IN THE SUPREME COURT OF FLORIDA

ANDREW DARRYL BUSBY,

Appellant,

v. CASE NO. **SC02-1364**

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as either "defendant," "appellant," or by his proper name. References to the record shall be by the volume number in Roman numerals, followed by the appropriate page number, both in parentheses.

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Columbia County on August 17, 2000 charged the appellant, Andrew Busby and Charles Globe, with one count of first degree murder (1 R 1). Busby pled not guilty to that charge and over the next several months he, the State, or Globe filed several motions and notices relevant to this appeal:

1. Notice of intent to rely on Williams' Rule evidence, and a notice of objection to it (11 R 2074, 8 R 86). Denied (13 R 2402).

2. Motion to sever defendants' trials (1 R 1467, 1533).

3. Motion for additional peremptory challenges (8 R 1524, 1544). Denied (13 R 2409)

4. Motion for individual and sequestered voir dire (8 R 1550, 1556).

5. Motion to suppress statements (11 R 2075). Denied (13 R 2408).

6. Motion to dismiss the indictment (11 R 2196). Denied (13 R 2410).

7. Objection to the standard jury instructions and proposed additional or alternative instructions (11 R 2199). Denied (13 R 2403, 2406, 2411).

8. Motion for findings of fact by the jury (12 R 2269). Denied (13 R 2415).

9. Motion to conduct Richardson inquiry (14 R 2781).

10. Motion to declare Section 921.141, Florida Statutes, unconstituonal based on Apprendi v. United States, 530 U.S. 466 (2000). Denied (70 R 201).

11. Motion in limine to prevent mental health defense (16 R 3003). Granted (17 R 3311-12).

12. Notice of intent to rely on a mental health defense other than insanity (17 R 3233).

Busby proceeded to trial before Judge Vernon Douglas. After the State had presented its case, Busby his defense, and the court the relevant law, jury found him guilty as charged (17 R 3360).

He then proceeded to the penalty phase portion of the trial, and the jury, after hearing the relevant evidence, argument, and law, recommended, by a vote of 11-1, that he die (18 R 3454). The court followed that verdict, and in support of it, the trial judge found the following aggravators:

1. Busby had a prior conviction for two first-degree murders

2. He was under sentence of imprisonment at the time of the murder.

3. The murder was especially heinous, atrocious, or cruel.

4. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In mitigation, the court found fifty-five facts that mitigated a death sentence, but it gave the sum of them only moderate weight (20 R 3899-3901). It also found that they failed to outweigh any of the aggravators (20 R 3903).

This appeal follows.

STATEMENT OF THE FACTS

I. The State's case against Andrew Busby

Andrew Busby was an inmate at Columbia Correctional Institution (76 R 871). He was also small (110 pounds), young, looked younger (maybe 9 years old), white, and small (80 R 1302).[1] He was, therefore, fair, desirable game for the population and especially the black population of the prison. Over the several months leading up to the murder of Eldon Ard, he was repeatedly, constantly harassed and attacked by other inmates who wanted to turn him into a "punk" or homosexual plaything (77 R 1004, 1028-29, 1033, 78 R 1071, 1086). He tried his "damnest" to get the other inmates to stop, but nothing worked (78 R 1051). When he complained to the prison staff, they gave him as much grief as the inmates, refusing to investigate his complaints and some, actually a lot of them, threatened him (78 R 1054, 1062, 1086-88). When he tried to get away from the harassment by requesting administrative confinement, "They just put him right back on the compound." (78 R 1067, 1088) Stuck, without any way out, he "thought long and hard" and came up with a plan "(77 R 1004). He linked up with another inmate, Charles Globe, and the two of them made a list of inmates and staff from

[1] This information came from Charles Konetski, a defense witness.

which they would choose to kill to send the prison--both administration and inmates -- a message that "This has to got to stop." (78 R 1033, 1050).

He had had sex with one inmate, a Roberto Rosa, who told him he was HIV positive, and Busby "wanted to kill him for that." (78 R 1051). Elton Ard, Busby's cellmate, was also on that list because he had pressured him since they had begun rooming together into becoming a "punk." (78 R 1028) He had also grabbed the defendant by throat a few times, to "put him down." (78 R 1034). Thus, by Friday, Busby and Globe had decided to kill Ard. They planned to do it on Saturday, but the plan failed to jell. They said they would do it the next day, but again things did not come together (78 R 1035).

After breakfast on Monday morning, Ard returned to his cell, and Busby followed. Within a short time, Globe also came in, closed and locked the cell door (78 R 1036, 79 R 1146). Ard wanted sex from Busby. "He told me he ain't never had no baby give him a head job before." (78 R 1037). Globe put some paper over the cell door window, and as Ard approached Busby, Globe began to strangle him with a garrote he had made (78 R 1039). It broke, Busby kneed him, and Globe wrapped the garrote around the victim's neck again. The men fell down. Ard asked them to stop, offering them $45 (78 R 1040). Eventually the yelling and screaming stopped. Apparrently he was still alive, and then one of the men "got

pissed" and "started hitting the shit out of him. And that's where all the blood came from." (78 R 1043). The garrotte was tightened more, and Ard died from the strangulation (77 R 963).

After, they posed the body, putting a cigarette in Ard's mouth (78 R 1044). Globe, using Ard's blood, wrote "Remember Andy and K.D." on the door, wrote "Andrew," and drew a "smiley" face (78 R 1046). Busby said he "poke[d] his eyes out," and "poked him in the ear," but there was no evidence of that (77 R 974-75, 82 R 1572). Globe said the two men then had sex (79 R 1165). After that, they waited for the guards (76 R 871-72).

II. Busby's defense

Busby agreed with the State regarding the harassment he had suffered in the days, weeks, and months before the murder of Ard. He also agreed that by July 3, 2000, Charles Globe, who also went by the name of Thomas Duke Kidd or K.D.(79 R 1136), had become more than friends. They had had sex (79 R 1179). On that day, he and Busby planned only to beat Ard, at least that is the impression Globe gave to the defendant (R 79 R 1147). Busby, however, had apparently had just had sex with Ard, and that enraged Globe (79 R 1152, 53). He snapped and strangled Ard over the defendant's protests (79 R 1155). He even tried to hit

Globe and otherwise stop him, but to no avail (79 R 1155-58). In fact, had Busby been more diligent, Globe would have killed him as well (79 R 1196-97) After killing Ard, Globe ordered Busby to have sex with him (79 R 1165). The guard then found the men an hour later during count (79 R 1164).

Globe also reinforced the testimony presented as part of the State's case. Busby wanted to get away from Columbia Correctional Institution because he faced harassment and threats not only from the inmates, but the staff as well (79 R 1166-67). He had helped Busby file "quite a few" grievances with the prison officials, but the latter did nothing (79 R 1168).

Another defense witness, Charles Konetski confirmed the sexual harassment and threats directed at the "very young" Busby (80 R 1293, 1298, 1299)[2]

Over defense objection, the court excluded, as part of his case in the guilt part of the trial, evidence that his mother, fathers, sisters, and foster parents had so severely physically, verbally, emotionally, and sexually abused Busby as a child that he was diagnosed as suffering Post-Traumatic Stress Disorder, among other things (78 R). As a result, he never, as a child, felt safe, and the fear of further trauma only increased when he went to Columbia Correctional with its threats of rape (78 R 1106). Thus, events, which to a normal person might seem inconsequential,

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[2] "At the time I knew Mr. Bushby was about maybe 110 pounds, very thin, very young--very, very young. Maybe looked 9 years or so." (80 R 1301)

would, to this traumatized young man, trigger a fear of an imminent attack (78 R 1106).

III. Penalty Phase evidence

The State introduced evidence that in January 1998 Busby had killed a cab driver and his passenger, and as a result, was found guilty of two counts of first-degree murder and sentenced to two consecutive terms of life in prison without the possibility of parole (82 R 1601-1603).

Andrew Busby was born Michael Davis (83 R 1656, 1667). His mother was probably a prostitute (83 R 1735), and during his early childhood, he witnessed violence, including violent crimes. He saw sexual acts, specifically his stepfather sexually abusing his sister, and he made him watch pornographic movies. "He witnessed a lot of things that we probably still don't know" (83 R 1732). More than simply seeing it, his father, sister, and her boyfriend repeatedly sexually assaulted him before his fourth birthday (83 R 1735)

Eventually the State took Busby away from his mother. Well, at first they did not, and during his childhood he was repeatedly taken from his mother, returned to her care and inevitably taken from her again and again. Each of the

innumerable times the State put him in a different foster home than the one he had been in before (83 R 1730).

Yet, life, even foster home placements were a disaster for this young boy (83 R 1736). One family wanted to adopt him, but the foster mother was herself abusive, threatening, belittling, and generally mimicking what his natural mother had done to him (83 R 1736). At least until he was 11 years old no one other than the State took care of him, and it systematically destroyed whatever childhood this young boy had (83 R 1741-42, 1750).

The boy who would become Andrew Busby predictably developed severe emotional and psychological problems. He would get angry, throw things in class, and unsurprisingly, act out sexually, even "propositioning" a doctor when he was four or six years old (83 R 1737). He wished the foster mother who had planned to adopt him and her unborn child were dead (83 R 1771). Most ominously, he violently killed a puppy while still a small boy (83 R 1737-38) "Something [was] seriously wrong."

Helpless against the attacks from his mother, father, sister, and others, this young boy's normal development was disrupted, and in his case "it was very serious because he didn't have a clear victim/offender identity." (83 R 1739) As a result he never overcame the sexual abuse, and he saw his perverse world of sex

acts, violence, terror, and abuse as normal. Very significantly, he never felt safe (83 R 1765). He was heavily traumatized, and eventually this child was sent to a hospital for his extreme psychiatric problems (83 R 1744). This insecurity so pervaded his life that even when experts tried to help him, they could not (83 R 1765).

When he was six years old, he tried to kill himself (83 R 1745).

When Michael Davis was 11 years old, the State asked Reverend Walter Busby if he could take care of the boy for the weekend. He agreed, and eventually he adopted him. The baggage of his abuse, however, came with him, and he continued to have problems in school and at home. (83 R 1764) "He would get afraid and angry," and "he was very afraid he would be, as he used to put it, dumped." (83 R 1764, 1766) Reverend Busby, however, told his new son, "the only way you're getting out of this house before you're 18 is if I'm lying across the doorsill dead." (83 R 1664-65). In time, the better side sometimes surfaced. He became a good worker, a loyal friend, and a devoted cousin (83 R 1675). Indeed, even in school Andy wanted to do well, and he "would start out with a bang." Eventually, however, his behaviors "would lead to going down," and by the 11th grade he had dropped out (83 R 1676, 1698).

Thus, when Busby was sent to Columbia Correctional Institution, the persistent sexual attacks and harassment inflicted on him aggravated the raw spot the years of abuse and terror this extremely emotionally disturbed and immature defendant had endured (83 R 1679, 1680-84).

SUMMARY OF ARGUMENT

ISSUE I. The court refused to grant Busby's cause challenge on Kim Lapan, a former guard of death row inmates at Florida State Prison. His acknowledged biases against them and admitted willingness to execute persons who had committed premeditated murders raised reasonable doubts of his impartiality not only for the guilt phase portion of the trial, but the penalty phase as well.

ISSUE II. The trial court refused to let Busby present the expert testimony of social worker Martha Jopson. She had treated him for almost 8 years as a result of the extensive child sexual, physical, and emotional abuse he had suffered. She diagnosed him as suffering from Post-traumatic Stress Disorder (PTSD). Her testimony would have helped the jury understand his self-defense argument, particularly why the prison environment, with its inherent and pervasive violence, would have created within this defendant a justified fear that he faced imminent violence. Specifically, he would be raped, not once, but repeatedly and without any concern or intervention by the prison administration. For him, the danger of such an attack was real, and Jopson's testimony would have helped the jury understand why his subjective fears increased once inside Columbia Correctional Institution.

ISSUE III. As part of Busby's defense, the defendant called the co-defendant, Charles Globe to testify. During his testimony, Lisa Long, a state attorney investigator saw the defendant make some hand guestures. The prosecutor brought the matter to the court's attention, and during the ensuing hearing, Busby testified that he had signed the word "liar" to Globe, who when he was asked, said he had never seen Busby's movements. The prosecutor, when he cross-examined the defendant, got him to say that by liar he meant that Globe was lying when he said Busby knew nothing about the murder and only watched him kill Ard. The court ruled the jury could not only hear Long's testimony, it could also hear Busby's testimony, especially that explaining what the defendant meant by signing "liar." That was error because what the defendant says at hearings, whether constitutional issues are involved or not, cannot be used as substantive evidence at trial. Indeed, before the defendant testified, the court reassured him the jury would never hear what he said at the hearing. It obviously reneged on that promise, but it erred in doing so.

