IN THE SUPREME COURT OF FLORIDA

ANDREW DARRYL BUSBY,

Appellant,

vs. **Case No. SC 02-1364**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT, IN AND FOR
COLUMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Andrew Darryl Busby, appeals from the judgment of conviction and sentence of death imposed by the Circuit Court of the Third Judicial Circuit, Columbia County, Florida, following a jury verdict finding him guilty of one count of murder in the first degree and recommending a death sentence. References to appellant will be to "Busby" or "Appellant," and references to appellee will be to "the State" or "Appellee." The record on appeal consists of eighty-six volumes. For the convenience of the Court, the State will cite to the record in a manner similar to that used by the Appellant, i.e., to the clerk's record on appeal as "R.," with the appropriate volume number and page citations as required by Fla. R. App. P. 9.210(b)(3).

STATEMENT OF THE CASE AND OF THE FACTS[1]

Trial Proceedings

Andrew Darryl Busby was charged by indictment in the Circuit Court of Columbia County, Florida, on August 17, 2000, with the first-degree murder of Elton Ard (R. 1:1). Ard, a fellow inmate of the Department of Corrections at the Columbia Correctional Institution (hereinafter "CCI") (R. 1:1), was murdered on July 3, 2000 (R. 1:1). A co-defendant, Charles Globe (hereinafter "Globe"), was also indicted and convicted in a separate trial of the murder (R. 1:1).[2] The jury found Busby guilty as charged on March 15, 2002 (R. 17:3360). The case then proceeded to the penalty-phase (R. 82:1547), where the jury subsequently recommended that Busby be sentenced to death, by a vote of 11 to 1 (R. 84:1864).

Guilt-phase:

Evidence adduced at the guilt-phase of trial established the following:

Busby and his homosexual partner and fellow inmate, Globe (R. 78:1027),

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[1]To avoid repetition, all relevant facts beyond those directly related to the offense will be set forth under the specific issue to which they apply.

[2]Globe also received a death sentence upon a jury's recommendation. State of Florida v. Charles Globe , No. 00-897CF A. Briefs have been filed in Globe's appeal before this Court, cause number SC02-39, and oral argument is scheduled for October 7, 2003.

decided that they were going to kill someone (R. 78:1028). Ard was one of seven potential victims (R. 78:1028), targeted because he was harassing Busby (R. 78:1028-1029). Busby had originally wanted to kill Robert Rosa Torado, because Torado was HIV-positive and Busby had been having sex with him (R. 78:1051-1052). For two months Busby and Globe tried to get to Torado to kill him (R. 78:1052-1053). For the three days preceding Ard's death, Busby and Globe intended on killing Ard but they did not have the opportunity (R. 78:1035). Busby, using sign-language, told Globe the night of July 2 that they would go ahead with their plan to kill Ard after breakfast the next day (R. 78:1035-1036).

The following morning, on July 3, 2000, at approximately 7:00 a.m., Globe slipped into the prison cell shared by Ard and Busby, after they had returned from breakfast (R. 78:1037). After locking the cell door and putting something up to block the window, Globe grabbed Ard around the neck and they struggled (R. 78:1037-1039). Globe placed one of the garrotes he made around Ard's neck, but it broke as Globe was choking Ard (R. 78:1039-1040). Busby then moved in and kneed Ard in the stomach (R. 78:1040). Both Busby and Globe choked Ard (R. 78:1040, 1041). The broken garrote was flushed down the toilet (R. 78:1040). Ard pled for his life, offering to give both men all of his money, a total of forty-five dollars (R. 78:1040). Busby beat Ard in the face, causing him to bleed (R. 78:1043). After discovering that

Ard was still alive, a second garrote was tied around Ard's neck (R. 78:1044). Globe and Busby then lit cigarettes and watched Ard gasp for air six times before he finally died (R. 78:1044). Afterwards, Globe removed the garrote from Ard's neck and tied it around Ard's wrist, and put a cigarette in Ard's mouth and a lighter in his hand (R. 78:1045).

During a prisoner count at approximately 9:00 a.m., Correctional Officer Tonya Nix found Globe locked inside of Ard and Busby's cell (R. 76:871). At the time, Ard appeared to be dead (R. 76:871). Nix called for assistance and notified medical, and had Globe and Busby removed from the cell, which was ordered secured until the Florida Department of Law Enforcement (hereinafter "FDLE") could arrive to begin their investigation (R. 76:872). Linda Summerall, a nurse at CCI, found that Ard did not have a pulse or blood pressure and was not breathing (R. 77:928-929). The following day Dr. Matthew Areford, M.D., performed an autopsy on Ard, determining that he had died from strangulation, and that he would have taken anywhere from two to eight minutes to have died from the strangulation (R. 77:963, 964-965). Dr. Areford further testified that Ard had injuries consistent with blunt force blows to his head, which did not contribute to his death (R. 77:973, 974). The ligature or garrote was consistent with the pattern of bruising found on Ard's neck, and the injuries were consistent with a "sleeper hold." (R. 77:967-968, 971).

Evidence recovered from the murder scene included a handwritten sign and photographs of writings on the prison wall (R. 76:885-887), the magic marker used to make the writings (R. 76:888), photographs of fingerprints in blood (R. 76:888-889), and the cigarette lighter found in Ard's hand and the cigarette placed in Ard's mouth (R. 76:889-890). Karen Smith, a crime laboratory analyst and forensic document examiner with FDLE, testified that of the sign and writings on the cell wall, Globe had written "Call FDLE. Thanks" (R. 77:999-1000) and "Remember Andy and K.D., 7-3-2000" (R. 77:1002). Smith had no opinion, however, as to who had written "Don't forget to look on the door" (R. 77:1001).

After the State rested its case-in-chief, Appellant moved for a judgment of acquittal (R. 78:1095-1097), which the trial judge denied (R. 78:1099).

Busby did not testify at the guilt-phase of his trial, but he did present the video-taped testimony of Globe (R. 79:1228-1283) and live testimony from a fellow inmate (R. 80:1292-1305). Globe testified to the following: Busby thought that Globe was going to beat up Ard (R. 79:1231), Globe "snapped" after he thought Ard had already had sex with Busby (R. 79:1237-1238), Busby told Globe not to choke Ard and tried to separate Globe from Ard (R. 79:1240, 1244), and Busby and Globe lied throughout the July 3, 2000 statement (R. 79:1260-1261). Fellow inmate Charles Konetski testified to the following: he came to know Busby at CCI and that Busby was very friendly (R.

80:1293), Busby was sexually harassed (R. 80:1298), Konetski tried to stop the harassment by reporting it (R. 80:1298-1300), and Busby looked like he weighed 110 pounds and was nine-years-old (R. 80:1301). During cross-examination, the State established that Konetski resided at CCI and only knew Busby from December 30, 1998 to March 16, 1999 (R. 80:1296).

The State then presented testimony in rebuttal. Inspector Jack Schenck with the Inspector General's Office of the Florida Department of Corrections testified regarding Busby's July 7, 2000 statement, that Busby had been advised of his rights and waived same (R. 81:1386), that Busby asked Globe to make something that they could use to strangle someone (R. 81:1386), and that Busby had wanted to decapitate Ard but did not have anything sharp to use and wanted to poke out Ard's eyes but Globe talked him out of it (R. 81:1388). Instead, Busby poked Ard's ear (R. 81:1388). An investigator with the State Attorney's Office, Lisa Long, also testified in rebuttal (R. 81:1390-1391), and Busby's proffer offered to preclude Long's testimony was read to the jury (R. 81:1392-1394).

Busby then presented Globe's surrebuttal testimony, that he did not see Appellant's hand gestures, and even if he had, it would not have affected his testimony (R. 81:1411). Busby renewed his motion for judgment of acquittal (R. 81:1414-1415), which the trial judge denied (R. 81:1420). At the close of the evidence, instructions,

and argument by counsel, the jury found Appellant guilty as charged (R. 81:1524).

Penalty-phase:

During the penalty-phase of the trial, the State relied upon the evidence adduced during the guilt-phase as well as additional evidence.

The State presented the testimony of Inspector Schenck, who testified regarding his interview of Busby on July 7, 2000 (R. 82:1550-1579). Busby was advised of his rights and agreed to talk to Schenck (R. 82:1551). Busby asked Globe to make the garrotes so that they could strangle who they ultimately decided to kill (R. 82:1565). Though Busby wanted to kill Torado (R. 82:1565), they decided to kill Palmer when they realized they could not get to Torado (R. 82:1567). When they could not get to Palmer, they turned their attention to Ard (R. 82:1568). On both Friday and Saturday, Globe and Busby were not able to kill Ard because he had to go the Y dorm (R. 82:1568). Busby could not remember why they did not try to kill Ard on Sunday (R. 82:1568). Both Busby and Globe choked Ard to death (R. 82:1568). Busby hit Ard in the face three or four times (R. 82:1570). In reference to killing Ard, Busby said "This son of a bitch right here was a pleasure." (R. 82:1578).

The State also presented two letters written by Busby; one to his stepfather Jim Waite (R. 82:1587-1591), and one to Globe (R. 82:1583-1587).

Further, the State presented to the jury Busby's statement to police from the investigation into two other murders that he had previously committed (R. 82:1616-1634).

Busby presented testimony from a number of witnesses, including his adoptive father Reverend Walter L. Busby, an employee of the Department of Children and Families (hereinafter "DCF"), former inmate Charles Konetski, and a licensed clinical social worker.

Reverend Busby testified that Appellant came to live with him when he was around age eleven (R. 83:1660-1661), and that Busby was deemed an emotionally handicapped child at school (R. 83:1661-1662). Reverend Busby had read that Appellant had been sexually abused when he was three or four years old (R. 83:1694). Appellant began receiving counseling with Nan Jobson while living in the former foster home (R. 83:1663, 1731), continued with therapy for some time (R. 83:1731), and was treated with medication for depression (R. 83:1670). Reverend Busby adopted Appellant (R. 83:1666), but Busby's mom "popped up" (R. 83:1672-1673) and Busby had a love-hate relationship with her (R. 83:1673). Busby dropped out of school in twelfth grade (R. 83:1676). Reverend Busby further testified to how often he visited Busby and spoke with him upon his incarceration (R. 83:1677-1678), that he was aware that Busby was smaller and younger than most at CCI (R. 83:1679), that Busby

was being sexually harassed (R. 83:1681), and that he missed his visit with Busby right before Ard was murdered (R. 83:1683). Reverend Busby opined that Busby's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired on July 3, 2000 (R. 83:1685-1686). Reverend Busby also believed that Globe was using Busby (R. 83:1689). Busby had a good work record when he wanted to work (R. 83:1695).

Susan Bell, an adoption specialist with DCF, identified various records maintained by DCF concerning Busby's foster care placement, treatment, and adoption (R. 83:1701-1714).

Charles Konetski, a former inmate, testified at the penalty-phase consistent with his guilt-phase testimony (R. 83:1714-1722).

Nan Jobson, a licensed clinical social worker, testified regarding her treatment of Busby beginning when he was ten years of age (R. 83:1728), and that Busby had been seen by many therapists before her (R. 83:1729). Jobson testified as to the effect that the sexual abuse by his father, sister, and sister's boyfriend had upon him, as well as having been verbally and physically abused by his mother and repeatedly abandoned by her, and having been abused by his foster parents (R. 83:1735-1736). Jobson testified that Busby attempted suicide at age six (R. 83:1745), and that Busby suffered from post-traumatic stress disorder and that he would respond in life as the

result of his past to various "triggers." (R. 83:1754-1757). Jobson last treated Busby when he was age seventeen (R. 83:1767). However, in a letter to Busby dated April, 1998, she referred to him as "Dearest Andy" (R. 83:1774-1775). Jobson also admitted that she winked at Busby when she testified during the guilty-phase of trial (R. 83:1775). During cross-examination, Jobson admitted that Busby wished his foster mother's unborn child was dead (R. 83:1771-1772), and that Busby's biological mother had given him up because she was afraid he would kill her (R. 83:1773).

The jury was instructed on the following aggravating circumstances:

> First, that the crime for which Andrew Busby is to be sentenced was committed while he was under sentence of imprisonment.
>
> Secondly, that the defendant has been previously convicted of another capital offense or for felony involving the use of violence to some person.
>
> . . . . The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.
>
> * * * * *
>
> . . . . The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> * * * * *

(R. 84:1855-1857). After the close of the evidence, instructions, and arguments by counsel, on March 22, 2002, the jury recommended the death penalty by a vote of 11-

1 (R. 84:1864).

A Spencer[3] hearing was held on April 2, 2002, wherein no additional evidence was presented.

On May 16, 2002, the trial court ultimately followed the jury's recommendation and sentenced Appellant to death (R. 86:1915).

