless search, the prosecutor bears the burden of proving that the defendant freely and voluntarily consented. Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); Bailey v. State, 319 So. 2d 22 (Fla. 1975); Norman; Acosta v. State, 519 So. 2d 658 (Fla. 1st DCA 1988); Lockwood. And "it must be shown by the State that strong circumstances are present in a case for it [the consent exception] to qualify as an acceptable alternative to preservation of constitutional rights of citizens." Bailey, 319 So. 2d at 26. Mere conclusions of an officer are insufficient to establish valid consent. Bailey. Rather, voluntariness of the consent is to be determined from the totality of the circumstances. Norman; Acosta. What happened here was similar to what happened in Kinsler v. State, 360 So. 2d 24, 25 (Fla. 2d DCA 1978), where the court rejected the State's argument that the appellant gave voluntary

consent to the taking of his footprint, because the appellant's "parole officer made it clear that to do otherwise would be a violation of a condition of parole[,]" and the appellant's "mere submission to the authority of an officer of the state [did] not constitute

voluntary consent. [Citation omitted.]"[20] In the instant case, the State could not carry its burden of proving free and voluntary consent where Appellant was merely acquiescing to the authorities' requests in order to avoid violating his parole and being returned to prison.

> This Court has recently explained the standard of review for orders on motions to suppress:
>
> [A]ppellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution.
>
> Connor v. State, 803 So.2d 598, 608 (Fla. 2001)

Nelson v. State, 27 Fla. L. Weekly S797, S798 (October 3, 2002).

ISSUE IV

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE HEARSAY EVIDENCE REGARDING LAW ENFORCEMENT'S INTERVIEW WITH LAURA ROMINES AT ST. JOSEPH'S HOSPITAL.

On September 14, 2000, Appellant filed, through counsel, a motion in limine to determine the admissibility of statements made by Laura Romines. (Vol. V, pp. 853-854) A hearing on the motion was held on September 14, 2000 before the Honorable Wayne Cobb. (Vol. VIII, pp. 1414-1474) Although Appellant's motion dealt with the

[20] In Hayes v. State, 439 So. 2d 896 (Fla. 2d DCA 1983), the court receded from Kinsler in part.

admissibility of statements Romines made on the side of the road to those who came to her aid, the court also took up the admissibility of statements Romines later made in the hospital when she was interviewed by the detectives from Pasco County. The court ruled that the statements Romines made to Lieutenant Arnold and others were admissible as "excited utterances," and that statements Romines made at the hospital were admissible as impeachment. (Vol. VIII, pp. 1471-1474) At Appellant's trial, when the State began to put on testimony regarding the interview with Romines in the hospital, Appellant renewed his objections, to no avail. (Vol. XV, pp. 567-568)

Under Florida's Evidence Code,

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

§ 90.801(1)(c), Fla. Stat. (2000). A "statement" includes not only oral or written assertions, but "[n]onverbal conduct of a person if it is intended by the person as an assertion." § 90.801(1)(a), Fla. Stat. (2000). Laura Romines' head movements in response to the questions of the detectives who were interviewing her in the ICU were hearsay. Pursuant to section 90.802 of the Evidence Code, hearsay generally is inadmissible, subject to certain exceptions. None of the exceptions delineated in sections 90.803 or 90.804 of the Florida Statutes applies in the instant case.

In Conner v. State, 748 So. 2d 950, 956 (Fla. 1999), this Court noted that a hearsay statement that does not come in under a firmly rooted hearsay exception is "'presumptively unreliable and inadmissi-

ble for Confrontation Clause purposes [citation omitted.]" The hearsay that was admitted at Appellant's trial was particularly unreliable because the declarant was in intensive care, under medication (Vol. VIII, pp. 1452-1453), and, because she could not speak, the jury had to rely upon the detectives' interpretation of Romines' head movements in response to their questions.

The fact that, according to the detectives, when asked whether Steve was her assailant, Romines shook her head "no" after initially nodding her head "yes" undermined Appellant's attempts to create a reasonable doubt in the jurors' minds that he was the perpetrator. In a case as close as this one (please see Issues I and II above) the court's improper admission of this evidence could well have tipped the scales against Appellant.

The trial court abused his discretion in allowing into evidence the hearsay statements of Laura Romines when she was in the hospital.[21] As a result, Appellant must receive a new trial.

ISSUE V

THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER STATE WITNESS JEFFREY BOUSQUET TESTIFIED THAT APPELLANT MENTIONED THAT HE THOUGHT HE NEEDED AN ATTORNEY.

Detective Jeffrey Bousquet of the Pasco County Sheriff's Office was near the end of his testimony regarding his first conversation

[21] For the standard of review to be employed (abuse of discretion), see Kearse v. State, 662 So. 2d 677 (Fla. 1995) and Reyner v. State, 745 So. 2d 1071 (Fla. 1999).

with Appellant at the sheriff's office in New Port Richey when he testified as follows (Vol. XVIII, p. 959):

> [Michael Fitzpatrick] stated that he was afraid, because in the last item of the news article that he had read, it stated that the person would be charged with murder, and he did not want to be charged with murder. I informed Michael I did not state he was going to be charged with anything, and he stated he read this in the paper, and that is why he was scared.
>
> Subsequently he did make mention that he thought he needed an attorney.

