IN THE SUPREME COURT OF FLORIDA

MICHAEL GORDON REYNOLDS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC03-1919
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In this brief, the symbol "R" will designate pages in the record on appeal, including transcript pages as renumbered sequentially by the clerk's office. Volumes will be referenced according to the sequential numbers assigned by the clerk's office for the entire record on appeal, and not by the concurrent numbering of the court reporters.

STATEMENT OF THE CASE

The defendant was charged by indictment with three counts of first degree murder on June 23, 1998, of Danny Ray Privett, Robin Razor, and Christine Razor, as well as one count of burglary of a dwelling with a battery and with a weapon. (Vol. 1, R 31-33)

Prior to trial, the defense moved to permit victim impact presentation to the judge only. (Vol. 1, R 88-91) The defendant also moved to declare Florida's death penalty unconstitutional and to dismiss the indictment for a variety of reasons, including the failure to require a unanimous jury recommendation, the failure of jurors to make specific findings regarding their recommendation, and improper burden shifting. (Vol. I, R 92-97, 126-127, 133-134, 131-132; Vol. 2, 236-336, 359-376; Vol. 3, R 447-460, 470-472) All of these motions were denied by the trial court. (Vol. 3, R 377, 535-536)

Due to unsuccessful attempts to secure the attendance as a witness of an uncooperative Justin Pratt, who had also been a suspect initially in the case due to repeated arguments with the victims regarding past due rent money, the defense sought to introduce Pratt's sworn statement to police investigators as a statement against penal interests. (Vol. 18, R 2333-2362) The court found that Pratt was

indeed an unavailable witness. (Vol. 18, R 2355) However, the trial court severely limited the portions of the statement that would be admissible to include only Pratt's admissions to leaving a threatening note on the victim's trailer shortly before their deaths and threatening the victims with a gun on prior occasions. (Vol. 18, R 2332-2399) The court refused defense requests to admit the entire statement, or, at least, to include Pratt's statements indicating knowledge of the manner of the victims' deaths, despite the fact that such information had not been made public by the police. (Vol. 18, R 2359-2360, 2377-2379, 2398-2399) The court also refused to allow the portion of Pratt's statement in which he tells where one victim, Danny Privett, would be outside if he were urinating, the exact location the deceased Privett was killed while in the process of urinating. (Vol. 18, R 2360, 2394) Moreover, the court excluded portions of the statement regarding Pratt's attempted alibi for part of the time frame during which the murders took place (that he was with his girlfriend, also a suspect in the case who also had problems with the victims' back rent), another portion of the statement dealing with Pratt's complaint about the money the victims owed him, and initial denials but then admissions of Pratt calling the victims' residence the night of the murders. (Vol. 18, R 2359, 2362, 2369-2377, 2380-2383, 2389-2395)

The trial court denied the defendant's motions for judgment of acquittal at

the end of the state's case and at the end of the evidence. (Vol. 18, R 2331-2332; Vol. 20, R 2732, 2761) The court denied defendant's request for a modification of the standard jury instruction to eliminate the section which states that the judge only is responsible for the sentence. (Vol. 21, R 2959) The jury found the defendant guilty of the lesser included offense of second degree murder for count 1, the death of Danny Ray Privett; guilty of first degree murder for counts 2 and 3, the deaths of Robin and Christine Razor; and guilty of burglary of a dwelling with a battery while armed, as charged in count 4. (Vol. 4, R 712-715)

The defendant affirmatively on the record waived the presentation of mitigating evidence to the jury and also sought to waive the jury's sentencing recommendation, seeking only to present evidence to the judge regarding the sentencing decision. (Vol. 25, R 3473, 3476-3499)[1] Even though the state was willing to accept this waiver of the jury's sentencing recommendation, the court refused, stating that it wanted to see their recommendation, and explained to the defense that if they had any "residual doubt" issues, that would only hold sway

[1] The defendant indicated that he knew how emotional the victims' family was and he did not desire to put them, or his family, through any more emotional turmoil, and felt that, with his record, sentencing was a foregone conclusion. (Vol. 25, R 3485-3487, 3495)

over the jury. (Vol. 25, R 3498-3499)[2]

The state, after presenting copies of convictions for three prior violent felonies, including an aggravated battery conviction in Hillsborough County, Florida, (Vol. 25, R 3512-3515) presented testimony, over defense objections, from the victim of that aggravated battery conviction as to details of an armed kidnapping and attempted sexual battery, charges for which the defendant was not convicted. (Vol. 25, R 3517-3532) Over defense objection, the state also presented victim impact testimony from the victims' family. (Vol. 25, R 3535-3540)

The jury, without hearing any mitigating evidence from the defense, recommended death sentences for each of the two first degree murder convictions by votes of 12-0. (Vol. 4, R 743-744; Vol. 25, R 3541, 3597)

The court held a *Spencer* hearing, during which the defendant made a presentation (continually claiming his innocence) and during which the defense introduced two depositions (one of the defendant's sister and one of an investigating officer speaking about another suspect, Justin Pratt) and the unredacted statement of Justin Pratt. (Vol. 5, R 748-830; Vol. 26, R 3606-3609) Mike Reynolds spoke to the court in his own behalf, continuing to proclaim his

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[2] The trial court explained to the defense that it would only consider "statutory factors." ("I go strictly by statutory factors, and so that's the way it is.") (Vol. 25, R 3499)

innocence, and denouncing the authorities for their incessant mishandling of the evidence in this case. (Vol. 26, R 3610-3701) In its sentencing memorandum, the defense had argued against certain aggravating factors relied on by the state and also proposed twenty non-statutory mitigating circumstances. (Vol. 5, R 851-865)

The trial court imposed two death sentences. (Vol. 6, R 936-966) The court filed an original sentencing order and, later, two amended orders, finding as aggravating circumstances for both first degree murders: (b) previous convictions, including the contemporaneous convictions, of crimes involving violence (given great weight), (d) while engaged in a burglary (great weight), (e) to avoid a lawful arrest (great weight), and (h) heinous, atrocious, and cruel (great weight). (Vol. 6, R 940-945, 951-957) As to count 3, the court also found as an additional aggravator: (l) the victim was under twelve years of age (great weight). (Vol. 6, R 957-958)

As to mitigating factors (based on evidence presented at the *Spencer* hearing and in the pre-sentence investigation), the court found: the defendant was gainfully employed (little weight), he exhibited appropriate courtroom behavior (little weight), Reynolds cooperated with law enforcement (little weight), and he had a difficult childhood (little weight). (Vol. 6, R 946-950, 958-962) The court rejected as mitigation that the defendant could easily adjust to prison life, since Reynolds had been a member of gangs while previously in prison, and also rejected the notion of

"residual doubt," ruling that that consideration was not permitted. (Vol. 6, R 947-948, 950-951, 960, 962-963) While citing to the unanimous jury recommendations, the court noted that it was not giving the recommendations great weight since the defendant had waived the presentation of mitigating evidence before the jury. (Vol. 6, R 951, 963) The court concluded that the aggravating factors outweighed the "minimal amount of mitigation that exists" and ruled that "the scales of life and death tilt to the side of death" as to each count. (Vol. 6, R 951, 963)

The court also sentenced the defendant to life imprisonment for count 1 (second degree murder) and life imprisonment for count 4 (burglary). (Vol. 6, R 871-875) The defendant's motion for a new trial was denied. (Vol. 4, R 746-747; Vol. 5, R 867-869, 870) Notice of appeal was timely filed. (Vol. 6, R 968) This appeal follows.

STATEMENT OF THE FACTS

Between 1:00 and 1:30 p.m. on July 22, 1998, Shirley Razor, the mother of victim Robin Razor, went to Danny Privett and Robin Razor's lot in Geneva, Florida, where the Privett family lived temporarily in a camper trailer while they worked on renovating two mobile home trailers for Shirley and their use. (Vol. 11, R 852-854, 856, 860) Upon her arrival, she spotted Privett lying in the yard next to a jug of moonshine. (Vol. 11, R 860-862) Accustomed to seeing Privett passed out on the ground from being drunk, she thought nothing unusual of it and ate lunch in one of the mobile home trailers. (Vol. 11, R 861-862) After finishing lunch, she returned outside, this time noticing that Privett had a "hole in his head," whereupon she ran to a neighbors to summon help. (Vol. 11, R 862-863) Upon returning to the scene, Shirley Razor looked into the windows of the camper trailer and saw her daughter and granddaughter, Christina Razor, dead inside. (Vol. 11, R 863-864)

Police discovered that Privett had been struck in the head by a bloody broken concrete block discovered nearby, apparently while he had been outside urinating on a tree in the yard (his pants were unbuttoned). (Vol. 11, R 872-875, 926-927) Cause of death was blunt force trauma to the head (possibly three blows), resulting in a skull fracture and hemorrhaging to the brain. (Vol. 12, R

1087-1088, 1100-1109) There were no signs of defensive wounds or a struggle. (Vol. 12, R 1102)

Inside the camper, police discovered Robin and Christina Razor dead, with Robin lying on the floor and Christina in a seated position on the couch. (Vol. 11, R 876-877, 926) Another piece of cinder block with blood on it was found on the couch. (Vol. 11, R 876) Robin suffered multiple stab wounds to her neck and one to her torso, and multiple blows to the head, resulting in a fractured skull and broken neck, which was fatal. (Vol. 12, R 1111-1125) She also received cuts to her arms and hands, which the medical examiner opined were "defensive wounds" (Vol. 12, R 1116, 1121-1124), and a glancing blow from a sharp object, perhaps the broken cinder block. (Vol. 12, R 1118-1119) While the cutting wounds would have been painful, after the head injury (which the doctor could not tell when it was delivered) Robin would have been unconscious. (Vol. 12, R 1124) Christina died of a knife wound that penetrated her sternum and lacerated the right pulmonary artery and also had contusions to her left eye and mouth. (Vol. 12, R 1126-1128) While the knife wound would have been painful, she would have lost consciousness quickly from the loss of blood. (Vol. 12, R 1128) The deaths were estimated to have occurred between 11:00 p.m. of July 21st and 7:00 a.m. of July 22nd. (Vol. 12, R 1139-1142) Although Christina was not wearing panties when her

body was discovered (and the panties were found across the room underneath a blanket on which the other victim, Robin, was found), there was no indication of a sexual assault and no semen was found. (Vol. 11, R 942, 947; Vol. 12, R 1008; Vol. 15, R 1657, 1691-1692)

Various items of clothing and other household items (blanket, pillow, towel, switch plate, door frame, wood molding, and floor and rug cuttings) which appeared to have blood stains or shoe prints were collected. (Vol. 11, R 933-955) Curiously, even though the evidence technician noted the presence of possible blood on sixty-one other items collected, the evidence log made no mention of the possible blood stains on the blanket and panties, which were later testified to contain blood. (Vol. 12, R 1006-1010) A pillow was collected and bagged for evidence, with the notation of a pillow as contents. (Vol. 11, R 955, 998) However, when this item of bagged evidence was opened at the FDLE lab, it was discovered that a wet blue towel, not seen by the evidence technician at the scene, had been commingled in the same bag, potentially causing "transference" or "cross-contamination" of any stains or contents of the towel and pillow. (Vol. 11, R 955, 982-990, 993-998; Vol. 14, R 1473-1474, 1478-1480; Vol. 16, R 1684-

1686)[3]

Police discovered that the older Privett daughter, Danielle, had spent the night at a friend's house. (Vol. 19, R 2412-2413) Police questioned her about anyone having argued with her family, and she reported that three people, Justin Pratt, his girlfriend, Nicole Edwards, and Alan Combs, had, in the past, threatened the family with guns, and had quite recently threatened the family due to past due rent money for the camper, and had driven past the Privett trailer and brandished guns and threatened to shoot the family just a day before the killings. (Vol. 19, R 2416-2423) Danielle was unaware of any current problems her parents were having with anyone else. (Vol. 19, R 2423, 2584-2585)