The trial court considered the following factors as possible mitigating evidence and the weight to be given to each: "First, the crime for which you, Mr. Busby, are to be sentenced was committed while you were under the influence of extreme or emotional disturbance according to the defense. . . . The Court considered this mitigating circumstance and finds that it does not exist." (R. 86:1904-1905); "You agreed that you were an accomplice in the capital felony committed by another person, and that your participation was relatively minor. . . . [T]he Court finds this mitigator does not exist." (R. 86:1906); "You next asserted that you acted under extreme duress or under the substantial domination of another person. . . . [T]he Court in fact finds that that mitigator does not exist." (R. 86:1906); "Next was raised your capacity to appreciate the criminality of your conduct or to conform your conduct to the requirements of the law, and that you were substantially impaired to conform your

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

conduct. . . . The Court finds that this mitigator does not exist." (R. 86:1907). The trial court also considered the following aspects of Busby's character, record, or background:

> And I considered your age at the time of the crime. The fact that you were loved by your family. The fact that you had emotional handicaps. That you were a witness to domestic violence. That you had a deprived childhood, a poor upbringing. That you had cooperated with law enforcement. That you were first incarcerated at a young age. That you had witnessed sexual abuse or had been sexually abused by your biological father. That there had been physical abuse by your biological father. That there had been abandonment by your family. That your mother had turned tricks by luring truckers on the CB radio in front of you. That you were placed in a position as prey to sexual predators in prison by your allegation. That foster parents once abandoned you. That you attempted suicide at the age of six, and was admitted into a hospital as a result of that act. I considered that you witnessed sexual abuse of your sisters by your father, that you witnessed sister on sister sexual abuse. I considered sexual abuse by your sister's boyfriend. That you suffered sexual abuse from your sister. Witnessed physical abuse by your father upon your mother. That you witnessed physical abuse by your father upon your mother. That you witnessed physical abuse by your father on your sisters. That you witnessed physical abuse by your mother on your sisters. The testimony of your mother's continued denial of abuse and attempts to blame you. That your mother's constant criticism and blame destroying your self esteem. Your claim of suffered institutional neglect while in the care of HRS. Your claim of suffered sexual harassment as a result of institutional neglect in the Department of Corrections while in prison. I considered the trauma of deprivation of love and nurturing, particularly in the formative years. I considered your artistic ability, your learning disability, chaotic and violent childhood. The claims of sexual harassment in prison. Impaired mental capacity. Considered your good work habits, your loyal, devoted and kindness to your adopted father, who has been with you throughout these proceedings. I considered that you were small in stature, and your

claim that this led to inmates attempting to prey upon you sexually. I considered the heartache and sadness of your life, the voluntary confession in this case. The claim that the co-defendant caused the death of the victim. Your claim, or the Defense claim, that you are a follower. Your claim of poor judgment and impulsive behavior. Your claim of low self esteem. Your feelings of being persecuted, exploited, and resulting in mistrust. I considered your prior suffering creating stress that led to offense that was committed for emotional reasons. Your claim that you didn't have any true childhood friends. Your claim that you were dominated by the co-defendant. I further considered your claim that you were unable to formulate a clear victim/offender identity, your claim that the abuse in your life was not reported early to authorities. The claim that your mother didn't believe your claim of abuse. And consideration of your poor access to information about what happened to you throughout your development. Considered the fact that you ultimately confessed in your first homicide case. Considered your claim of remorse about the murders, the two murders in the first homicide case. Considered your cooperation with law enforcement in your first homicide case. Considered your cooperation in the investigation of the homicide of Elton Ard. And considered your feelings of being persecuted and exploited resulting in mistrust of others.

* * * * *

The Court finds that many of the mitigating factors set forth by the defense were repetition and were the same argument presented in different lights, but the Court considers that the mitigators are each separate and distinct and were treated as such, and considered as such by the Court.

All such mitigators taken together should be afforded, and the Court only affords moderate weight, and finds that they do not outweigh any aggravating factor.

The Court considered any other circumstances of the offense. Certain circumstances that were considered as they related to the existence or non-existence of all these mitigators that I have discussed,

and the Court finds that there are no additional circumstances of the offense which would serve as mitigators.

The Court further finds that assuming that each and every one of the above discussed mitigating circumstances are found to exist and that none of them is given more than slight weight.

(R. 86:1908-1911).

As was submitted to the jury, the trial court found the following statutory aggravating circumstances:

As to the existence of aggravating circumstances the first aggravator the Court considered was that the crime for which you, Mr. Busby, are to be sentenced, was committed while you were under a previous conviction for a felony, and while you were under a sentence of imprisonment.

You've been previously convicted of two counts of first degree murder, and you're now serving two consecutive life sentences. This aggravating circumstance was established by the evidence beyond a reasonable doubt.

The second aggravator the Court considered, Mr. Busby, that you were previously convicted of a felony involving the use or threat of violence to some person. Having been previously convicted of two counts of first degree murder, this aggravating circumstance was established beyond a reasonable doubt.

Thirdly, the crime for which you, Mr. Busby, are to be sentenced, that aggravator was that it was especially heinous, atrocious and cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious and cruel is one accompanied by additional acts that

show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

The victim pleaded with you to stop, offering you $45.00.

You intentionally tried to inflict pain on Mr. Ard.

Ard suffered. You and Globe gloated about how Ard had to be choked a second time because he was still making gurgling noises, struggling for that last breath of life. You and Globe took the second garrote, tied it around Ard's neck, in your words, real, real, real tight. And then the two of you tied another knot and walked away.

The victim did not die immediately.

The testimony indicated you enjoyed killing the victim. You laughed about it being a deadly game of twister.

You were at times indicated that you were sorry for the first two murders, "those first two people, those were all mistakes, but this son of a --- (Ard) was a pleasure."

From the medical examiner's testimony, and the photographic evidence of the scratch marks on the neck, the victim attempted to release the strictures around his neck in an effort to breath, however he was unsuccessful in his attempt and died due to strangulation.

By your admission, the victim struggled in an attempt to save himself.

Your taped statements indicated that you enjoyed the victim's suffering in that you laughed while describing the attack.

The activity to which you admitted, either on tape or in written statements are as follows:

Extremely wicked, shockingly evil, outrageously wicked and vile.

The activity to which you admitted was designed to inflict a high degree of pain, with utter indifference to the suffering of the victim.

The killing of inmate Elton Ard was accompanied by acts that show the crime was conscienceless and pitiless and was unnecessarily torturous. And the Court finds that that aggravating circumstance was proved beyond a reasonable doubt.

The next and last aggravator the Court considered was that the crime for which you're to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

Cold means that the murder was a product of calm and cool reflection. Calculated means having a careful plan or a prearranged design to commit murder. A killing is premeditated if it occurs after you consciously decide to kill. However, in order for this aggravating circumstance to apply in this case a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

By your written and taped statements you had been contemplating the murder by ligature strangulation of an inmate or a correctional officer for months before Mr. Ard's death.

The evidence indicated you thought long and hard about it.

You got involved with punks, scoping out someone that would be loyal to you and help you kill someone.

You made a list of people that you wanted to kill, and Mr. Ard was on that list.

By your written and taped statements you decided to kill inmate Elton Ard more than 24 hours before the actual killing.

By your written and taped statements you told Globe to prefabricate garrotes which you intended to strangle inmate Elton Ard

with.

By your written and taped statements you then attempted the strangulation of Elton Ard on at least three occasions before being able to carry it out as you had pre-planned.

By your written and tape recorded statements you and Globe strangled the victim for an extended period of time.

By your written and tape recorded statements, after a period of strangulation you both released the victim, then checked his vital signs to make sure the victim was dead.

By your written and tape recorded statements, after believing that you possibly detected vital signs you then applied the second garrote to the victim and sat back to smoke a cigarette and watch inmate Ard die.

You described how Ard must have struggled a good ten, fifteen minutes before he died.

The killing of Inmate Elton Ard was cold as defined by statute and court decisions.

The killing of Inmate Elton Ard was calculated as defined by statute and court decisions.

The killing of Inmate Elton Ard was premeditated as defined by statutes and court decision.

As to the issue of a pretense of moral or legal justification, which is any claim of justification or excuse, though insufficient to reduce the degree of murder, nevertheless, results in cold, calculated or premeditated nature of the murder. As justification or excuse for the killing of Elton Ard, you, by written and taped statements have offered the following.

That you were sexually harassed, and as a result of this sexual

harassment Elton Ard deserved to die.

> The Court finds this does not constitute a pretense of moral or legal justification for murder.
>
> The murder was committed as a political statement to highlight the unfair treatment of prisoners in the Florida Department of Corrections.
>
> The Court finds this does not constitute a pretense of moral or legal justification for the killing.
>
> You asserted that the murder was committed in retaliation for verbal insults Inmate Ard made to you.
>
> This does not constitute a pretense of moral or legal justification for murder.
>
> The Court finds beyond all reasonable doubt that the killing of Inmate Elton Ard was cold, calculated and premeditated, without any moral or legal justification.

(R. 86:1897-1903). Each of the aggravators was accorded great weight (R. 86:1912-1914).

The trial court found that each statutory aggravating circumstance, standing alone, was sufficient to outweigh any and all mitigating evidence (R. 86:1912-1913).

The trial court further stated that it agreed "with the eleven to one recommendation of the Jury, and finds that the facts suggests that a sentence of death are so clear and convincing that virtually no reasonable person could differ." (R. 86:1914). Busby was thereupon sentenced to death (R. 86:1914-1915).

Direct Appeal

Busby filed his notice of appeal on June 17, 2002, and now raises the following thirteen issues on direct appeal:

(1) "The court erred in refusing to grant Busby's cause challenges to prospective juror Kim Lapan, a former guard of death row prisoners and one who had a bias against them, which forced him to use a peremptory challenge to keep him off his jury, a violation of his Fifth, Sixth, and Fourteenth Amendment rights." Initial Brief Of Appellant (hereinafter "App.Br."), at 19;

(2) "The court erred in excluding the testimony of Martha Jobson, a social worker, who would have testified that Busby suffered from post-traumatic stress disorder, where such evidence would have supported and justified a defense of self-defense, a violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." App.Br. at 28;

(3) "The court erred in allowing State Attorney Investigator Lisa Long to testify that she saw Busby make some hand gestures during the testimony of Charles Globe, and it also erred in allowing the State to read, as substantive evidence of guilt, the testimony of Andrew Busby when he took the stand after Long only to explain the gestures, a violation of his Fifth, Sixth, and Fourteenth Amendment rights." App.Br. at 43;

(4) "The court erred in refusing to give Busby his due process right to present his defense in the way he chose when it refused to let his co-defendant, Charles Globe, testify before the jury live and in person, but insisted he do so only by videotape, a violation of Busby's Fifth, Sixth, and Fourteenth Amendment rights." App.Br. at 50;

(5) "The court erred in denying Busby's motion to suppress statements he made to law enforcement officers after he told them he did not want to talk with them, a violation of his Fifth and Fourteenth Amendment rights under the United States Constitution, and his rights under Article I, Section IX of the Florida Constitution." App.Br. at 59;

(6) "The court erred in admitting, as Williams[ ] Rule evidence that Busby wanted to kill a Roberto Rosa and Alphonso Palmer, a violation of the defendant's constitutionally guaranteed right to a fair trial." App.Br. at 66 (internal footnote with citation omitted);

(7) "The court erred in admitting a transcript of Busby's July 7, 2000 confession rather than the original audiotape of that statement, a violation of the defendant's constitutional rights to a fair trial." App.Br. at 73;

(8) "The court erred in finding Busby murdered Elton Ard in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, a violation of the defendant's Eighth Amendment rights." App.Br. at 79;

(9) "The court erred in refusing to admit several exhibits Busby offered during the penalty phase portion of his trial, which would have helped the jury understand why he had been diagnosed as suffering from post traumatic stress disorder, a violation of his Eighth and Fourteenth Amendment rights." App.Br. at 83;

(10) "The court erred in admitting a letter Busby ostensibly wrote to Charles Globe because its prejudicial value substantially outweighed its limited relevance, a violation of the defendant's due process right to a fair trial." App.Br. at 86;

(11) "The court erred in sentencing Busby to death because Section 921.141 Florida Statutes unconstitutionally allowed the trial court to sentence him to do so without, among other things, a unanimous death recommendation from the jury." App.Br. at 89;

(12) "The court erred in allowing the State to present evidence beyond the fact that Busby had two prior first degree murder convictions in support of the prior violent felony aggravating factor, a violation of the Fifth, Sixth, and Fourteenth Amendments." App.Br. at 93;

(13) "The trial court erred in repeatedly instructing the jury that their recommendation was just that, a recommendation, a violation of Busby's Sixth, Eighth, and Fourteenth Amendment rights." App.Br. at 95.

In addition, this Court has an independent duty to review the sufficiency of the

evidence of the first degree murder conviction and the proportionality of the sentence. See Bell v. State, 841 So.2d 329, 336-337 (Fla. 2002) (citing cases); Knight v. State, 746 So.2d 423, 437 (Fla. 1998) (citing constitutional provision and cases), cert. denied, 528 U.S. 990 (1999). The State addresses these matters under Issue XIV in its brief.

SUMMARY OF THE ARGUMENT

I.

The trial court did not abuse its discretion in denying Appellant's motion to strike venireman Lapan for cause. And because venireman Lapan did not serve on the jury, and Appellant failed to make any showing that the jury was biased, Busby failed to demonstrate that he was denied his right to an impartial jury.

II.

The trial court did not abuse its discretion in rejecting Appellant's proffer of mental health expert testimony in furtherance of his claim of self-defense. Busby failed to establish that the evidence was relevant, as there was no showing that he murdered Ard in response to any conduct of the victim that put Appellant in imminent fear for his physical safety.

III.

The trial court did not err in admitting the testimony of an investigator from the State Attorney's Office, who testified that she observed Appellant make hand motions to his co-defendant when the co-defendant testified as to Busby's lack of involvement in the murder. The evidence was properly adduced in rebuttal to Globe's testimony

as impeachment evidence. In addition, any objection was abandoned as to the admissibility of the investigator's testimony, as no argument is presented on appeal. Busby's testimony was also properly admitted, as he did not have a constitutional right to make statements to his co-defendant while he was testifying, and thus his decision to testify in furtherance of his argument that Investigator Long's testimony should be excluded did not involve the invocation of one constitutional right at the expense of the loss of another. Finally, even if admission of the evidence was error, it was harmless beyond a reasonable doubt.