Thereupon, defense counsel lodged an objection, and a discussion ensued at the bench, during which Appellant moved for a mistrial, which the court denied. (Vol. XVIII, pp. 959-963) Although the court initially seemed inclined to give the jury a cautionary instruction, and defense counsel said he was "going to try to figure out something" the court could tell the jury, Judge Swanson ultimately decided to move on without giving a curative instruction. (Vol. XVIII, pp. 961-963)

Appellant's jury should not have been permitted to hear that Appellant told Detective Bousquet that "he thought he needed an attorney." Such testimony was highly prejudicial, and the court below should have granted Appellant's request for a mistrial.

In Jones v. State, 777 So. 2d 1127 (Fla. 4th DCA 2001), the court reversed and remanded due to a comment by a State witness on the fact that the defendant had contacted a law firm several months before he was arrested, despite the fact that the trial judge sustained a defense objection to the comment and gave a curative instruction. The appellate court equated a defendant's statement

requesting an attorney to a comment on a defendant's right to remain silent; both involve invocation of valuable constitutional rights.

It is improper for the State to comment on the defendant's invocation of his right to remain silent, Griffin v. State, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), and comments volunteered by a witness or made by the prosecutor which are fairly susceptible of being construed by the jury to refer to the defendant's right to remain silent or his failure to testify are impermissible. Kirkland v. State, 684 So. 2d 732 (Fla. 1996); Jackson v. State, 522 So. 2d 802 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 153 (1988); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); State v. Kinchen, 490 So. 2d 21 (Fla. 1985); David v. State, 369 So. 2d 943 (Fla. 1979); Clark v. State, 363 So. 2d 331 (Fla. 1978). In DiGuilio this Court emphasized "that any comment, direct or indirect, by anyone at trial on the right of the defendant not to testify or to remain silent is constitutional error and should be avoided." 491 So. 2d at 1139.

The implication raised by Bousquet's testimony was that Appellant was guilty and had something to hide, otherwise, why would he need an attorney before answering more of the detective's questions?

In Jones the court addressed the standard of review applicable to a case of this nature:

> Generally, a trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. Goodwin v. State, 751 So.2d 537, 546 (Fla.1999). However, this court has held that "[d]enial of appellant's motion for mistrial based on testimonial comment on the defendant's silence must be

> evaluated under the harmless error doctrine." Anderson v. State, 711 So.2d 230, 232 (Fla. 4th DCA 1998). The burden is on the state to show beyond a reasonable doubt that there is no reasonable possibility that the error complained of contributed to the conviction. Id. (citing Diguilio v. State, 491 So.2d 1129 (Fla.1986)).

777 So. 2d at 1129.

Given the paucity of evidence to convict Appellant in this case, the State cannot carry its burden of showing that the remark by Bousquet was harmless and did not contribute to the guilty verdicts. Appellant's convictions must be reversed and this cause remanded for a new trial.

ISSUE VI

> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS TO PROHIBIT THE OUT OF COURT AND IN COURT IDENTIFICATIONS OF APPELLANT MADE BY ALBERT J. HOWARD AND MELANIE YARBOROUGH.

On July 27, 2000, Appellant filed, through counsel, a Motion to Suppress and/or in Limine to Prohibit Out of Court and In Court Identification of the Accused by Albert J. Howard. (Vol. IV, pp. 726-727) On September 5, 2000, Appellant filed a Motion to Suppress and/or in Limine to Prohibit Out of Court and In Court Identification of the Accused #2, which pertained to identification by Melanie Yarborough. (Vol. IV, pp. 731-732)

A hearing on the motion pertaining to Howard's identification was held before the Honorable Wayne Cobb on September 14, 2000. (Vol.

VIII, pp. 1301-1413) Stacey Morrison[22] of the Pasco County Sheriff's Office testified that she showed a driver's license photograph of Michael Fitzpatrick to A. J. Howard on September 20, 1996, but, after studying the picture for approximately 30 to 45 seconds, Howard was unable to make an identification. (Vol. VIII, pp. 1301-1307, 1318-1321) This encounter was videotaped. (Vol. VIII, pp. 1304-1307) On September 24, a photopack was shown to Howard, and he selected a picture of Appellant. (Vol. VIII, pp. 1307-1309)

A. J. Howard testified that the lighting conditions in his house were very good, and that the pizza man was in his home for 15, 20 minutes. (Vol. VIII, pp. 1330-1331) Howard was installing vinyl tile, but when the pizza man showed up he lay down his tools and stood up. (Vol. VIII, pp. 1328-1330) He contacted the sheriff's office after reading about Laura Romines in the newspa per. (Vol. VIII, p. 1333) He did not remember being shown the driver's license photo of Appellant. (Vol. VIII, pp. 1333-1336) He selected a picture from a photopack on September 23, 1996. (Vol. VIII, pp. 1336-1337) Howard at first testified on cross-examination that, before he viewed the photopack, Morrison told him that "they thought they had a suspect and wanted [him] to take a look at some pictures." (Vol. VIII, pp. 1347-1348) However, he then testified that Morrison "didn't tell [him] nothing, but just asked if he recognized any of the people in the photopack." (Vol. VIII, p. 1350, 1352-1353) He told Morrison that he was "almost sure" of his identi-

[22] Deputy Morrison's first name is spelled two different ways in the record on appeal: Stacie and Stacey.

fication, but he was not "completely positive." (Vol. VIII, pp. 1334, 1370)

When defense counsel asked Howard how certain he had been of his identification from the photopack, he responded (Vol. VIII, pp. 1367):

> I told her that that has got a lot of appearance and everything, but there's no way that I would stand there and swear--because there can be six look-a-likes walking down the street. You know what I mean? You see them every day.
>
> So, there's no way you could look at that, if you took that right now, took a picture of him, nobody could actually swear that's the same picture you took.