Justin Pratt, in a statement to investigators, admitted leaving a threatening note on the victims' trailer recently, because of wanting his past due rent money, in which he threatened "war" with "conventional weapons." (Vol. 19, R 2571-2578) Robin Razor paid some of the past due money to Pratt and Edwards, but Pratt and Edwards were still upset over the amount still due and continued to harass Privett and Razor. (Vol. 19, R 2579-2580)[4]

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[3] An FDLE lab technician indicated that "With Seminole County, it wasn't odd for us to get surprise items." (Vol. 14, R 1473-1474)

[4] In his statement to police, Pratt also professed knowledge that Robin and Christina Razor had been stabbed, a fact not released by the authorities and, hence,

Despite this lead into these other suspects, police also began to question the defendant, Mike Reynolds, who lived on the same road as the victims, since he had appeared at a local hospital the morning after the killings with a lacerated little finger and a sprained ankle. (Vol. 12, R 1060-1061, 1064) Reynolds had told emergency room personnel and later the police, that he had fallen on his trailer steps (his landlady testifying that the steps were indeed dangerous) early that morning while taking his puppy out for a walk, and had caught himself by reaching for the door frame, which had a burr on it, cutting his finger. (Vol. 12, R 1062-1063, 1074-1079) Reynolds told police that he had returned to his trailer later and had broken off the offending burr, and an examination of the door frame confirmed that a small piece had, indeed, been recently removed, which piece was subsequently discovered in the shrubbery next to the trailer steps. (Vol. 12, R 1166, 1178-1179, 1182; Vol. 13, R 1206, 1263, 1288-1289, 1299-1300, 1313-1314, 1318-1319)

The defendant admitted that, approximately a month earlier, he had had a

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a fact which would be known only by the perpetrator (Vol. 18, R 2359-2360, 2362, 2369-2383, 2389-2395, 2398-2399) and attempted to establish an alibi for the time frame of the killings, also unknown to anyone but the killer. However, the court excluded this evidence from the jury's consideration, finding that this portion of the statement of the unavailable Pratt was not a statement against penal interests, and hence not admissible. (*Id*.) Investigator John Parker, who interviewed Pratt, indicated in his deposition which was admitted at the *Spencer* hearing, that Pratt had failed a lie detector test when asked if he had killed Privett and the Razors. (Vol. 5, R 816)

dispute over a trailer frame, which his landlord had originally given him. (Vol. 13, R 1251-1254) When Reynolds had not moved the trailer frame from his landlord's property soon enough for his liking, the landlord, originally unbeknownst to the defendant, gave the trailer frame instead to Danny Privett. (Vol. 13, R 1251-1254) Reynolds, discovering the trailer frame on Privett's lot, got into an argument with him, but also and mainly with Alan Combs (who was visiting Privett at the time) over the frame. (Vol. 13, R 1251-1254) Later, having discovered that his landlord had indeed given the trailer frame to Privett, Reynolds returned to the Privett trailer and apologized to Danny for the argument, telling him the trailer frame was Privett's to keep. (Vol. 11, R 888; Vol. 13, R 1253-1254)[5] As this issue had been resolved and Reynolds and Privett continued to socialize over horseshoe games at the Privett trailer, Danielle Razor, in informing the police about any known disputes between her family and others, did not even recount this incident, nor mention Mike Reynolds' name. (Vol. 13, R 1253-1254)

Despite the apparent motive of Pratt and Edwards, the police investigation began to focus solely on Reynolds, with the defendant voluntarily consenting to a police search of his trailer and car and the seizure of his clothing. (Vol. 12, R 1173;

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[5] This fact was confirmed by a neighbor and friend of the victims, Ernie Rash, who witnessed the argument and the defendant telling Privett he could keep the trailer. (Vol. 11, R 883-888)

Vol. 13, R 1285-1286) Nothing recovered from his trailer or car connected him to the killings, only Reynolds' blood being found on his clothing and car. (Vol. 17, R 2017-2020) Reynolds voluntarily provided hair and blood samples to police for their use in the investigation. (Vol. 12, R 1177-1178) Police did not submit any hair, blood, DNA, footware, fingerprints, palmprints, or any other samples of Pratt, Edwards, or Combs for forensic comparison. (Vol. 14, R 1514, 1548-1549, 1598-1599; Vol. 16, R 1851) The defendant's shoes did not match any of the footprints found inside the trailer and none of the unidentified footprints were ever compared to any other suspect. (Vol. 14, R 1593-1594, 1598)

Authorities from FDLE and the FBI were given only some of the samples and items collected from the victims' trailer and from the defendant for their comparison; a great many items including hairs and bloodstains, although collected because of their potential evidentiary value, were never submitted for testing. (Vol. 11, R 964; Vol. 12, R 1028; Vol. 19, R 2453-2508) Despite testimony and the defendant's statement that he had recently washed some clothes (which he pointed out to police hanging on the clothesline), the authorities did not submit for testing any lint or debris samples which evidence technicians had taken from the washing machine and plumbing in the hopes of finding debris or DNA from the victims. (Vol. 12, R 1306-1307; Vol. 19, 2459, 2462-2463) In a search for hair and fibers,

debris was sweeped first from the defendant's clothing, then, in the same evidence collection room, from the items taken from the victims' trailer. (Vol. 14, R 1480, 1483-1486, 1489)[6] A pubic hair, recovered in this fashion on the sweeping paper after a sweep of a pair of girl's panties recovered from the victims' trailer (and after previous sweeps of the defendant's clothing in the same collection room), was identified by a hair comparison expert as being consistent in some ways with a known sample of the defendant, but inconsistent in other aspects. (Vol. 14, R 1514-1515, 1542-1543) A DNA comparison expert opined that the pubic hair DNA matched the defendant's. (Vol. 16, R 1972) A second DNA sizer, however, who checks the first examiner's evaluation, noted the presence of a number eleven allele, which DNA marking would exclude the defendant, whose DNA did not include a number eleven allele. (Vol. 17, R 2178-2179) This discrepancy was attributed by the testifying expert, though, as having merely been caused by "artifacts" from the DNA sampling process. (Vol. 17, R 2180)

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[6] While the floor and table of the sweeping room were mopped with a cleaning solution and a new collection paper placed over the table, the FDLE expert testified that utilizing the same room to sweep first the defendant's items, then the victims' was a "no-no" because of possible cross-contamination. (Vol. 14, R 1483-1486) "Hopefully there was no contamination," she implored. (Vol. 14, R 1489) Hair comparison experts testified elsewhere at trial, however, as to the ubiquitous nature of hairs, that they can float in the air, and are simply present everywhere in nature. (Vol.14 , R 1509-1511)

Similar problems of "stutters," artifacts, and "partialling" were reported with blood DNA recovered from a wood air conditioner frame, from a switch plate, from a pillow[7] all from inside the victim's trailer and from the outside door frame of the trailer (a scant twenty-two inches off the ground). (Vol. 15, R 1785-1786, 1788-1789, 1795; Vol. 16, R 1806, 1818-1819, 1829, 1862, 1939, 1946, 1950; Vol. 17, R 2136-2137, 2147, 2155-2156, 2181-2183) Despite measurements, bands, and alleles of the DNA not matching the defendant's, the expert opined these samples were still his DNA. He explained that, with these different measurements and alleles, the DNA samples would not match the defendant. (Vol. 16, R 1806, 1820-1823; Vol. 17, R 2136-2137, 2147, 2155-2156, 2161-2162, 2181) However, despite these discrepancies, the expert continued to maintain that they were not different, but instead caused either by imperfections and limitations in the DNA sorting process or were due to mixtures of DNA, and hence did not exclude the defendant, rather, in his opinion, matching Reynolds to the evidence. (*Id*.; Vol. 15, R 1776-1777, 1782-1783, 1785-1786; Vol. 16, R 1932, 1938-1940, 1972, 1945) He admitted that when their lab would get an unexpected, inconsistent result, they

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[7] which pillow had improperly been packaged with an unidentified blue towel discovered in the same evidence bag and which could have caused contamination. (Vol. 11, R 955, 982-990, 993-998; Vol. 14, R 1473-1474, 1478-1480; Vol. 16, R 1684-1686)

would not declare it to be not a match; instead, they would disregard it and say it was inconclusive, which they did here. (Vol. 16, R 1818-1823)

Blood stains from the victims' clothing, bed linen, and other household items, not surprisingly, matched the victims' DNA. (Vol. 15, R 1769-1775, 1779-1781; Vol. 16, R 1941-1944, 1963-1967, 1982-1991; Vol. 17, R 2008-2012, 2020-2022, 2027-2029) However, none of the defendant's DNA or blood was discovered on the victims themselves, despite the state's theory that the defendant had cut himself and bled profusely while stabbing the victims. (*Id*.) Blood stains tested on the defendant's clothing, again not surprisingly, matched only that of the defendant's DNA, with no hint of the victims' DNA. (Vol. 17, R 2017-2020) Hairs, recovered by police from Robin Razor's bloody hands did not match the defendant's, but four unknown brown Caucasian head hairs were identified, including at least one of which had been forcibly yanked from its owner. (Vol. 12, R 1025; Vol. 14, R 1521-1524, 1546-1547, 1549-1550) Inexplicably, these hairs were not compared to any other suspects, nor were they compared with each other to determine if they had the same origin,[8] the expert opining that these hairs simply were transitory ("You can almost not go anywhere in which you can't find some

[8] the hair expert unaccountably opining that it was impossible to compare these hairs to each other since there was not a "known" sample! (Vol. Vol. 14, R 1554)

hairs that are lying around in nature.") (Vol. 14, R 1510-1511, 1548)

The authorities, trying to develop their case over the next couple of years, submitted many exhibits to the lab for testing, but, curiously, did not submit a multitude of items for testing, which could have further implicated or completely exonerated the defendant. (Vol. 17, R 2034-2035; Vol. 19, R 2453-2508) These items included cuttings from the victims' couch, bedding, and clothing, all containing blood stains, and cuttings and sweepings from the defendant's car, also appearing to contain blood stains. (*Id*.) Authorities, explaining why these relevant items were not submitted for testing, contended that an attempt to save on investigative costs prevented these submissions and necessitated prioritizing items for testing. (Vol. 11, R 964; Vol. 12, R 1028; Vol. 19, R 2509-2510)

The state further produced the impeached testimony of a fellow inmate, Darrell Courtney, who told police, in exchange for thirty months off of his federal sentence, that the defendant had once upon a time told him that he felt bad about having to kill the girl, but that, with his record, he could not leave any witnesses. (Vol. 14, R 1429-1433, 1444) However, another inmate acquaintance of Courtney, Robert Scionti, came forward to authorities and told the jury that just days earlier during this trial, Courtney had admitted to him in the jail that Reynolds had never confessed to him, but Courtney was telling authorities this simply because he felt

Reynolds was "a shit." (Vol. 20, R 2613, 2623) Another inmate, Christopher Zink, told jurors that, one day on the way to court proceedings in the jail van, Reynolds and he were discussing their charges. (Vol. 14, R 1564-1566) Reynolds told Zink that Zink's case of domestic violence was nothing compared to his where he "hit a guy with a brick while he was taking a leak" and they charged him with stuff done inside a trailer. (Vol. 14, R 1566) Zink testified that Reynolds was "saying that that's what they were accusing him of," and "he didn't say he did anything inside." (Vol. 14, R 1566-1567) Zink also professed to have overheard an argument between the defendant and another inmate during the same van ride, during which, he claimed, the defendant threatened to kill the other "just as he had that family in Sanford."[9] (Vol. 14, R 1567-1568)

Deputies who had canvassed the neighborhood after the killings learned from Jason Columbus, a next-door neighbor of the victims, that he had seen a dark car, maybe similar to the defendant's car, at about 11:00 p.m. on the night of the murders. (Vol. 11, R 901, 916) He saw three males sitting on the hood of the car and heard Danny Privett speaking loudly. (Vol. 11, R 908-912) However, even though he knows the defendant and could identify his voice, Columbus did not

[9] However, the killings here did not occur at all in Sanford, rather in the rural Seminole County town of Geneva. (Vol. 11, R 847, 873)

recognize the voices of the other two males. (*Id*.)