IV.

Appellant should not be heard to complain as to the manner in which his co-defendant's testimony was admitted, in that the defense expressly requested that Globe testify via videotape rather than live before the jury.

V.

Appellant's request to remain silent did not create a per se prohibition precluding further questioning by the authorities. The fact that approximately seven hours elapsed before Appellant was again asked if he wished to make a statement established that his invocation of his right to remain silent was scrupulously honored

and the July 3, 2000 statement was properly admitted. Appellant's statement given on July 7, 2002 was also properly admitted. Because the earlier statement was not illegally obtained, admission of the latter, in this case as rebuttal evidence, was not unconstitutional. Further, Appellant was properly advised of his Miranda rights and his waiver was knowing, intelligent, and voluntary. Finally, even if admission of either statement constituted error, the verdict could not have been affected by the error and thus any such error was harmless beyond a reasonable doubt.

VI.

The admission of evidence, from Appellant's July 3, 2000 statement, that he and Globe had targeted and attempted to lure other inmates to Busby's cell to kill them in the manner in which Ard was murdered, was properly admitted as Williams rule evidence. In addition, the evidence was inextricably intertwined with the facts of the crime charged. Finally, even if deemed error, admission of the evidence was harmless.

VII.

The trial court properly admitted into evidence during the penalty-phase of trial the transcript of Appellant's July 7, 2000 statement under § 921.141(1), Fla. Stat., and as secondary evidence, where the law enforcement officer that interviewed Appellant

testified that the transcript fairly and accurately depicted his recollection of that interview.

VIII.

The trial court did not erroneously find the cold, calculated, and premeditated aggravating circumstance. The evidence supported the elements of the aggravator beyond a reasonable doubt. Busby's contention that the murder was committed under the pretense of moral or legal justification is procedurally barred as now raised on appeal, as Busby argued below on the issue that he killed to send a message but now contends that he committed the murder in self-defense. And even if properly before the Court, the record clearly refutes Busby's claim beyond a reasonable doubt.

IX.

The trial court did not abuse its discretion in excluding during the penalty-phase hearsay evidence proffered by the defense that the State did not have a fair opportunity to rebut. And even if erroneous, Appellant was not prejudiced because the evidence, including two videotapes of Busby role-playing and a letter about his relationship with his mother, was cumulative to evidence that was presented by the defense in mitigation.

X.

Pursuant to § 921.141(1), the trial court properly admitted into evidence during the penalty-phase a letter identified as having been written by Appellant to his co-defendant. The letter was probative of the extent of Busby's involvement in the commission of the murder. In addition, Busby defaulted upon his claim that the prejudicial effect of portions of the letter outweighed its probative value, having failed to request that the trial court redact those portions. Finally, even if the letter should not have been admitted, any such error was harmless beyond a reasonable doubt.

XI.

Appellant is not entitled to relief upon his claim that Ring v. Arizona, 536 U.S. 584 (2002) requires that the jury recommendation of death be unanimous. This Court has rejected such claims post-Ring. In addition, two of the aggravating circumstances were prior violent felony convictions, which were the result of unanimous jury verdicts and fall outside of Ring.

XII.

In Cox v. State, 819 So.2d 705 (Fla. 2002), cert. denied, 123 S.Ct. 889 (2003), this Court upheld the admission of facts underlying the prior violent felony convictions

of which the State relied as statutory aggravating circumstances. In asking the Court to reconsider Cox, Busby contends that the probative value of the evidence was outweighed by its prejudicial effect. The evidence, however, was Busby's own confession to the murders, and was properly admitted under § 921.141(1).

XIII.

The Florida Standard Jury Instructions do not contravene Caldwell v. Mississippi, 472 U.S. 320 (1985). The instructions properly informed the jury of its role under Florida law. In addition, at no time was the jury's sense of responsibility diminished in respect to its role in respect to its consideration of the aggravating circumstances.

XIV.

The evidence overwhelmingly supports Busby's conviction upon one count of first degree premeditated murder, where Busby had targeted a number of inmates and corrections officers and ultimately decided to kill the actual victim in this case, directed his co-defendant to make a ligature in order to strangle their victim, and sought to kill the victim for three days preceding the murder. In addition, the sentence of death imposed in this case is proportionate to others approved by this Court. The record

supports the finding of the four aggravating factors submitted and the trial court appropriately considered and weighed the mitigating factors presented.

ARGUMENTS

I.

APPELLANT'S RIGHT TO AN IMPARTIAL JURY WAS NOT VIOLATED UPON THE TRIAL COURT'S REJECTION OF BUSBY'S MOTION TO STRIKE FOR CAUSE VENIREMAN KIM LAPAN AND DENIAL OF APPELLANT'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES, WHERE APPELLANT FAILED TO MAKE ANY SHOWING THAT THE VENIREMEN THAT HE WOULD OTHERWISE HAVE REMOVED WERE UNQUALIFIED OR THAT THE JURY THAT DID SIT WAS NOT IMPARTIAL.

Busby contends under Issue I that the trial court erroneously refused to strike for cause venireman Kim Lapan, which necessitated that Busby exercise all of his peremptory challenges. App.Br. at 19. At trial Busby stated that he would have removed veniremen Winston and Liebel had the trial court granted him extra peremptory challenges (R. 75:744-745). Because Appellant fails to make any showing, however, that the venirepersons that did serve on the jury were biased or otherwise unqualified, he is not entitled to relief.

First, while conceding that "this Court reviews these types of issues for an abuse of discretion," citing Pentecost v. State, 545 So.2d 861 (Fla. 1989), App.Br. at 19, Appellant asserts that his "persistence in satisfying every demand this Court has required to preserve his objection to Lapan should prompt it to give much closer scrutiny of what the trial court did than it might do for other alleged trial errors."

App.Br. at 19-20. Busby cites no authority for the application of a different standard of review based upon his compliance with the prerequisite for preservation of error as would be expected of any defendant seeking to litigate on appeal the propriety of the trial court's ruling on a motion to strike for cause, and there is no reason for this Court to deviate from the abuse of discretion standard.

Without more, the governing standard is whether the trial court abused its discretion in denying Busby's strike for cause to venireman Lapan.[4] See, e.g., Reaves v. State, 639 So.2d 1, 5 (Fla.), cert. denied, 513 U.S. 990 (1994); Valdes v. State, 626 So.2d 1316, 1321 (Fla. 1993), cert. denied, 512 U.S. 1227 (1994). Here, however, Busby removed venireman Lapan with a peremptory challenge. In Ross v. Oklahoma, 487 U.S. 81 (1988), the United States Supreme Court unequivocally "reject[ed] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." Id. at 88. The rationale underlying the Supreme Court's decision is that peremptory challenges are a means of obtaining an

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[4]The record precludes such a finding in this case, as venireman Lapan, although a former prison guard, was qualified to serve on the jury. He unequivocally stated that he would follow the court's instructions, specifically agreeing that he could impose a life sentence if the aggravating circumstances were not sufficient or if the mitigating circumstances were outweighed by the evidence in aggravation (R. 72:381-382, 384). And notwithstanding venireman Lapan's strong feelings about the death penalty, he was nonetheless qualified to serve because he indicated that he could abide by the trial court's instructions. Johnson v. State, 660 So.2d 637, 644 (Fla. 1995).

impartial jury; the peremptory challenges themselves are not of constitutional dimension. Id. Similarly, Ross rejected the argument that a deprivation of due process results wherein a defendant exercises a peremptory challenge to remove a venireperson he otherwise believes should have been struck for cause. Id. at 89; see also Chandler v. Moore, 240 F.3d 907, 917 (11th Cir.), cert. denied, 534 U.S. 1057 (2001); Heath v. Jones, 941 F.2d 1126, 1132-1133 (11th Cir. 1991), cert. denied, 502 U.S. 1077 (1992). Thus because peremptory challenges are not required by the Constitution and are a creature of state statutory law, "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." Ross, 487 U.S. at 89. To hold that petitioner may establish constitutional error absent a demonstration that the empaneled jury was not impartial based upon the use of a peremptory challenge to remove a venireperson who he contends should have been removed for cause would constitute creation of a new rule of constitutional law. See United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000) ("We hold . . . that if the defendant elects to cure such an error by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right.").

"Under federal law [then], the defendant must show that a biased juror was seated." Trotter v. State, 576 So.2d 691, 692-693 (Fla. 1990); see also Martinez-

Salazar, 528 U.S. at 316 ("Nor did the District Court's ruling result in the seating of any juror who should have been dismissed for cause. . . . [T]hat circumstance would require reversal.") (internal citation omitted). "Under Florida law, 'to show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted.'" Id. at 693 (quoting Pentecost, 545 So.2d at 863 n.1). Busby makes no attempt to demonstrate that the jury that did sit at his trial was not impartial or that the veniremen that he would have struck with additional peremptory challenges were unqualified.

"The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." Kearse v. State, 770 So.2d 1119, 1127 (Fla. 2000) (citing Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984)), cert. denied, 532 U.S. 945 (2001). In Bryant v. State, 601 So.2d 529 (Fla. 1992), this Court set forth the applicable standard for determining whether a venireman should be struck for cause:

> The standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment was restated by the United States Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985), in which that Court stated:
>
> That standard is whether the juror's views would "prevent

> or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with Witherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."
>
> *Id*. at 424 (footnote omitted) (quoting *Adams v. Texas*, 448 U.S. 38, 65 L. Ed. 2d 581, 100 S. Ct. 2521 (1980)).

Id. at 532.

Review of the record pertaining to the veniremen that Appellant would have exercised peremptory challenges had he been accorded additional challenges by the trial court refutes any notion that the veniremen were not qualified.

Regarding venireman Winston, while his son worked at Union Correctional Institution (R. 73:479), he said he could vote for life if the aggravating circumstances were insufficient (R. 73:475) or if the mitigating circumstances outweighed the aggravators (R. 73:475-476). In other words, venireman Winston averred that he could follow the court's instructions. Busby failed to present any evidence of bias. Busby did not move to strike venireman Winston for cause (R. 73:480). The fact that Winston's son worked for a correctional institution did not give rise to a per se disqualification to sit on the jury. Cf. State v. Williams, 465 So.2d 1229, 1230 (Fla. 1985) (citing Lusk, 446 So.2d at 1041 and Morgan v. State, 415 So.2d 6 (Fla), cert. denied, 459 U.S. 1055 (1982) for the proposition "that state prison employees are not

automatically disqualified from jury service" and holding that the trial judge did not abuse its discretion in refusing to excuse for cause the correctional officers). Regarding venireman Liebel, while her son worked at Columbia Correctional Institution, she similarly stated that she would only consider aggravating evidence that the court instructed upon (R. 72:393), and that she could vote for life if the aggravating circumstances were insufficient or if the mitigation outweighed the evidence in aggravation (R. 72:394). As was the case with venireman Winston, venireman Liebel could follow the court's instructions. Busby failed to present any evidence of bias, and did not move to strike Ms. Liebel for cause (R. 72:397).

Because veniremen Liebel and Winston were qualified to sit as jurors and Busby failed to make any showing otherwise, Issue I should be denied. Penn v. State, 574 So.2d 1079, 1081 (Fla. 1991); Rollins v. State, 148 So.2d 274, 276 (Fla. 1963).

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING BUSBY'S POST-TRAUMATIC STRESS DISORDER EXPERT TESTIMONY DURING THE GUILT-PHASE OF TRIAL IN FURTHERANCE OF HIS CLAIM OF SELF-DEFENSE, AS APPELLANT FAILED TO ESTABLISH THAT THE VICTIM ENGAGED IN ANY CONDUCT THAT WOULD HAVE REASONABLY PLACED APPELLANT IN IMMINENT DANGER.

Appellant contends that the trial court erroneously excluded the testimony of Martha "Nan" Jobson regarding Busby suffering from Post-Traumatic Stress Disorder in furtherance of his defense of self-defense. App.Br. at 28-30.

Busby goes into detail regarding Post-Traumatic Stress Disorder and cites various publications not presented below, see App.Br. at 33-39, and contends that "evidence that Busby suffered from PTSD was relevant to explain why he believed he was in imminent danger of being raped, tortured, or killed." App.Br. at 36. Nonetheless, he neglects to acknowledge or address the fact that he failed to cite, let alone establish, any overt act by the victim, Elton Ard, before the trial court that would give rise to an imminent threat of harm by Ard to Busby -- i.e., that the evidence was relevant to a claim of self-defense. While evidence of Post-Traumatic Stress Disorder is generally admissible as state-of-mind evidence to support a claim of self-defense, State v. Mizell, 773 So.2d 618, 620-621 (Fla. 2000), a criminal defendant must still establish that the evidence is relevant to the claim of self-defense.

"Under Florida statutory and common law, a person may use deadly force in self-defense if he or she reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm." Weiand v. State, 732 So.2d 1044, 1049 (Fla. 1999). In discussing the admissibility of evidence in support of a claim of self-defense, the First District Court of Appeals stated that

> [w]here there is even the slightest evidence of *an overt act by the victim* which may be reasonably regarded as placing the accused apparently in *imminent* danger of losing his life or sustaining great bodily harm, all doubts as to the admissibility of evidence bearing on his theory of self-defense must be resolved in favor of the accused.