Howard did not remember describing the pizza man to Morrison as clean cut, with no facial hair, no beard, no mustache. (Vol. VIII, pp. 1365-1366)

On the day of the hearing, Morrison told Howard that the picture he selected from the photopack was the right one. (Vol. VIII, p. 1373)

About two years before he gave his testimony at the hearing, Howard was in an automobile accident. (Vol. VIII, p. 1339) He had a "blood clot on the brain" and "was paralyzed on half [his] body part of that time[,]" but there was nothing wrong with his memory. (Vol. VIII, p. 1339)

Upon being called by the defense, Morrison testified at the hearing that Howard had told her the pizza man was clean-shaven, with no beard or mustache. (Vol. VIII, pp. 1378-1379)

Detective Bousquet confirmed, upon being called by the defense, that Howard had told Morrison that the man was clean-shaven. (Vol. VIII, pp. 1388-1389) However, the photopack that was prepared showed six bearded people. (Vol. VIII, p. 1392)

The court denied Appellant's motion to prohibit the identifications by A. J. Howard, finding that there was not a substantial likelihood that his selection of the photograph from the photopack was influenced by his earlier viewing of the driver's license photograph because the two pictures were so different. (Vol. VIII, pp. 1411-1413)

A hearing pertaining to Yarborough's identification was held before Judge Cobb on November 3, 2000. (Vol. XI, pp. 1824-1887) Melanie Yarborough testified that, when the Pro Pizza man first arrived at A. J. Howard's residence, she "sat and stared at him for a good two or three minutes, trying to figure out why is this Pro Pizza guy here" when they had ordered pizza from Little Caesar's. (Vol. XI, pp. 1833-1834) She said that she got a "very good" look at the man, who was wearing a green Pro Pizza shirt and green hat, and that the lighting conditions were "very good." (Vol. XI, p. 1834) The pizza man was in and out of the house for about 10 minutes. (Vol. XI, p. 1834) He did not have a beard; Yarborough was not sure about a mustache. (Vol. XI, pp. 1857-1858) Yarborough did not think Howard was working on anything that night; they were just sitting around talking in the kitchen. (Vol. XI, p. 1846)

On October 10, 1996, Sergeant Morrison showed Yarborough a photopack and asked if she recognized anybody, and Yarborough selected a picture. (Vol. XI, pp. 1834-1837)

Stacie Morrison testified that she interviewed Yarborough and showed her a photopack on October 10, 1996 in Ringgold, Georgia. (Vol. XI, pp. 1864-1865) She told Yarborough to look at all the pictures and see if the person was there that she recalled being at A. J. Howard's that night. (Vol. XI, pp. 1867-1868) It took Yarborough less than 10 seconds to choose a picture from the photopack; "[s]he looked at every photo and immediately zoomed in." (Vol. XI, p. 1868) Yarborough acknowledged that she had been drinking that night, but did not believe she was intoxicated. (Vol. XI, pp. 1880-1881)

The court denied Appellant's motion, finding there was "no evidence to indicate that this identification [by Yarborough] was the result of any suggestion." (Vol. XI, p. 1887)

An abuse of discretion standard of review applies to the denial of the motions in question. Walker v. State, 776 So, 2d 943 (Fla. 4th DCA 2000); State v. Jackson, 744 So. 2d 545 (Fla. 5th DCA 1999).

"Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401, 411 (1972). "Impermissibly suggestive identification procedures causing a likelihood of irreparable misidentification violate a criminal defendant's right to a

fair trial, and result in a denial of due process. [Citations omitted.]" Johnson v. State, 717 So. 2d 1057, 1062 (Fla. 1st DCA 1998)

> The test for suppression of an out-of-court identification is two-fold: (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. See Thomas v. State, 748 So.2d 970, 981 (Fla. 1999); Green v. State, 641 So.2d 391, 394 (Fla.1994); Grant v. State, 390 So.2d 341, 343 (Fla.1980). The factors to be considered in evaluating the likelihood of misidentification include:
>
> > [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
>
> Grant, 390 So.2d at 343 (quoting Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)).

Rimmer v. State, 825 S. 2d 304, 316 (Fla. 2002). With regard to A. J. Howard, it should be noted first of all that his opportunity to observe the pizza man was very limited. He claimed that the man was in his house for 15-20 minutes, which was contradicted by the testimony of Melanie Yarborough, who said the man was there only 10 minutes, and was in and out of the house. As for the degree of attention Howard was paying to the man, there were many distractions at his house that night, including the parties that were going on, the fact that a newcomer (Laura Romines) was present, and the fact

that Howard was attempting to lay some vinyl tile. When Howard viewed the photopack, he was not 100 per cent certain of his identification, and he had told the police the man was clean-shaven, and yet he selected a picture of a bearded man from the photopack. Finally, more than a month passed between the time Howard saw the pizza man on August 17-18 and the time he viewed the photopack on September 23 or 24..