ISSUE IV. As mentioned in the previous issue, Busby called Globe to testify in his behalf. Actually, Busby's lawyer wanted him to take the stand. The defendant adamantly did not want him to. To resolve this "impasse" between counsel and his client, the State suggested that Globe's testimony be videotaped.

Busby's lawyer vigorously objected. He wanted the jury to be in the co-defendant's physical presence to appreciate his domineering physicality. The court refused that request, and the jury saw only Globe's videotaped testimony. That was error because the Sixth Amendment guarantees an accused the right to literally, physically present his evidence to the jury. The virtual reality of the late twentieth century electronic age has, to a large degree, found little acceptance in the courtroom. Having the jury see Globe through a TV set had no substantial justification and served no useful purpose. The State had no standing or right to meddle in the disagreement between Busby and his lawyer, and its "good idea" served his interests more than those of the defendant.

ISSUE V. Prison investigators talked with Busby four times: twice on July 3, once on July 7, and once on July 12, 2000. At the first July 3rd questioning, after being informed of his Miranda rights, he told them he did not want to talk. Inspector Schenck stopped his questioning, but Agent Ugliano from the Florida Department of Law Enforcement did not, although the defendant said nothing particularly incriminating. Later that evening, the inspectors again warned him of his rights, the defendant acknowledged them, but never explicitly waived them. Shortly, he and Globe confessed to killing Ard. Applying the several factors identified by the United States Supreme Court in Michigan v. Mosely, 423 U.S. 96

(1975), to the facts of this case reveals that the police failed to scrupulously honor the defendant's right to cut off questioning guaranteed by the Fifth Amendment and the Miranda rights.

ISSUE VI. As part of the State's case, the prosecutor introduced evidence that Busby wanted to kill two other inmates. Ostensibly this evidence showed his premeditated intent, tended to rebut a defense of minor or no participation, and it exhibited a similar modus operandi with the murder of Ard. Whatever tendency this evidence may have had, its prejudicial impact substantially outweighed its relevance. The State simply had no need for this proof, and had relevance only to show the defendant's bad character.

ISSUE VII. As mentioned, the police interviewed or questioned Busby on several dates. At the guilt phase, the State played the audio tape of the July 3 confession. As it did this, the jury read along with a transcript of the statement. During the penalty phase of the trial, the prosecution had the jury read a transcript of the July 7 confession because by the time of the trial, it had lost the audiotape of it. The court should have refused to let the prosecutor do that. Jack Schenck, the investigator who had questioned Busby on July 7, listened to the tape shortly after the interrogation, but he had never made a detailed comparison of the accuracy of the transcript with the tape. As such, the State never carried its burden of showing

that the transcript was a "duplicate" of the tape. Without being able to attest to its accuracy, the written record of the confession was inadmissible.

ISSUE VIII. The trial court found Busby committed the murder of Elton Ard in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Busby, however, presented extensive evidence of the harassment, taunts, and threats by other inmates and the indifference of the prison staff to his repeated pleas for help. The murder of Elton Ard became his way of defending himself from the reality of repeated, daily rapes. As such, he had at least a pretense of legal justification in killing the victim.

ISSUE IX. As part of his penalty phase defense, Busby sought to admit evidence detailing the trauma he had suffered at the hands of his mother, father, and others when he was a youth. The court excluded the letters and videotapes because they were hearsay and "self-serving." That was error because this evidence would have supported his claim of extreme, extraordinary abuse as a child and young adult. Because this Court has recognized the lesser standards for admissibility of evidence applicable for penalty phase hearings, the trial judge should have admitted Busby's proffered exhibits.

ISSUE X. At some point, Busby wrote a lurid, sexually explicit letter to Globe. The court admitted it during the penalty phase hearing because in it he said

that but for Globe's "love and support, I would be on trial for another murder." Whatever relevance that letter had was overwhelmed by its shockingly sexual content.

ISSUE XI. Although this Court has ruled that Ring v. Arizona, 536 U.S. 584 (2002), has no impact on the constitutionality of Florida's death penalty scheme, it does. That case will ultimately required unanimous jury recommendations of death. This Court should recognized that truth and reverse the trial court's sentence of death because the jury in this case voted death by a non-unanimous 11-1 vote.

ISSUE XII. This Court has also rejected the application of the United States Supreme Court's ruling in Old Chief v. United States, 519 U.S.172 (1997). That case should have prevented the State from presenting the underlying facts of the defendant's other convictions which had an affect on his current legal status. This Court should recognize it has erred in so ruling, even though it has recently reaffirmed that position.

ISSUE XIII. Finally, this Court should grant Busby a new sentencing hearing because the jury instructions repeatedly told the penalty phase jury that its verdict was merely a recommendation, and at no point does it say that the trial court will give their decision great weight. Such minimizing of the jury's role

violated the dictates of the United States Supreme Court's ruling in Caldwell v. Mississippi, 472 U.S. 320 (1985).

ARGUMENT

ISSUE I

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.

During voir dire, Busby sought to excuse Mr. Kim Lapan because of his inability to render an impartial verdict, as required by the law of this State. Singleton v. State, 783 So. 2d 970, 973 (Fla. 2001). The court refused to excuse him for that cause, and that, in turn, forced the defendant to use one of the 10 peremptory challenges given him to keep this prospective juror off his jury (73 R 601-602, 75 R 744). As a result, he later exhausted them, requested more, and specifically identified those members of the venire he would have used them on (75 R 744). The trial court, rather than granting any extra challenges, denied that request (75 R 745). Busby, thus, has clearly preserved this issue for review. Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990). Indeed, although this Court reviews these type of issues for an abuse of discretion, Pentecost v. State, 545 So.

2d 861 (Fla. 1989),[3] the defendant's 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.

When questioned, Mr. Lapan revealed that he was in favor of the death penalty, apparently because he had worked at the Florida State Prison for eight years. More specifically, he had worked on death row.

> Q. Mr. Lapan, would you say that you oppose or are you in favor--
>
> A: I am favor of it. I worked in Florida state prisons.
>
> Q: Did you work on death row?
>
> A: Yes.
>
> Q: What did you do there?
>
> A: I worked the keys. I have worked showering. Everything there is. I worked every post.
>
> Q: You no longer work there?
>
> A: No, sir.
>
> Q: Based upon your experience as a correctional officer, if I told you that you could end up learning this homicide occurred inside a prison, do you think that would affect your ability to sit as a juror?
>
> A: Possibly.
>
> Q: Would that be something that knowing the position that you held before, you might consider something an aggravating circumstance beyond what the judge says, based on your personal experience?

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[3] In Salgado v. State, 829 So. 2d 342, 344-45 (Fla. 3rd DCA 2002), the Third District recognized that issues of juror competence raised a question of mixed law and fact. Accordingly, this Court must give the trial court's evaluation of the facts the due deference implied by an abuse of discretion standard, but it is free to reach its conclusion about what those facts legally mean.

A: Possibility.

* * *

Q: Knowing that, do you think based on your experiences as a correctional officer that worked on death row, that there might be things in your mind that are aggravating circumstances that you would consider outside those that the judge read you, particularly once you learn that this homicide was --

A: No. I don't think so. I think I can determine what the judge wants and go by what they feel are the parameters we are supposed to stay within.

Q: So what you are saying, even though you worked as a correctional officer for eight years --

A: Yes, sir.

Q: -- with part of that time spent on death row --

A: Yes, sir.

Q: -- that you don't think that any of your own personal experiences would come into play as far as maybe you think something is an aggravating circumstance that could possibly warrant a death sentence that was not included in the judge's instructions?

A: I would like to think I could be openminded enough.

* * *

Q: ... What I am trying to find out is based on your own life experience, do you think there is something you feel so intensely about that could possibly cause you to vote for death -- not be outlined by the judge?

A: One thing I don't like is death row inmates that are sentenced to death sit 10 to 15 years, which I don't think is right.

* * *

Q: Do you believe that life in prison is severe enough for someone who is found guilty of premeditated murder?

A: No.

* * *

[BY MR. DEKLE][the prosecutor]:

Now you had mentioned someone having been convicted prior of crimes. Might in your mind be something that would cause you to automatically vote for the death sentence?

A: Possibly.

* * *

Q: While you were at F.S.P., were you ever the victim of any assaults?

A: Yes.

Q: Do you think that is something in your own mind if you learn that this had taken place in a correctional institution would factor in regardless of what the judge said as far as affecting your mind?

THE COURT: You can answer that if the going to affect your decision in this case.

THE PROSPECTIVE JUROR:

I don't know.

[BY MR. DOSS]: If the judge instructs you to set your personal feelings aside, would that be something you can or can't set aside?

A: I believe I can.

(72 R 382-389)

As mentioned, Busby moved to excuse Mr. Lapan for cause, but the prosecutor found him "imminently qualified," and the court denied the challenge (72 R 390). That was error.

The jury system of justice traces its roots back three quarters of a millenium to a time when those chosen to determine an accused's guilt or innocence had knowledge of the facts of the case. Stephen Landsman, "A Brief Surey of the Development of the Adversary System," 44 Ohio St. L. J., 713, 722 n. 17 (1983); Ellen S. Sward, "Values, Ideology, and the Evolution of the Adversary System," 64 Ind. L. J., 303, 322 n. 16 (1999). That approach worked, perhaps, in small communities where everyone knew everyone and everyone minded his neighbor's

business. It collapsed, however, as society evolved and became larger and more complex, and it did so for obvious reasons. One juror may know the "facts" but others did not. Hence, his recollection, correct or not (because there was no way to measure its accuracy) would tend to become the "facts" on which the rest of the jury based its verdict. Confidence in the results, thus, ebbed. Hence, over the last two hundred years, at least, the American justice system has moved toward the ideal that the jury should know nothing about the facts of the crime the State has charged the defendant with committing. Landsman, cited above, at 713. The court, utilizing the rules of evidence, "filters" the evidence every juror hears so that when they deliberate, they all have the same facts on which to reach a just verdict. Thus, jurors who are relatives of the defendant or the victim, are routinely excused from serving on the jury, as are others who might have first hand knowledge of the facts of a case.

Yet, this "sanitizing" goes beyond excluding those prospective jurors who might know the facts of a case. It extends to those who might have some bias or prejudice for or against the victim or the defendant. Mothers against Drunk Driving would naturally have a difficult time passing on the guilt or innocence of a person charged with driving while intoxicated. Our system of justice has moved so far from the early forms that it now rests on the unchallenged prerequisite of juror

impartiality. Carratelli v.State, 27 Fla. L. Weekly D2510 (Fla. 4th DCA November 20, 2002). Hence, a court should excuse a prospective juror if "there is any reasonable doubt about the juror's ability to rend an impartial verdict." Singleton, cited above. (Emphasis added.) A court should excuse a member of the venire if there is doubt about his or her impartiality.

In this case, there is no evidence Lapan had any knowledge of the facts of this case. The problem arises from the biases he had developed during the eight years he had worked for the Department of Corrections generally and on death row in particular. Of course, just being a guard at FSP, by itself, would provide some, but not enough, reason to have found him incapable of sitting as a juror. State v. Williams, 465 So. 2d 1229, 1230-1231 (Fla. 1985).[4] Lapan, however, had more problems than simply having worn the brown DOC uniform. First, he had no love lost for the inmates he had supervised. Indeed, he was in favor of the death penalty because he had worked on death row at Florida State prison. (72 R 382). Rather than saying that experience would have had no impact on his impartiality, he said it possibly could affect his ability to sit as a juror (72 R 383). More disturbing, that exposure to death row inmates might become an unenumerated aggravating

[4] Thus, the court would have been correct in denying a cause challenge to a prospective juror whose wife worked at the prison where the murder occurred (73 R 461).

circumstance (73 R 383). Indeed, his years as a guard at FSP and on death row had so hardened his attitudes that he believed that death was the only punishment a defendant should receive who had premeditated a murder (72 R 385-86).