Warren v. State, 577 So.2d 682, 684 (Fla. 1st DCA 1991) (emphasis added). In determining whether the proffered evidence is relevant, an objective standard "must be applied to *the facts and circumstances as they appeared at the time of the altercation to the one acting in self defense.*" Toledo v. State, 452 So.2d 661, 662-663 (Fla. 3rd DCA 1984) (internal citation and quotation marks omitted; emphasis in original).

Here, Busby made no such showing of any conduct on the part of the victim that would reasonably have placed Appellant in imminent danger. Instead, he relied upon generalizations about how someone with his abusive background would, in "a prison setting and been the subject of constant sexual harassment and possibly hearing the threat of being raped or being forced to submit to someone sexually" (R. 78:1105-

1106), have been "triggered" and "interpret that possibility as an imminent threat." (R. 78:1106). Indeed, Busby's "Memorandum In Support Of Self Defense Evidence" made no mention of any threat by Ard, but stated that Appellant "was sexually harassed on a regular ongoing basis [and] [a]s a result of the sexual harassment, Mr. Busby was in fear of another inmate attempting to rape him." (R. 16:3099). Contrary to providing a basis for the defense, Busby's claim is refuted by the testimony of his expert that the victim's act in refusing to have oral sex with Appellant, immediately preceding the murder, would not have triggered the response that he was in imminent danger (R. 78:1109). In addition, as intricately examined in the State's "Reply Brief To 'Self Defense' Memorandum" (R. 17:3219-3222), the record is replete with instances refuting Busby's general allegation that he was in "imminent danger."

The trial court excluded the expert testimony as follows:

> The Court recognizing the time having passed and the -- this defendant being present with a person larger than the two other persons and the two persons present, if the testimony is believed, having no trouble overpowering the third, the Court finds the trigger testimony is not sufficient to outweigh the facts before the Court, and the Court will deny the post traumatic stress disorder, self-defense issue as presented to this point.

(R. 78:1113). Based upon the foregoing, Issue II should be denied.

III.

THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF THE INVESTIGATOR FOR THE STATE ATTORNEY'S OFFICE AND APPELLANT'S PROFFER TO EXCLUDE THAT TESTIMONY.

As discussed in Issue IV, Appellant's co-defendant testified via videotape upon the wishes of both Busby and defense counsel. See infra, at 45-50. When the videotape of Globe's testimony was made, an investigator for the State Attorney's Office, Lisa Long, observed Busby make a series of five signing motions to Globe (R. 81:1391). After Globe's testimony was recorded, a lunch recess was taken (R. 79:1199-1200). At that time, the prosecutor, who did not observe Busby's hand signaling himself, learned of it (R. 79:1219). After the recess, when Busby told the court that he wanted the tape played, the prosecutor said that it would be subject to rebuttal testimony and asked that the defendant be advised accordingly (R. 79:1210). Another issue was then addressed, and thereafter the prosecutor advised the trial court of what his investigator had observed and of his intention to "call her to the witness stand to testify to that." (R. 79:1219). The State then gave notice of Long's testimony by proffering it outside the jury's presence, the extent of which was that she observed Busby signing to Globe when Globe was testifying, that she saw five hand motions, and that she could not remember at what point in Globe's testimony that she saw the hand motions (R. 79:1221-1222). Busby then took the stand, also outside of the jury's

presence (R. 79:1222), and testified concerning his signaling Globe while he was testifying (R. 79:1223-1225). The court ruled Long's testimony admissible (R. 81:1335) and she subsequently testified before the jury (R. 81:1389-1392). After finding Busby's testimony admissible (R. 81:1340, 1392), Busby's testimony was read to the jury, as follows:

> THE CLERK: "Andrew Busby, a witness having been duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:
>
> The Court: Thank you. Please be seated.
>
> Mr. Ellis [defense counsel], Question: Tell us your name, sir.
>
> Answer: Andrew Busby.
>
> Question: Were you present when Mr. Globe testified?
>
> Answer: Yes, I was.
>
> Question: Did you at any point communicate by sign language of some type?
>
> Answer: Yes, I did.
>
> Question: In the direction of Mr. Globe?
>
> Answer: Yes, I did.
>
> Question: Would you tell his Honor, the Judge, what, if anything you said?
>
> Answer: Called him a liar.

Question: Did you say anything else to him?

Answer: No, I did not.

MR. ELLIS: No other questions.

Mr. Dekle [prosecutor], Question: What was he saying when you called him a liar?

Answer: That our roles -- about the roles in the killing.

Question: About the roles in the what?

Answer: In the killing.

Question: In other words, you were telling him that he was a liar when he said that he acted alone?

Answer: Yes."

(R. 81:1393-1394).

Appellant contends that "[a]llowing Ms. Long to testify was error, but much more significantly, the court erred in allowing the State to produce Busby's testimony, and it abused its discretion in doing so . . . ." App.Br. at 45.

Regarding the testimony of Investigator Long, the evidence was properly adduced in rebuttal to Globe's testimony as impeachment evidence. Notwithstanding, Appellant fails to present any argument in the argument portion of his brief as to why her testimony was not admissible. See App.Br. at 43-49. The claim as to Long's testimony is, therefore, abandoned. Marshall v. State, ___ So.2d ___, 2003 Fla.

LEXIS 1056 *47 (Fla. June 12, 2003); Gore v. State, ___ So.2d ___, 28 Fla. L. Weekly S334, S338 n.9 (Fla. Apr. 17, 2003).

Regarding Busby's testimony, to the extent that Appellant cites the trial court's statement that the jury was not going to hear the testimony, see App.Br. at 44, the trial court did not make that statement until after the portion of Busby's testimony that was read into the record. Thus any contention that Busby relied upon the trial court's assertion would be unfounded as occurring after his admitted testimony (compare R. 79:1223-1225 with R. 81:1393-1394).

Before the trial court, Busby opposed admission of his testimony made outside of the jury's presence on the basis that it was given in a situation no different than a hearing on a motion to suppress (R. 80:1316-1317).

In Simmons v. United States, 390 U.S. 377 (1968), the United States Supreme Court addressed the problem of whether the surrender of one constitutional right for the exercise of another imposed an impermissible penalty. Id. at 394. Here, unlike the situation in Simmons and other cases cited by Appellant, App.Br. at 45-48, Busby sought to preclude admission of testimony regarding actions that he voluntarily took in open court, but for which he had no constitutional right. Thus unlike a claim involving an alleged unreasonable search or seizure or use of a statement taken in violation of the privilege against self-incrimination, Busby's use of sign language to a

defense witness did not implicate a matter for which he had a constitutional right. For this reason, the cases relied upon by Busby are inapposite. That Busby decided to testify to attempt to have testimony concerning his in-court conduct excluded -- i.e., an evidentiary matter -- does not raise that underlying claim to constitutional dimension. Accordingly, Busby's testimony was properly admitted.

Nor is there any merit to Busby's contention that his testimony was inadmissible because he had a "Fourteenth Amendment due process right to present a defense, to object to and present evidence against the State's proof." App.Br. at 47. In addition to the fact that this claim is procedurally barred as it was not presented to the trial court, the situation is not any different than when a defendant elects to take the stand to testify in opposition to the State's evidence. Finally, the United States Supreme Court rejected an analogous argument in McGautha v. California, 402 U.S. 183 (1971), where the defendant contended that under the Fourteenth Amendment he was entitled to a bifurcated trial in order to protect his right to be heard on the issue of punishment. Id. at 210-213.

Moreover, even if the trial court erred in admitting the evidence, the error was harmless. United States v. Pena-Corea, 165 F.3d 819, 822 (11th Cir. 1999) ("We need not reach the question of whether *Simmons*' rationale extends to a situation like the one here--where the defendant was not attempting to vindicate a constitutional

right--because the evidence of [petitioner's] guilt was overwhelming. Thus, the error, if any, was harmless."). Here, evidence of Busby's active participation in the premeditated murder included his letter to his stepfather and the statements made on July 3 and July 7, 2000. See also infra, at 92-93.

Appellant has failed to establish that he is entitled to relief under Issue III and thus it should be denied accordingly.

IV.

THE TRIAL COURT DID NOT ERR IN ADMITTING CO-DEFENDANT GLOBE'S TESTIMONY VIA VIDEOTAPE, AS REQUESTED BY THE DEFENSE.

Under Issue IV, Busby contends that

> THE COURT ERRED IN REFUSING TO GIVE BUSBY HIS DUE PROCESS RIGHT TO PRESENT HIS DEFENSE *IN THE WAY HE CHOSE* WHEN IT REFUSED TO LET HIS CO-DEFENDANT, CHARLES GLOBE, TESTIFY BEFORE THE JURY LIVE AND IN PERSON, BUT INSISTED HE DO SO ONLY BY VIDEOTAPE, A VIOLATION OF BUSBY'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

App.Br. 50 (emphasis added). According to Busby, "[t]he question presented here asks to what extent can the trial court control or dictate how he presents that defense." App.Br. at 51.

Unfortunately for Appellant, the record reflects that it was the defense and Busby himself that wanted Globe's testimony presented via videotape rather than live. While Appellant properly sets forth the facts concerning the manner in which the idea to videotape Globe's testimony arose, he neglects that most crucial fact.

The facts underlying the issue are as follows:

Busby first disagreed with counsels' decision to present the testimony of co-defendant Globe. The defense made a record of that disagreement for the trial court (R. 76:833-840). The issue was later take up on the record again (R. 79:12124-1133).

At that time, based upon the belief that Globe was a "loose cannon" and "there will be absolutely no repercussions because he is awaiting a death sentence" (R. 79:1124), and that Busby did not want Globe to testify while his attorneys did as a tactical matter (R. 79:1127-1128), the prosecutor suggested that Globe's testimony be videotaped (R. 79:1129). Defense counsel objected to the State's suggestion, stating that he wanted "Mr. Globe here." (R. 79:1129-1131). The Court overruled the objection and directed that Globe's testimony be videotaped (R. 79:1131-1133). Globe then testified outside of the presence of the jury, which was videotaped (R. 79: 1135-1198). Thereafter, Busby persisted in his position that he did not want Globe to testify (R. 79:1198-1199), while counsel still wanted to present his testimony (R. 79:1199). The court then recessed for lunch, having decided to take up the issue after the recess (R. 79:1199-1200). Upon returning from the lunch recess, the following side bar conference was had:

> THE COURT: We are on the record. The Court -- I want to inform you, Mr. Busby, that the legal research of both the State, the Defense and the Court is that you have the absolute right to choose whether to have a witness called or not in the defense.
>
> MR. DOSS: Judge, I take myself out of that equation because I still maintain that it's our choice.
>
> THE COURT: Okay. The Judge is ruling that it's your choice. Okay. You can make the choice. You have experienced, competent attorneys who disagree with you and have given you their best level

advice, but I am ruling it's your choice.

MR. DOSS: Judge, I am asking for an opportunity one more time to speak with Mr. Busby about this issue.

MR. BUSBY: I was going to ask the same thing.

MR. DOSS: Because we had conferred over the break with a different understanding.

THE COURT: I understand, but knowing that is going to be the ruling of the Court, I will allow you time to make an informed decision.

MR. DOSS: Thank you, sir.

MR. BUSBY: Thank you.

(The Defendant and Counsel confer off the record.)

THE COURT: *Mr. Dekle, there is no more argument on video versus live whenever that time comes, is there?*

MR. DEKLE: *Yes, sir, there may be some.*

THE COURT: All right. It's time for it.

(A side bar conference was held with defendant present as follows:)

THE COURT: Does the Defense have an answer on my earlier ruling about the defendant having the right to make the choice? Has he made a choice?

THE DEFENDANT: Yes, sir.

THE COURT: And what is that?

THE DEFENDANT: *Play the tape.* I don't want – I really don't want to agree with his testimony at all, *but I would rather go with the tape than him doing it live.*

THE COURT: Well, it's your choice of whether we have it at all or not. What is your choice about having anything?

THE DEFENDANT: *Going with the tape.*

THE COURT: Then the State is going to argue --

MR. DEKLE: There is kind of an equivocable issue here that I would like to straightened it.

THE COURT: It will be. I will do that.

MR. DEKLE: The question I would like to have Mr. Busby asked is: *Does he understand that if he says no, the tape does not get played, nothing goes before the jury. All he has to do is say no and it don't happen.*

THE COURT: *Do you understand that, Mr. Busby?*

THE DEFENDANT: *I understand that.*

THE COURT: All right. Do you want -- now is the State arguing for live or tape?

MR. DEKLE: The State would be content with the tape.

THE COURT: That is excellent.

Now, Mr. Busby, you have said yes you want the tape played?

THE DEFENDANT: *Yes, sir.*

THE COURT: *And you know that you have the right not to*

play the tape?

THE DEFENDANT: *Yes, sir.*

THE COURT: *Do you agree with your attorneys on that issue?*

MR. BUSBY: *Yes, sir.*

THE COURT: *Your attorneys have advised you that it's best to play the tape, is that correct, than have this witness testify?*

MR. BUSBY: *Yes, sir.*

MR. DOSS: *I will confirm that, Judge.*

THE COURT: *And you agree, Mr. Ellis?*

MR. ELLIS: *Yes. And Mr. Busby has talked us into not -- to play it.* Conservatively Mr. Busby is an unpredictable personality --

MR. DOSS: Mr. Globe?

MR. ELLIS: I am sorry, Mr. Globe is an unpredictable personality.