Moreover, the fact that the police first showed Howard a single picture of Appellant (the driver's license photo) tainted his subsequent identifications.[23] In Way v. State, 502 So. 2d 1321, 1323 (Fla. 1st DCA 1987), the court observed: "Certainly, use of a single photograph is one of the most suggestive methods of identification possible and is impermissibly suggestive under most circumstances." The show-up technique, in which a witness is presented with only one possible suspect for identification, was characterized by this Court in Blanco v. State, 452 So. 2d 520, 524 (Fla. 1984) as "inherently suggestive." In Washington v. State,
653 So. 2d 362, 365 (Fla. 1994), this Court agreed with the appellant that "the showing of a single photo [to a witness] was unduly suggestive." Similarly, in State v. Cromartie, 419 So. 2d 757, 759 (Fla. 1st DCA 1982), the court stated that "[t]he show-up identification is, by its nature, suggestive in that, unlike a line-up, a witness is presented with only one possible suspect for identification..." And

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[23] The fact that Howard did not even remember being shown the driver's license photo calls into serious question his ability to recall and to render an accurate identification. Perhaps his automobile accident had something to do with his memory lapse.

in State v. Jackson, 744 So. 2d 545, 548 (Fla. 5th DCA 1999), the court wrote: "case law reflects that show-ups are inherently suggestive and are widely condemned [citations omitted]."

Although Howard failed to make an identification from the driver's license photo, the fact that the same man was depicted in this photo and in the photopack made it much more likely that Howard would select Appellant's picture from the photopack; it was a picture of someone he had seen before (in the driver's license photo). The police further tainted Howard's out-of-court and in-court identification by including only men with beards in the photopack after Howard had said the man was clean-shaven, and further tainted the in-court identification by telling Howard, on the day of the suppression hearing, that he had picked the right photo out of the photopack, thus improperly bolstering Howard's confidence in his identification. Under all these facts and circumstances, Howard's identifications of Appellant, out of court and in court, cannot be considered reliable, and the trial court should have granted Appellant's motion to exclude them.

Melanie Yarborough's identifications suffer from some of the same defects as Howard's. She had a limited opportunity to observe the pizza man because, according to her testimony, he was at Howard's house for only 10 minutes, and was in and out. The distractions of the parties and the newcomer would have affected her as well. Additionally, Yarborough had been drinking unknown quantities of alcohol that night. And there was an even greater length of time that passed between the time she observed the pizza man on August 17-

18 and the time she viewed the photopack on October 10. With regard to any previous descriptions that Yarborough had given of the pizza man, defense counsel tried mightily to obtain such a description from Yarborough herself and from Stacie Morrison at the suppression hearing, to no avail. (Vol. XI, pp. 1856-1858, 1872-1874, 1877, 1880) Furthermore, Yarborough's identifications of Appellant were tainted by the fact that, on the day of the suppression hearing, prior to giving her testimony, she listened to the tape recording of her interview with Morrison and once again viewed the photopack, thus bolstering her confidence in her identifications.

The unreliability of the identifications made by both Howard and Yarborough at trial is further demonstrated by the seeming hesitation and uncertainty they displayed when asked if they recognized the pizza man in the courtroom. Howard testified that Appellant had "changed" since he last saw him some four and one-half years before, and Yarborough testified that he looked "different." In addition, before she testified, Yarborough had
read a newspaper article about Appellant which contained his picture. (Vol. XVII, pp. 849-850)

Under all the facts and circumstances of this case, this Court must concluded that the procedures used to obtain the identifications of Appellant by these two witnesses tainted them to such a degree that the identifications were not reliable, and there was a high probability of misidentification. As a result, Appellant is entitled to a new trial.

ISSUE VII

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY RULINGS OF THE LOWER COURT EXCLUDING CRITICAL DEFENSE EVIDENCE.

Rulings of the trial court excluding evidence that was crucial to Appellant's defense deprived him of a fair trial.

During the defense case, Appellant called as a witness Robyn Ragsdale, a crime laboratory analyst with the Florida Department of Law Enforcement, and attempted to question her regarding her analysis of fingernail scrapings or clippings taken from Laura Romines, but was prevented from doing so when the trial court sustained a State objection as to chain of custody. (Vol. XIX, pp.1154-1158)

Appellant subsequently proffered Ragsdale's testimony out of the hearing of the jury. (Vol. XIX, pp. 1230-1240) She performed poly-merase chain reaction DNA testing on clippings taken from the right and left hands of Laura Romines and compared the results to DNA from Romines herself, Stephen Kirk, and Appellant. (Vol. XIX, pp. 1231-1240) With regard to the right hand, Ragsdale tested what appeared to be human tissue she removed from the clippings. (Vol. XIX, p. 1235) Romines could be eliminated from the mixture of DNA found in the tissue, but neither Appellant nor Stephen Kirk could be eliminated as a possible contributor to the mix. (Vol. XIX, pp. 1233-1234) There was evidence of the DNA of another, unknown person in the tissue from the right-hand clippings. (Vol. XIX, pp. 1235-1236) With regard to the sample from the left-hand, both Appellant and

Stephen Kirk could be eliminated, but Romines could not; there was no mixture present. (Vol. XIX, pp. 1236-1237)