Busby acknowledges that Lapan said that he could "go by what they feel are the parameters we are supposed to stay within," and he "would be open minded enough." (72 R 384, 385) Yet, his presumed assurances of impartiality lack the firmness required, especially in light of the obvious bias revealed by his other answers. See Kerestesy v. State, 760 So. 2d 989, 991-92 (Fla. 2d DCA 2000) (prospective juror who "guessed" she could be fair and follow the law after a previous hesitant response regarding whether or not she could be impartial should have been excused for cause); see also Brown v. State, 728 So. 2d 758, 759 (Fla. 3rd DCA 1999) (Trial court erred in refusing to excuse for cause a prospective juror who responded, "Yeah, I think so" when asked whether he would be able to follow the trial court's instructions). They do not overcome the distinct impression that this former guard, who had himself been assaulted by inmates, (72 R 389) raised a reasonable doubt about his impartiality in this type of case. Williams v. State, 638 So. 2d 976, 978 (Fla. 4th DCA 1994)(A juror's response that 'I'll be impartial because that's my character' was insufficient to erase the doubt created by his other comments.) This is particularly true here because the jury would hear

testimony that the guards refused to help Busby when he complained to them of the sexual advances other inmates had made on him (77 R 1004, 1028-29, 1033, 78 R 1071, 1086). Not simply an indifference to his plight but a thinly veiled contempt for him (78 R 1054, 1062, 1086-88). More troubling, other testimony showed that Busby and Globe included guards in the list of those whom they considered killing. For a former guard, who had been assaulted, and who had little love for those whom he had guarded, such evidence could only have triggered the biases he had.[5] Fortunately the law says Busby should not have had to overcome that tilt to get a level playing field. Hill v. State, 477 So. 2d 553, 556 (Fla. 1985); Price v. State, 538 So. 2d 486, 489 (Fla. 3d DCA 1989)("A juror is not impartial when one side must overcome a preconceived opinion in order to prevail.")

Lapan's anwsers to voir dire raised a reasonable doubt of his impartiality not only in the guilt phase of the trial, but critically in the penalty phase trial. It would be shear folly to believe the experiences and biases developed during his eight years as a guard at Florida's most dangerous prison guarding the world's most dangerous men would have magically remained outside the jury deliberation room. It is far more reasonable to believe that the other jurors, for whom death row and capital sentencing was a strange, foreign experience, would have naturally looked

[5] Lapan also had friends who were involved in the murder of death row inmate Frank Valdez by prison guards (73 R 601)

to and relied on the one person who had sustained experience dealing with death row inmates. Yet, the history of our system of justice has moved far beyond the medieval dependance on personal knowledge and bias of jurors. Juror impartiality, as much as a judge's evenhandedness, forms the bedrock foundation on which we have built the modern approach to justice. The trial court, therefore, erred in refusing to grant Busby's cause challenge on Lapan and forcing him to use a peremptory to make sure this obviously biased member of the venire would never serve on the defendant's jury.

ISSUE II

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.

Before trial Busby sought a court ruling that he could raise a defense of self-defense. Specifically he wanted to present the testimony of Martha "Nan" Jobson and Charles Konetski. Ms. Jopson, a social worker who had seen Busby as a child and teenager, had diagnosed him as suffering from Post-traumatic Stress Disorder (78 R 1104). Mr. Konetski was an inmate at Columbia Correctional Institution, and he had witnessed several inmates harass, threaten, and taunt the defendant in the days and weeks before he and Globe killed Elton Ard (80 R 1298-99). After some preliminary skirmishing (see volume 72 of the record),[6] the State objected to the defense testimony only on the grounds of relevancy (72 R 255), and the requirement to lay a predicate for its admissibility (77 R 910). Specifically, it

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[6] The State originally objected to self-defense claim because no notice of it had been given (72 R 206). The court granted that objection and completely excluded any self-defense claim (72 R 237-38). It also refused to grant a defense requested continuance (72 R 245) to give the State an opportunity to prepare for that defense (72 R 249). The State later retracted its original objection, but maintained that the testimony Ms. Jobson would offer was still irrelevant should be excluded for that reason (72 R 255)

claimed Busby's witnesses could not show he had killed Ard because of the latter's "offer of imminent violence." (77 R 920) The court postponed ruling on the admissibility of her testimony on that basis until the State had rested its case in chief.

At that point, the defendant proffered what Jobson would say. As a licensed social worker with 15 year experience treating those who had suffered sexual abuse, she had treated the defendant from 1988 to 1996 (78 R 1102). Before he turned 11 years old, his natural father, mother, and sister, and foster parents had physically, sexually, and verbally abused him (78 R 1108). She diagnosed him as suffering a conduct disorder, depression, and most significant, Post-Traumatic Stress Disorder (PTSD) (78 R 1104).[7] He was reactionary, and he had a history of getting angry and acting out, and on occasion his perceptions of reality blurred (78 R 1104, 1108).

Consequently, he never felt safe for most of his life (78 R 1105). "He wasn't safe from his early childhood throughout his different foster care placements; and really for the first time in his life he found safety in the home of Reverend Busby." (78 R 1105). This meant that "constant sexual harassment" and threats of rape "triggered" the childhood fears for his safety (78 R 1106). Most significantly, "If

[7] Additionally, he had nightmares, acted out, and would react with outbursts (78 R 86).

somebody was triggered in that manner, [they would] interpret that possibly as an imminent threat." (78 R 1106) That person, the one who suffered the PTSD, the one who had never been safe as a child, the one who had suffered severe sexual abuse as a child would believe he was in danger (78 R 1106). Said in legal terms, "that trigger would result in a subjective fear of imminent great bodily harm." (78 R 1108)

The court, after hearing Jopson's testimony, refused to let Busby call her as a witness. "[T]e defendant being present with a person larger than the two other persons and the two persons present, . . . 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." (78 R 1113)

As part of his defense Busby called Charles Konetski, an inmate at Columbia Correctional. He knew the defendant and described him as "about maybe 110 pounds, very thin, very young- -very very young. Maybe looked 9 years old or so." (80 R 1302) The defense witness was particularly aware of the continuous harassment Busby had received from other inmates (80 R 1299). Konetski told guards and staff about it, but they did nothing (80 R 1299-1300).

Busby renewed his request to present his self-defense claim after he had rested his case, but the court again denied it (81 R 1415, 1420). Under an abuse of discretion standard, this Court must conclude the lower court erred in making those rulings because Jopson's testimony would have explained why the threats of rape had such a tragic effect on Busby. Not only did it rule incorrectly, its mistake effectively gutted his defense, and as such the error became so prejudicial that this Court must reverse his judgment and sentence and remand for a new trial so can present his self-defense claim.

I. The law on self-defense.

Section 776.12, Florida Statues (2002), allows a defendant to raise a claim of self-defense, even when he or she uses deadly force:

> A person is justified in the use of force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against such other's imminent use of unlawful force. However, the person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.

Two parts of that definition bear examination: 1. The defendant must reasonably believe force is necessary, 2. To prevent the imminent commission of a forcible felony.

As to the defendant's reasonable belief, it is the defendant's subjective perception of his situation that is critical. There is no objective, reasonable person standard that must be met. Charneski v. State, 619 So. 2d 486, (Fla. 5th DCA 1993); State v. Mizwell, 773 So. 2d 618 (Fla. 1st Dca 2000). Thus, when Busby raised self-defense as an issue, how he perceived his world at Columbia Correctional Institution, his state of mind, See, State v. Hickson, 630 So. 2d 172 (Fla. 1994), became a critical part of his defense. This perception, which even an objective reasonable man would agree, had a large degree of truth, consequently led him to believe that the prison setting itself was always imminently dangerous, and he always faced the possibility of rape and assault. So, the problem Busby had to face at trial was establishing a basis or reason he believed he needed to kill Elton Ard. To do that, he had to present evidence of what PTSD meant and how it affected his perceptions, and to show that what he faced at Columbia Correction subjectively and perhaps reasonably triggered his fears for his safety.

II. Post-traumatic Stress Disorder as a defense.

Although Post-traumatic Stress Disorder (PTSD) has historical roots, until 1980 it had no formal, professional recognition. Disabled veterans returning from the Vietnam war forced the mental health profession to seriously consider the long term psychological damage soldiers suffered when exposed to the terrors of combat. Since then others besides them have been recognized as suffering severe mental disintegration because of their exposure to sudden, violence with the promise of death. Today, Post-traumatic Stress Disorder is a recognized psychological disorder arising when a person is personally exposed to or witnesses an extreme traumatic event that involves death or serious injury. The person's response to the event involves intense fear, helplessness, or horror. Diagnostic and Statistical Manual IV (Text Revision) (DSM IV-TR) American Psychiatric Association, section 309.81. While adults can suffer this disorder, as the Vietnam war clearly showed, sexually abused children are, understandably, particularly susceptible to a diagnosis of PTSD. That is, by virtue of their immaturity and undeveloped personalities, the abuse inflicted on them creates greater stress, terror, horror, and hopelessness. They perceive a greater threat of danger from those who

should protect them.[8] When the child has grown, he or she may be unable to accurately assess danger, and "men with histories of childhood abuse are more likely to take out their aggressions on others. . ."[9]

Child victims of abuse, thus, present a more complex problem than the soldier exposed to combat, or the person who witnessed a car wreck.

> In survivors of prolonged, repeated trauma, the symptom picture is often far more complex. Survivors of prolonged abuse develop characteristic personality changes, including deformations of relatedness and identity; in addition, they are particularly vulnerable to repeated harm, both self-inflicted and at the hands of others.[10]
>
> While it is clear that ordinary, healthy people may become entrapped in prolonged abusive situations, it is equally clear that after their escape they are no longer ordinary or healthy. Chronic abuse causes serious psychological harm. [11]
>
> The first task of recovery is to establish the survivor's safety. This task take precedence over all others, for no other therapeutic work can possibly succeed if safety has not be adequately secured.[12]

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[8] National Center for Post-Traumatic Stress Disorder. Http://www.ncptsd.org/facts/general.

[9] Judith Herman, Trauma and Recovery: The aftermath of violence-from domestic abuse to political terror. Basic Books, (1997), p. 113; see, also, Jennifer E. Lansford, et.al. "A 12-year Prospective Study of the Long-term Effects of Early Child Physical Maltreatment on Psychological, Behavioral, and Academic Problems in Adolescence," 156 Archives of Pediatric Adolescent Medicine, 824 (August, 2002)

[10] Id, at 119

[11] Herman, Trauma and Recovery, cited above, at p. 116

[12] Id. at 159.

> The process of establishing safety may be hampered or stymied altogether, however, if the survivor encounters a hostile or unprotective environment.[13]

Persons with PTSD typically exhibit a hypervigilance, or a heightened sensitivity to the nuances in the abuser and their surroundings. They may also become irritable and prone to outbursts of anger. They tend to have recurrent and intrusive distressing recollections of the events. They may act or feel as if the traumatic event is recurring, and that may include hallucinations and flashbacks. They have intense distress when exposed to the cues that symbolize or resemble the traumatic event. DSM IV-TR, p. 468.

If the mental health field has only officially recognized PTSD within the last quarter century, the courts, and particularly those in Florida, have moved with unusual speed in finding evidence of the disorder, or its variants, relevant. Hawthorne v. State, 408 So. 2d 80, 806-807 (Fla. 1st DCA 1982). This Court has recognized that Battered Spouse Syndrome, a subspecies of PTSD, is also relevant to a claim of self-defense. State v. Hickson, 630 So. 2d 172, 175 (Fla. 1993); Masterson v. State, 516 So. 2d 256 (Fla. 1987). It has allowed expert testimony on these newly named disorders "precisely because a jury would not understand why appellant would remain in the environment. . ." Hickson at 174.

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[13] Id. at 165.

Directly on point, the First District Court of Appeal, in State v. Mizell, 773 So. 2d 618, 621 (Fla. 1st DCA 2000), recognized "that PTSD evidence is relevant on the question of self-defense." [14]

> We view the PTSD evidence offered in this case as state-of-mind evidence, quite analogous to battered spouse syndrome (BSS) testimony that has in fact been approved many times. BSS testimony has been admitted to support a claim of self-defense. See State v. Hickson, 630 So. 2d 172, 173 (Fla. 1993) . . . . The cases that admit evidence of BSS do so to help the jury understand why the victim would subjectively fear increased aggression against hear. See Hawthorne v. State, 408 So. 2d 801, 806-807 (Fla. 1st DCA 1982).