THE COURT: *So you're listening to your Counsel and you want the tape played and you do not want the live witness Globe; is that correct?*

THE DEFENDANT: *Yes, sir.*

* * * * *

(R. 79:1206-1210) (emphasis added).

As the above colloquy establishes, it was Busby's decision to present Globe's

testimony via the videotape. His change of mind now on appeal does not provide a basis for relief. Mansfield v. State, 758 So.2d 636, 643 (Fla. 2000) ("The defense, having invited the error, is precluded from complaining of it on appeal.") (citing Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983)), cert. denied, 532 U.S. 998 (2001); Goodwin v. State, 751 So.2d 537, 544 n.8 (Fla. 1999) ("Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal."). Moreover, because Globe was Busby's witness, his reliance upon Confrontation Clause cases, in particular Harrell v. State, 709 So.2d 1364 (Fla.), cert. denied, 525 U.S. 903 (1998), App.Br. at 51-53, is misplaced. In Harrell, the State -- not the defendant -- had presented the testimony of the two victims via satellite transmission. Id. at 1367. "[T]he Confrontation Clause guarantees a criminal defendant the right *to physically confront accusers*, [although] this right is not absolute." Id. (emphasis added) (citing Maryland v. Craig, 497 U.S. 836, 849-851 (1990)).

Based upon the foregoing, Issue IV is without merit and should be denied.

V.

ADMISSION OF BUSBY'S STATEMENTS, PROVIDED ON JULY 3, 2000 AND JULY 7, 2000, DID NOT VIOLATE THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS AUTHORITIES SCRUPULOUSLY HONORED APPELLANT'S RIGHT TO REMAIN SILENT AND APPELLANT SUBSEQUENTLY WAIVED HIS MIRANDA RIGHTS.

Busby appeals from the admission of his statements made on July 3, 2000 and July 7, 2000.[5] Busby filed a motion to suppress the two statements (R. 11:2075-2078), which was denied following a suppression hearing (R. 13:2408). At trial Busby objected to the admission of the July 3rd statement (R. 78:1022-1023). The July 7th statement was not offered as substantive evidence during the guilt-phase of trial; rather, a witness present when the statement was made testified in rebuttal concerning aspects of the statement at guilt-phase (R. 81:1385-1388), and during the penalty-phase it was presented in the form of a transcript, as the audiotape was not available (R. 82:1552). Busby's challenge to the manner in which the July 7th statement came in at the penalty-phase, upon a timely objection (R. 82:1553), is presented under Issue VII. App.Br. 66-70.

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[5]While Busby's suppression motion pertained to the statements made on July 3, July 7, and July 12, 2000 (R. 11:2075-2078), on appeal he does not address the admissibility of the July 12, 2000 statement, presumably because that statement did not pertain to the murder (R. 1:59) and was not presented to the jury.

A. Admissibility of the Statements

The standard of review is as follows:

> Appellate 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.

Nelson v. State, ___ So.2d ___, 27 Fla. L. Weekly S797, S798 (Fla. Oct. 3, 2002) (quoting Connor v. State, 803 So.2d 598, 608 (Fla. 2001), cert. denied, 535 U.S. 1103 (2002)).

1. July 3, 2000 Statement

Busby contends that the law enforcement authorities failed to scrupulously honor his request to remain silent when FDLE Special Agent Ugliano told Busby he was from FDLE and asked whether Busby had requested FDLE, referring to the written message "Call FDLE" found in Busby's cell, approximately thirty seconds after the audiotape was turned off, after Busby said he did not want to talk about the murder (R. 67:65, R. 67:79). App.Br. at 63. Busby further contends that while he was advised of his constitutional rights prior to making the July 3rd statement, "he never said he wanted to waive them (62 R 12332), and in light of his invoking them earlier,

the police should have done more than to accept his silence as anything other than an acquiesence [sic] to the inevitable." App.Br. at 63.

The facts surrounding the two interviews on July 3rd are as follows:

On July 3, 2000, at 12:02 p.m., Inspector Schenck and Agent Ugliano attempted to interview Busby at CCI (R. 1:27). Busby was advised of his Miranda[6] rights and acknowledged that he understood them (R. 1:27). When asked "Would you like to ask . . . . answer a few questions, or make a statement," Busby answered "No." (R. 1:27). The interview was concluded, and at 12:04 p.m., the audiotape was turned off (R. 1:27). According to testimony adduced at the suppression hearing, however, it was established Agent Ugliano asked Busby "whether or not he had summoned the Florida Department of Law Enforcement, and then there was an exchange between" the two (R. 67:65). Inspector Schenck had no memory of what Busby's response was to the question or what was said thereafter (R. 67:66). Agent Ugliano testified at the suppression hearing that he "told Mr. Busby that I was -- I was from FDLE; that there was a sign in the cell asking for FDLE, and I was FDLE, and what did they -- what did they want." (R. 67:79). The record fails to reflect what Busby's response was and what additional exchange occurred (compare R. 67:65-66, 79-80, 87).

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

The second interview on July 3, 2000, was conducted at 7:32 p.m. (R. 1:110). Those present, in addition to Busby and Globe, included Inspector Schenck, Agent Ugliano, Agent Gode, Inspector Supervisor Dotson, and Inspector Rhoden (R. 1:110). Busby had made a telephone call to his father around 6:30 p.m., and was crying when he finished (R. 67:81). At that time Agent Ugliano was speaking with Globe, who said he would make a statement if Busby "was going to be allowed to make a statement with him." (R. 67:81). Agent Ugliano further testified that "Charles approached Andy and told him he was going to make a statement, and he wanted Andy with him; and Andy said that he was also going to make a statement, and we took them to the room where they made a joint statement." (R. 67:81-82). After being advised of their rights, both Globe and Busby verbally acknowledged that they understood their rights (R. 1:110-111; see R. 67:71-72). Although Busby did not expressly answer the question whether or not he wished to answer questions or make a statement, he did volunteer answers throughout the statement (R. 1:113, 115-144, 147-153, 155-158).

Regarding whether his right to remain silent was scrupulously honored, Busby fails to acknowledge that any statement that he might have made in response to Agent Ugliano's question after the tape recorder was turned off, a question that was prompted by the actions of Busby and his co-defendant in writing "call FDLE" at the

murder scene, was not admitted at trial. See Henry v. State, 574 So.2d 66, 70 (Fla. 1991). For that matter, the record of the suppression hearing does not even establish what Busby said to Agent Ugliano. Nor does the record establish that Agent Ugliano specifically asked Busby about the murder. Thus Agent Ugliano's isolated statement "did not delude [defendant] as to his 'true position, or . . . exert improper and undue influence over his mind.' . . . ." Peterka v. State, 640 So.2d 59, 67 (Fla. 1994) (internal citations omitted), cert. denied, 513 U.S. 1129 (1995). Accordingly, Busby's reliance upon Bowen v. State, 404 So.2d 145 (Fla. 2nd DCA 1981), is misplaced. In Bowen, the police continued to question the defendant about the burglary after he said he did not want to talk about it. Id. at 146. That did not occur here, where Agent Ugliano only asked whether Busby had sent for the FDLE.

In addition, Busby's actual statement made on July 3rd was not elicited until at least seven hours had passed from the time that he declined to speak with authorities, as the first interview occurred at 12:02 p.m. (See R. 10:2076) and the second interview did not take place until 7:32 p.m. (R. 78:1025). There is not a "per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." Michigan v. Mosley, 423 U.S. 96, 102-103 (1975); see also Kelly v. Lynaugh, 862 F.2d 1126, 1130-1131 (5th Cir. 1988) (seven to twelve-hour delays between assertions of right to

remain silent and renewed questioning with new advisement of Miranda rights deemed to have scrupulously honored right to remain silent), cert. denied, 492 U.S. 925 (1989). Accordingly, Busby's right to remain silent was scrupulously honored.

Busby also contends that the State failed to establish that he did actually waive his constitutional rights.

"[A] determination of the issues of both the voluntariness of a confession and a knowing and intelligent waiver of Miranda rights requires an examination of the totality of the circumstances." Lukehart v. State, 776 So.2d 906, 917 (Fla. 2000), cert. denied, 533 U.S. 934 (2001) (citing Jennings v. State, 718 So.2d 144, 150 (Fla. 1998), cert. denied, 527 U.S. 1042 (1999)). The State carries a heavy burden to establish, by a preponderance of the evidence, that the waiver is knowing, intelligent, and voluntary. Ramirez v. State, 739 So.2d 568, 575 (Fla. 1999).

> Whether the rights were validly waived must be ascertained from two separate inquiries:
>
> > First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been

waived.

Id.

Here, the record establishes that Busby understood his Miranda rights, and then proceeded to volunteer answers to questions posed to both Globe and Busby. "[W]aiver of *Miranda* rights need not be by affirmative response or express waiver once the warning has been given." Jordan v. State, 334 So.2d 589, 592 (Fla. 1976). As this Court has explained,

> the trial judge was quite proper in determining that the appellant had implicitly waived his *Miranda* rights. Implicit waiver can operate as effective waiver especially where adequate *Miranda* warnings are given and the suspect indicates an understanding thereof. *Jordan v. State*, 334 So.2d 589, 592 (Fla.1976). The record firmly establishes that appellant rendered his statement after having been first properly advised of his *Miranda* rights and having evidenced an understanding thereof. From such conduct we can safely infer appellant's intent to waive his *Miranda* protections.

Jones v. State, 440 So.2d 570, 574 (Fla. 1983). The fact that Busby had previously declined to talk to the authorities about the murder does not give rise to a heightened waiver requirement, and Busby fails to cite any authority for his belief that a distinct standard is required. Compare App.Br. at 63 (conclusory argument that "police should have done more . . . ."). Moreover, it is not Busby's silence that establishes the waiver but the fact that he volunteered answers and added to information provided

by his co-defendant.[7] Under these facts, the State has met its burden to establish that Busby indicated his desire to make a statement, and that his waiver was knowing, intelligent, and voluntary.

2. July 7, 2000 Statement

To the extent that Busby persists in his contention that his statement made on July 7th violated his privilege against self-incrimination, he offers no argument in support in his Initial Brief and has, accordingly, abandoned the claim. Marshall, 2003 Fla. LEXIS 1056 *47; Gore, 28 Fla. L. Weekly at S338 n.9.

And even if properly reviewable, the record clearly refutes any such claim of error. Inspector Schenck, who had interviewed Appellant during the July 3rd statement, see supra, at 53, also interviewed Appellant on July 7th (R. 1:89; R. 67:63). Agent Ugliano was also involved in both interviews (R. 1:89, 110). The July 7th statement was made at Union Correctional Institution (R. 1:89). Inspector Schenck advised Busby of his Miranda rights (R. 1:89; R. 67:63), which Appellant waived (R. 1:89; R.67:63). Busby thereupon discussed how he had planned to commit a murder and

[7]Although not raised by Appellant, statements made by co-defendant Globe are attributable to Busby as adoptive admissions, evidenced by Appellant's participation in and contribution to the joint confession. Nelson v. State, 748 So.2d 237, 242-243 (Fla. 1999), cert. denied, 528 U.S. 1123 (2000).

his actual killing of Ard (R. 1:90-108).

First, because the statement taken on July 3rd did not violate Appellant's Miranda rights, see supra, at 54-58, the July 7th statement is not inadmissible as the fruit of the poisonous tree. Johnson v. State, 660 So.2d 648, 659-660 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996). Furthermore, the record readily reflects that Busby was advised of his rights under Miranda, that he agreed to waive those rights, and that no threats or promises were made to induce his statement (R. 1:89, 109; see R. 67:63). Because Busby's subsequent statement on July 7th was given following new Miranda warnings and was knowing and voluntary, any infirmity with the July 3rd did not taint the latter statement. See State v. Polanco, 658 So.2d 1123, 1126 (Fla. 3rd DCA 1995); State v. Hostzclaw, 351 So.2d 1033, 1036 (Fla. App. 1976).

B. Harmless Error

Lastly, even if the Court were to determine that admission of the July 3rd statement during the guilt-phase, or admission of the July 7th statement at the penalty-phase was error, Appellant would, nonetheless, not be entitled to relief. "The erroneous admission of statements obtained in violation of *Miranda* rights is subject to harmless error analysis. . . . Error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not affect the verdict." Mansfield, 758 So.2d at

644 (internal citation and quotation marks omitted).

Here, Appellant was found locked in his cell with his cellmate murdered (R. 76:871), admitted to committing the murder in the letter written to his stepfather (R. 77:1003-1004), and was overheard telling co-defendant Globe that he had told some people about killing Ard (R. 77:934). Pertaining to the penalty-phase, each of the four aggravating circumstances, including that Busby had previously committed two murders, standing alone, was sufficient to outweigh any and all mitigating evidence (R. 86:1912-1913). Accordingly, there is no reasonable possibility that admission of either statement affected the verdict. Almeida v. State, 748 So.2d 922, 932 (Fla. 1999) (citing State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986)), cert. denied, 528 U.S. 1181 (2000).

For the foregoing reasons, Issue V should be denied.

VI.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT BUSBY AND HIS CO-DEFENDANT HAD TARGETED, ATTEMPTED TO LURE, AND PLANNED TO KILL TWO OTHER INMATES IN THE MANNER THAT ARD WAS MURDERED.