Nicole Edwards, Pratt's girlfriend, was finally located during the trial, and testified during the defendant's case that indeed, the victims were behind in their rent money due to Pratt and her, but she denied they had been upset over the past due rent and denied they had made threats to the victims. (Vol. 19, R 2586-2587) Protesting that she did not realize that she and Justin "were on trial here," Edwards admitted to crack cocaine usage and that Pratt and she fought violently, with an outstanding warrant still in existence against Pratt for domestic violence against her. (Vol. 19, R 2591-2592, 2595-2596) Maintaining that the defense, "better find some other people," and contrary to other evidence offered during the trial, Edwards denied going out to the victims the night before the killings seeking their money and also initially denied being with Pratt on the night of the killings, claiming to be with other friends at that time (but admitting later that she may have told investigators that they were together, which, if she had said that, would have been the truth). (Vol. 19, R 2588-2589, 2593)

SUMMARY OF ARGUMENT

Point I. The trial court erred in excluding the entire sworn statement of an unavailable witness, a prior suspect in the case. The redacted portions were not hearsay, or in the alternative, if they were, the entire statement was an admission against penal interests. The exclusion deprived the defendant of his right to present his defense in its entirety, that this unavailable witness was the real killer.

Point II. The convictions for the two first degree murders, the second degree murder, and burglary must be vacated. The circumstantial evidence was insufficient as a matter of law in that it did not foreclose the reasonable hypothesis of innocence, that someone else, whose footprints were inside the trailer and whose Caucasian head hairs were in the hand of the victim, was the real killer. The DNA evidence was too tenuous (because of extra bands, alleles, and measurements of the DNA did not match that of the defendant).

Point III. The court abused its discretion in refusing to permit the defendant to waive his right to a penalty phase jury determination, especially where the jury recommendation was tainted by the court's granting of the defendant's waiver of the presentation of mitigating evidence before the jury (the defendant not wanting his family, nor the victims', to continue to endure more court proceedings). The

death sentences, based in part on those jury recommendations, are rendered unconstitutional and must be vacated.

Point IV. The trial court committed reversible error in allowing the presentation of testimony of the victim of the defendant's prior aggravated battery to details of other alleged violent crimes (attempted sexual battery and armed kidnapping) for which the defendant had been acquitted. The consideration of these improper details could only have caused this factor to be given greater weight by the jury and the trial court. A new sentencing, without reference to these prior alleged acts of graphic violence, is required or the death sentences must be vacated.

Point V. Florida's capital sentencing scheme and penalty phase jury instructions unconstitutionally shift the burden of proof to the defendant. It must be declared unconstitutional, following the lead of a recent Kansas Supreme Court case striking down their death penalty statute.

Point VI. The trial court erred in refusing to consider as a nonstatutory mitigating circumstance residual doubt as to the defendant's guilt. Such a residual doubt should preclude the death sentences.

Point VII. The trial court erred in making its findings of fact in support of the death sentences where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found

inappropriate aggravating circumstances, and where a comparison to other capital cases reveals that the only appropriate sentences in the instant case are life sentences.

Point VIII. Florida's death penalty procedure violates the Sixth and Fourteenth Amendments under *Ring v. Arizona*.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN REFUSING TO ADMIT THE ENTIRE STATEMENT OF AN UNAVAILABLE WITNESS WHERE THE REDACTED PORTIONS WERE NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED OR WERE AN ADMISSION AGAINST THE DECLARANT'S INTERESTS, AND WHERE THE EXCLUSION DEPRIVED THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL AND TO PRESENT HIS DEFENSE, UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

A. The Redacted Portions of the Statement Were Not Hearsay.

The defendant sought to introduce the entire statement of the unavailable Justin Pratt, an original suspect in the case, not only as an admission against penal interest exception to the hearsay rule, but also portions of the statement which were simply not hearsay. The trial court permitted a portion of the statement Justin Pratt made to police regarding recent specific threats he and his girlfriend had made to the victims over past due rent money as an admission against penal interest exception to the hearsay rule. To that limited end, however, the court refused to allow the remainder of the statement into evidence, ruling that only limited portions of the statement were technically admissions against interest and hence the

remaining portions of the statement were not admissible. The defendant proffered that redacted portions of the statement indicated that Pratt had knowledge of the manner of death of the two female victims, and that he sought to establish an alibi between the hours of 1:30 and 7:00 a.m., even though the manner and time of the deaths had not been released to the public and, arguably, could only have been known by the killer.

The admission or exclusion of evidence is reviewed under the abuse of discretion standard. *San Martin v. State*, 717 So.2d 462 (Fla. 1998). Here, the trial court abused his discretion in excluding the entire statement.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted*." § 90.801 (c), *Fla. Stat.* (2003) (emphasis added). By definition, then, an out-of-court statement offered for a purpose *other* than proving the truth of its contents is *not* hearsay and is thus admissible. *State v. Baird*, 572 So.2d 904, 907 (Fla. 1990); *Koon v. State*, 513 So.2d 1253, 1255 (Fla. 1987); *Breedlove v. State*, 413 So.2d 1, 6 (Fla. 1982). "A statement may, however, be offered to prove a variety of things besides its truth." *Foster v. State*, 778 So.2d 906, 914-915 (Fla. 2000).

Here, Reynolds contended that the portions he sought to admit were not

offered to prove the truth of the matter asserted: he was not contending that Pratt's statements about the manner of death of the victims was truthful, but merely that Pratt stated that he knew they had been stabbed, which fact was unknown to the public. Likewise, the defendant was certainly not contending that Pratt's alibi was truthful; only that Pratt was attempting to establish an alibi for this time frame, the time of the killings, unknown to anyone but the killer and the authorities. "The hearsay objection is unavailing when the inquiry is not directed to the truth of the words spoken, but, rather, to whether they were in fact spoken." *Breedlove v. State*, 413 So.2d at 6.

When the statements are not offered to prove the truth of the matter asserted, and thus not hearsay, the test is simply one of relevance:

> Of course, the alternative purpose for which the statement is offered must relate to a material issue in the case and its probative value must not be substantially outweighed by its prejudicial effect.

Foster v. State, 778 So.2d at 915, *citing State v. Baird*, *supra*. *See also* Ehrhardt, *Florida Evidence*, §801.2:

> If an out-of-court statement is offered for a purpose other than proving the truth of its contents, the statement is admissible only when the purpose for which the statement is being offered is a material issue in the action. If the evidence is not relevant, it is not admissible.

"The question of what is relevant to show a reasonable doubt may present different considerations than the question of what is relevant to show the commission of the crime itself." *Vannier v. State*, 714 So.2d 470, 472 (Fla. 4th DCA 1998). It was certainly highly relevant to show that a suspect in the killings, who had a motive, would profess to know the manner of death of two of the victims. It is certainly material that Pratt would seek to establish an alibi for himself during the time of the killings. "Because of the trial court's ruling, the jury was deprived of a means of assessing appellant's defense," that only the real killer, Justin Pratt, would know those things. *See Barber v. State*, 576 So.2d 825, 831 (Fla. 1st DCA 1991). The limited part of Investigator Parker's testimony regarding what he heard from Pratt about his motive "did not convey the full import" of Pratt's knowledge of the crimes and, hence, his apparent involvement in them. *See Hansman v. State*, 679 So.2d 1216, 1218 (Fla. 4th DCA 1996). The exclusion of this evidence is not harmless, "for it goes to the heart of the defense." *Id*. *See also King v. State*, 684 So.2d 1388 (Fla. 1st DCA 1996); *Sibley v. State*, 636 So.2d 893 (Fla. 5th DCA 1994).

B. The Complete Statement, Given Its Entire Context, Was An Admission Against Penal Interest, And The Whole Of The Statement Is Admissible.

The court, in limiting the admissible portions of Pratt's statement to police,

accepted the state's argument below that only those portions directly related to Pratt's threats over money, were "technically" admissions against penal interest, and the rest of the statement, providing the entire context of his acknowledgment of the threats, had to be redacted. In addition to not being hearsay (*see* Point I A, *supra*), defense counsel argued that Pratt's attempts to establish an alibi to fit the time frame of the murders and his knowledge of the manner of death, were still encompassed within the admission against interest exception.

Section 90.804 (2)(c), Florida Statutes, defines a statement against interest as

> A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

The statements in and of themselves do not have to exonerate the defendant or directly implicate the declarant to criminal liability; it is enough for admissibility under this section, after showing the declarant's unavailability, to show the statements were relevant, and "tended" to expose the declarant and hence, "tended" to exculpate the defendant. *Voorhees v. State*, 699 So.2d 602, 613 (Fla.

1997); §90.804 (2)(c), *Fla. Stat.* *See also Carpenter v. State*, 785 So.2d 1182, 1202-1204 (Fla. 2001).

In determining whether it is reasonable to believe that a person in the declarant's position would have made the statement, the court must consider all the circumstances existing at the time the statement was made, as well as the context and content. *Smith v. State*, 746 So.2d 1162, 1167 (Fla. 1st DCA 1999); §90.804 (2)(c), *Fla. Stat.* Posturing to obtain an alibi for the time of the killings (unknown to all but the police and the killer) and revealing details of the manner of the deaths certainly fits within this definition of an admission against penal interests, a much broader view than that afforded by the trial court. The investigating officer taking the statement was conspicuously attempting to have Pratt implicate himself. And implicate himself, he did, by revealing time frames and manner of deaths known only to one who was inculpated and drawing further suspicion on himself. But the jury was not allowed to hear the full import of what Pratt told police; it went to the heart of the defense and its exclusion deprived the defendant of his federal and Florida constitutional rights to a full and fair trial and his ability to present his defense. *See Hansman v. State*, *supra*. The weight to be given these statements should have been for the jury to determine. *Voorhees v. State*, *supra*.

Moreover, "the rule as to admissions in general is that the whole of the

statement containing the admission is to be received together." *Bennett v. State*, 96 Fla. 237, 118 So. 18, 19 (1928). The "rule of completeness"necessitates the admission of the entire context of a statement where only a portion of it is otherwise admissible in order to show relevant details of the event and to allow the fact-finder to see the entire context and make a reasonable assessment of its weight given all the facts. Admissibility extends to its entire subject matter, and to all matters that may modify, supplement, or make clearer the facts regarding the statement and its effect. *See Cotton v. State*, 763 So.2d 437, 440 (Fla. 4th DCA 2000); *Guerrero v. State*, 532 So.2d 75 (Fla. 3rd DCA 1988).

Justice Wells, in his opinion in *Brooks v. State*, 787 So.2d 765, 783 (Fla. 2001) (Wells, J., concurring in part, dissenting in part), rejects the faulty analysis of the first district in *Smith v. State*, *supra* at 1168, which takes the narrow approach of the federal courts to the rule of admissions against interest given by the trial court here and relied on by the state below "so that only those declarations or remarks within a confession that 'are *individually* self-incriminatory' are included within the exception as a statement against penal interest." (Vol. 18, R 2363) Noting that this Court has never approved such a narrow approach to admissions against penal interests, Justice Wells finds a more reasonable and broader approach in Florida which would allow admission of the statement as a whole to show the

entire context of the admission and the circumstances under which it was given. *Brooks v. State*, *supra* at 783.