The court ruled the proffered evidence to be "irrelevant and immaterial" and said that it was "inconsequential" and did "not lead to any conclusion of any kind." (Vol. XIX, p. 1241)

A chain-of-custody objection normally will not be sustained unless the objecting party shows a probability of tampering with the evidence. See Floyd v. State, 27 Fla. L Weekly S697 (Fla. August 22, 2002). The prosecutor below did not even allege tampering, nor was there any evidence that the fingernail clippings in question had been tampered with in any way. If chain-of-custody truly was an issue, the court should have acceded to Appellant's request that the trial be recessed until the person who had taken custody of the clippings, William Joseph, a crime scene technician with the Pasco County Sheriff's Office, returned from out of state and was available to testify. (Vol. XX, pp. 1270-1273)

Pursuant to Florida's Evidence Code, "[a]ll relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2000). "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2000). The fact that Laura Romines had someone else's DNA under the fingers of her right hand, someone other than Appellant, went toward showing that someone else may have been involved in assaulting her, certainly a material fact in a case in which a man is on trial for his life, and a fact the jury should have been allowed to consider in assessing whether the defense could establish a reasonable doubt as to Michael

Fitzpatrick's guilt. See Rivers v. State, 561 So. 2d 536, 539 (Fla. 1990) ("...where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission.")

Appellant was further stymied in the presentation of his defense when he attempted to have Detective Bousquet and Diane Fairbanks identify where Appellant appeared on the surveillance tape from the 7-11 store, but was prevented from doing so when the court sustained objections from the prosecutor that "the tape speaks for itself." (Vol. XIX, pp. 1223-1226-1227; Vol. XX, pp. 1251-1253, 1263) Appellant proffered Fairbanks' testimony, and the State agreed that she would identify Appellant on the tape and the clothing he was wearing at the time. (Vol. XX, pp. 1269-1270)

In this case, the tape did not "speak for itself." As defense counsel pointed out (Vol. XX, p. 1252), and as even the State's witnesses acknowledged, Appellant had changed considerably between the time the videotape was made in 1996 and the time he went to trial in 2001. It would be unreasonable for Appellant's jury to be expected to examine the tape themselves and locate Appellant, whom they did not know. This evidence was vital to the defense to show what clothing Appellant was wearing on the evening in question. It was not a Pro Pizza uniform, and this would have called into serious question the testimony of State witness Melanie Yarborough, who had testified that the man who picked up Laura Romines at A. J. Howard's residence was wearing a Pro Pizza uniform.

"...[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." Gardner v. State, 530 So. 2d 404, 405 (Fla. 3d DCA 1988), citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Boykins v. Wainwright, 737 F. 2d 1539 (11th Cir. 1984), rehearing denied, 744 F. 2d 97 (11th Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1775, 84 L. Ed. 2d 834 (1985). See also Miller v. State, 636 So. 2d 144 (Fla. 1st DCA 1994) (defendant was entitled to present testimony relevant to his defense). As the Supreme Court of the United States noted in Washington v. Texas, 388 U.S. at 19:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In Moreno v. State, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982), the court observed:

> Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility.

> [Citations omitted.] Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. [Citations omitted.]

Michael Fitzpatrick was deprived of her rights to present witnesses and evidence on his own behalf by the rulings of the court below.

This Court's admonition in Guzman v. State, 644 So. 2d 966, 1000 (Fla. 1994) is particularly pertinent here:

> We are...concerned about Guzman's contentions that the trial judge erroneously limited the testimony of two of Guzman's witnesses and refused to allow Guzman to recall one of those witnesses. We emphasize that trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life.

(Emphasis supplied.) Michael Fitzpatrick was on trial for his life, and yet the trial court unduly restricted his ability to mount a defense by his rulings excluding the evidence discussed above. As a result, Michael Fitzpatrick must receive a new trial.

As Appellant's issue deals with the admissibility of evidence, an abuse of discretion standard applies. Reed v. State, 783 So. 2d 1192 (Fla. 1st DCA 2001); Mathis v. State, 760 So. 2d 1121 (Fla. 4th DCA 2000); Sexton v. State, 697 So. 2d 833 (Fla. 1997). "However, a trial court's discretion is limited by the rules of evidence." Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001).

ISSUE VIII

SEVERAL ERRORS COMMITTED BY THE COURT BELOW RENDERED APPELLANT'S SENTENCE

OF DEATH UNRELIABLE, AND IT CANNOT BE PERMITTED TO STAND.

Appellant's sentence of death is unreliable and must be vacated for the reasons which follow.

A. Admission of Appellant's grand theft conviction and admission of hearsay regarding Appellant's aggravated battery conviction

Over objection at penalty phase, the State presented evidence that Appellant had not only been previously convicted of aggravated battery, but of grand theft as well. A prior conviction for the non-violent felony of grand theft does not come within the ambit of the aggravating circumstances set forth in section 921.141(5) of the Florida Statutes, which are exclusive. Grossman v. State, 525 So. 2d 833 (Fla. 1988). Nor was it admissible to rebut the mitigating circumstance of no significant history of prior criminal activity, where Appellant did not intend to rely upon this mitigator. See Maggard v. State, 399 So. 2d 973 (Fla. 1981) and Geralds v. State, 674 So. 2d 96 (Fla. 1996). Although the prosecutor argued that it was relevant to establish Appellant's status as a parolee, and hence his eligibility for the aggravating circumstance set forth in section 921.141(5)(a) of the Florida Statutes, this could have been accomplished by using his conviction for aggravated battery. This non-statutory aggravator was thus irrelevant, and was prejudicial, and Appellant's jury should not have been permitted to consider it.