Id. 620-21.

Thus, just as evidence of battered spouse syndrome is relevant "to show that because she suffered from the syndrome, it was reasonable for her to have remained in the home and, at the pertinent time, to have believed that her life and the lives of her children were in imminent danger, evidence that Busby suffered from PTSD was relevant to explain why he believed he was in imminent danger of being raped, tortured, or killed. "It is precisely because a jury would not understand why appellant would [strike out] that the expert testimony would have aided them in evaluating the case." Hawthorne, at 807.

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[14] Busby emphasizes that he wanted the PTSD evidence to support his defense of self-defense. He did not want it to show he had some reduced intent or diminished capacity to premeditate a murder. With some notable exceptions, evidence to do that is inadmissible. Chestnut v. State, 538 So. 2d 820 (Fla. 1989); Dillbeck v. State, 643 So. 2d 1027 (Fla 1994)

III. What Busby feared: The imminence of rape and death in prison.

"Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offense against society,'" prison officials have a duty to protect inmates from violence at the hand of other inmates, Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)(quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). Yet, undeniably it happens. And that should be expected because we have after all collected the most dangerous people in the world and concentrated them behind three layers of fencing and concertina wire. Why should we expect the bullying, the muggings, and the rapes to stop? Indeed, with a literally captive audience, most of whom have little to do, predators freely roam the prison halls and cells.

Even the United States Supreme Court has recognized the brutal violence endemic to prisons:

> Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, "[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do . . . unless all prisoners are locked in their cells 24 hours a day and sedated." McGill v. Duckworth, 944 F. 2d 344, 348 (CA7 1991)

Farmer v. Brennan, 511 U.S. 825, 858 (1994)(Thomas, concurring.)

> The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking . . .

> A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail.

United States v. Bailey, 444 U.S. 394, 421 (1980)(Blackmun, dissenting.)

Lower federal courts have echoed that conclusion, noting, for example, that insufficient staffing led to "frequent violence and homosexual assault among the inmates,"Alberti v. Klevenhagen, 790 F. 2d 1220, 1222 (5th Cir.) clarified, 799 F. 2d 992 (5th Cir. 1986); reports of many sexual assaults, Hassine v. Jeffes, 846 F.2d 169, 172 (3d Cir. 1988); "the risk of sexual assault was a serious problem of substantial dimensions," Jones v. Diamond, 636 F. 2d 1364, 1372 (5th Cir. 1981)); Withers v. Levine, 615 F. 2d 158, 161 (4th Cir. 1980); "an ugly picture of constant physical attacks and sexual assaults by other inmates," exists, Little v. Walker, 552 F. 2d 193, 194 (7th Cir. 1977); and "[p]risoners are frequently attacked and raped," Holt v. Sarver, 442 F. 2d 304, 308 (8th Cir. 1971);.McGill v. Duckworth, 944 F. 2d 344, 348 (7th Cir. 1991); Redman v. County of San Diego, 942 F. 2d 1435 (9th Cir. 1991) (en banc);

Academics have supported those judicial findings of epidemic and pervasive prison violence. David M. Siegal, "Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framwork of Wilson v. Seiter", 44 Stan. L.Rev. 1541,1544 (1992)(Homosexual rape within male prisons occurs with frightening frequency and

brutality.); Majore Rifkin, "Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a hidden World," 26 Colum. Hum. Rts. L.Rev. 273 (1995)("[B]rutal assault and homosexual rape are facts of daily life in men's prisons. . . Correctional administrators have long recognized that prisoners likely to be victimized are overwhelmingly young first offenders of slight build with passive, soft-spoken personalities."); Jeff Potts, "American Penal Institutions and Two Alternative Proposals for Punishment," 34 S.Tex. L.Rev. 443, 470-72 (1993).

This Court has also faced the reality of brutal, sudden inmate on inmate violence in this State's prisons. See, e.g., Christian v. State, 550 So. 2d 450 (Fla. 1989)(Inmate brutally kills another inmate who had days earlier smashed him in the head with a barbell.); Cox v. State, 819 So. 2d 705 (Fla. 2002)(murder of inmate whom Cox believed had stolen $500 of his.); Kilgore v.State, 688 So. 2d 895 (Fla. 1996)(stabbing of homosexual lover); Demps v. State, 395 So. 2d 501 (Fla. 1981)(three inmates charged in the stabbing murder of another inmate.); Lusk v. State, 446 So. 2d 1038 (Fla. 1984)(Victim and two other inmates had robbed Lusk in his cell on the morning of the murder, stabbed his mattress several times and threatened him if he reported the incident. Lusk said he would not take it anymore and resolved to kill one of the men.)

Finally, Globe's and Busby's confession revealed the pervasiveness and reality of violent rape by the predators at Columbia Correctional that was directed specifically at him. For six months "Approximately – 43 people on this compound, other inmates, have been going around saying [Busby] is a punk [homosexual]. . . .That shit got old. . . . Stepped to the officers, let it die, stop it, quit it, and all he got was more harassment. He had officers telling him, oh, it's true, ain't it, it's true, ain't it. . . .Ard – passing the rumor, trying to keep the shit started and trying to pressure that dude into being a punk.. . (78 R 1028-29) Others had grabbed him by the throat several times (78 R 1034). "The purpose was to send a message. This has got to stop. . . I'm a young white boy.. . This camp right here is basically turning a white boy into a punk so he can be with a black dude." (78 R 1050) Indeed, the night before the murder, Busby heard Ard "tell someone that he was going to make me submit to him." (77 R 1004)

Of course, the prison staff theoretically controls or prevents the violence, but in this case, they not only failed to do so, they deliberately ignored it. With only one guard, and that probably a female (76 R 869), for every 225 inmates they simply could not control the population (76 R 878, 78 R 1079).

But we have more than simple overwork and insufficient staffing. The prison officials deliberately refused to help Busby. He complained about the threats, but

after 18 months they had done nothing about them, as prison investigator Schenk candidly admitted at trial (78 R 1086-87). When Busby tried to "check in," or be placed in administrative confinement to avoid being raped, that request was denied (78 R 1067, 1088). The guards even threatened Busby (78 R 1062, 79 R 1166)

In short, as Globe put it at trial, "[I]nside where I'm at the rules are totally different than out here. Inside prison it's a totally different situation, man. Out here you can call the police and they will come running to your house and everything is fine and dandy. Where I am at there ain't nothing like that. The only time the police want to come around is if you got something to snitch on." (79 R 1176)

So what could he do? Escape, even if possible, was legally unavailable. United States v. Bailey, 444 U.S. 394 (1980)(Defenses of duress and necessity unavailable if a legal alternative to escape exists.) Murder is an obvious extreme solution, and there is evidence Busby only wanted to beat Elton Ard (79 R 1147). But given the immenience of the rapes and beatings that pervaded and percolated through Columbia Correctional Institution and the prison official's acknowledged indifference to them, Busby had the right to defend himself. Or, in terms of this issue, the trial court should have allowed him to present his PTSD defense.[15] Whether, he had the right to kill Elton Ard was for the jury's determination.

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[15] Busby's argues only that he had the right to present his defense. The jury was the sole body to judge its credibility.

Thus, refusing to let him present the testimony of Nan Jopson was error, and because it gutted any self-defense claim he had that this Court must reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

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.

As part of his case, Busby called his co-defendant, Charles Globe. Actually, defense counsel called Mr. Globe because the defendant adamantly did not want him to testify (79 R 1127). To apparently resolve this "problem" the State suggested (over defense objection(79 R 1129-30)) that the Court have Globe's testimony videotaped outside the jury's presence (79 R 1129). Judge Douglas agreed (79 R 1131). The jury then viewed the recorded testimony of the co-defendant (79 R 1228-1282).

As Globe testified, Lisa Long, an investigator with the State Attorney's office noticed Busby making some gestures with his hands (79 R 1221). It looked to her as if he was telling the witness something in sign language (79 R 1221). She had no idea what it was (79 R 1221), and she could not recall at what point in his testimony he made the movements (79 R 1222).

Busby then took the stand and said that he had signed "liar" and nothing else (79 R 1223). On cross-examination, the prosecutor asked him if "you were telling him that he was a liar when he said that he acted alone." (79 R 1224). Busby said yes, and defense counsel objected to that question (79 R 1224). The court overruled the objection, noting "The jury is not going to hear it, but it goes in the record and you have the right to ask." (79 R 1224)

Actually, the jury did hear what Busby had said. After they heard Globe's videotaped testimony, the defendant called Charles Konetski, an inmate at Columbia Correctional Institution, and after he had testified, the defense rested its case (80 R 1305). The State then sought to call Lisa Long and to have Busby's testimony read as substantive evidence since he would not take the stand (80 R 1315-16). Busby vigorously protested, arguing

> The case law [is] legion as far as defendants taking the stand at motion [to] suppress statements or evidence hearings that that should not be used against them later on unless they actually take the stand and lie. . . .We are perfectly allowed to have him come forward and not run the risk that he is waiving any right to remain silent. That way we don't run afoul of his 5th Amendment rights."

(80 R 1316-17)

The State responded by arguing that the only time Busby could protect his right to remain silent "is when you are litigating Constitutional issues." (80 R 1318)

It then cited two cases, Simmons v. United States, 390 U.S. 377 (1968), and Hayes v. State, 581 So. 2d 121 (Fla. 1991), to support that position.

Overnight, Busby filed a written motion with the court arguing against admitting Ms. Long's and his testimony, and he also relied on Simmons and Hays. (17 R 3370-3381). The court denied the motion, citing the two cases (17 R 3382). This meant that Ms. Long testified, and Busby's testimony was read for the jury to hear (81 R 1389-94). The defendant then called Mr. Globe to testify, and he said he had seen no hand gestures by Busby (81 R 1411). Allowing 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, the applicable standard of review for this Court to use in measuring the harm of the court's error.

Put simply, the question presented here focuses on whether Busby's Fifth Amendment right against self-incrimination prevents the State from using, as substantive evidence, testimony Busby gave to resolve a question regarding the admissibility and relevance of Long's testimony. Simmons, Hays, and other cases from this Court and other courts have uniformly rejected the narrow approach advanced by the State, opting for a broader application of the Fifth Amendment.

In Simmons, the United States Supreme Court held

> that when a defendant testifies in support of a motion to suppress evidence on Fourth amendment grounds, his testimony may not

> thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

Id. at 394.

In Hayes, the defendant sought to prevent the State from using testimony he had given at a hearing on his motion to suppress statements he had given the police as substantive evidence at his trial for murder. The State tried to limit Simmons to protecting a defendant's standing to assert a Fourth Amendment challenge to a police search. This Court rejected that argument. "We reject the state's argument, instead agreeing with courts that have refused to read the principles of Simmons so narrowly." Id. at 126.

Indeed, this Court and courts of this and other states and the federal judiciary have applied the Simmons rationale beyond the "constitutional issues" limitation successfully argued by the prosecutor in this case. See, United States v. Hitchcock, 922 F. 2d 236, 239 (9th Cir 1993)(cannot use information in a financial disclosure form used to establish eligibility for appointed counsel as substantive evidence); United States v. Inmon, 568 F. Fd 326, 333 (3rd Cir 1977)(double jeopardy claim); Pedrero v. Wainwright, 590 F. 2d 1383, 1388, n3 (5th Cir 1979)(Statement made by the defendant at arraignment in support of insanity defense unavailable for use at trial.); State v. Spiegel, 710 So. 2d 13 (Fla. 3rd DCA 1998)(Testimony at a bar grievance proceeding cannot be used at trial.).

But, if the prosecutor correctly stated the law, the court should still have prevented the State from using Busby's testimony against him. That is, along with the Fifth Amendment rights, he has the Fourteenth Amendment due process right to present a defense, to object to and present evidence against the State's proof. Washington v. Texas, 388 U.S. 14 (1967).[16] It simply goes against the constitutional notions of fairness to allow the State to make its allegations but allow the defendant to meet them only if he gives up his Fifth Amendment right against self incrimination. Simmons, at 394. ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.")

Moreover, the cited cases express the concerns the founding fathers had in adding an amendment to the constitution that protected accused citizens from having their testimony unwillingly used against them. This privilege or right against self-incrimination has such fundamental roots that courts look very close at claims that he or she has waived it. See, Smith v. United State, 337 U.S. 137 (1949)

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

(Presumption against waiver of the privilege against self-incrimination, and courts will generally indulge every reasonable presumption against finding one.)