C. Even If Otherwise Inadmissible Under Evidentiary Rules, The Constitutional Right To A Fair Trial Requires Admission Of Relevant Evidence Crucial To The Defense.

Finally, Florida courts have recognized that technical state evidentiary rules may not prevent the admission of relevant evidence crucial to a defendant's case. A trial judge may be required to admit third-party statements under constitutional principles, even if it does not technically qualify as a declaration against penal interest under the state law of evidence. *Curtis v. State*, 876 So.2d 13 (Fla. 1st DCA 2004).

> If the directions we have received from the state legislature regarding the admission of evidence were all that we had to consider, the argument made here would be at an end. But the courts must also consider the constitutional effect of excluding evidence in a criminal trial. In some cases, judges have a duty to admit evidence that does not fit neatly within the confines of the Evidence Code in order to protect the defendant's right to a fair trial. This concept is well established in the law. [citing *Davis v. Alaska*, 415 U.S. 308, (1974); and *Chambers v. Mississippi*, 410 U.S. 284 (1973).]

Curtis v. State, *supra* at 19. The *Curtis* court goes on to rule that the exclusion of a third-party statement on technical evidentiary grounds could, just as in *Chambers v. Mississippi*, 410 U.S. 284 (1973), deny the defendant the right to due process of

law, as well as the right to confront the witnesses against him. The courts in *Chambers* and *Curtis* rejected the states' argument that the statements were inadmissible under the hearsay rule, stating that "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302; *Curtis*, 876 So.2d at 20.

As *Curtis* explains, if a statement by a third party is critical evidence that should have been admitted in evidence to protect the constitutional rights of the accused, the particular reason for excluding it under state law will make little difference. If the statement was excluded on the ground that it did not meet the technical requirements of the declaration against penal interest exception,

> the effect would be the same as if there were no exception at all. Here again, Curtis was no better off than Chambers. It did not help him that Florida generally recognizes an exception for declarations against penal interest, because the exception could not be employed under the facts of his case. Indeed, the Florida courts have consistently applied the constitutional analysis in *Chambers*, despite the exception in section 90.804(2)(c), Florida Statutes, for declarations against penal interest. *See Grim v. State*, 841 So.2d 455, 464 (Fla.2003); *Sliney v. State*, 699 So.2d 662, 670 (Fla.1997); *Gudinas v. State*, 693 So.2d 953, 965 (Fla.1997); *Hartley v. State*, 686 So.2d 1316, 1321 (Fla.1996); *Lightbourne v. State*, 644 So.2d 54, 57 (Fla.1994). As these opinions implicitly recognize, a trial judge may be required to admit a third-party confession under constitutional principles, even if it does not qualify as a declaration against penal interest under the state law of evidence. Federal courts have come to

the same conclusion.

Curtis v. State, 876 So.2d at 20-21.

In *Neiner v. State*, 875 So.2d 699 (Fla. 4th DCA 2004), the trial court had excluded testimony in a possession of prescription drug case that the pharmacy where defendant claimed she had obtained the prescription years earlier destroyed its prescription records after five years; hence they would have no record of an old prescription. The trial court had ruled that the absence of possibly corroborating records did not technically fit within the "business records exception" and hence was not admissible. The Fourth District, finding such evidence critical to the defendant's case, ruled that the testimony should have been admitted.

> "Where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." *Rivera v. State*, 561 So.2d 536, 539 (Fla. 1990). *Chambers v. Mississippi*, [citation omitted] ("[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.")

Neiner v. State, 875 So.2d at 700.

Here, just as in *Neiner*, the exclusion of Pratt's entire statement to police critically damaged the defendant's ability to present his whole defense, that Pratt was the killer who, not only had threatened the victims with violence, but also knew matters which only the killer would know. The exclusion infringed on the

defendant’s constitutional rights to present his case and requires a new trial.

POINT II.

THE CONVICTIONS FOR TWO FIRST-DEGREE MURDERS, SECOND DEGREE MURDER, AND BURGLARY VIOLATE THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

The trial court erred by denying the appellant's motions for judgment of acquittal because the state's evidence is legally insufficient to support a guilty verdict; the proof fails to exclude the reasonable possibility that someone other than Michael Reynolds killed Danny Ray Privett and Robin and Christina Razor. Similarly, the evidence is insufficient to show the defendant committed the burglary and thus cannot establish felony-murder and that theory should not have been permitted to go to the jury. As such, this Court must vacate his convictions.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). This Court has long held that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. *Cox v. State*, 555 So.2d 352 (Fla. 1989). When the

State relies upon purely circumstantial evidence to convict an accused, the courts have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. *Davis v. State*, 90 So.2d 629, 631 (Fla.1956); *McArthur v. State*, 351 So.2d 972 (Fla.1977). Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged." *Hall v. State*, 90 Fla. 719, 720, 107 So. 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. *Williams v. State*, 143 So.2d 484 (Fla.1962); *Davis*; *Mayo v. State*, 71 So.2d 899 (Fla.1954).

Indeed, one of this Court's functions in reviewing capital cases is to see if there is *competent substantial* evidence to support the verdict. *Cox v. State*, *supra* at 353; *Williams v. State*, 437 So.2d 133 (Fla.1983). When evidence of guilt is circumstantial, a special standard of review of the sufficiency of the evidence applies:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. *Jaramillo v. State*, 417 So.2d 257 (Fla.1982). Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be

> sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. *McArthur v. State*, 351 So.2d 972 (Fla.1977); *Mayo v. State*, 71 So.2d 899 (Fla.1954). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.
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> * * *
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> [However, a] motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. *See Wilson v. State*, 493 So.2d 1019, 1022 (Fla.1986). Consistent with the standard set forth in *Lynch* [*v. State*, 293 So.2d 44 (Fla.1974)], if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." 293 So.2d at 45 (Fla.1974). The state's evidence would be as a matter of law "insufficient to warrant a conviction." Fla. R. Crim. P. 3.380.

State v. Law, 559 So.2d 187, 188-189 (Fla. 1989).

The evidence of Reynolds' guilt is entirely circumstantial; the case entirely rests upon the fact that Reynolds had an injury to his finger (which he explained as being caused by catching his finger on a burr on his door frame when he took his dog out for a walk earlier that morning) and the tainted and inconsistent DNA evidence.

DNA evidence, it is submitted, is like fingerprint evidence; it is merely a

variety of circumstantial evidence. *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982); *Mucherson v. State*, 696 So.2d 420, 422 (Fla. 2nd DCA 1997). Proof that DNA from blood and a single hair similar in many ways, but also dissimilar in some, was found in the trailer, just like fingerprint evidence, is insufficient to convict for murder (including the burglary felony-murder theory) unless the state has shown that the defendant's DNA could only have been deposited by the killer at the time of the murder. Where fingerprints are used to establish identity, "the circumstances must be such that the print could have been made only at the time the crime was committed." *Tirko v. State*, 138 So.2d 388 (Fla. 3rd DCA 1962); *Jaramillo*, *supra*; *Williams v. State*, 247 So.2d 425, 426 (Fla. 1971) (fingerprint evidence showed only that defendant had been at crime scene, not when he was there). Where the state fails to show that the fingerprints could only have been made at the time the crime was committed, the defendant is entitled to a judgment of acquittal. *Sorey v. State*, 419 So.2d 810, 812 (Fla. 3rd DCA 1982); *State v. Hayes*, 333 So.2d 51, 54 (Fla. 4th DCA 1976).

Here, as in the cases reversing conviction based solely on fingerprint evidence, where all the DNA discovered inside the trailer defendant's was either tainted in some way or did not exactly match the defendant's DNA, the hypothesis of innocence related by the defense (that he was not the killer) must be accepted as

true unless contradicted by other proof showing the defense version to be false. *See Amell v. State*, 438 So.2d 42, 44 (Fla. 2nd DCA 1983); *Sorey v. State*, *supra* at 814; *Cox v. State*, *supra*. Thus, in the words of *State v. Law*, *supra* at 189, "the evidence would be such that no view which the jury may lawfully take of it favorable to the state can be sustained under the law." The state's evidence is as a matter of law insufficient to warrant a conviction.

The evidence showed that, regrettably, Seminole County officials botched the collection and packaging of evidence, tainting the evidence collected.[10] An unidentified blue towel was mysteriously packaged with a pillow from which a DNA sample was obtained and which could have caused cross-contamination. (Vol. 11, R 955, 982-990, 993-998; Vol. 14, R 1473-1474, 1478-1480; Vol. 16, R 1684-1686) A pubic hair, which in some ways matched the defendant's but in other ways was inconsistent (both in a hair analysis and in a DNA comparison), was recovered from items swept in the same sweeping room after the defendant's clothing had already been swept in that room, causing a potential contamination. (Vol. 14, R

[10] Apparently a common occurrence with Seminole County law enforcement, such that an FDLE technician commented that such surprises were not unusual coming from Seminole County. (Vol. 14, R 1473-1474)

1483-1486, 1489)[11] Every other item compared for the DNA of the defendant had measurements, bands, and alleles of DNA which did not match, and, thus, would exclude, the defendant's DNA.[12] And we cannot forget that, despite the state's theory that the defendant had cut himself on the murder weapon while stabbing the victims in the trailer, none of his blood was discovered on the victims (Vol. 15, R 1769-1775, 1779-1781; Vol. 16, R 1941-1944, 1963-1967, 1982-1991; Vol. 17, R 2008-2012, 2020-2022, 2027-2029) and none of the victims' blood was found on the defendant or his clothing or car. (Vol. 17, R 2017-2020) Nor can we forget that footprints at the murder site and hairs in the hand of one of the victims (at least one of which was forcibly removed from its owner) did not match those of Reynolds (nor the victims) and, inexplicably, were never compared to shoes or hairs of any other suspects. (Vol. 12, R 1025; Vol. 14, R 1510-1511, 1514, 1521-1524, 1546-1550, 1598-1599; Vol. 15, R 1769-1775, 1779-1781; Vol. 16, R 1851, 1941-1944,

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[11] "Hopefully there was no contamination," the FDLE expert prayed, (Vol. 14, R 1489) since such hairs can float in the air. (Vol. 14, R 1509-1511)

[12] However, the state's expert, who admitted that if these measurements were correct they would exclude the defendant, attributed all of the discrepancies to imperfections and limitations in the DNA sorting process or due to mixtures of DNA, opining still that, despite these differences, the samples matched the defendant's DNA, and inexplicably declaring any inconsistent results instead as inconclusive. (Vol. 15, R 1776-1777, 1782-1783, 1785-1786, 1788-1789, 1795; Vol. 16, R 1806, 1818-1823, 1829, 1862, 1932, 1938-1940, 1945-1946, 1950, 1972; Vol. 17, R 2136-2137, 2147, 2155-2156, 2161-2162, 2181-2183)

1963-1967, 1982-1991; Vol. 17, R 2008-2012, 2020-2022, 2027-2029)

Thus, the state cannot support its theory of the murder based solely on the problematic DNA findings. Instead, the evidence supports the hypothesis that the murders were committed by someone else's hand. *Cox v. State; State v. Law*; *Sorey v. State*; *Amell v. State*, *supra*. While the circumstances of the DNA and the expert's opinion may have created a suspicion that the defendant committed the crime, they, because of their inconsistencies, are not sufficient to support this conviction. *Williams v. State*, *supra at* 143 So.2d 484; *Mayo*, *supra*; *Cox v. State*, *supra*.