It was also improper for the trial court to allow Appellant's probation officer, George Kranz, to provide prejudicial hearsay testimony regarding the details of the aggravated battery for which

Appellant was convicted, namely, that Appellant struck the victim several times in the head with a hammer during an unprovoked attack, causing injury. Kranz had no first-hand knowledge about this crime, and did not even begin to supervise Appellant as a parolee until long after his conviction.

The Sixth Amendment right of an accused to confront and cross-examine the witnesses against him applies to the capital sentencing process. Engle v. State, 438 So. 2d 803 (Fla. 1983). Nonetheless, hearsay may be admitted, "provided the defendant is accorded a fair opportunity to rebut any hearsay statements." § 921.141(1), Fla. Stat. (2000). Appellant was hardly in a position to rebut the type of hearsay presented at his penalty phase. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989) and Gardner v. State, 480 So. 2d 91 (Fla. 1985). If the State felt the necessity for presenting details concerning the incident, this could have been accomplished by other means, such as having the victim testify, or having the investigating officer testify.

B. Requiring prosecutor to present so-called mitigating evidence to Appellant's jury

The court below required the prosecutor to present to Appellant's penalty phase jury all mitigating circumstances available to the state attorney's office. In the guise of mitigation, the prosecutor informed Appellant's jury that Appellant had a problem with alcohol and drugs, had attempted suicide in 1995, tested positive for marijuana while on supervision [parole], and had some unstableness in his employment situation and residence while on parole.

Appellant had a right to control his own destiny, and could not legally be forced to present mitigating evidence at his penalty phase. Grim v. State, 27 Fla. Law Weekly S805 (Fla. October 3, 2002) It was Appellant's call, and the trial court should not have thwarted his will by requiring the State to present mitigation for him.

Furthermore, the prosecution had an obvious conflict of interest in simultaneously presenting evidence in aggravation and asking for the death penalty while also being required to put on a case in mitigation. And, as defense counsel recognized, the prosecutors had no experience or expertise in presenting mitigating evidence, and it came out more as aggravation than anything else. Nor was the jury given any instructions that would allow them to differentiate whether the testimony being elicited by the prosecutor was being offered in aggravation or mitigation.

C. Sentencing Appellant to death without benefit of a complete presentence investigation

In Muhammad v. State, 782 So. 2d 343, 363 (Fla. 2001), this Court imposed a requirement that a presentence investigation be prepared "in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence. [Footnote omitted.]" The Court also noted: "To be meaningful, the PSI should be comprehensive..." 782 So. 2d at 363. In addition the Court wrote that the trial court should require the State to place into the record all evidence in its possession of a mitigating nature, including, among other things, military records. 782 So. 2d at 364. In Appellant's case, the trial court did order a

comprehensive PSI. However, near the beginning of the sentencing hearing on November 2, 2001, the court observed: "No military records were received, as the appropriate federal agencies declined to send them despite several requests therefore [sic]." (Vol. XII, p. 2011) Without the missing military records, the PSI was incomplete. The court should not have proceeded to sentence Appellant until he had the military records in hand.

D. Submission to jury and finding of aggravating circumstance that homicide was committed during a sexual battery when evidence was insufficient

As discussed in Issue II. B. above, the evidence was insufficient to submit the sexual battery charge to the jury, and the trial court should have granted a judgment of acquittal on this count. Because the jury was allowed to consider the sexual battery as an aggravating circumstance at penalty phase (Vol. XXI, p. 1592), as well as it being found by the court in his sentencing order, Appellant is entitled to a new penalty trial. See Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) and Omelus v. State, 584 So. 2d 563 (Fla. 1991).

E. Standards of review

To the extent Appellant's issue deals with the admissibility of evidence, an abuse of discretion standard applies. Reed v. State, 783 So. 2d 1192 (Fla. 1st DCA 2001); Mathis v. State, 760 So. 2d 1121 (Fla. 4th DCA 2000); Sexton v. State, 697 So. 2d 833 (Fla. 1997). "However, a trial court's discretion is limited by the rules of evidence." Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001). To the extent the issue involves purely matters of law, a de novo standard applies. State v. Glatzmayer, 789 So. 2d 297, 301 n, 7 (Fla. 2001); Butler v. State, 706 So. 2d 100, 101 (Fla. 1st DCA 1998).

ISSUE IX

MICHAEL FITZPATRICK IS ENTITLED TO A LIFE SENTENCE BECAUSE THE FLORIDA DEATH PENALTY STATUTE VIOLATED HIS DUE PROCESS RIGHT AND HIS RIGHT TO A JURY TRIAL WHICH REQUIRE THAT A DEATH QUALIFYING AGGRAVATING CIRCUMSTANCE BE FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

Appellant's issue presents a question of law, and so the standard of review is de novo. State v. Glatzmayer, 789 So. 2d 297, 301 n, 7 (Fla. 2001); Butler v. State, 706 So. 2d 100, 101 (Fla. 1st DCA 1998).