Busby contends that the trial court erred in admitting evidence that several weeks prior to killing Ard, he and Globe had attempted to separately lure two other inmates, Alphonso Palmer and Roberto Rosa Torado, into Busby's cell to kill each by strangling them with a garrotte. App.Br. at 67. According to appellant, such Williams[8] rule evidence was not admissible under § 90.404(2)(a), Florida Statutes (1997), "because the facts of the threats were so vague and devoid of details that they share no similarities with those connected with the murder of Ard so as to show the defendant's motive or intent." App.Br. at 67-68. In addition, Busby argues that the evidence was not relevant to the issue of premeditation because "[s]trangulations, by their very nature, and particularly in this case, must involve an evil intent or premeditation. Busby's designs were never at issue." App.Br. at 69.

Prior to trial, the prosecution filed a notice of intent to introduce evidence of collateral crimes, wrongs, or acts pursuant to Williams and § 90.404(2), Fla. Stat. (1997) (R. 4:677; R. 11:2074). After Busby filed his written objections to the evidence

[8]Williams v. State, 110 So.2d 654 (Fla. 1959).

(R. 8:1413-1416) and a hearing was held as to the admissibility of the evidence (R. 67:135-142), the trial judge overruled Busby's objection to the evidence (R. 13:2404).

Pursuant to § 90.404(2)(a),

> [s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Here, the prosecution sought to put on evidence of the other attempted murders for the follow reasons:

> And, basically, what the evidence would be introduced to prove is: No. 1, premeditation on the part of the defendant; that the premeditation began a long time before, continued for a good while; and then when the attempt to kill these two men had failed and did not look like it was going to come to fruition, then they changed their design and aim and killed Mr. Ard instead.
>
> So it goes to the issue of premeditation, and it also goes to the fact that it's almost inextricably bound up in the killing of Mr. Ard because Mr. Ard's death is a part of this general design to just kill inmates.
>
> It also goes to this: There's some indication that Mr. Globe desires to appear on behalf of Mr. Busby and to testify that Mr. Busby did not have anything to do with the crime. It was all Mr. Globe's idea, and that testimony and evidence will tend to refute that defense, and we can engage in the case law under Williams in anticipatory rebuttal.
>
> And so that the three rationale for the admission of the Williams Rule evidence that I had spoken to thus far is: No. 1, relevant to prove the issue of premeditation; No. 2, the death of Inmate Ard was inextricably bound up in the design to kill an inmate, of which the killing

> of, Rosa and Palmer were part of that design; No. 3, to rebut or refute the implication that Mr. Busby was a minor actor in this, and that it was all Mr. Globe's idea.
>
> Mr. Globe [sic], he had nothing to do with it; and 4thly, the methodology that was used shows the same modus operandi in that what they were trying to do was lure these two men into the cell where they could choke them.
>
> So for those four reasons, the Williams Rule testimony that we're proffering is admissible.

(R. 67:137-138). The Williams rule evidence in this case came from the July 3, 2000 statement that Busby made with his co-defendant.

Contrary to Busby's assertions otherwise, the evidence was relevant to Busby's premeditation as to the murder of Elton Ard, particularly his intent, preparation, plan, and knowledge thereto, which was disputed based upon Globe's testimony that Busby was not even aware that Globe intended on killing Ard (R. 79:1245). The fact that the planned attempts to murder Palmer and Torado occurred no more than two months before Ard's murder does not render that evidence any less relevant. See Conahan v. State, 844 So.2d 629, 28 Fla. L. Weekly S70, S (Fla. 2003) (citing as Williams rule evidence an assault similar to the charged murder that occurred nearly two years prior to murder).

And even if not proper Williams rule evidence, Busby's statement of recent prior attempts to lure Palmer and Torado in order to kill them in the same manner that

Ard was ultimately murdered, as part of Busby and Globe's plan to "just kill inmates," establishes that the evidence was properly admitted under § 90.402 as inextricably linked or intertwined with the crime charged. Coolen v. State, 696 So.2d 738, 742-743 (Fla. 1997). That Busby believes the evidence may have been easily excluded, App.Br. at 70, 71, is not determinative as to whether the State was entitled to present the evidence. Such evidence "is admissible under section 90.402 because 'it is a relevant and inseparable part of the act which is in issue. . . . It is necessary to admit the evidence to adequately describe the deed.'" Griffin v. State, 639 So.2d 966, 968 (Fla. 1994) (quoting Charles W. Ehrhardt, Florida Evidence § 404.17 (1993 ed.), cert denied, 514 U.S. 1005 (1995). Here, Busby and Globe set out to kill inmates to send a message "to the harassers and abusers to stop." (R. 20:3838-3839; R. 78:1050). Ard, who was on the list of potential victims, became specially targeted only after the attempts on Palmer and Torado failed (R. 78:1033-1034, 1052-1053; R. 82:1565, 1567). Contrary to Appellant's assertion, the evidence did explain and throw light upon the crime prosecuted, as it supported the State's theory as to Busby's intent and refuted defense evidence that Busby did not know that Globe was going to kill Ard. Damren v. State, 696 So.2d 709, 711 (Fla. 1997), cert. denied, 522 U.S. 1054 (1998).

Finally, even if deemed error, admission of the evidence was harmless. Here, Appellant was found locked in his cell with his cellmate murdered (R. 76:871),

admitted to committing the murder in the letter written to his stepfather (R. 77:1003-1004), and was overheard telling co-defendant Globe that he had told some people about killing Ard (R. 77:934). Pertaining to the penalty-phase, each of the four aggravating circumstances, including that Busby had previously committed two murders, standing alone, was sufficient to outweigh any and all mitigating evidence (R. 86:1912-1913). Accordingly, there is no reasonable possibility that admission of the plan to kill other inmates affected the verdict. Almeida, 748 So.2d at 932 (citing DiGuilio, 491 So.2d at 1139).

Based upon the foregoing, Issue VI should be denied.

VII.

THE TRIAL COURT PROPERLY ADMITTED THE TRANSCRIPT OF APPELLANT'S JULY 7, 2000 STATEMENT DURING THE PENALTY-PHASE, AS THE EVIDENCE MET THE REQUIREMENTS UNDER § 921.141, AND IN ANY EVENT, WAS SECONDARY EVIDENCE BECAUSE THE AUDIOTAPE WAS NOT AVAILABLE AND THE TRANSCRIPT HAD PREVIOUSLY BEEN AUTHENTICATED.

Under Issue VII, Busby contends that the trial court erred in admitting into evidence during the penalty-phase the transcript of his July 7, 2000 statement to authorities. According to Busby, the State failed to authenticate the transcript and thus without properly establishing that the transcript was a duplicate of the audiotape, "it had no relevance to the penalty proceeding, even under the 'relaxed' rules of evidence . . . ." App.Br. at 77.

The starting point in evaluating Busby's claim is § 921.141(1), Fla. Stat., which provides in pertinent part that

> [a]ny such evidence which the court deems to have probative value may be received, *regardless of its admissibility under the exclusionary rules of evidence*, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

(emphasis added). "Under section 921.141, the linchpin of admissibility is whether the defendant has a 'fair opportunity to rebut any hearsay statements.'" Rodriguez v.

State, 753 So.2d 29, 44 (Fla.), cert. denied, 531 U.S. 859 (2000). Wide latitude is permitted in admitting evidence during the penalty-phase, see Rutherford v. State, 727 So.2d 216, 221 (Fla. 1998), and "there should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or any other matter except illegally seized evidence." Hildwin v. State, 531 So.2d 124, 127-128 (Fla. 1988), cert. granted on other grounds, aff'd at, 490 U.S. 638 (1989). The trial court will only be reversed for an abuse of discretion. Perry v. State, 801 So.2d 78, 92 (Fla. 2001).

Here, Inspector Schenck, who interviewed Busby on July 7th, had compared the tape recording to the transcript *when he wrote his report* (R. 82:1551-1152). Thus Appellant's complaint that Schenck was relying upon his memory "about what was said in an interrogation that had happened a year earlier," App.Br. at 77, is a red-herring. Schenck, who was present when the statement was made, testified that the transcript fairly and accurately depicted his recollection of the conversation he had with Busby on July 7th (R. 82:1652).[9] The trial court resolved the constitutionality of

[9]While the prosecutor makes reference to "July the 3rd" (R. 82:1652), the prosecutor's prior question asking whether Inspector Schenck was able to locate the tape recording (R. 82:1652), where the recording of the July 3rd statement was not lost but had been admitted into evidence during the guilt-phase of trial and the prior statement directing Inspector Schenck's attention "to July the 7th" (R. 82:1651), (continued...)

the statement against Busby (R. 13:2408), and because the statement at issue was Busby's own statement and thus an admission, hearsay is not an issue. Thus the trial court did not abuse its discretion in admitting the transcript of the July 7, 2000 statement during the penalty-phase.

Even under the traditional evidentiary rules, the trial court properly admitted the transcript of Busby's July 7th statement.

Pursuant to § 90.952, Fla. Stat., "[e]xcept at otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." Thus § 90.952 codifies the best evidence rule. Justus v. State, 438 So.2d 358, 364 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984). Under § 90.953, Fla. Stat., however, "[a] duplicate is admissible to the same extent as an original . . . .", subject to three narrow exceptions. In this case, Appellant relies upon the exception in subsection 2, that "[a] genuine question is raised about the authenticity of the original or any other document or writing.

In Allen v. State, 492 So.2d 802 (Fla. 1st DCA 1986), the First District Court of Appeals upheld the admission of a transcript of the defendant's confession where the recording was lost by the State:

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[9](...continued)
clearly indicates that the prosecutor was referring to the July 7th statement.

> The test for authentication under the code is whether the evidence is "sufficient to support a finding that the matter in question is what its proponent claims." *§ 90.901*, Fla. Stat. (1981). Further, in determining whether the evidence is sufficient for this purpose "the trial judge must evaluate each instance on its own merits, there being no specific list of requirements for such a determination." *Justus v. State, 438 So. 2d 358, 365 (Fla. 1983).* And, unless "clearly erroneous," the trial court's determination must stand. *Id. at 365*. . . .

Id. at 803. As was the case in Allen, Inspector Schenck was present when Busby made the statement on July 7, 2000, and testified that the transcript completely and accurately reflected the incriminating statements made by Appellant, contrary to Busby's assertion that "the State never asked Schenck if he based his conclusion of the transcript's accuracy on an independent knowledge and recollection of the events." (Compare App.Br. at 77 with R. 82:1552). And the fact that Inspector Schenck did not make a "'detailed comparison' of the then existent audio tape with the transcription" is irrelevant, as § 90.901 does not require that for authentication. See Grimes v. State, 244 So.2d 130, 135 (Fla. 1971) (in case where audiotape was not lost, transcript properly published but not admitted in that it was authenticated upon the police officer's testimony that he was present when statement was made, checked the recording, and the transcript was an accurate copy of the recording).

To the extent that Busby complains that the court failed to give a cautionary instruction, see App.Br. at 75 n.23, he should not be heard to complain, having failed

to request such an instruction (R. 82:1556). Cf. McCall v. State, 463 So.2d 425, 426 (Fla. 3rd DCA 1985) ("[F]ailure to request a curative instruction precludes consideration of his argument that the prejudice was incurable.").

Finally, even if the trial court erred in admitting the July 7th statement, any such error was harmless. First, the substance of Busby's statement on July 7th was admitted during the guilt-phase through the properly admitted July 3rd statement (Compare R. 78:1025-1068 with R. 82:1556-1578). Moreover, each of the four aggravating circumstances, including that Busby had previously committed two murders, standing alone, was sufficient to outweigh any and all mitigating evidence (R. 86:1912-1913). Accordingly, there is no reasonable possibility that admission of the plan to kill other inmates affected the verdict. Almeida, 748 So.2d at 932 (citing DiGuilio, 491 So.2d at 1139).

Based upon the foregoing, Issue VII should be denied.

VIII.

THE TRIAL COURT PROPERLY FOUND THAT BUSBY COMMITTED THE MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, WHERE THE EVIDENCE REFUTED APPELLANT'S ASSERTION OF A COLORABLE CLAIM OF SELF-DEFENSE.

Busby does not challenge the trial court's determination as to the existence of the elements that the murder was cold, calculated, and premeditated[10], but instead

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[10]Nonetheless, the evidence adduced at trial establishes beyond a reasonable doubt that Busby committed Ard's murder in a cold, calculated and premeditated manner. The trial court found the following facts establishing CCP:

> By your written and taped statements you had been contemplating the murder by ligature strangulation of an inmate or a correctional officer for months before Mr. Ard's death.
>
> The evidence indicated you thought long and hard about it.
>
> You got involved with punks, scoping out someone that would be loyal to you and help you kill someone.
>
> You made a list of people that you wanted to kill, and Mr. Ard was on that list.
>
> By your written and taped statements you decided to kill inmate Elton Ard more than 24 hours before the actual killing.
>
> By your written and taped statements you told Globe to prefabricate garrotes which you intended to strangle inmate Elton Ard with.

(continued...)

contends that "[t]he court erred in finding the CCP aggravator because Busby presented competent, substantial evidence to support his claim" that he had pretense of legal justification. App.Br. at 79.

"This Court's role in considering challenges to findings on aggravating circumstances is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent

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[10](...continued)

> By your written and taped statements you then attempted the strangulation of Elton Ard on at least three occasions before being able to carry it out as you had pre-planned.
>
> By your written and tape recorded statements you and Globe strangled the victim for an extended period of time.
>
> By your written and tape recorded statements, after a period of strangulation you both released the victim, then checked his vital signs to make sure the victim was dead.
>
> By your written and tape recorded statements, after believing that you possibly detected vital signs you then applied the second garrote to the victim and sat back to smoke a cigarette and watch inmate Ard die.
>
> You described how Ard must have struggled a good ten, fifteen minutes before he died.