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

Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956) (emphasis added); *see also Crain v. State*, 29 Fla. L. Weekly S635, at 645-646 (Fla. Oct. 28, 2004) (Wells, J., dissenting in part) (would have found the evidence insufficient as a matter of law),

and at 641 (Quince, J., concurring specially) (would affirm on sufficiency of the evidence *only* because there was no "evidence which would suggest some other person is responsible for the disappearance and death" of the victim.) Here, there was evidence, footprints and hairs (in the grasp of the victim's hand) that belonged to someone other than the defendant, suggesting that some other person, indeed, was responsible for the killings.

The state thus failed to prove the identity of the killer and burglar. The defendant's convictions must be vacated.

POINT III.

THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING THE DEFENDANT'S EXPRESS WAIVER OF HIS RIGHT TO A SENTENCING JURY RECOMMENDATION, RENDERING HIS SENTENCE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

The defendant, who did not wish to present evidence in mitigation, attempted to waive the jury sentencing recommendation, but, despite the state's acquiesence, the trial court refused, wanting to see the jury's recommendation. The trial court abused its discretion (the standard for review of such an issue) in requiring a jury recommendation, where the defendant would not present his mitigation to the jury.

One who has been convicted of a capital crime and faces sentencing may waive his right to a jury recommendation, provided the waiver is voluntary and intelligent. *State v. Hernandez*, 645 So.2d 432 (Fla. 1994); *Sireci v. State*, 587 So.2d 450, 452 (Fla. 1991); *State v. Carr*, 336 So.2d 358 (Fla. 1976). Upon finding such a waiver, the sentencing court, may in its discretion, dispense with the sentencing hearing before a jury, or may, under normal circumstances, may still require the penalty phase before the jury. *Id*.; *Lamadline v. State*, 303 So.2d 17 (Fla. 1974).

Here, the refusal to accept the defendant's waiver of the jury's sentencing recommendation was, unlike those cases, an abuse of discretion. Because the defendant did not want to put the victims' family and his own through any more public anguish, Reynolds had already indicated that he was waiving the presentation of any evidence of mitigation to the jury, seeking to present any such evidence to the judge alone. (Vol. 25, R 3473, 3485-3487, 3495) Because the jury, then, heard no evidence of mitigation, their recommendation of death was improperly skewed and should not have formed any basis for the ultimate sentencing to death.[13] To give the baseless sentencing recommendation any weight, after the defendant tried to exercise his constitutional right to waive that recommendation, renders the court's death sentences unconstitutional, mandating life sentences.

[13] While the sentencing court recognized that the jury had not been presented with any evidence of mitigation (which was later presented to the judge alone) and hence should not be given the same weight as if it had, the court still considered the 12-0 recommendation in deciding on the ultimate penalties. (Vol. 6, R 951, 963)

POINT IV.

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF DETAILS OF A PRIOR VIOLENT FELONY FOR WHICH THERE HAD BEEN NO CONVICTION, DEPRIVING HIM OF HIS RIGHT TO A FAIR TRIAL AND RENDERING HIS DEATH SENTENCES UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

In a penalty phase proceeding the jury and the court may hear and consider as an aggravating circumstance evidence that the defendant was previously convicted of a felony involving the use or threat of violence. §921.141 (5)(b), Fla. Stat. This aggravator has been held to be one of the "most weighty in Florida's sentencing calculus." *Sireci v. Moore*, 825 So.2d 882 (Fla. 2002); *Elledge v. State*, 346 So.2d 998 (Fla. 1977). While the state may present testimony giving some details of the prior felonies, this circumstance is strictly limited to actual convictions for violent felonies. *Id*.; *Perry v. State,* 395 So.2d 170, 174-75 (Fla.1981); *Provence v. State,* 337 So.2d 783 (Fla.1976).

In the instant case, after presenting copies of convictions for three prior violent felonies, the state, over defense objections, presented testimony from one of these victims as to additional facts (and alleged crimes) surrounding the prior

offense for which the defendant had been acquitted. The aggravated battery victim was permitted to testify to additional details of an alleged armed kidnapping and an alleged attempted sexual battery, charges for which the defendant had not been convicted. (Vol. 25, R 3517-3532) To allow these matters before the jury and the judge in determining the appropriate sentences was error as a matter of law or, at least, a palpable abuse of discretion which renders Reynolds' sentences constitutionally infirm.

Clearly, the death penalty statute expressly limits what may be considered concerning a defendant's prior criminal record to only those offenses for which "the defendant was previously convicted." *Perry v. State*, *supra*; *Provence v. State*, *supra*. Hence, where, as here, a defendant is acquitted of charges, this testimony clearly should have been excluded. Reynolds was not convicted of those crimes, and they were therefore not properly the subject of the sentencer's attention. They cannot be used as the basis for this aggravator. *Id*.; *Alvord v. Wainwright*, 564 F.Supp. 459, 483 (D.C. Fla. 1983), *rev'd on other grounds*, *Alvord v. Wainwright*, 725 F.2d 1282 (11th Cir. 1984).

Moreover, in an analogous context of the sentencing guidelines, it is clear that factors which do not result in a conviction may not be scored on the guidelines. *See Chapman v. State*, 29 Fla. L. Weekly D2436 (Fla. 5th DCA

October 29, 2004) (victim injury points for death cannot be scored where the state nolle prossed the murder charge). If factors for which the defendant was not convicted cannot be considered in the sentencing guidelines context, surely they cannot be utilized in the death sentencing context.

The death sentences here, based in part on these improper considerations, must be vacated.

POINT V.

PLACING A *HIGHER* BURDEN OF PERSUASION ON THE DEFENSE TO PROVE THAT LIFE IMPRISONMENT SHOULD BE IMPOSED THAN IS PLACED ON THE STATE TO PERSUADE THAT CAPITAL PUNISHMENT SHOULD BE IMPOSED VIOLATES FUNDAMENTAL FAIRNESS AND DENIES DUE PROCESS UNDER *IN RE WINSHIP* AND *MULLANEY V. WILBUR.*

Prior to trial, Appellant unsuccessfully moved to have Section 921.141, Florida Statutes declared unconstitutional because it cast the burden of persuasion on the defense to prove that a life sentence was appropriate, *and that the burden of persuasion was higher than was on the State to persuade the judge/jury that capital punishment was appropriate*. (Vol., R 131-134; Vol. 2, R 272-278). The issue is thus preserved. This error denies Due Process and fundamental fairness under Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Specifically, the procedures for imposition of capital punishment in Florida are set forth in Section 921.141, Florida Statutes (2001), which in pertinent part provides the following:

> **(1) Separate proceedings on issue of penalty.--**Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as

> authorized by s. 775.082. . . .
>
> **(2) Advisory sentence by the jury.--**After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> **(3) Findings in support of sentence of death.--**Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

The substance and procedures of Section 921.141, Florida Statutes, as set forth in Florida's Standard Jury instructions, require that the jury make a determination concerning whether capital punishment or life imprisonment should be imposed as follows:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that [this evidence when considered with the evidence you have already heard] [this evidence] is presented in order that you might determine, first, **whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second,**

whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

* * *

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an **advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to *outweigh* any aggravating circumstances found to exist**.

* * *

Should you find sufficient aggravating circumstances do exist, it will then be your duty to **determine whether mitigating circumstances exist that *outweigh* the aggravating circumstances**. Among the mitigating circumstances you may consider, if established by the evidence, are:

* * *

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without parole.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that *outweigh* the aggravating circumstances.

* * *

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. **You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on**

these considerations.

Florida Standard Jury Instructions in Criminal Cases, "7.11. Penalty Proceedings, Capital Cases, West's "Florida Criminal Laws and Rules (2003 Supplement) (emphasis added).

The foregoing language in the statute and the standard jury instructions given over timely objection create a presumption that death is the appropriate sentence that must be rebutted by the defendant contrary to the right to a jury trial, fundamental fairness and Due Process under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. Further, requiring the defendant to prove that "*sufficient* mitigating circumstances exist which *outweigh* the aggravating considerations found to exist" in order to receive a sentence of life imprisonment in accordance with Section 921.141, Florida Statues and the Standard Jury Instructions places a *higher* burden of persuasion on the defendant than was on the State initially to support imposition of the death penalty. This denies the right to a jury trial, fundamental fairness and Due Process under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This is precisely the argument accepted by the Kansas Supreme Court in ruling that their death penalty statute

violated both the state and federal constitutions by placing a higher burden on the defendant to prove that the mitigators outweighed the aggravators. *State of Kansas v. Marsh*, ___ P.3d ___ (Kan. Case # 81135, Dec. 17, 2004).

Heightened standards of due process apply to imposition of the death penalty due to the severity, uniqueness and finality of that sanction. *Elledge v. State*, 346 So.2d 998 (Fla.1977); *Beck v. Alabama*, 447 U.S. 625, 638 (1988). *See Burger v. Kemp*, 483 U.S. 776, 785 (1987) (A court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). Timely and specific objections were made here to the capital sentencing procedure requiring the mitigators to outweigh the aggravators. (Vol. 1, R 131-134; Vol. 2, R 272-278).

The statute and jury instructions direct the judge and jury to perform the following analysis to determine whether a sentence of life imprisonment or the death penalty should be imposed:

> (a) That sufficient aggravating circumstances exist as as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to ***outweigh*** the aggravating circumstances.

Section 921.141(3), Florida Statutes (emphasis added). The "outweigh" standard violates Due Process under Article I, Sections 2, 9, 16, 17 and 22 of the Florida

Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because that standard creates a presumption that death is the appropriate sanction in the absence of mitigating circumstances and then places a higher burden of persuasion on the defendant to prove that a life sentence is more appropriate than capital punishment. *See State of Kansas v. Marsh, supra*.

The contention (that the statute and standard jury instructions create an unlawful presumption that the death penalty is justified in the absence of any mitigating circumstances) was not specifically addressed when Florida's death penalty was initially upheld by the United States Supreme Court, and it is apparent that the United States Supreme Court misapprehended Florida law. *See Proffitt v. Florida*, 96 S.Ct. 461, 466-467 (1976) ("Under the state law that decision [of whether to impose a sentence of death or life imprisonment] turned on *whether certain statutory aggravating circumstances* <u>*outweighed*</u> *any statutory mitigating circumstances* found to exist.")(emphasis added). In fact and practice, the focus in Florida is not on whether the statutory aggravating factors outweigh the mitigating circumstances as perceived by the United States Supreme Court, but instead on whether mitigating circumstances rebut the presumption that death is the appropriate sentence if aggravating circumstances exist.