More applicable to this case, "waiver by testimony of the Fifth Amendment privilege is generally limited to the particular proceeding in which the witness volunteered the testimony." State v. Spiegel, 710 So. 2d 13 (Fla. 3rd DCA 1998). In short, when a defendant takes the stand at a Fourth or Fifth Amendment proceeding, a hearing on a motion in limine, or a bar grievance proceeding, he knows that, except for impeachment uses, the State cannot use what he says there as substantive evidence at trial.

Of course, in Hays the defendant won the battle but lost the war because this Court found the lower court's mistake harmless beyond all reasonable doubts. Id. at 126. Such cannot be the case hear for the simple reason that the jury, during its deliberations, specifically asked the court for Busby's sign language testimony, as well as the statements he had made he made to the prison investigators in July 2000 (81 R 1518).[17] Obviously, what he said at trial had an impact on its deliberations

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[17] The prosecutor also referred to the signing incident during his closing argument. "And you can tell from his demeanor on the witness stand what a gigantic joke he thought this was. Laughing as he testified. Smirking as Busby (indicating) signaled to him: Oh, you little liar. The little joke between them. The joke that the protector here is going to lie Busby out of trouble on this murder charge, and nobody gets punished for the death of Elton Ard." (81 R 1497) Busby objected to that argument

and verdict. Or, said in the language of State v. DiGuilio 491 So. 2d 1129, 1139 (Fla. 1986): "[T]here is a reasonable possibility that the error affect the verdict." This Court cannot say the trial judge erred but only harmlessly. It should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

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.

Defense counsel planned to call Charles Globe, Busby's co-defendant, to testify as part of his defense. Busby, personally, objected to that. He did not want him to do so. "I still stand by my word. I don't want him testifying." (79 R 1127)

> THE COURT: If he testifies in your favor, it will be a good decision. You agree with that?
>
> MR. BUSBY: If he intends to take the whole blame. But I believe there's other things that he can say that is going to hurt me. I don't know what he would say, but I believe that.
>
> MR. DEKLE[the prosecutor]: Judge, I have an idea, and every once in a while I have a good one and I think this is a good one. Let's take Mr. Globe's testimony videotape. Ant at the end of his testimony give Mr. Busby an opportunity to voice whatever he voices . . . If he continues to object to it then the Defense can call the idea - -can then make a decision about whether or not to present his videotaped testimony.
>
> MR. DOSS [defense counsel]: Judge, I object to that. I want Mr. Globe here. I want the jury to see what kind of person that we are dealing with . . . I consider Mr. Globe an extremely intimidating man, that the jury will not get a full flavor of what is going on in that cell unless they are able to see him, hear him, look at him, have him look at them, and that they can understand what wen on there. . . .And a videotape is not going to be able to convey that . . .I don't think that Mr. Globe has acted out.
>
> MR. DEKLE; I think [videotaping] strikes a balance here between the defendant's wishes and trial counsel's wishes.

(79R 1129-1131)

The court then overruled defense counsel's objection, found merit in the State's "good idea," and had Globe's videotaped testimony presented to the jury (79 R 1228-1282). That was a bad idea, and the court's ruling an error.

This is an unusual issue. No one questions that Busby has a due process right to present a defense. Washington v. Texas, 388 U.S. 14 (1967). The question presented here asks to what extent can the trial court control or dictate how he presents that defense. Certainly, within the bounds of relevancy and other rules of law, Busby had the right to call Charles Globe as a witness to bolster or establish his self-defense claim. Could the court, though, agree with him to that point but then say he could do so only by presenting his testimony through a television set? Few cases from this Court have provided much guidance for this unusual issue.

Of course, extensive litigation erupted several years ago around the Sixth Amendment Confrontation Clause problem of the extent to which the law could limit the right of a defendant to actually, "face to face," confront his accusers, particularly when those accusers were children. Maryland v. Craig, 497 U.S. 836 (1990); Coy v. Iowa, 487 U.S. 1012 (1988). While not on point to this issue, these cases shed some light on the very important significance the founding fathers gave

to live, in person testimony. What they and the United States Supreme Court have said on the Sixth Amendment issue has relevance to this due process claim.

In Craig, the Supreme Court approved Maryland's procedure permitting allegedly sexually abused children to testify by one-way television. It did so with some significant restrictions. It held that generalized rules prohibiting any defendant from confronting a child victim would fail to pass constitutional muster. Instead, in every case, the court had to make case-specific findings of necessity.

This Court has followed the path blazed by the United States Constitution when confronted with the peculiarly late twentieth century issue of allowing witnesses to testify by satellite links rather than appearing in person. "We are unwilling to develop a per se rule that would allow the vital fabric of physical presence in the trial process to be replace at any time by an image on a screen. Perhaps the 'virtual courtroom' will someday be the norm in the coming millennium; for now we do not conclude that virtual presence is the equivalent of physical presence for the purposes of the confrontation clause." Harrell v. State, 709 So. 2d 1364, 1368-69 (Fla. 1998). This Court gave no blanket approval of such techniques. "The State is urging this Court to conclude that the satellite procedure used in this case is the equivalent of physical, face-to-face confrontation. We decline to make such a finding." Id. at 1368. Instead, it allowed it only when

the witness's testimony was "material and necessary," face to face testimony was a practical impossibility, and significant restrictions were followed. Id.at 1369-71 There is, thus, a legitimate queasiness in blindly accepting or even reasonably allowing the marvels of the electronic age into the courtroom. "However, in every criminal case, there is a strong presumption in favor of face-to-face testimony." Id. at 1370, f.n. 6.

> A courtroom is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of the trial, contributing a dignity essential to the "integrity of the trial process.

Estes v. Texas, 381 U.S. 532, 561 (1965)

> In a televised appearance, crucial aspects of a defendant's physical presence may be lost or misinterpreted, such as the participants' demeanor, facial expressions and vocal inflections, . . . and the solemnity of a court proceeding.

People v. Gutterndorf, 728 N.E. 2d 838, 840 (Ill. 3d DCA 2000)(Rejecting the television presence of the defendant at a plea hearing as equivalent to his physical presence.)

Trial courts, of course, have considerable discretion in how trials are conducted. Defendants have no blank check to do whatever they want and in whatever manner they choose. For example, in Stevens v. State, 419 So. 2d 1058, 1063 (Fla. 1982), the defendant claimed that he was so intoxicated when questioned

by the police that what he told them was not voluntarily given. To prove or tend to prove his point, he offered to drink two cases of beer as a demonstration of his condition when he confessed. This Court agreed with the trial court that such a demonstration was unnecessary.

In Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999), the defendant wanted the jury to view the murder scene at 3 a.m, the time of night of the murder. The trial court refused, and this Court affirmed that ruling, although it reversed his conviction and sentence of death on other grounds. "Thomas's motion for a jury view was denied on the ground that it would serve no useful purpose because the scene could not be substantially duplicated."

If we adopt a "useful purpose" standard in measuring a trial court's limits on how a defendant presents his defense, there was no useful purpose in requiring Globe to testify by television instead of in person and "face to face." To the contrary, Busby's lawyer strongly emphasized the "useful purpose" of having this man physically appear before the jury. "I consider Mr. Globe an extremely intimidating man, that the jury will not get a full flavor of what is going on in that cell unless they are able to see him, hear him, look at him, have him look at them, and that they can understand what went on there." (79 R 1130) Moreover, Globe had presented no problems when he had testified in his own trial, and his lawyer

anticipated he would behave at Busby's trial (79 R 1125). Countering Busby's insistence on Globe's personal appearance, the prosecutor noted that if the co-defendant testified, "he is very likely to mention murder convictions, possibly even make up murder convictions." So, what? Whether Globe lied or told the truth was for Busby to worry about, and it, in any event, had no relevance to how he would testify.

Of course, the prosecutor presented his "good idea" of videotaping Globe to get around the differences Busby had with his lawyer (79 R 1129). Yet, Busby had no problem with Globe testifying in person. He had a more basic difference with his counsel: he did not want the co-defendant testifying at all (79 R 1127). " I still stand by my word. I don't want him testifying." (79 R 1127). So, whether Globe spoke from the stand or through a televison tube made no difference, the defendant's and his counsel's differences remained.

Moreover, one must question the standing or right of the prosecutor to intrude into an attorney/client dispute. Trial strategy and deciding what witnesses to call or not to call is peculiarly a defense matter, and even more specifically it is a right that belongs to counsel, not the defendant. C.f., Jacobs v. State, 800 So. 2d 322, 323 (Fla. 3rd DCA 2001)(Absent extraordinary circumstances, failure of counsel to call a witness is not a ground for collateral attack.) Thus, the prosecutor

had no say in how Busby's counsel wanted to present his case, and the trial court had only an exceedingly limited right to control how he presented Busby's defense.

As significant, since the State proposed the videotaping, it had the burden of showing its "substantial justification." Harrell, cited above at 1370, fn.6. It provided none. Likewise, the trial court provided no specific reasons why Globe, who was present, under subpoena, and able to testify in person, had to present his evidence on videotape.

To significantly limit Busby's right to present his defense the way he wanted to for no significant reason was error, and intruding into this attorney client relationship served no useful purpose. To the contrary, it significantly limited the effectiveness of the defendant's defense by failing to give the jury the full impact of Globe's very intimidating physical presence. When compared to Busby's youth and very slight build, the self-defense claim would have become significantly stronger, particularly when Globe said he would have killed Busby if he had interfered with him while he was killing Ard (79 R 1196-97).

Because the State's case rested largely on the confession of Busby and Globe and the defendant's in court admission (See ISSUES IV, V, VII), refusing to allow Globe to testify in person was error. It became reversible error largely because we can have no honest assessment of its impact on the jury's verdict.

That is, this court gives the trial court discretion in matters of this sort precisely because it is there, on the spot, and better able to measure the impact than this Court is, being miles from and months after the trial. Yet, if the trial court abuses its discretion, the very ephemeral nature of this issue must compel this Court to grant a new trial. The impact of Globe's physical presence in the courtroom instead of simply his virtual reality is hard to measure, but this Court cannot say with the easy confidence it has required when measuring the harmlessness of an error, State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986), that it had no effect on the jury's verdict. This is particularly true as evidenced by the jury's desire to closely re-examine the confessions Globe and Busby gave, along with the defendant's objected to in court admission (81 R 1518). Obviously, they did not consider the evidence overwhelming. We must conclude they gave the defendant's self-defense defense serious consideration, ultimately, however, rejecting it. Had Globe testified before the jury in person, would they have inevitably reached the same conclusion? Hard to say, and because that is such a difficult question to answer beyond a reasonable doubt, DiGuilio, at 1139 this Court must reverse the trial court's judgment and sentence and remand for a new trial.

The court's refusal to let the jury physically see Globe also had an impact in the penalty phase portion of the trial as well. Busby called his adopted father to the

stand to testify, among other things, about the relation his son had with Globe. He testified that the defendant was a follower, or rather, "definitely a follower." (83 R 1690). The court would not, however, let him answer whether "Andy was under the substantial domination of KD. [i.e. Globe] on July 3rd 2000, based on your opportunities to observe their relationship." (83 R 1690)[18] That was error. Garron v. State, 528 So. 2d 353 (Fla. 1988); Rivers v. State, 458 So. 2d 762 (Fla. 1984); Hansen v. State, 585 So. 2d 1057, 1058 (Fla. 1st DCA 1991)(Lay witness can given opinion about a defendant's mental condition based on knowledge gained in a time reasonably proximate to the charged crime.) When that error is combined with the court's earlier mistake of allowing Globe to appear only by video then not only was their jury's guilt phase verdict affected, their death recommendation as well became suspect.

[18] The court had, however, allowed Reverend Busby to answer whether his son's ability to appreciate to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. "Yes, I think he did. He was at his wits end." (83 R 1685-86).

ISSUE V

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.

About noon on July 3, 2000, the day Ard was murdered, Jack Schenck, a senior inspector with the prison system's inspector general office and Don Ugliano, an agent with the Florida Department of Law Enforcement, questioned, or rather, tried to question Busby about Ard's death. The officials tape recorded their advising him of his rights (62 R 12315-16). When advised of his right to remain silent, "he elect[ed] not to speak" to them (62 R 12322). Agent Ugliano, however, continued to talk with Busby, but that part of the interrogation was not recorded (62 R 12325). Later that evening, about seven o'clock, the officers questioned the defendant again, this time with Globe present as well as some additional inspectors (62 R 12326-27). After reading the defendant his rights he talked with them (62 R 12322-23). But, as they admitted at the subsequent suppression hearing, "there was no indication in there that he waived his rights," although they said the defendant acknowledged he understood them "and began responding." (62 R 12332). The prison officials and FDLE agents also questioned him on July 7 and

July 12, after they had read him his rights, and he apparently agreed to discuss the Ard murder with them (62 R 12323-24).