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2355 (2000), and Jones v. United States, 526 U.S. 227, 243 n.6 (1999), the United States Supreme Court held that, any fact (other than prior conviction) that increases the maximum penalty for a crime must be

charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, 120 S.Ct. at 2362-63; Jones, 526 U.S. at 231. Basing its decision both on the traditional role of the jury under the Sixth Amendment and principles of due process, the Apprendi Court made clear that:

> [i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others . . . it necessarily follows that the defendant should not -— at the moment the state is put to proof of those circumstances -— be deprived of protections that have until that point unquestionably attached.

530 S.Ct. at 2359. The Apprendi Court held that the same rule applies to state proceedings under the Fourteenth Amendment. 530 S.Ct. at 2355. These essential protections include (1) notice of the State's intent to establish facts that will enhance the defendant's sentence; and (2) a jury's determination that the State has established these facts beyond a reasonable doubt.

In Jones, 526 U.S. at 250-51, the Court distinguished capital cases arising from Florida.[24] In Apprendi, 530 S.Ct at 2366, the Court observed that it had previously

> rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649 ... (1990)[.]

[24] Those cases were Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989).

Thus, it appeared that the principles of Jones and Apprendi did not apply to state capital sentencing procedures. See Mills v. Moore, 786 So. 2d 532, 536-38 (Fla.), cert. denied, 532 U.S. 1015 (2001). In Ring v. Arizona, 122 S. Ct. 2428 (2002), however, the United States Supreme Court overruled Walton v. Arizona and held that the Sixth and Fourteenth Amendments to the United States Constitution require the jury to decide whether a death qualifying aggravating factor has been proven beyond a reasonable doubt.

A defendant convicted of first-degree murder may not be sentenced to death without an additional finding. At least one aggravator must be found as a sentencing factor. Like the hate crimes statute in Apprendi, Florida's capital sentencing scheme exposes a defendant to enhanced punishment —- death rather than life in prison —- when a murder is committed "under certain circumstances but not others." Apprendi, at 2359. This Court has emphasized that "[t]he aggravating circumstances" in Florida law 'actually define those crimes . . . to which the death penalty is applicable . . . .'" State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert denied sub nom., 416 U.S. 943 (1974).

Michael Fitzpatrick was sentenced to death pursuant to section 921.141, Florida Statutes (2000), which does not require a jury finding that any specific aggravating factor exists. Section 921.141(2) governs the advisory sentence rendered by the jury in this case and provides as follows:

> (2) ADVISORY SENTENCE BY THE JURY. -- After hearing all the evidence, the jury shall deliberate and render an

> advisory sentence to the court, based on the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

On its face, this statute does not require any express finding by the jury that a death qualifying aggravating circumstance has been proven. Moreover, this Court has never interpreted this statute to require the jury to make findings that specific aggravating circumstances have been proven. See Randolph v. State, 562 So. 2d 331, 339 (Fla.), cert. denied, 498 U.S. 992 (1990); Hildwin v. Florida, 490 U.S. 638, 639 (1989). Consequently, the statute plainly violates the Sixth and Fourteenth Amendment requirements of Jones, Apprendi, and Ring, and is unconstitutional on its face.

Fitzpatrick's case illustrates how section 921.141 violates the requirement that the jury must find a death qualifying aggravating circumstance. Pursuant to section 921.141, the jury was instructed to consider four aggravating circumstances: 1) under sentence of imprisonment;[25] 2) prior conviction for a capital or other violent felony;[26] 3) the homicide was committed while Appellant was engaged in committing a sexual battery;[27] and 4) HAC.[28] (Vol. XXI, pp. 1591-

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[25] § 921.141(5)(a), Fla. Stat. (2000).

[26] § 921.141(5)(b), Fla. Stat. (2000).

[27] § 921.141(5)(d), Fla. Stat. (2000).

[28] § 921.141(5)(h), Fla. Stat. (2000).

1592) The judge instructed the jury that it was their duty to render to the Court an advisory sentence based upon their determination as to whether sufficient aggravating circumstances existed to justify imposition of the death penalty, and whether sufficient mitigating circumstances existed to outweigh any aggravating circumstances found to exist. (Vol. XXI, p. 1591)

They were further instructed that, if they found sufficient aggravating circumstances existed to justify the death penalty, it would then be the duty of the jury to examine whether mitigating circumstances existed that outweighed the aggravating circumstances (Vol. XXI, p. 1593), and that, if one or more aggravating circumstances was established, the jury

> should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the appropriate sentence that should be imposed.

(Vol. XXI, p. 1595)

The jurors were instructed that it was not necessary that the advisory sentence of the jury be unanimous. (Vol. XXI, p. 1595)

They were never instructed that all must agree that at least one specific death qualifying aggravating circumstance existed -- and that it must be the same circumstance. Thus, the sentencing jury was not required to make any specific findings regarding the existence of particular aggravators, but only to make a recommendation as to the ultimate question of punishment.

The jury ultimately returned an advisory sentence recommending by a vote of ten to two that the court impose the death penalty. The advisory sentence did not contain a finding as to which specific aggravating circumstance(s) was (were) found to exist. (Vol. VI, p. 1034; Vol. XXI, p. 1601)

It is likely in any case that some of the jurors will find certain aggravators proven which other jurors reject. What this means is that a Florida judge is free to find and weigh aggravating circumstances that were rejected by a majority, or even all of the jurors. The sole limitation on the judge's ability to find and weigh aggravating circumstances is appellate review under the standard that the finding must be supported by competent substantial evidence. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997).