The Florida Supreme Court has clearly recognized that the statute and

standard jury instructions create a presumption that, in the absence of mitigating circumstances, death is *presumed* to be the appropriate sentence. *See Davis v. State*, 703 So.2d 1055, 1060-61 (Fla. 1997) ("Where there are one or more valid aggravating factors that support a death sentence and no mitigating circumstances to weigh against the aggravating factors, *death is presumed to be the appropriate penalty*."); *Elledge v. State*, 706 So.2d 1340, 1346 (Fla.1997) (no error where trial judge stated "*death is presumed to be the proper penalty* when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances."); *Valle v. State*, 474 So.2d 796, 806 (Fla. 1985) ("When one or more of the aggravating circumstances is found, death is *presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); *Burr v. State*, 466 So.2d 1051 , 1054 (Fla. 1985) ("There were several aggravating *circumstances and no mitigating circumstances*, *so* death was to be presumed the appropriate penalty."); *Blanco v. State*, 452 So.2d 520, 526 (Fla.1984) ("Where there are one or more valid aggravating factors that support a death sentence and no mitigating circumstances to weigh against the aggravating factors, *death is presumed to be the appropriate penalty*."); *Funchess v. State*, 449 So.2d 1283 (Fla.1984) (objection to trial judge instructing jury that *death is presumed to be the proper sentence* unless aggravation is overridden by mitigation

without merit); *White v. State*, 446 So.2d 1031, 1037 (Fla. 1984) ("When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factor(s) which might override the aggravating factors, *death is presumed to be the appropriate penalty*."); *Sims v. State*, 444 So.2d 922, 926 (Fla.1983) ("Where there are some aggravating and no mitigating circumstances, *death is presumed to be the appropriate punishment*."); *Jackson v. Wainwright*, 421 So.2d 1385, 1389 (Fla. 1982) ("The court instructed the jury that should mitigating circumstances outweigh the presumed fact, they were not bound by the presumption. The instruction of the trial court was not improper, so the failure of counsel to challenge the instruction on direct appeal did not deprive defendant of effective assistance of appellate counsel."); *Christopher v. State*, 407 So.2d 198, 203 (Fla. 1981) ("We also held in [*State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973)] that when one or more aggravating circumstances are found, the *death penalty is presumed proper* unless the aggravating circumstance or circumstances are overridden by one or more of the mitigating circumstances."); *Smith v. State*, 407 So.2d 894, 903 (Fla. 1981) ("As we noted in [*State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973)], when one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); *Zeigler v. State*, 402 So.2d 365, 375

(Fla. 1981) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence*[.]"); *White v. State*, 403 So.2d 331, 340 (Fla. 1981) ("Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances."); *Jacobs v. State*, 396 So.2d 1113, 1119 (Fla. 1981) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); *Shriner v. State*, 386 So.2d 525, 534 (Fla. 1980) ("We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. *Since death is presumed in this situation*, improper consideration of a nonstatutory factor does not render the sentence invalid") (footnote omitted); *Lewis v. State*, 377 So.2d 640,647 (Fla. 1979) (Adkins, J., dissenting) ("At least one aggravating circumstance was properly found by the court. Therefore, *death should be presumed to be the proper sentence* unless the aggravating circumstance is overridden by one or more of the mitigating circumstances."); *Stone v. State*, 378 So.2d 765, 772 (Fla. 1979) ("Inasmuch as the trial court found these other aggravating circumstances, and no mitigating circumstances, *death is presumed to be the proper sentence*."); *Ford v. State*, 374 So.2d 496, 503 (Fla. 1979) ("Consequently, even though there was error in

assessment of some of the statutory aggravating factors, there being no mitigating factors present *death is presumed to be the appropriate penalty*."); *Spenkelink v. State*, 372 So.2d 65, 66 (Fla. 1979)(England, J., concurring) ("We have repeatedly held that "(w)hen one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances . . . ."); *Holmes v. State*, 374 So.2d 944, 950 (Fla. 1979) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); *Foster v. State*, 369 So.2d 928, 931 (Fla. 1979) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); *LeDuc v. State*, 365 So.2d 149, 152 (Fla. 1978) ("The case of State v. Dixon, 283 So.2d 1 (Fla.1973), established that when one or more aggravating circumstances is found, *death is presumed to be the proper sentence* in the absence of any mitigating circumstances."); *Buckrem v. State*, 355 So.2d 111, 113 (Fla. 1978) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975) ("When one or more of the aggravating

circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"); *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances[.]"). (emphasis added to all)

The fact that neither the statute nor the standard jury instructions use the word "presumption" has no significance, where the effect of the statute and standard jury instruction is to create a presumption that death is the proper sentence. The ability of a defendant to "rebut" that presumption does not make the statute and jury instructions constitutional, where the burden of persuasion cast upon the defendant is *higher* to prove that a life sentence is justified than was on the State to initially prove that the death penalty is the proper sentence. The initial determination made that death is appropriate is based *solely* on consideration of the aggravating circumstances and expressly excludes the consideration of mitigating considerations.

The right to a jury trial under the Sixth Amendment and the rights to fundamental fairness and Due Process under the Fifth and Fourteenth Amendments require that the State ultimately bear the burden of persuasion that imposition of

capital punishment is justified:

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S., at 364. This "bedrock, 'axiomatic and elementary' [constitutional] principle," *id.*, at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom v. Montana, supra*, at 520-524; *Patterson v. New York*, 432 U.S. 197, 210, 215 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 698-701; see also *Morissette v. United States*, 342 U.S. 246, 274-275 (1952). The prohibition protects the "fundamental value determination of our society," given voice in Justice Harlan's concurrence in *Winship*, that "it is far worse to convict an innocent man than to let a guilty man go free." 397 U.S., at 372. See *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958). The question before the Court in this case is almost identical to that before the Court in *Sandstrom:* "whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of ... state of mind," 442 U.S., at 521, by creating a mandatory presumption of intent upon proof by the State of other elements of the offense.

Francis v. Franklin, 105 S.Ct. 1965, 1970 (1985).

Functionally, Florida's statute and standard jury instruction are equivalent to the procedure condemned in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975). *Mullaney* ruled that the procedure in Maine denied Due Process where the State had only to prove that an intentional and unlawful homicide occurred, and the defendant then bore the burden of proving "by a fair preponderance of the

evidence that he acted in the heat of passion on sudden provocation" to avoid punishment for committing murder as opposed to manslaughter. *Mullaney*, 95 S.Ct. at 1883. The United States Supreme Court ruled that it is fair to cast the burden of producing evidence on the defendant to place an ultimate fact in issue but, consistent with *In re Winship*, 397 U.S. 358 (1970), Due Process and the right to a jury trial require that the State ultimately bear the burden of persuasion beyond a reasonable doubt. "The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." *Mullaney*, 95 S.Ct. 15 1889.

> *Winship* is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the "operation and effect of the law as applied and enforced by the state," (citation omitted), and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.

Mullaney, 95 S.Ct. 1890.

The importance of the State bearing the burden of persuasion beyond a reasonable doubt of the ultimate issue in question was explained in both *Mullaney* and *In re Winship, supra*. The requirement that the government bear the burden of persuasion beyond a reasonable doubt is a component of fundamental fairness that serves as a cornerstone for public acceptance of the outcome of the trial:

> "The requirement of proof beyond a reasonable doubt has (a) vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . 'Moreover, the use of the reasonable-doubt standard is indispensable to the command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are bing condemned." 397 U.S., at 363, 364.

Mullaney, 95 S.Ct., at 1890. Additionally, due to the uniqueness of the severity and finality of capital punishment, Due Process compels that heightened scrutiny of the procedures be given as to both the conviction and sentencing of a defendant in order to achieve the requisite reliability:

> Even assuming, however, that the proceeding on the prior conviction allegation has the "hallmarks" of a trial that we identified in Bullington, a critical component of our reasoning in that case was the capital sentencing context. The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). *Because the death penalty is unique "in both its severity and its finality*," id., at 357, *we have recognized an acute need for reliability in capital sentencing proceedings*. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668 (1984) (Brennan, J., concurring in part and

> dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252 (1998) (emphasis added). The Florida Supreme Court has also expressly acknowledged the constitutional requirement of reliable fact finding in the context of capital punishment. *See Arvelaez v. Butterworth*, 738 So.2d 326, 326-27 (Fla.1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent *and reliable manner* . . . ") (emphasis added). The reliability of a death sentence is constitutionally deficient when the burden of persuasion as to the propriety of the imposition of the death penalty is cast upon the defendant rather than the state. The constitutional requirement of reliability is founded in the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

By mandating that the defendant prove that the mitigating circumstances "outweigh" the aggravating circumstances, Section 921.141(3), Fla. Stat., Florida's capital sentencing procedure casts the burden of persuasion on the defendant to prove that a life sentence is appropriate. Due Process requires that the burden of persuasion be on the State. Application of the statute further denies fundamental fairness because the defendant actually has a higher burden of persuading the jury

and judge that a life sentence is appropriate than the State had to meet to show that a death sentence should be imposed. The language of the statute and standard jury instructions create a presumption that death is appropriate when an aggravating circumstance is proved to exist, without any consideration of the mitigating considerations surrounding the facts of the crime or the individual characteristics of the defendant. This determination, made without consideration of mitigation, becomes a presumption that can only be rebutted by more evidence than was required for the State to persuade the jury that the death penalty is appropriate.

Specifically, the State only has the burden of persuading the jury that the death penalty is appropriate in the absence of any mitigating considerations, for under Florida law and the standard jury instructions, the jury must first determine whether "sufficient" aggravating circumstances exist for imposition of the death penalty (again, expressly *without* considering mitigating circumstances). Implicit in that statute and instruction is the fact that two or three or more statutory aggravating circumstances may have to exist before they are deemed "sufficient" for imposition of capital punishment. It is only after the jury and/or judge have been persuaded that there are "sufficient" aggravating circumstances for imposing the death penalty that the defendant is given the burden of persuading the jury and/or judge that "sufficient mitigating circumstances exist that *outweigh the aggravating*

circumstances." Thus, in order to then persuade the jury and/or judge that a life sentence is appropriate, the defendant must persuade the jury on the ultimate issue - whether the death penalty should be imposed, and the burden of proof is *higher* than was cast upon the State. In practice and as occurred here over timely and specific objection, if the State proves beyond a reasonable doubt that the death penalty in appropriate based solely on the aggravating circumstances without considering the mitigating circumstances, the defendant must meet a higher standard - he must prove that "mitigating circumstances exist that *outweigh* the aggravating circumstances."

The Florida Supreme Court has often summarily rejected, in summarized form and in dicta, arguments that Florida's death penalty is unconstitutional because the burden is shifted to the defendant to prove that a life sentence is appropriate. *See Asay v. Moore*, 828 So.2d 985, 993 (Fla. 2002) (holding that issue waived, and in dicta stating "This Court has repeatedly rejected the argument that the standard jury instruction shifted the burden to the defense. *See, e.g., San Martin v. State*, 705 So.2d 1337, 1350 (Fla. 1997); *Shellito v. State*, 701 So.2d 837, 842 (Fla. 1997); *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla. 2002) (holding that issue waived, and in *dicta* stating that argument repeatedly rejected in *Carroll*, *Rutherford*, *Downs*, *San Martin* and *Shellito*); *Cox v. State*, 819 So.2d 705, 725

(Fla. 2002) ("Finally, this Court 'has repeatedly held that there is no merit to the burden shifting claim.' *Freeman v. State*, 761 So.2d 1055, 1067 (Fla. 2000)"); *see also Shellito v. State*, 701 So.2d 837, 842-43 (Fla. 1997); *Carroll v. State*, 815 So.2d 601, 623 (Fla. 2002) (holding that issue waived, and in *dicta* stating "that the burden shifting argument is without merit" citing *Rutherford* and *Demps v. Dugger*, 714 So.2d 365 (Fla. 1998)); *Rutherford v. Moore*, 774 So.2d 637, 644 (Fla. 2000) (holding that standard jury instructions improperly shift the burden to the defendant to prove that death is inappropriate has been previously rejected, citing *Downs* and *Demps v. Dugger*, *supra* at 368 fn. 8); *Downs v. State*, 740 So.2d 509, 510 fn 4 & 5 (Fla. 1999) (holding that issue is waived); *San Martin v. State*, 705 So.2d 1337, 1350 (Fla. 1997) (holding that issue not preserved, and in dicta stating claim rejected by *Walton v. Arizona* and *Arango*); *Freeman v. State*, 761 So.2d 1055, 1067 (Fla. 2000) (held that burden shifting not preserved, and in dicta said it was without merit anyway); *Demps v. Dugger*, 714 So.2d 365, 368 (Fla. 1998) (held that issue was waived, dicta noting that issue without merit, citing *Shellito*); *Shellito v. State*, 701 So.2d 837, 842-43 (Fla. 1997) (holding that standard jury instructions do not improperly shift the burden of proof, citing *Walton v. Arizona* and *Robinson*); *Robinson v. State*, 574 So.2d 108, 113 fn.7 (Fla. 1991) (generic rejection of issue claiming trial court erred in refusing to give requested instruction

to eliminate shifting of burden of proof, citing *Arango*); *Preston v. State*, 531 So.2d 154, 160 (Fla. 1988) (holding that issue was waived, and in dicta stating "when viewed as a whole, the instructions given by the court did not shift the burden of proof to the defendant. *See Arango v. State*, 411 So.2d 172 (Fla.), *cert. denied*, 457 U.S. 1140, 102 S.Ct. 2973 73 L.Ed.2d 1360 (1982)).