(R. 86:1901-1902). These findings are amply supported by the record (R. 78:1035-1046, 1048-1054). This Court has upheld the CCP aggravator upon similar circumstances. See, e.g., Cox, 819 So. 2d at 709; Williamson v. State, 511 So.2d 289, 290-291 (Fla. 1987), cert. denied, 485 U.S. 929 (1988).

substantial evidence supports its finding." Duest v. State, ___ So.2d ___, 2003 Fla. LEXIS 1069 *29 (Fla. Jun. 26, 2003) (internal citation and quotation marks omitted).

> In order to establish the CCP aggravator, the evidence must show that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.

Brown v. State, 721 So.2d 274, 278-279 (Fla. 1998), cert. denied, 526 U.S. 1102 (1999).

Contrary to Appellant's suggestion that the Court has not said much regarding the "pretense of moral or legal justification" element of CCP, a number of opinions have addressed the matter. See, e.g., Cox, 819 So.2d at 721-722; Jackson v. State, 704 So.2d 500, 505 (Fla. 1997); Walls v. State, 641 So.2d 381, 388 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995); Wuornos v. State, 644 So.2d 1000, 1008 (Fla. 1994) (internal citation omitted), cert. denied, 514 U.S. 1069 (1995); Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992), cert. denied, 510 U.S. 836 (1993); Williamson, 511 So.2d at 293. As with the other elements of the aggravator, the State must prove beyond a reasonable doubt that the defendant had no pretense of moral or legal justification. Banda v. State, 536 So.2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989). "A 'pretense' of the type required here is any colorable claim based at

least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." Wuornos, 644 So.2d at 1008 (internal citation omitted). In the case of a claim of self-defense, it has typically been based upon an allegation that "the victim had threatened violence against the defendant at some recent point in the past." Walls, 641 So.2d at 388.

Before the trial court on this issue, Busby did not contend that he killed Ard in self-defense, instead that he killed Ard to send a message "to the harassers and abusers to stop." (R. 20:3838-3839). Accordingly, the claim was not presented below and should be dismissed as procedurally barred. See Spann v. State, ___ So.2d ___, 28 Fla. L. Weekly S293, S296 (Fla. Apr.3, 2003) ("To be preserved for appeal, 'the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.'") (quoting Rodriguez v. State, 609 So.2d 493, 499 (Fla. 1992)).

In any event, Busby is not entitled to relief. The trial court rejected Busby's assertion of a pretense of moral or legal justification as follows:

> As to the issue of a pretense of moral or legal justification, which is any claim of justification or excuse, though insufficient to reduce the degree of murder, nevertheless, results in cold, calculated or premeditated nature of the murder. As justification or excuse for the killing of Elton Ard, you, by written and taped statements have offered

the following.

> That you were sexually harassed, and as a result of this sexual harassment Elton Ard deserved to die.
>
> The Court finds this does not constitute a pretense of moral or legal justification for murder.
>
> The murder was committed as a political statement to highlight the unfair treatment of prisoners in the Florida Department of Corrections.
>
> The Court finds this does not constitute a pretense of moral or legal justification for the killing.
>
> You asserted that the murder was committed in retaliation for verbal insults Inmate Ard made to you.
>
> This does not constitute a pretense of moral or legal justification for murder.

(R. 86:1903)

Here, the record simply refutes Busby's assertion of a colorable claim that Ard's murder was motivated out of self-defense. Bell v. State, 699 So.2d 674, 678 (Fla. 1997), cert. denied, 522 U.S. 1123 (1998). The evidence established beyond a reasonable doubt that while the victim may have spread rumors about Busby "being a punk" (R. 78:1028), had gotten on his nerves (R. 78:1029), and had possibly been "coming on to" Busby (R. 78:1030), Ard had not threatened Busby. Indeed, while Appellant contends that "he killed Ard as a matter of self-defense," App.Br. at 82, and states that he "presented competent, substantial evidence to support his claim,"

App.Br. at 79, he misstates the record in asserting that "Ard had attacked him some time before July 3, 2000 (78 R 1034)." App.Br. at 81. To the contrary, the July 3, 2000 statement by Busby and Globe reflects that "[a] little Spanish dude . . . . [named] "*Eddie* somebody . . . ." had been grabbing Busby's "throat a few times, tried to put him down." (R. 78:1034; R. 1:119) (emphasis added). Busby and Globe then talked about when they had decided to murder the victim, Elton Ard (R. 78:1035). Ard was ultimately killed shortly upon his return to his prison cell, after he refused to engage in oral sex with Busby (R. 78:1037, 1039).

Accordingly, Busby's reliance upon Christian v. State, 550 So.2d 450 (Fla. 1989), cert. denied, 494 U.S. 1028 (1990), App.Br. at 80-81, is misplaced. In Christian, this Court found that "this record is replete with unrebutted evidence of the victim's threats of violence to Christian and his apparent inclination to fulfill them." Id. at 452. In the case at bar, Ard did nothing that would support a colorable claim of self-defense on Busby's part. Zack v. State, 753 So.2d 9, 21 (Fla.), cert. denied, 531 U.S. 858 (2000); Jackson, 704 So.2d at 505. The facts presented are similar to those in Williamson, where this Court rejected the defendant's assertion of a pretense of moral or legal justification where "[t]here is no evidence of any threatening acts by [victim] prior to the murder; nor is there any evidence that [victim] planned to attack either Omer or Williamson [defendant's partner and defendant]." Id., 511 So.2d at

293.

Based upon the foregoing, Issue VIII is without merit and should be denied.

IX.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING, DURING THE PENALTY-PHASE OF TRIAL, APPELLANT'S PROFFERED EVIDENCE INCLUDING HEARSAY STATEMENTS THAT THE STATE DID NOT HAVE A FAIR OPPORTUNITY TO REBUT.

Busby contends that the trial court erroneously failed to admit "several pieces of evidence through Nan Jobson . . . ." proffered by the defense during the penalty-phase of trial. App.Br. at 83. At issue are three items: Defendant's Exhibit 74, "something that Andy dictated to [Jobson] about his mother and his struggles with his mother" (R. 83:1751), and Defendant's Exhibits 73-B and 73-C, two videotapes of role-playing by Busby and his father "acting out different situations as far as trauma to try to resolve the trauma that had occurred to him regarding situations with his mother, regarding situations with his father." (R. 83:1784-1787). App.Br. at 83.

Hearsay evidence may be admissible at the penalty-phase of trial provided that the opposing party has the opportunity to rebut the evidence. § 921.141(1). Here, the State did not have a fair opportunity to rebut the hearsay, as it could not confront the declarant because Busby did not testify at the penalty-phase. That the State could have cross-examined Jobson, to whom Busby sent the letter, is not the issue. See Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997) (application for political asylum not admissible as its preparer was not identified), cert. denied, 525 U.S. 839 (1998);

Rodriguez, 753 So.2d at 44 (observing that the requirement of having the opportunity to rebut out-of-court statements is not met where co-defendants did not testify); compare Zack, 753 So.2d at 23 (defendant had opportunity to cross-examine out-of-court declarant); Lawrence v. State, 691 So.2d 1068, 1073 (Fla.) (defendant had opportunity to cross-examine declarant at prior trial), cert. denied, 522 U.S. 880 (1997). In addition, self-serving statements made by the defendant are not admissible. Mendoza, 700 So.2d at 675; Griffin, 639 So.2d at 970.

In any event, Busby presented mitigation evidence concerning the physical, emotional, and sexual abuse he experienced as a child, perpetrated by family, foster parents, and others, and the effect that it had upon him (R. 83:1728-1757). In addition, evidence concerning Busby's relationship with his mother (R. 83:1672-1673), and his mental health and other records maintained by the DCF were admitted during the penalty-phase of trial (R. 83:1703-1713). Thus because the same information was before the jury, Busby fails to demonstrate any prejudice from the trial court excluding the hearsay evidence. Mendoza, 700 So.2d at 675 (failure to admit hearsay harmless beyond a reasonable doubt where evidence was cumulative); Stewart v. State, 549 So.2d 171, 174-175 (Fla. 1989) (same), cert. denied, 497 U.S. 1032 (1990).

Based upon the foregoing, Issue IX should be denied.

X.

THE TRIAL COURT PROPERLY ADMITTED, DURING THE PENALTY-PHASE OF TRIAL, APPELLANT'S LETTER WRITTEN TO HIS CO-DEFENDANT, WHERE THE LETTER WAS PROBATIVE OF THE DEGREE OF BUSBY'S ROLE IN ARD'S MURDER AS DEMONSTRATED BY THE NATURE OF BUSBY'S RELATIONSHIP WITH GLOBE.

Busby contends that the trial court erred in admitting during the penalty-phase "a letter purportedly written by Busby to Charles Globe" because it included "Busby's repeated professions of love for Globe and his explicit sexual desires for the man that had no or little relevance to what penalty Busby should receive (15 R 1583-1587)." App.Br. at 86. In conclusory fashion, Busby contends that "its overwhelming, explicit sexual content served only to inflame the jury and unfairly prejudice him in their minds." Id.

"At the outset, it must be remembered that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the defendant's character." Perry, 801 So.2d at 89. Section 921.141(1), Fla. Stat., governs Appellant's claim. That provision states in pertinent part that

> [a]ny such evidence which the court deems to have probative value may be received, *regardless of its admissibility under the exclusionary rules of evidence*, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in

> violation of the Constitution of the United States or the Constitution of the State of Florida.

(emphasis added). "Under section 921.141, the linchpin of admissibility is whether the defendant has a 'fair opportunity to rebut any hearsay statements.'" Rodriguez, 753 So.2d at 44. Wide latitude is permitted in admitting evidence during the penalty-phase, see Rutherford, 727 So.2d at 221. The trial court will only be reversed for an abuse of discretion. Perry, 801 So.2d at 92.

Here, the prosecutor offered the letter that was identified by the State's handwriting expert as having been written by Busby, on the following basis:

> Well, the relevance of the letter is this: The defense has always contended that it was Mr. Globe who was the main actor; that Mr. Busby tried to stop him and so forth, and this letter goes right to the heart of that where Mr. Busby in his letter to Mr. Globe says, where do you believe I would be right now if it wasn't for you, for your love and support? I would be on trial for another murder.
>
> And that shows that Mr. Busby was a full participant in this one and Mr. Globe, in fact, held Mr. Busby back from acts of violence in the past and goes right to the heart of the defense.

(R. 82:158-1582).

"Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989). Busby's relationship with his co-

defendant and his status as a "punk," someone who could be forced into having homosexual sex (see R. 82:1588), was inextricably intertwined with Busby's motive in committing Ard's murder (see R. 78:1027-1028, 1050; R. 80:1298-1299; R. 82:1563-1564, 1568, 1588). Compare Bowles v. State, 716 So.2d 769, 773 (Fla. 1998) (evidence and argument concerning the defendant's alleged hatred of homosexual men was not relevant to any issue and "were simply an attack on appellant's character unconnected to this murder."). Moreover, the nature of Busby's relationship with Globe was relevant to the extent of Busby's involvement in the crime -- that he was the principal agent behind the murder plot, as evidenced by his statement that but for Globe's actions, Busby would have been on trial for another murder -- and thus to his culpability for the murder.

While stating that the evidence had little or no relevance, Busby's chief complaint is that the prejudice created by the letter outweighed its probative value. App.Br. at 87-88. Busby fails to acknowledge, however, that pursuant to § 921.141(1), the appropriate inquiry is whether it was probative "*regardless* of its admissibility under the exclusionary rules of evidence." (emphasis added). Because § 90.403, providing for the exclusion of evidence on grounds of prejudice or confusion is an exclusionary rule of evidence, it has no application to the admissibility of evidence under § 921.141(1). But see Mendyk v. State, 545 So.2d 846, 849 (Fla.)

(potential confusion and unfair prejudice far outweighed any probative value in admitting titles from pornographic books and magazines seized from defendant's home; § 921.141(1) not addressed), cert. denied, 493 U.S. 984 (1989). Nonetheless, at no time did Appellant request that the trial court redact any portion of the letter that he believed to be unduly prejudicial (see R. 82: 1581-1583), and has therefore defaulted upon the claim. Compare Smith v. State, 711 So.2d 581, 582 (Fla. 2nd DCA 1998) (holding that trial court's failure to redact from defendant's video confession the inadmissible and prejudicial portions was harmless error).

Finally, even if this Court determines that the trial court erred in admitting Busby's letter to Globe, any such error was harmless. First, Appellant ignores the fact that the defense itself made the jury aware that Busby was involved in a homosexual relationship with Globe. Indeed, Globe previously testified that after he killed Ard, he and Busby engaged in consensual sex (R. 79:1250). Secondly, the prosecutor did not even mention the sexual nature of Appellant's relationship with Globe during his penalty-phase closing argument (see R. 84:1800-1817). And finally, in light of the overwhelming evidence in aggravation, there is not a reasonable probability that the jury would have recommended a sentence of life and that the trial court would have imposed same, absent admission of Busby's letter.

Based upon the foregoing, Issue X should be denied.

XI.

APPELLANT IS NOT ENTITLED TO RELIEF UNDER RING v. ARIZONA, 536 U.S. 584 (2002) OR APPRENDI v. NEW JERSEY, 530 U.S. 166 (2000).