An additional problem with the absence of any jury findings with respect to the aggravating circumstances is the potential for skewing this Court's proportionality analysis in favor of death. An integral part of this Court's review of all death sentences is proportionality review. Tillman v. State, 591 So. 2d 167 (Fla. 1991). This Court knows which aggravators were found by the judge, but does not know which aggravators and mitigators were found by the jury. Therefore, the Court could allow aggravating factors rejected by the jury to influence proportionality review. Such a possibility cannot be reconciled with the Eighth and Fourteenth Amendment requirement of reliability in capital sentencing.

The flaws in Florida's capital sentencing scheme discussed above constitute fundamental error which may be raised for the first

time on appeal. In Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983), this Court ruled that the facial constitutional validity of the statute under which the defendant was convicted can be raised for the first time on appeal because the arguments surrounding the statute's validity raised fundamental error. In State v. Johnson, 616 So. 2d 1, 3-4 (1993), this Court ruled that the facial constitutional validity of amendments to the habitual offender statute was a matter of fundamental error which could be raised for the first time on appeal because the amendments involved fundamental liberty due process.

In Maddox v. State, 760 So. 2d 89, 95-98 (Fla. 2000), this Court ruled that defendants who did not have the benefit of Florida Rule of Criminal Procedure 3.800(b), as amended in 1999 to allow defendants to raise sentencing errors in the trial court after their notices of appeal were filed, were entitled to argue fundamental sentencing errors for the first time on appeal. To qualify as fundamental error, the sentencing error must be apparent from the record, and the error must be serious; such as a sentencing error which affected the length of the sentence. Id., at 99-100. Defendants appealing death sentences do not have the benefit of Rule 3.800(b) to correct sentencing errors because capital cases are excluded from the rule. Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015, 1026 (1999).

The facial constitutional validity of the death penalty statute, section 921.141, Florida Statutes (2000), is a matter of funda-

mental error. The error is apparent from the record, and it is certainly serious because it concerns the due process and right to jury trial requirements for the imposition of the death penalty. Imposition of the death penalty goes far beyond the liberty interests involved in sentencing enhancement statutes.

Moreover, the use of a facially invalid death penalty statute to impose a death sentence could never be harmless error. A death sentence is always and necessarily adversely affected by reliance upon an unconstitutional death penalty statute, especially when the statute violates the defendant's right to have the jury decide essential facts. See Sullivan v. Louisiana, 508 U.S. 275, 279-282 (1993) (violation of right to jury trial on essential facts is always harmful structural error).

Thus, Florida's death penalty statute is unconstitutional on its face because it violates the due process and right to jury trial requirements that all facts necessary to enhance a sentence be found by the jury to have been proven beyond a reasonable doubt, as set forth in Jones, Apprendi, and Ring. This issue constitutes fundamental error, and can never be harmless. This Court must reverse Fitzpatrick's death sentence and remand for a life sentence.

Appellant is aware that in King v. Moore, 27 Fla. L. Weekly S906 (Fla. Oct. 24, 2002) and Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002) this Court rejected arguments similar to those contained herein, but asks the Court to revisit these important issues, and raises them here to preserve them for possible further review in another forum.

ISSUE X

THE COURT BELOW ERRED IN SENTENCING APPELLANT ON THE NON-CAPITAL COUNT OF SEXUAL BATTERY WITHOUT BENEFIT OF A SENTENCING GUIDELINES SCORESHEET.

On December 21, 2001, Judge Swanson convened court for the purpose of sentencing Appellant on count two of the indictment, the non-capital count of sexual battery, for which the court sentenced Appellant to 30 years in prison. (Vol. XII, pp. 2002-2006)

The record does not reflect that Appellant was sentenced on count two pursuant to a sentencing guidelines scoresheet. The record on appeal does not contain a scoresheet, and there was no mention of a scoresheet at the sentencing hearing held on December 21.

Appellant was entitled to be sentenced pursuant to a scoresheet on the non-capital offense of sexual battery. Pietri v. State, 644 So. 2d 1347 (Fla. 1994); Holton v. State, 573 So. 2d 284 (Fla. 1990); Lamb v. State, 532 So. 2d 1051 (Fla. 1988); Riggsby v. State, 696 So. 2d 1337 (Fla. 2d DCA 1997); Troncoso v. State, 825 So. 2d 494 (Fla. 3d DCA 2002). His sentence on this count must be vacated and this cause remanded for resentencing using a properly calculated score-sheet.

As this issue presents a question of law, the standard of review is de novo. State v. Glatzmayer, 789 So. 2d 297, 301 n, 7 (Fla. 2001); Butler v. State, 706 So. 2d 100, 101 (Fla. 1st DCA 1998).

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Michael Peter Fitzpatrick, prays this Honorable Court to vacate his convictions and sentences and remand with directions that he be discharged. In the alternative, Appellant requests a new trial. If neither of these forms of relief is forthcoming, Appellant asks that his sentences be vacated and that he be afforded a new sentencing trial before a jury or a new sentencing hearing before the court, and that he be resentenced on the sexual battery charge pursuant to a correctly prepared scoresheet. Appellant further prays for such other and further relief as this Honorable Court may deem appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Attorney General's Office, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 801-0600, on this 31st day of February, 2003.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

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