Thus, the cases from the Florida Supreme Court that "reject" some type of burden shifting argument can be traced directly to *Arango v. State*, 411 So.2d 172, 174 (Fla. 1982), *cert. denied*, 457 U.S. 1140 (1982). The fact that the United States Supreme Court denied certiorari review of *Arango* is meaningless because the denial of certiorari does not in any way, by inference or otherwise, approve the analysis or result of a decision. *See Hughes Tool Company v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973)(A denial of certiorari neither approves nor disapproves the decision sought to be reviewed.); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1956) (same).

The reasoning/analysis in *Arango* is wrong and it otherwise does not control both issues presented here. Specifically, in *Arango v. State*, 411 So.2d 172 (Fla. 1982), the Florida Supreme Court identified, analyzed and resolved a "burden shifting" issue as follows:

> Appellant next maintains that the instructions given to the jury

> impermissibly allocated the constitutionally prescribed burden of proof. At one point in the proceedings, the judge stated that if the jury found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." This instruction, appellant argues, violates the due process clause as interpreted in Mullaney v. Wilbur, 421 U.S. 684 (1975), and State v. Dixon, 283 So.2d 1 (Fla. 1973).
>
> In Mullaney the Supreme Court held that a Maine law requiring the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter did not comport with due process. Such a rule, the Court wrote, is repugnant to the fourteenth amendment guarantee that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In Dixon we held that the aggravating circumstances of section 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that they state must establish them. In the present case, the jury instruction, if given alone, may have conflicted with the principles of law enunciated in Mullaney and Dixon. A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. *Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.* These standard jury instructions taken as a whole show that no reversible error was committed.

Arango v. State, 411 So.2d 172, 174 (Fla. 1982) (emphasis added). The material facts necessary for the Court's holding in *Arrango* reflect that the trial judge there at some point instructed the jury that a death sentence "could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances." Neither the standard jury instructions given over objection here

nor Section 921.141, Florida Statutes, are the same as the instructions reportedly given in *Arrango*, nor do they comport with the dictates from the Florida Supreme Court. *See Alvord v. State*, 322 So.2d 533, 540 (Fla.1975) ("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors."); *Bottoson v. Moore*, 833 So.2d 693, 792 (Fla. 2002) ("The jury was instructed that in order to recommend a sentence of death it must find that aggravating circumstances exist and that the aggravating circumstances found to exist must outweigh any mitigating circumstances.") (Quince, J., concurring); *Bottoson v. Moore*, *supra* at 721 ("In Florida, *just as in Arizona*, the death penalty cannot be imposed unless and until a *trial court* makes the additional findings of fact both that the aggravating circumstances exist and that the aggravators outweigh the mitigators.") (Pariente, J., concurring).

The holding in *Arango* cannot be applied outside the context of the material facts of that case. As written by the Florida Legislature and as applied through the standard jury instructions, an unconstitutional burden of persuasion is placed on the defendant in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and, article I, section 2, 9, 16, 17 and 22 of the Florida Constitution and the holdings of *In Re Winship*, *supra* and *Mullaney v. Wilbur*, *supra*. *See also, State of Kansas v. Marsh, supra*. As worded, the

standard instructions dilute the requirement that the State prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. *See Cage v. Louisiana*, 498 U.S. 39 (1990) and *Sandstrom v. Montana*, 442 U.S. 510 (1979). The fact that the instructions might reasonably be interpreted as casting the burden of persuasion on the defendant denies due process. *Francis v. Franklin,* 471 U.S. 307 (1985); *In re: Winship, supra*; *Mullaney v. Wilbur, supra*; *State of Kansas v. Marsh, supra*. Simply said, the standard jury instructions and Section 921.141(2) & (3), Florida Statutes, are unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The death sentences erroneously imposed here must be reversed and Section 921.141, Florida Statutes, must be ruled unconstitutional.

POINT VI.

THE TRIAL COURT ERRED IN REFUSING TO CONSIDER IN ITS DEATH SENTENCE DETERMINATION RESIDUAL DOUBT AS TO THE DEFENDANT'S GUILT, IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND RENDERING HIS DEATH SENTENCES UNCONSTITUTIONAL UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS.

The United States Supreme court in *Lockett v. Ohio*, 438 U.S. 586 (1978), announced that a capital sentencer may not be precluded from considering in mitigation ". . . any aspect of a defendant's character or record and *any of the circumstances of the offense* that the defendant offers as a basis for a sentence less than death . . ." The lingering doubt argument in this cause is concerned with "the circumstances of the offense" and thus constitutes relevant mitigating evidence, which should be considered by the jury, the trial court, and by this Court.

Despite this mandate of *Lockett*, this Court, however, in *King v. State*, 514 So.2d 354 (Fla. 1987), ruled that residual, or lingering, doubt is not an appropriate nonstatutory mitigating circumstance. In *Way v. State*, 760 So.2d 903, 922-4 (Fla. 2000) (Pariente, J., concurring), Justice Pariente, though concurring in the result reached by the majority, wrote a separate opinion (in which Justice Anstead concurred) concluding that this Court "should recede from its prior decisions that preclude the consideration of 'lingering' or 'residual' doubt as a nonstatutory

mitigator ." Citing the *Model Penal Code* § 210.6(1) (1962), Justice Pariente noted that the drafters of that Code included the consideration of "lingering doubts" about guilt in the model death penalty statute, *not* as just a mitigating factor, but as a factor that ***excludes*** *the possibility of a death sentence as a matter of law.*

> In summary, I believe that the nature and strength of the evidence of guilt should be considered in deciding whether to impose the death sentence and in whether to uphold a death sentence. I urge the Legislature consider including evidence of residual doubt as a statutory mitigating factor that could be considered by juries in making a sentencing recommendation, the trial court in imposing the death sentence, and this Court in determining whether the death penalty should be affirmed.

Way v. State, at 924.

As urged by Justice Pariente in *Way*, Reynolds invites this Court to recede from its prior decisions precluding a consideration of "residual" or "lingering doubt" as a valid nonstatutory mitigating circumstance, as required by *Lockett v. Ohio.* The trial court should have considered and found it as a weighty, valid mitigating circumstance, precluding the death sentences. Reynolds' death sentences, imposed without a consideration of this mitigator, are unconstitutional under the state and federal constitutions.

POINT VII.

THE APPELLANT'S DEATH SENTENCES WERE IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

The sentences of death imposed upon Michael Reynolds, must be vacated. The trial court found improper aggravating circumstances, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Reynolds' death sentences unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Aggravating circumstances must be proven beyond a reasonable doubt to exist and review of those factors is by the competent substantial evidence test. Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Review of the weight given to mitigation is subject to the abuse-of-discretion standard. *See Cole v. State*, 701 So.2d 845, 852

(Fla. 1997). It is submitted that this Court's proportionality review, being a question of law, is a *de novo* review.

A. The Trial Judge Considered Inappropriate Aggravating Circumstances.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by *competent, substantial* evidence. *Martin v. State*, 420 So.2d 583 (Fla. 1982); *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to at least two of the aggravating circumstances found by the trial court, that of heinous, atrocious, or cruel; and that the murders were committed to avoid arrest. Additionally, the court engaged in improper consideration of the testimony of a prior aggravated battery victim that she had also been the victim of a kidnapping and attempted sexual battery, where the defendant had not been convicted of those charges. (*See* Point IV, *supra*.) The court's findings of fact, based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous findings, do not support these circumstances and cannot provide the bases for the sentence of death.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in *State v. Dixon*, *supra* at 9:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, *Tedder v. State*, 322 So.2d 980, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crime *especially* heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, *supra* at 9.

As this Court has stated in *Santos v. State*, 591 So.2d 160, 163 (Fla. 1991), and *Cheshire v. State*, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a *desire* to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. *See, e.g.*, *Douglas v. State*, 575 So.2d 165, 166 (Fla. 1991) (torture-murder involving heinous acts extending over four hours). The present killings happened too quickly with no substantial competent suggestion that the killer *intended* to inflict a high degree of

pain or otherwise torture either of the victims. Contrary to the trial court's findings, the medical examiner did *not* testify that the scratch wounds to Robin were "torture wounds." The doctor opined that these wounds were caused either by the distance the knife and attacker were from the victim at that point in time, "or else possibly . . . *possibly* used to scare the victim." (Vol. 12, R 1116) Such speculative evidence of one of a number of possible alternatives hardly rises to the level of "substantial, competent" evidence, and proof beyond a reasonable doubt. Accordingly, the trial court erred in finding this factor to be present.

The fact that two persons are killed, even after a short confrontation, does not necessarily show that the homicides were especially heinous, atrocious or cruel. *See Cheshire v. State*, *supra* at 912 (HAC "is proper only in torturous murders – those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.").

Here, the medical examiner testified that Robin and Christina Razor were rendered unconscious very quickly, immediately upon infliction of the head injury to Robin (which she could not tell when it was delivered), and shortly after the single knife wound to Christina due to loss of blood. (Vol. 12, R 1124, 1128) The testimony and physical evidence supports the conclusion that they were quickly

killed. The blows struck by perpetrator were sufficient to immediately stun them and cause unconsciousness. There was no evidence whatever of sexual abuse. Neither of the victims were abducted, transported to another area of the house or bound.

The HAC factor is appropriately given enormous weight when there is intentional torturing and intentional mental anguish inflicted upon a suffering victim:

> The murder described in gruesome detail in this record is a most heinous and calculated slaying. Prior to the murder, appellant kidnaped, repeatedly abused, sexually molested, bound and gagged, and literally toyed with the victim. At one point, the victim was stretched and tied to a sawhorse; at another, she was wired between two trees. It is clear from the statements of Frantz that Mendyk actually planned the murder of Larmon in advance and calculated upon that plan as he returned to the site where she was bound. It is equally clear that the torture and terror this the victim must have endured for a lengthy period of time *which was directly intended by Mendyk* was certainly extreme, rendering this murder heinous, atrocious and cruel.

Mendyk v. State, 545 So.2d 846, 850 (Fla. 1989)(emphasis added). *See Booker v. State*, 773 So.2d 1079, 1091 (Fla.2000) ("It is uncontested in this case that HAC was properly established in the brutal sexual battery and stabbing death of the ninety-four-year-old female victim."); *Chandler v. State*, 534 So.2d 701, 704 (Fla. 1988) ("We agree with the trial court's finding these murders to have been heinous, atrocious, or cruel after considering that this elderly couple, of whom the wife was

very frail, must have suffered great fear and apprehension after being subdued and abducted from their home by a young man armed with a baseball bat and knife and then beaten to death in each other's presence.")

This Court is all too aware of the depravity of those who intentionally torture and enjoy the suffering of others. It is in cases like that, and for people who intentionally do things like that, where the crimes become the most aggravated of capital crimes. *See Schwab v. State*, 636 So.2d 3, 8 (Fla. 1994) (HAC appropriate where boy was abducted, taken to motel room, stripped naked, bound and gagged, anally raped, and then smothered to death); *Power v. State*, 605 So.2d 856, 863 (Fla. 1992) (HAC appropriate where 25 year old man took small 12-year-old girl prisoner, terrorized her, anally and vaginally raped her, hog-tied and gagged her, then stabbed her and left so that she slowly bled to death over period of 10 to 20 minutes). The death penalty is reserved for such defendants, who commit such crimes.