Under Issue XI, Busby challenges Florida's death penalty scheme on the basis of Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 166 (2000). In recognizing that this Court in Mills v. Moore, 786 So.2d 532, 538 (Fla. 2001), held that Apprendi did not apply to Florida's death penalty statute, Busby raises the claim "to preserve this issue in case Harry Potter waves his wand and this Court reverses itself." App.Br. at 90.

On appeal, Busby "argues that the Sixth Amendment requires Florida juries to unanimously recommend death before the trial judge can impose that sentence." App.Br. at 90.

Contrary to Busby's apparent belief otherwise, Ring did not hold that the jury's vote must be unanimous. This Court has recognized as much. See, e.g., Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003); Cole v. State, 841 So.2d 409, 429-430 (Fla. 2003).

In any event, Busby ignores the fact that two of the aggravating circumstances were prior violent felony convictions, of which he was unanimously convicted (R. 82:1548-1549). Relief is therefore not warranted. Thibault v. State, ___ So.2d ___,

28 Fla. L. Weekly S486, S___ (Fla. Jun. 26, 2003); Duest, ___ So.2d at ___; 2003 Fla. LEXIS 1069 *39; Lugo v. State, ___ So.2d ___, 28 Fla. L. Weekly S159, S173 n.79 (Fla. Feb. 20, 2003); Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003).

Issue XI should, therefore, be denied.

XII.

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO PRESENT EVIDENCE OF THE CIRCUMSTANCES UNDERLYING BUSBY'S PRIOR CONVICTIONS FOR FIRST DEGREE MURDER IN SUPPORT OF THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE, AS SUCH EVIDENCE WAS RELEVANT TO BUSBY'S CHARACTER, CONSTITUTING A PROPER CONSIDERATION DURING THE PENALTY-PHASE OF TRIAL.

Busby challenges the admission of facts underlying his prior violent felony convictions. While admitting that this claim has been decided adversely to his position, Appellant raises it "in the hopes that someday this Court will come to its senses and realize the mistake it has made and grant the defendant relief." App.Br. at 93. Busby further argues that Cox v. State, 819 So.2d 705 (Fla. 2002) should be reconsidered as "the prejudicial impact of facts surrounding the two murders he had committed outweighed any probative value they may have had." App.Br. at 94.

In Cox, this Court upheld the admission of facts underlying the prior violent felony conviction, stating:

> We have consistently stated that "any relevant evidence as to the defendant's character or the circumstances of the crime is admissible [during capital] sentencing" proceedings. *Stano v. State, 473 So. 2d 1282, 1286 (Fla. 1985);* see also *Rhodes, 547 So.2d at 1204* ("Testimony concerning the events which resulted in the [prior] conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence."); *§ 921.141(1), Fla. Stat.* (2001) ("In the [capital sentencing] proceeding, evidence may be

> presented as to any matter that the court deems relevant to . . . the character of the defendant . . . . "). Thus, the holdings of *Old Chief, 519 U.S. 172* and *Brown, 719 So.2d 882* are not properly analogized to this capital sentencing proceeding, where "the point at issue" is much more than just the defendant's "legal status."
>
> As "admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion," *Ray v. State, 755 So. 2d 604, 610 (Fla. 2000),* there is no basis to reverse the ruling of the court below admitting testimonial evidence of the appellant's prior violent felonies at trial. This evidence was not emphasized to the level of rendering the prior offenses a central feature of the penalty phase.[12] See *Rodriguez v. State, 753 So. 2d 29, 44-45 (Fla. 2000); Finney v. State, 660 So. 2d 674, 683 (Fla. 1995).* Therefore, we affirm the trial court's decision allowing the admission of this evidence.
>
> ---
>
> [12]The record reflects each witness's simply relating Cox's crimes against him or her. No emotional displays or breakdowns occurred.

Cox, 819 So.2d at 716-717.

Busby makes no attempt to demonstrate that under the applicable standard, the trial court abused its discretion. In fact, before the trial court, Appellant challenged the admissibility of the evidence on a different legal basis, that the State had failed to establish that the statement was made pursuant to a knowing and intelligent waiver of rights (R. 82:1612). Thus Busby's challenge now premised upon the prejudicial value of the evidence is procedurally defaulted. See Spann, 28 Fla. L. Weekly at S296 ("To be preserved for appeal, 'the specific legal ground upon which a claim is based must

be raised at trial and a claim different than that will not be heard on appeal.'") (quoting Rodriguez, 609 So.2d at 499).

In any event, here the State presented Busby's confession through a neutral witness relative to his conviction on the two counts of first degree murder (R. 82:1623-1632). Obviously Busby's own description of those murders was highly relevant to his character, which is a proper consideration during the penalty-phase. Zant v. Stephens, 462 U.S. 862, 879 (1983). Section 921.141(1) governs the admissibility of evidence during the penalty-phase, and provides for the admission of constitutionally-obtained evidence "which the court deems to have probative value . . . regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is afforded a fair opportunity to rebut any hearsay statements." Thus under the statute, "the linchpin of admissibility is whether the defendant has a 'fair opportunity to rebut any hearsay statements.'" Rodriguez, 753 So.2d at 44. Because the facts underlying the prior violent felony convictions came from Busby himself, and absent a demonstration that the trial court abused its discretion in admitting the evidence, he should not be heard to complain.

Based upon the foregoing, Issue XII should be denied.

XIII.

THE TRIAL COURT DID NOT ERR UPON INSTRUCTING THE JURY DURING THE PENALTY-PHASE OF TRIAL WITH THE STANDARD JURY INSTRUCTIONS.

Appellant requests that the Court reconsider its rulings previously upholding the Florida Standard Jury Instructions as in compliance with Caldwell v. Mississippi, 472 U.S. 320 (1985), citing Burns v. State, 699 So.2d 646, 654 (Fla. 1997), cert. denied, 522 U.S. 1121 (1998), Sochor v. State, 619 So.2d 285, 291-292 (Fla.), cert. denied, 510 U.S. 1025 (1993), and Thomas v. State, 838 So.2d 535, 541-542 (Fla. 2003), on the basis of Justice Lewis' concurrence in Bottoson v. Moore, 833 So.2d 693, 731-734 (Fla.), cert. denied, 123 S.Ct. 662 (2002). App.Br. at 96.

Before the trial court, Busby filed a "Motion In Limine To Strike Portions Of 'Florida Standard Jury Instructions In Criminal Cases' Re: Caldwell Vs. Mississippi" (R. 8:1499). Therein, Appellant argued that the jury instructions and any comments "which would lead the jury to believe that their decision in the penalty portion of the trial is advisory, or a recommendation, or that the responsibility for determining appropriateness of MR. BUSBY's death rests elsewhere other than with them" is unconstitutional under Caldwell (R. 8:1500). After providing the parties with an opportunity to make additional argument on the issue, the trial court denied the motion (R. 13:2406). At trial, Busby renewed his objections to the instructions, which the trial

court overruled (R. 82:1545-1547). In addition, the trial court declined to give Appellant's proposed instructions (R. 84:1795).

As Busby recognizes, this Court has repeatedly held that the Florida Standard Jury Instructions are in compliance with Caldwell. See, e.g., Floyd v. State, ___ So.2d ___, 27 Fla. L. Weekly S697, S703 (Fla. Aug. 22, 2002) (citing cases); Brown, 721 So.2d at 283 (citing cases); Burns, 699 So.2d at 654. "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury under local law." Dugger v. Adams, 489 U.S. 401, 407 (1989).

Here, as this Court has held, and notwithstanding Busby's conclusory assertion to the contrary, the instructions properly informed the jury of its role under Florida law, and thus any claim of a Caldwell violation is without merit. See Romano v. Oklahoma, 512 U.S. 1, 9 (1994) ("The infirmity identified in Caldwell is simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process."). Moreover, in properly instructing the jury regarding its advisory role, at no time was the jury's sense of responsibility diminished in respect to its role in respect to its consideration of the aggravating circumstances. To the contrary, the jury was instructed that its advisory sentence "must be based on" whether it found certain aggravating circumstances, any mitigating circumstances, and

whether the aggravators outweighed the mitigation evidence (R. 84:1859).

Subsequent to this Court's decision in Bottoson, the Court has rejected similar challenges based upon Caldwell. See, e.g., Jones v. State, ___ So.2d ___, 28 Fla. L. Weekly S395, S397 n.4 (Fla. May 8, 2003); Gore, 28 Fla. L. Weekly at S337 n.4; Thomas, 838 So.2d at 541-542.

Issue XIII should, therefore, be denied.

XIV.

BUSBY'S CONVICTION IS SUPPORTED BY SUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT AND THE DEATH SENTENCE IS PROPORTIONATE TO THAT IN OTHER CAPITAL CASES.

"This Court has the obligation to independently review the record for sufficiency of the evidence." Taylor v. State, ___ So.2d ___, 28 Fla. L. Weekly S439, S441 (Fla. Jun. 5, 2003). Here, Busby was charged with first degree premeditated murder of Elton Ard by choking or strangulation (R. 1:1). The jury was instructed on premeditated first degree murder as follows:

> First, that Elton Ard is dead; the death was caused by the criminal act or agency of Andrew Busby; and thirdly, there was a premeditated killing of Elton Ard.
>
> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix an exact period of time that must pass between the formulation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

(R. 81:1502-1503).

"In determining the sufficiency of the evidence, the question is whether, after

viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Bradley v. State, 787 So.2d 732, 738 (Fla.), cert. denied, 534 U.S. 1048 (2001). The evidence established Ard died as the result of the actions of Busby and Globe, through manual and ligature strangulation (R. 77:963). The garrote used on Ard was made by Globe at Busby's direction (R. 81:1386). Busby, who initially had decided to kill Roberto Rosa Torado, turned his attention to Ard as one of several potential victims (R. 78:1028). For three days before committing the murder, Busby and Globe targeted Ard but they did not have the opportunity to kill him (R. 78:1035). The night before the murder, Busby told Globe that they would carry out their plan the following morning (R. 78:1035-1036). After determining that Ard was still alive notwithstanding being manually strangled and beaten about the face, the second garrote was very tightly put around Ard's neck and Busby and Globe watched him struggle for air six times before he finally died (R. 78:1044). Ard was killed to send a message to the prison population (R. 20:3838-3839; R. 78:1050). The evidence overwhelmingly supports Busby's conviction of first degree premeditated murder. Cf. Young v. State, 579 So.2d 721, 723 (Fla. 1991) (defendant brought murder weapon with him to the scene; weapon had to be reloaded), cert. denied, 502 U.S. 1105 (1992).

This Court also has "an independent obligation to review each death case to determine whether death is the appropriate punishment." Philmore v. State, 820 So.2d 919, 939 (Fla.), cert. denied, 123 S.Ct. 179 (2002). Regarding proportionality review, this Court has recently stated the following:

> Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. See Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). In conducting this review, this Court considers the totality of the circumstances in a case as compared to other cases in which the death penalty has been imposed, thereby providing for uniformity in the application of the death penalty. See Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Porter v. State, 564 So. 2d at 1064. This Court's function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial court. See Bates v. State, 750 So. 2d 6, 14-15 (Fla. 1999). The death penalty is reserved for only the most aggravated and the least mitigated of first-degree murders. See Urbin, 714 So. 2d at 416.

Taylor, 28 Fla. L. Weekly at S447. Moreover, in conducting its proportionality review, the Court "accepts the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence." Duest, 2003 Fla. LEXIS 1069 *33-34.

As discussed previously, supra, at 71-76, the CCP aggravator was properly found. As for the HAC aggravator, "[b]ecause strangulation of a conscious victim involves foreknowledge and the extreme anxiety of impending death, death by strangulation constitutes prima facie evidence of HAC." Barnhill v. State, 834 So.2d 836, 849-850 (Fla. 2002) (citing Mansfield, 758 So.2d at 645 and Orme v. State, 677

So.2d 258, 263 (Fla.1996), cert. denied, 519 U.S. 1079 (1997)). The fact that both CCP and HAC were present is significant for purposes of proportionality review. Nelson , 27 Fla. L. Weekly at S803. Moreover, Busby had been convicted of two prior violent felonies -- to wit: two counts of first degree murder.

In addition, there is nothing disproportionate in imposing a death sentence in the case of murder committed at a correctional facility by a prisoner upon a fellow inmate. See, e.g., Cox, 819 So.2d at 723-724; Kilgore v. State, 688 So.2d 895, 897 (Fla. 1996), cert. denied, 522 U.S. 832 (1997); Marshall v. State, 604 So.2d 799, 802 (Fla. 1992); Williamson, 511 So.2d at 290-291; Lusk, 446 So.2d at 1042-1043; Agan v. State, 445 So.2d 326, 328-329 (Fla. 1983), cert. denied, 469 U.S. 873 (1984).

Further, the Court has upheld the imposition of a death sentence in strangulation cases. See, e.g., Barnhill, 834 So.2d at 849-853; Ocha v. State, 826 So.2d 956, 966 (Fla. 2002); Bowles v. State, 804 So.2d 1173, 1184 (Fla. 2001), cert. denied, 122 S.Ct. 2603 (2002); Blackwood v. State, 777 So.2d 399, 412 (Fla. 2000), cert. denied, 122 S.Ct. 2603 (2002).

Finally, Busby's co-defendant, Globe, also received a sentence of death.

Based upon the foregoing, the judgment of conviction and sentence should be affirmed, as the evidence was sufficient to support the conviction and death is the proper sentence in this case.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment of conviction and sentence should be affirmed.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on this ____ day of July, 2003, to:

David A. Davis
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CERTIFICATE OF TYPE SIZE AND STYLE

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