By way of a pretrial motion, Busby sought to suppress the statements he had made to the law enforcement officers on July 3, July 7, and July 12 because they had violated his Fifth and Fourteenth amendment rights against self-incrimination. Specifically, the police failed to "scrupulously honor" his request to remain silent. Miranda v. Arizona, 384 U.S. 436 (1966); Michigan v. Mosely, 423 U.S. 96 (1975); See, Traylor v. State, 596 So. 2d 957 (Fla. 1992). After hearing evidence and argument on the matter, the trial court denied the motion, finding that "the statements were made freely and voluntarily after full and complete advice as to the Defendant's rights." (13 R 2408)

At the guilt phase of the trial, the State introduced, over Busby's renewed objection (78 R 1023), the July 3 statement in which the defendant and Globe confessed to killing Ard. They also provided extensive detail of why they murdered him (78 R 1027-34). That evidence formed the foundation of the State's cases against Busby. During the penalty phase part of the trial, it also presented the jury with the transcript of the July 7 interrogation (82 R 1553-78).[19] That was

[19] For some reason, the police had lost the tape, and the court allowed the prosecution to give the jury a transcript it assured the court was accurate (82 R 1592)

error. This Court should review this issue by allowing the trial court its discretion to find facts supported by the record, but it can reach its own legal conclusions. Gibson v. State, 835 So. 2d 1159 (Fla. 2nd DCA 2002)(The applicable standard of review requires us to defer to the trial court's factual findings that are supported by competent, substantial evidence, but we independently review the trial court's legal conclusions.)

Without question or arugment, the law enforcement officers followed the dictates of Miranda at each interrogation when they read him the rights as required by that case. The problem arose when Busby decided to cut off further questioning by invoking his Fifth Amendment right to remain silent. What could the police do or not do after that?

The law first required them to have "scrupulously honored" his request to remain silent. Michigan v. Mosely, cited above. That is, they could not ignore, as Agent Ugliano did here (62 R 12339), his just invoked right to stop questioning and continue to ask him about Ard's death. Traylor, cited above at p. 966 ("[I]f the suspect indicates inany manner that he or she does not want to be interrrogated, interrogation must . . . immediately stop.")

Now does this mean that they police could never talk to Busby about this or any other crime? No, but whether they had continued to scrupulously honor his

original request to remain silent or had just worn him down into a fatalistic acquiesence depends on the facts under which the police reapproached him. In Michigan v. Mosley, the police arrested Mosely because they believed he had committed a robbery. When they tried to question him, he invoked his right to remain silent as they had just told him he could do. Two hours later, another officer sought to ask him about a murder he was investigating. After reading him his rights, Mosely waived his right to remain silent and eventually confessed to the murder. The United States Supreme Court found no constitutional problem with that confession.

> [T]he police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

Id. at 106.

The Court identified several factors in reaching that conclusion.

1. The police advised Mosley of his rights before each questioning began.
2. They immediately stopped questioning the defendant when he said he did not want to talk about the robbery.
3. A significant amount of time elapsed between the interrogations.
4. The second session took place in a different locale than the first.
5. The second session focused on a different crime.

Id. at 104-105.

Here, the police went through the ritual of advising Busby of his rights at each interrogation. They did not, however, honor Busby's request to stop questioning him. Instead, at the first session, after Busby said he did not want to talk, Agent Ugliano said that he was from FDLE, and because someone had written on the cell wall to call it, he was there and what did he want (62 R 12340). Similarly, at the 7 p.m. session, although a visibly upset Busby (62 R 12341, 12353) acknowledged knowing what his rights were, 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 to the inevitable. Bowen v. State, 404 So. 2d 145 (Fla 2nd DCA 1981)(Police failed to honor Bowen's request to remain silent and failed to get a subsequent waiver.)

The noon and 7 p.m. interrogations both took place at Columbia Correctional (62 R 12324, 12326). They also involved at least the same officers in each instance, although the evening questioning included others as well as Schenck and Ugliano (62 R 12324, 12327). The murder similarly was the focus of both sessions.

Thus, the Mosley factors show only that the police gave Busby his rights at both sessions. But that is all they did. Equally clear, when the defendant invoked his right to remain silent, the police understood what he had said as doing that. Henry v. State, 574 So. 2d 66 (Fla. 1991)(Defendant did not clearly invoke his right to remain silent.) Yet, Agent Ugliano wanted to keep him talking when he told Busby (after he had said he wanted to remain silent) that he was from FDLE and what did he want? This law enforcement officer tried to coax Busby to speak despite his acknowledged reluctance to do so. This inquiry, which may seem of little import to those not under the police lights, may very well have contributed to Busby's eventual capitulation to the repeated police inquiries about the murder. Breedlove v. State, 364 So. 2d 495 (Fla. 4th DCA 1978)(Relatively little pressure by the police needed to overcome a suspect's will to remain silent.)In terms of Miranda, he never "scrupulously honored" this defendant's clearly invoked right to remain silent.

Careful scrutiny of the interrogating officers' actions, Jones v. State, 346 So. 2d 639 (Fla. 2nd DCA 1977), show that the other Mosley factors weigh against finding the later confessions admissible, and exhibit the investigator's determination to question the defendant and eventually get his acquiesence by simply wearing him down. This is, as the Supreme Court said, a "case, therefore,

where the police failed to honor a decision of a person in custody to cut off questioning, . . .by persisting in repeated efforts to wear down his resistance and make him change his mind." Id. at 105-106. Here, the police failed to "scrupulously honor" his request to remain silent.

This Court should reverse the trial court's order denying his motion to suppress, and remand for a new trial.

ISSUE VI

THE COURT ERRED IN ADMITTING, AS WILLIAMS[20] 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.

Before trial the State filed a "Williams Rule Notice" in which it claimed that at trial it would introduce evidence that Busby and Globe planned to "lure" two other prison inmates, Alphonso Palmer and Roberto Rosa, into his cell and kill them by strangling them with a garrotte (4 R 677, 11 R 2074). Busby filed a "Notice of Objection to Williams' Rule Testimony and Motion to Prohibit Williams' Rule Testimony." (8 R 1413-16). At the hearing on the notices and motion, the State gave a fuller explanation of the relevancy of that testimony. Specifically, in the July 3rd and 7th statements Busby and Globe said they had planned to kill "some inmate, any inmate," and that included Palmer and Rosa. When their plans collapsed, they settled on Ard (62 R 12397). "So, [the evidence of the other plans] 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 kill inmates." (62 R 12397) The evidence also tended to refute the

[20] Williams v. State, 110 So. 2d 654 (Fla. 1959)(Similar fact evidence admissible even though it points to commission of another crime.)

anticipated defense that Busby had nothing to do with the murder. (62 R 12397-98). Finally, the evidence had relevance, the State argued, to show a similar modus operandi between the murder of Ard and the plans for Rosa and Palmer, namely the use of a garotte (62 R 12398).

Busby responded with several arguments, but the one relevant to this appeal contended that it was unnecessary and did nothing other than show his criminal propensity, which, of course, is irrelevant (62 R 12399, 63 R 12400)

The court denied the defendant's motion to exclude the Williams' Rule evidence (13 R 2404), and at trial and over Busby's renewed objections, the State introduced evidence of his attacks on and desires to kill Rosa and Palmer (78 R 1051). It also used this evidence during its closing argument (81 R 1427). Admitting that evidence and denying Busby's renewed objections were errors; under an abuse of discretion standard, this Court should reverse the trial court's judgment and sentence and remand for a new trial. Geldrich v. State, 763 So. 2d 1114 (Fla. 4th DCA 1999).

If the evidence of the plans against Rosa and Palmer has relevance to the State's case against Busby it does so only under Section 90.402, Florida Statutes (1997). Section 90.404(2)(a), Florida Statutes (1997), the codification of the so-called Williams Rule, provides no basis for admissibility 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.

Thus, only Section 90.402 justifies, if it can be, the threat evidence. It simply provides that "All relevant evidence is admissible, except as provided by law." Significantly for this case, the "except as provided by law" includes Section 90.403, Florida Statutes (1997), which limits otherwise relevant evidence if "Its probative value is substantially outweighed by the danger of unfair prejudice, ..." Also, if the evidence only exhibits the defendant's bad character, it is inadmissible. Hence, because of the extraordinarily corrosive strength of the bad acts evidence, the vague threats against Rosa and Palmer, this Court should apply the "strict standard of relevancy" it has adopted in other cases. Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987).

In this case, the State claimed the threats had relevance to show Busby's premeditation or consciousness of guilt, but if so, its pertinence to that issue was so weak that its damning, prejudicial value substantially outweighed the limited significance it may have had. Section 90.403, Florida Statutes (1997). Williamson v. State, 681 So. 2d 688, 696 (Fla. 1996)(Claim that prejudicial value of evidence outweighed its relevance rejected because it was "integral to the State's theory of why its key witness acted as he did both during and after the criminal episode.")

In State v. McClain, 525 So. 2d 420 (Fla. 1988), this Court articulated the test to determine if the prejudicial significance of the offered evidence outweighs its probative value:

> In excluding certain relevant evidence, Section 90.403 recognizes Florida law. Certainly, most evidence that is admitted will be prejudicial to the party against whom it is offered. Section 90.403 does not bar this evidence; it is directed at evidence which inflames the jury or appeals improperly to the jury's emotions. Only when that unfair prejudice substantially outweighs the probative value of the evidence is the evidence excluded. .... In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction.1 C. Ehrhardt, Florida Evidence § 403.1 at 100-03 (2d Ed. 1984) (footnotes omitted).

Here, the State simply had no need for this evidence, which had only a minimal relevance at best. David v. Brown, 774 So. 2d 775 (Fla. 4th DCA, 2000). Strangulations, by their very nature, and particularly in this case, must involve an evil intent or premeditation. Busby's designs were never an issue. This became obvious during the penalty phase of the trial when the State argued, and the court found, he had the "heightened premeditation" required for him to have committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (84 R 1807, 86 R 1900). The threats against Rosa and Palmer simply were unnecessary for any relevant purpose, and instead showed the defendant's bad character. See,

Williams v. State, 539 So. 2d 563 (Fla. 4th DCA 1989)(Trial court should have excluded, as unduly prejudicial, portion of the defendant's confession in which he had said he had been arrested before and was on probation.)

Perhaps, though, the testimony of the uncharged crimes or bad acts -- i.e. the threats against Rosa and Palmer -- were admissible if they were inseparable from the charged crime and were necessary to adequately to describe it. Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994); Coolen v. State, 696 So. 2d 738, 742-43 (Fla. 1997). Obviously, what Busby said a week or month or two months before the murder could easily have been excluded without any reduction of the State's ability to tell its story. The threats simply did nothing to "explain[] or throw[] light upon the crime being prosecuted." Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA 1986). Rather, as the State clearly implied in its closing argument, Busby's plots and plans did nothing but reveal his propensity or bad character.

> Let's look at each part of this: Andrew Busby killed after consciously deciding to do so. What evidence do wehave of that? He wanted to kill Roberto Rosa. He wanted to kill Eddie, Alfonso Palmer, the guy I mentioned in opening statement. He wanted to kill Sergeant Smith. . . . He wanted to kill Sergeant Davis. He wanted to kill Sergeant Lindlow. Anybody. Somebody. Just let me have somebody to kill. He wanted to kill Ard.

(81 R 1427)

The threats could also have had relevancy if they put the "entire case in perspective." Bradley v. State, 787 So. 2d 732, 742 (Fla. 2001). In Bradley, the defendant and a couple of his employees tried to retrieve a diamond ring Jack Jones, the husband of Linda Jones, had given to his teenage girlfriend. Mrs. Jones had convinced Bradley to bully the girl and beat up Mr. Jones. A week after he had accosted the girl, Bradley beat and murdered the husband. The earlier incident against the teenager had relevance this Court held because it "provides the necessary coherence to the State's theory that Bradley had become the enforcer of Mrs. Jones' angry wishes, which ultimately included murdering her husband for his participation an extramarital affair."