The circumstances of this case, on the other hand, do not support the conclusion that the killer intended to cause any unnecessary suffering to the Razors. Rather, the evidence is consistent with both victims being quickly killed. The death penalty is not the appropriate sentence for Michael Reynolds when the totality of circumstances is considered, because his case is not the most aggravated and least

mitigated of capital crimes.

The state failed to meet its burden in this case. In *Rhodes v. State*, 547 So.2d 1201 (Fla. 1989), the decomposing body of an approximately forty-year-old female, missing her lower right leg, was found in debris being used to construct a berm in St. Petersburg. The medical examiner determined manual strangulation to be the cause of death because the hyoid bone in the victim's throat was broken. Although Rhodes claimed the victim died accidentally when she fell three stories while in a hotel, three of Rhodes' fellow inmates at the jail testified that Rhodes admitted killing the victim. The trial court in *Rhodes* had found that HAC applied stating:

> That the murder of Karen Nieradka was especially heinous, atrocious and cruel in that the victim was manually strangled and the clumps of her own hair found in her clenched hands indicates the pain and mental anguish that she must have suffered in the process.

This Court, however, rejected the trial court's finding of HAC, finding that the victim may have been semiconscious at the time of her death according to the conflicting stories told by Rhodes. Further, the Court, quoting *State v. Dixon*, found nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies."

In *DeAngelo v. State*, 616 So.2d 440 (Fla. 1993), the defendant struck the

victim on the head, used manual strangulation, and then strangled the victim with a ligature. The trial court did not find the presence of this aggravator. In rejecting the state request for HAC, this Court upheld the trial court, agreeing that the state had failed to prove that the victim was conscious during the ordeal, relying on the medical examiner's testimony as to the *possibility* that at the time she was strangled with the ligature the victim was unconscious as a result of the pressure of the manual choking or as a result of a blow to her head. This is precisely the situation here. The facts of the instant case reveal that there was no intentional torture of the victims.

The state presented no competent testimony from the medical examiner to support a conclusion beyond a reasonable doubt that there was excessive pain or torture involved here. The testimony and evidence is to the contrary; the victims here were rendered unconscious in a very brief time, with little suffering and pain. *Contrast, e.g., Davis v. State*, 604 So.2d 794 (Fla. 1992), wherein the medical examiner testified that the 73-year-old victim likely was not rendered unconscious by a blow to the head and could have been conscious for thirty to sixty *minutes*, while slowly bleeding to death from the stab wounds.

The contrast between those cases involving torture or depravity and the instant case should be clear; failure to recognize the contrast would render

Florida's capital scheme unconstitutional. Here, the state has failed to prove this factor of torture or depravity beyond a reasonable doubt. The conclusion of the trial court should be rejected. Even if not rejected outright, due to the lack of evidence of torture and desire to inflict suffering, this factor should, at most, be given minimal consideration in the weighing and proportionality review process.

The trial court also erred as a matter of law in finding that the murders were committed for the purpose of avoiding a lawful arrest. This aggravating circumstance focuses on the motivation for the murder, and is usually found where the victim is a police officer. *See, e.g., Mikenas v. State*, 367 So.2d 606 (Fla. 1978). When the victim is not a police officer, however, in order to prove this circumstance, the evidence must prove beyond a reasonable doubt that the dominant or only motive was to eliminate the victim as a witness. *Bell v. State*, 841 So.2d 329, 336 (Fla. 2002); *Connor v. State*, 803 So.2d 598, 610 (Fla.2001); *see also Alston v. State*, 723 So.2d 148, 160 (Fla.1998). "Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Likewise, the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator." *Looney v. State*, 803 So.2d 656, 676 (Fla.2001); *Bell v. State*, *supra*; *Geralds v. State*, 601 So.2d 1157 (Fla. 1992). The state thus must prove by "very

strong," positive evidence (rather than by speculation, default, or elimination) that the dominant motive was to eliminate a witness. *Jackson v. State*, 502 So.2d 409 (Fla. 1986); *Connor v. State*, 803 So.2d 598 (Fla. 2001) (other motives as likely); *Riley v. State*, 366 So.2d 19 (Fla. 1978).

Thus, the finding of this aggravator with regard to Robin Razor is totally speculative on the trial court's part – simply because she knew the defendant is not the strong evidence required to find this factor. *Id*. *See also Amazon v. State*, 487 So.2d 8 (Fla. 1986) (evidence inconclusive where the defendant killed his next-door neighbor as she called for help during the burglary, *even where the detective said the defendant told him he killed to avoid arrest*); *Garron v. State*, 528 So.2d 353 (Fla. 1988) (victim shot while talking on the phone asking for the police held insufficient); *Zack v. State*, 753 So.2d 9 (Fla. 2000) (fact that defendant planned to kill victim and take her property and the victim knew and could identify defendant was insufficient to support the avoiding arrest circumstance).

Further, the trial court's finding that Robin "disliked" and "mistrusted" the defendant so that she would have "advis[ed] authorities that the defendant would be a primary suspect" (in the killing of Danny Privett) is speculative and has no basis in the evidence. In fact, the victims' daughter and sister, Danielle, had told authorities of problems her parents were having with three other people, Justin

Pratt, Nicole Edwards, and Alan Combs, who had threatened them in the past, yet made no mention of any problems with the defendant. (Vol. 19, R 2423, 2584-2585) And, as found by the trial court, the killing of Danny Privett took place some distance away from the trailer where Robin and Christina were, thus "not necessarily afford[ing] its occupants to either see or hear the murder of Danny Ray Privett." (Vol. 6, R 943)

As to the testimony of convicted felon and fellow inmate, Darrell Courtney (that the defendant had once told him that he had to kill "the girl" so as not to leave any witnesses), that testimony was seriously impeached by the disinterested witness, Robert Scionti, who came forward to authorities to let them know that Courtney, on the day he was to testify in Reynolds' case, admitted to Scionti in the jail that, in truth, Reynolds had never confessed to him, but that he (Courtney) was telling authorities this simply because he felt Reynolds was "a shit." (Vol. 20, R 2613, 2623)[14] Surely, Courtney's impeached testimony does not rise to the required level of "very strong," "competent and substantial" evidence to prove the "avoid arrest" aggravator beyond a reasonable doubt, as is required. This Court must strike the aggravator of "avoid arrest" and vacate the death sentences.

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[14] The trial court's sentencing order mysteriously omits any reference to Scionti's impeachment of Courtney. (Vol. 6, R 943-944, 955)

B. Mitigating Factors Are Present Which Outweigh Any Appropriate Aggravating Factors.

In *Campbell v. State*, 571 So.2d 415 (Fla. 1990), this Court reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant. In *Campbell*, the Court quoted from prior federal and Florida decisions to remind courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982); *Rogers v. State*, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Once a factor is reasonably established, it cannot be dismissed as having no weight as a mitigating circumstance. *Campbell*, *supra*. For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence.

It is submitted that the trial court's sentencing order here totally fails to meet this standard necessitated by the capital sentencing scheme. The trial court glossed over the non-statutory mitigating factors argued by the defense and supported by the evidence and improperly abused its discretion in given them little weight. Firmly established, but inexplicably not found or given merely little weight (without

any discussion whatsoever as to why, simply making the bald assertion that they were), were the highly relevant mitigators of:

the defendant's cooperation with the police, voluntarily providing hair and blood samples, consenting to be interviewed and to have his home searched and his belongings seized. *See Johnson v. State*, 720 So.2d 232 (Fla. 1998); *Perry v. State*, 522 So.2d 867 (Fla. 1988); *Washington v. State*, 362 So.2d 658 (Fla. 1978).

Reynolds exhibited good trial behavior and was cooperative with court personnel. *See Brennan v. State*, 754 So.2d 1 (Fla. 1999); *Snipes v. State*, 733 So.2d 1000 (Fla. 1999).

The defendant was remorseful, apologizing to the families for them having to go through the ordeal of the trial and attempting to waive the penalty phase of the trial so that they would not have to endure that proceeding. *See Snipes v. State*, 733 So.2d 1000 (Fla. 1999); *Morris v. State*, 557 So.2d 27 (Fla. 1990); *Nibert v. State*, 574 So.2d 1059 (Fla. 1990); *Pope v. State*, 441 So.2d 1073 (Fla. 1984). This factor was not even mentioned by the trial court in its sentencing order.

Michael Reynolds had an abusive and deprived childhood, wherein his father repeatedly and consistently abused him, both mentally and physically. *See Almeida v. State*, 748 So.2d 922 (Fla. 1999); *Livingston v. State*, 441 So.2d 1083, 1086 (Fla. 1983); *Campbell v. State*, *supra*; *Nibert v. State*, *supra*.

Reynolds had a loving relationship with his mother and cared for his wheelchair bound sister while growing up. *See Ray v. State*, 755 So.2d 604 (Fla. 2000); *Bedford v. State*, 589 So.2d 245 (Fla. 1988); *Perry v. State*, 522 So.2d 817 (Fla. 1988).

Reynolds was gainfully employed. *See Wright v. State*, 586 So.2d 1024 (Fla. 1991); *Dolinsky v. State*, 576 So.2d 271 (Fla. 1991); *Smalley v. State*, 546 So.2d 720 (Fla. 1989).

The trial court merely lists, without any additional comment or analysis of the weight to be given them, the four nonstatutory mitigating factors it found. Again, the failure of the trial court to provide details of its weighing process with factual findings and support from the evidence dooms the sentencing order to unconstitutional status. The trial judge must expressly *evaluate* (not just list) in its written order each mitigating circumstance proposed by the defendant to properly weigh the sentencing determination and provide this Court with a basis of review. *Campbell v. State*, *supra*.

Further, the trial court refused to consider the relevant mitigating factor of residual or lingering doubt (*see* Point VI, *supra*). The court's comment during the penalty phase of the trial, that "I go strictly by statutory [mitigating] factors, and so that's the way it is" (Vol. 25, R 3499), is particularly telling, exhibiting a violation of

Lockett v. Ohio, supra, and indicating that the trial court imposed these sentences in violation of the constitutions of Florida and the United States.

In conclusion, the trial court found improper aggravating circumstances, including heinous, atrocious or cruel, and to avoid arrest; and gave weight to the improper testimony of other violent crimes for which the defendant had not been convicted. The substantial nonstatutory mitigating circumstances presented here via Reynolds' sister's deposition, the defendant's statements at the *Spencer* hearing, and in the PSI, unrebutted by the evidence, clearly tip the scale in favor of life imprisonment. His sentences of death, when compared to others, is disproportional and constitutes cruel or unusual punishment under the circumstances. It must be vacated.

POINT VIII.

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL UNDER ***RING V. ARIZONA***.

In *Ring v. Arizona*,122 S.Ct. 2428 (2002), the Supreme Court held that Arizona's capital sentencing statute violated the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the judge, rather than the jury, was given the responsibility of making the findings of fact necessary to impose a sentence of death. Florida law, like Arizona law, makes imposition of the death penalty contingent on a *judge's* factual findings regarding the existence of statutory aggravating circumstances, and is thus unconstitutional.[15]

[15] This Court has nevertheless concluded that it must uphold the constitutionality of Florida's statute unless and until the United States Supreme Court overrules *Hildwin v. Florida*, 490 U.S. 638 (1989), and expressly applies *Ring* to Florida. See *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So.2d 143 (Fla. 2002).

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court reverse the judgments and sentences of death and as to Point I, remand for a new trial, as to Point II, remand for discharge, as to Points III through VIII, vacate the death sentences for the imposition of life sentences.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Honorable Charles Crist via his mailbox at the Fifth District Court of Appeal and mailed to Mr. Michael Gordon Reynolds, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL. 32026, this 27th day of December, 2004.

_____
JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14pt.

_____
JAMES R. WULCHAK
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