In this case, the testimony of the threats -- i.e. the desire to kill Roberto and Palmer -- were admissible if they were inseparable from the charged crime and were necessary to adequately to describe it. Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994); Coolen v. State, 696 So. 2d 738, 742-43 (Fla. 1997). Obviously, those vague plans and intentions made some unspecified time before the murder could easily have been excluded without any reduction of the State's ability to tell its

story.[21] The threats simply did little to "explain[] or throw[] light upon the crime being prosecuted." Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA 1986).

The threats against Rosa and Palmer only put Busby's bad charcter in perspective, or rather, it clearly presented this man's undifferentiated desire to kill. Such evidence, shocking as it was, was unnecessary to the State's case, so its obvious prejudicial value substantially outweighed its muted relevance. The court should have, therefore, excluded it, and that it abused its discretion in admitting this evidence means that this Court should reverse the trial court's judgment and sentence and remand for a new trial.

[21] The plans on Rosa and Palmer were discussed as along as a week and maybe a month before the murder of Ard (63 R 12400).

ISSUE VII

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.

Busby gave three statements to the prison investigators: July 3, 2000, July 7, 2000, and July 12, 2000. During the guilt phase of his trial, the State introduced an audio tape of the July 3 confession, which the jury heard (78 R 1025). They also had a transcript of what he had said to use while the tape was played (78 R 1025).[22] During the penalty phase, the State wanted to introduce only an alleged transcript of the July 7, 2000 confession. By the time of trial, the police had lost the audio tape of what the defendant had said, and had only what it claimed was a transcript of it (82 R 1592). Jack Schenck, one of the prison officials who had questioned Busby on July 7, claimed the transcript "fairly and accurately depict[ed his] recollection of the conversations [he] had with Mr. Busby on July the 3rd (sic)?" (82 R 1552). He had not, however, transcribed the interrogation(82 R 1554), nor had he listened to the tape for at least 21 months (82 R 1553). That is, about a year after the murder, the prosecutor asked Mr. Schenck "to do a comparison of the tapes and transcripts, [and] it was at that time that I discovered that the tape had been

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[22] See Exhibits 74-A and 75-A.

separated from the file." (82 R 1553) Thus, Schenck could testify about the accuracy of the transcript only because he had heard Busby's confession over a year earlier, and had listened to the now lost tape and made a cursory (or "not in a detailed fashion") check for its accuracy only shortly after the defendant had given it (82 R 1554).

Busby objected to the State's efforts to introduce the transcript because "there is no way we can rely on this being a true and accurate depiction of what it is; that is, it's subject to interpretation of whoever transcribe it, not necessarily Mr. Schenck." (82 R 1555)

The prosecutor, admitting it had not tried to have the July 7 statement introduced at the guilt phase of the trial, apparently because he did not have the tape, said that the court should let the jury hear it in the penalty phase because "we have a lesser standard of proof and the rules of evidence are relaxed." (82 R 1555). The court summarily and without any evident concern with or analysis of the problem of the transcript's accuracy ruled the transcript admissible. It did so without any regard to this Court's admonition that he should have used "extreme caution before allowing transcripts of recordings to be view by the jury." Martinez

v. State, 761 So. 2d 1074, 1086 (Fla. 2000).[23] The standard of review this Court should use is unclear. Busby contends that while this Court should give the lower court discretion regarding its factual findings supported by the record, it should reach its own conclusions about how the law applies to those facts.

Several little used rules of evidence control this issue. First, Section 90.901, Florida Statutes (2000), requires the "Authentication or identification of evidence. . . as a condition precedent to its admissibility." Section 90.952, Florida Statutes (2000), provides that "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." Finally, Section 90.953, Florida Statutes (2000), allows a party to use a duplicate of the original document unless, "A genuine question is raised about the authenticity of the original or another other document or writing."

So, in order for the State to use the July 7 confession it needed to produce the original audio tape and have it properly authenticated. If it could not, it had to have a duplicate. The question, thus presented here, is whether the document the prosecutor claimed was a transcript of the July 7 meeting qualified as a duplicate and thus admissible. Or, asked another way, was it relevant?

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[23] The court also failed to give a cautionary instruction about the use of the transcript. Martinez at 1086.

First, to say what this issue is not about. It is not about using a transcript where part of the audiotape is distorted, unintelligible or garbled. At least we do not know if the tape had those problems. See, Wilson v. State, 680 So. 2d 592 (Fla. 3rd DCA 1996). It is also not about giving the jury a transcript to read as they listen to the audiotape. Duggan v. State, 189 So. 2d 890 (Fla. 1st DCA 1966). Here, the jury did that with the July 3 statement used in the guilt phase of the trial. It did not have that luxury in the penalty phase, the audiotape having disappeared long before that proceeding began. Hunt v. State, 746 So. 2d 559 (Fla. 1st DCA 1999)(Jury may have a transcript of a recorded conversation to aid them in understanding what they heard on the tape.)

What it does involve, as defense counsel argued at trial (82 R 1555), was the accuracy of the transcription. We do not know who did it. Duggan (Transcription inadmissible because, among other reasons, "the court reporter who made that transcript was not present when the recording was made . . ." and could vouch for its accuracy.) No one ever said a professional court reporter made the transcription, and if so, they never complied with Rule 1. 310(f) Fla. R. Civ. P that provides for a transcriber's certification of accuracy. At best, we have Schenck relying on his memory about what was said in an interrogation that had happened a year earlier. While a person who witnessed the questioning in general

can testify about the accuracy of a later transcription, Duggan, cited above, Schenck's authentication has problems. See also, Martinez v. State, 761 So. 2d 1074, 1087 (Fla. 2000); Harris v. State, 619 So. 2d 340, 343 (Fla. 1st DCA 1993). At no time did he ever make a "detailed comparison" of the then existent audio tape with the transcription. Indeed, not until that year later did anyone even think to check the accuracy of the tape with the transcript. Also, the State never asked Schenck if he based his conclusion of the transcript's accuracy on an independent knowledge and recollection of the events. That is, was the transcript accurate because that is what he remembered was said, or was it accurate because of what he read? Allen v. State, 492 So. 2d 803 (Fla. 1st DCA 1986); Martinez(participant at conversation can verify accuracy based on her recollection of it.) These unanswered questions and the problems they raised expose the State's failure to provide enough evidence for the trial court to have any confidence that what the jury read was a "duplicate" of the transcript. Since it was not, it had no relevance to the penalty proceeding, even under the "relaxed" rules of evidence the State relied so heavily on to justify introducing this piece of evidence.

As to the harm, the July 7th statement provided evidence to support the especially heinous, atrocious, or cruel and cold, calculated, and premeditated aggravators. Specifically, in that confession Busby admitted helping Globe choke

Ard (82 R 1568), he wanted to tear off the victim's head (82 R 1569), after he was dead a "couple of times I would walk over to Ard and tap him on the head and say, 'How you doing Buddy?'" (82 R 1572), he stuck him in the ear after he was dead, wanted to "pop his eyes out cause I ain't never seen that," and he "hated every single person there." (82 R 1577) The jury could very well have properly or improperly considered that evidence in support of those aggravators. See, Halliwell v. State, 323 So. 2d 557 (Fla. 1975)(What is done to a body after death is irrelevant to the heinous, atrocious, or cruel aggravator.)

The trial court therefore erred in admitting transcript, and this Court should reverse its sentence of death and remand for a new sentencing hearing.

ISSUE VIII

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.

In sentencing Busby to death, the court found that he had committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Specifically, it rejected his claim he had a pretense of legal justification:

> As justification or excuse for the killing of Inmate Elton Ard, you, by written and taped statements, have offered the following:
>
> i. You were harassed sexually and as a result of this sexual harassment, Eldton Ard deserved to die. This does not constitute a pretense of moral or legal justification.
>
> ii. The murder was committed as a political statement to highlight the unfair treatment of prisoners in the Florida Department of Corrections. This does not constitute a pretense of moral or legal justification.
>
> iii. The murder was committed in retaliation for verbal assaults Inamate Ard made to you. This does not constitute a pretense of moral or legal justification.

(20 R 3897)

The court erred in finding the CCP aggravator because Busby presented competent, substantial evidence to support his claim, the appropriate standard of

review this Court should use to review this issue. Alston v. State, 723 So. 2d 148 (Fla. 1998).

This Court has said a lot about what makes a murder cold, calculated, and premeditated. It has said much less about the essentially affirmative defense of a "pretense of moral or legal justification." In fact, only one case, Christian v. State, 550 So. 2d 450 (Fla. 1989), has any significant relevance to resolving the issue presented here. In that case, Alfred Moore and Doy Christian were both inmates at Florida State Prison. One day, Christian caught Moore cheating at cards. Later, Moore, harboring an "insane hatred" of Christian hit him in the back of the head with a 40 pound curling iron, knocking the defendant unconscious. During the next three weeks, Moore kept up a verbal assault on Christian, threatening to kill him and his parents, and to turn him into his homosexual lover.

Finally, something snapped in Christian. One day, he saw two guards escort a handcuffed Moore. Grabbing a knife he had, he stalked or rushed up to him and pushed the guards aside. Moore tried to flee, but Christian caught up with him and methodically stabbed the victim 26 times, including wounds to the eyes. Finally, he spit in the man's face, lifted him up, and threw him off the third floor tier of cells. This was a cold, calculated, and premeditated murder. Christian, however, had a pretense of moral or legal justification, as this Court found. "[T]his record

discloses at least a colorable claim that the murder was 'motivated out of self-defense,' although in a form legally insufficient to serve as a defense to the crime. . . . Christian's attack on Moore was preceded by three weeks of constant harassment and threats." Id. at 452.

Christian's pretense of self-defense arose from a single source-Alfred Moore, and the latter's physical and verbal attacks on him over the short course of three weeks. Busby's claims had no similar single person focus. Instead, a large part of the Columbia Correctional populace wanted to rape him, and the persistent, always present real threat of physical danger, accented by the constant barrage of taunts and harrassment made his situation at least comparable to Christians. Of course, no one had knocked him unconscious, but Ard had attacked him some time before July 3, 2000 (78 R 1034). Finally, unlike the staff at Florida State Prison, the guards at the defendant's prison refused to help him, and indeed, told him they would ignore any attacks made on him (78 R 1054, 1062, 1086-88).

In Mohammad v. State, 494 So. 2d 969 (Fla. 1986), this Court recognized that prison life differs from that in a free society. Besides having many fewer options, there is a strong "wild west" element, where a man is expected to solve his own problems, to do his own time. Thus, when Busby faced an unrelenting and imminent threat of being constantly, daily raped, he had to solve his dilemma

himself. Hence, like Christian, he killed Ard as a matter of self-defense, and if the law says that motive cannot provide enough justification in the guilt phase of a trial, it will at least acknowledge the pretense of justification in the penalty phase. Busby committed a cold, calculated, and premeditated murder of Elton Ard, but he had at least a pretense of legal justification in doing so.

This Court should reverse the trial court's judgment and sentence and remand for a new sentencing hearing before a new jury.

ISSUE IX

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.

During the penalty phase portion of Busby's trial, the defendant sought to introduce several pieces of evidence through Nan Jobson, the social worker who had seen him as a patient for eight years (78 R 1102). Exhibit 74 included a letter "Andy had dictate to me about his mother and his struggles with his mother" along with a "treatment plan diagnosis." (83 R 1751) The court admitted the latter diagnosis, but excluded the letter from Busby because it was hearsay (83 R 1752).[24] Busby also sought to have admitted (again through Ms. Jobson) two videotapes made years before the murder that involved "her and Reverend Busby and Andy acting out different situations as far as trauma to try to resolve the trauma that had occurred to him (83 R 1785). The State again objected because "We are talking about videotape role playing and we are talking about self-serving statements by the defendant." (83 R 1785) The court agreed with the State and excluded them

[24] The excluded letter was identified as exhibit 74-A (83 R 1754).

(83 R 1787)[25] In both instances, the court abused the discretion given it in admitting or excluding evidence, and this Court should reverse for a new penalty phase hearing so Busby can present this legitimate mitigating evidence. See, Philmore v. State, 820 So. 2d 919 (Fla. 2002).

In Spencer v. State, 645 So. 2d 377, 383-84 (Fla. 1994), this Court found no error in the trial court having admitted the testimony of a police officer about statements the murder victim had made to him.

> Although the testimony involved hearsay, it was admissible under Florida's death penalty statute. During the penalty phase proceedings for capital felonies, "[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." § 921.141(1), Fla. Stat. (Supp.1992). This hearsay testimony was probative of both the CCP and HAC aggravating factors as it showed Spencer's intention to kill Karen as well as his intention to punish her. Spencer was also given an opportunity to cross-examine *384 the officer. *Waterhouse v. State,* 596 So.2d 1008, 1016 (Fla.), *cert. denied,* 506 U.S. 957, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992); *see also Clark v. State,* 613 So.2d 412, 415 (Fla.1992), *cert. denied,* 510 U.S. 836, 114 S.Ct. 114, 126 L.Ed.2d 79 (1993) (finding hearsay testimony about defendant's prior first- degree murder conviction admissible where defendant afforded opportunity to rebut, even though he did not or could not rebut the testimony).

In this case, the mitigating evidence Busby wanted admitted would have supported his penalty phase claim of extraordinary and extreme child abuse, abuse

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[25] They are exhibits 73-B and 73-C (83 R 1787).

that reached into his young adulthood. While it would not have excused or exonerated him it did tend to mitigate a death sentence. As such, under Spencer, it was relevant. The State had the opportunity, much as Spencer did, to cross-examine Nan Jobson and rebut her testimony if it could.

As such, the court erred, and this Court should reverse its subsequent sentence of death and remand for a new sentencing hearing.

ISSUE X

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.

Over defense objection (82 R 1580-81), the State introduced a letter purportedly written by Busby to Charles Globe. The State claimed it had some relevance during the penalty phase portion of the trial to show that Busby was as involved in the murder as his co-defendant . Specifically, in it the defendant said, "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." (82 R 1581) Busby, on the other hand argued that "this is a letter that is very explicit and sexual and lurid in nature; it does nothing other than inflame the jury." (82 R 1581). The court, rejecting that claim, admitted it (82 R 1582). That was error because for five pages of the transcript, Karen Smith, a handwriting analyst, read 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). Indeed, its overwhelming, explicit sexual content served only to inflame the jury and unfairly prejudice him in their minds. Thus, the trial court abused the discretion given it in

matters of this sort by allowing the state to have the female witness read this absolutely lurid letter.

While Busby recognizes that relevant evidence is admissible unless excluded by law. Section 90.402, Florida Statutes (2000). Ruffin v. State 397 So. 2d 277, 279 (Fla. 1981), he points out that limits on that general rule exist, some discretionary, and some absolute, that prevent the jury from hearing all relevant evidence. Primarily for this issue, section 90.403 Florida Statutes (2000), prohibits introducing pertinent proof of some fact where the prejudice it would create outweighs its probative value. Of course, parties usually want evidence admitted because it prejudices its opponents, but this court has held that "Only where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded." Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988).

Now, if the State's reason for admitting this steamy homosexual letter was to show Busby's equal participation in the murder, it had no need to use it to do this. It had introduced other evidence in the guilt phase of the trial that did the same thing. Specifically, in the July 3, 2000 joint statement the defendant repeatedly, and for more than 30 transcript pages, implicated himself in the planning and execution of the murder (78 R 1033-68). After the jury heard that they had no need to listen

to a letter filled with Busby's nauseating profession of love that had only a brief, tangential allusion to his willingness to kill. All it did was inflame the jury.

In Ruiz v. State, 743 So. 2d 1, 8 (Fla. 1999), the State introduced, at the penalty phase hearing, a two foot by three foot blow-up picture of the victim's headless body and bloody upper torso. The jury had seen the same picture, but in a standard size photo, during the guilt phase portion of the trial. "This was error," this Court held, because "the photo was offered simply to inflame the jury." Accord, Matthews v. State, 772 So. 2d 600 (Fla. 5th DCA 2000)(probative value outweighed by its inflammatory nature and unfair prejudice.)

Because of lurid, sexual content of Busby's letter, its minimal relevance, and its inflammatory nature the court erred in admitting it in the penalty phase of this defendant's trial. This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

ISSUE XI

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.

Given the current state of Florida law, Busby acknowledges the futility of raising issues claiming that the United States Supreme Court's opinion in Ring v. Arizona, 536 U.S 584 (2002), and Apprendi v. New Jersey, 530 U.S. 166 (2000), should give him any sentencing relief.

At the trial level, Busby raised the following Ring/Apprendi issues:

1. A request for the jury to find which aggravating factors it found proven beyond all reasonable doubts (11 R 2196, 62 R 12374)
2. The jury's death recommendation must be unanimous. (12 R 2269)
3. The jury must unanimously agree regarding each aggravating circumstance found applicable (12 R 2269)
4. A motion to declare section 921.141 unconstitutional (15 R 2880).

Trial counsel acknowledged that this Court's opinion in Mills v. State, 536 So. 2d 532, 538 (Fla 2001), had declared that Apprendi had no relevance to Florida's death sentencing scheme (70 R 200). Accordingly, the trial court denied his several motions (13 R 2410, 2415, 2416).

As counsel did at the trial level, appellate counsel confesses to this Court what it already knows: Mills remains good law. Despite the United States Supreme

Court's ruling in Ring v.Arizona, 536 U.S 584 (2002), this Court, as a court, has steadfastly refused to find the State's death penalty statute, in part or in total, in violation of the Sixth Amendment to the United States Constitution. Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Kormondy v. State, Case No. SC 96197 (Fla. Feb. 13, 2003). Busby raises this issue, not in hopes that it will be swayed by the logic and persuasiveness of his argument, which will be brief, but to preserve this issue in case Harry Potter waves his wand and this Court reverses itself. Because this issue involves a pure question of law, this Court can review it de novo.

Busby specifically argues that the Sixth Amendment requires Florida juries to unanimously recommend death before the trial judge can impose that sentence. Relying on precedent from the United States Supreme Court and a pre-Furman v. Georgia 408 U.S. 238 (1972), death penalty case this Court has held that jury unanimity in capital sentencing has no of due process limitations. Alvord v. State, 322 So.2d 533 (Fla.1975); Johnson v. Louisiana, 406 U.S. 356 (1972) "We do not find that unanimity is necessary when the jury considers this issue." This Court has reaffirmed that position recently. Evans v. State, 800 So. 2d 182, 197 (Fla ,2001); Sexton v. State, 775 So. 2d 923, 937 (Fla. 2000); Bottoson v. Moore, cited above (Shaw, concurring).

Johnson, however, was a non capital case, and that is a significant distinction. In death sentencing, the United States Supreme Court has found that states must ensure not only that defendants receive due process, but a "super due process." See, Eddings v. Oklahoma 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986). For example, capital defendants have a due-process right to a state-provided psychiatrist to help prepare his defense. Ake v. Oklahoma, 470 U.S. 68 (1985). The sentencer cannot consider information unavailable to the defendant. Gardner v. Florida, 407 U.S. 349 (1977). This Court has also said sentencing orders, unlike their non capital counterparts, must be unmistakably clear. Mann v State, 420 So. 2d 578, 581 (Fla. 1982); the sentencers can only consider specifically legislatively created aggravators, State v. Dixon, 283 So. 2d 1 (Fla. 1972); and only relevancy limits mitigation limited. Lockett v. Ohio, 438 U.S. 586 (1978).

Thus, with the jury being a key, core part of Florida's split sentencing scheme, Espinosa v. Florida, 505 U.S. 1079 (1992), an equally vital component is their unanimity in recommending death. The utter finality of that punishment and the heightened due process required before it can be imposed demands no less than the community's united decision that a defendant deserves to die.

In short, before a judge can impose a sentence of death Ring requires the jury to have authorized it. See also, United States v. Harris, ___ U.S. ___, 112 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). Busby simply argues that without the united, unanimous voice of the community that he deserves to die, it has not approved a death sentence.

The Appellant, therefore, respectfully asks this honorable Court to declare Section 921.141 unconstitutional for any or all of the reasons presented here, and remand his case for imposition of a life sentence.

ISSUE XII

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.

This issue, like the previous one, has been decided against Busby. He raises it, again like the previous one, in the hopes that someday this Court will come to its senses and realize the mistake it has made and grant the defendant relief. At trial, he asked the court to limit the use of his two prior convictions for first degree murder. Specifically, he argued that the United States Supreme Court's opinion in Old Chief United States 519 U.S. 172 (1997), prevented the State from presenting the facts of the murders to support the aggravating factor that he had a prior conviction for a capital or violent felony. Section 921.141(5)(a), Florida Statutes (2000). ((82 R 1535). He also relied on this Court's opinion in Brown v. State, 719 So. 2d 882 (Fla. 1998). (82 R 1535). The trial court rejected his request, and because its ruling involved only a matter of law, this Court can review it de novo.

Recently, this Court in Cox v. State, 819 So. 2d 705, 715-716 (Fla. 2002), affirmed a trial court's similar ruling.

> 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. . . .Thus, the holdings of Old Chief and Brown are not properly analogized to this capital sentencing proceeding, where "the point at issue" is much more than just the defendant's "legal status."

Busby respectfully asks this honorable Court to reconsider Cox because in this case the prejudicial impact of facts surrounding the two murders he had committed outweighed any probative value they may have had. After all, a criminal defendant can have no worse criminal record than to have committed a murder, except to have committed two murders. That fact is the major reflection on his character, and the marginal weight given it as an aggravator is substantially outweighed by the prejudicial impact it has on the jury. That is the fundamental holding of Old Chief, and however it may apply in capital sentencing in general, in this case it had a significant unfair weight.

This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE XIII

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.

Before the penalty phase jury heard any testimony regarding what aggravating and mitigating factors existed, after they had heard all the evidence, and after the court had instructed the jury on the relevant law, Busby objected to several of the penalty phase instructions because they diminished the role of the jury in sentencing the defendant to death (82 R 1545-47, 84 R 1795, 1818-19). The court denied those complaints (82 R 1547, 84 R 1795, 1819). He had also filed a pre-trial motion raising the same issue that also included several proposed jury instructions (11 R 2199-12 R 2258), which the court denied (13 R 2406). These requests took legal strength from the United State Supreme Court's opinion in Caldwell v. Mississippi, 472 U.S. 320 (1985). In that case,

> [T]he State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated."

472 U.S. at 341. As with the two prior issues, this one involves a pure question of law, which should be reviewed de novo.

This Court has repeatedly and recently held that the standard penalty phase jury instructions comply with Caldwell. "This Court will note that the Florida Standard Jury Instructions have been determined to be in compliance with the requirements of Caldwell." Burns v. State, 699 So. 2d 646, 654 (Fla.1997); Sochor v. State, 619 So. 2d 285, 291-92 (Fla.1993); Thomas v. State, 28 Fla. L. Weekly S106 (Fla. January 30, 2003).

Despite these rulings, Busby asks this Court to reconsider its rulings in those cases in light of Justice Lewis's concurring and dissenting opinion in Bottoson v. Moore, 833 So. 2d 693, 731-34 (Fla. 2002). In that case, Justice Lewis had great trouble approving those instructions because of their "tendency to minimize the role of the jury," and the trial court's added explanation of Florida's death penalty scheme. "I question whether a jury in situations such as this can have the proper sense of responsibility with regard to finding aggravating factors or the true importance of such findings as now emphasized in Ring [v. Arizona, 536 U.S. 584 (2002)]." Id.

Busby asks this Court to listen to Justice Lewis' argument. In this case, it has particular resonance because within the space of eight pages, the jury was told ten times that their sentence was merely advisory (84 R 1854-61). When the judge repeatedly, repeatedly, repeatedly let them know that he had the responsibility to

sentence Busby and never told them that it had to give "great weight" to their decision, then Justice Lewis' concerns raises to the point of prophesy. Tedder v. State, 322 So. 2d 908 (Fla 1975). The jury instructions used in the penalty phase portion of a capital trial generally and in this case specifically fail to eliminate the Caldwell problem.

This Court should reverse Busby's sentence of death and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments presented here, the Appellant, Andrew Busby, respectfully asks this honorable Court to 1. Reverse the trial court's judgment and sentence and remand for a new trial. Or, 2. Reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **CURTIS FRENCH**, Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050; and to appellant, **ANDREW DARRYL BUSBY**, #V03727, Florida State Prison, 7819 NW 288th Street, Raiford, FL 32026, on this date, April 10, 2003.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.201(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

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DAVID A. DAVIS