IN THE SUPREME COURT OF FLORIDA

JOHN S. HUGGINS,)
)
)
Appellant,)
)
vs.) CASE NUMBER SC02-2364
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PREJUDICIAL EVIDENCE THAT WAS NOT RELEVANT TO ANY CONTESTED ISSUE.

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

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PRELIMINARY STATEMENT

The record on appeal comprises twenty-eight consecutively numbered volumes. Counsel will refer to each volume using a Roman numeral followed by the appropriate page numbers. There is one volume of supplemental record which will be referred to as (SR).

Additionally, this Court granted Appellant's motion to utilize the record on appeal prepared for ***State v. Huggins***, 788 So.2d 238 (Fla. 2001). That record includes six consecutively numbered volumes of the record and thirteen consecutively numbered volumes of supplemental record. Counsel will refer to this record using the symbols (RA) and (SRA) with the appropriate volume and page numbers.

STATEMENT OF THE CASE

On May 28, 1998, the Ninth Judicial Circuit, Orange County, Florida, spring term grand jury returned a four count indictment charging John Steven Huggins, the appellant, with the premeditated first-degree murder[1] of Carla Larson, carjacking,[2] robbery,[3] and kidnaping.[4] (XII 468-70) The appellant was originally convicted of first-degree murder, carjacking, kidnaping and robbery and sentenced to death following a 1999 trial in Jacksonville following a change of venue. The trial court subsequently granted appellant's motion for a new trial and vacated the death sentence based on the trial court's findings that the State failed to disclose exculpatory evidence contrary to ***Brady v. Maryland***, 373 U.S. 83 (1963). The State of Florida appealed the trial court's order. On June 7, 2001, this Court affirmed the trial court's action in vacating appellant's convictions and sentences and ordering a new trial. ***State v. Huggins***, 788 So.2d 238 (Fla. 2001). On remand, appellant waived any conflict with the representation by the Office of the Public Defender, Ninth Judicial Circuit. (XII 472) Appellant elected Osceola

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[1] In violation of Sections 782.04 and 775.087, Florida Statutes.

[2] In violation of Sections 812.133(1) and 812.133(2)(b), Florida Statutes.

[3] In violation of Section 812.13(2)(c), Florida Statutes.

[4] In violation of Section 787.01(1)(a)(2), Florida Statutes.

County as the proper venue. (XII 475-76, 486)

Appellant filed a total of four unsuccessful motions to disqualify Jeff Ashton, the assistant state attorney. These were based on Ashton's prior conduct of failing to disclose exculpatory evidence; losing potential impeachment evidence; failure to fully comply with discovery; and the use of perjured testimony. (I 44; XII 480-81, 488, 513-15, 527-28, 568-70, 635) Appellant also filed a motion to compel the state to identify and exclude any new evidence developed since the 1999 trial. (XII 498-99, 527-28, 581-86, 620-21) Appellant also filed an unsuccessful motion to dismiss the indictment based on double jeopardy and due process grounds where the misconduct of the state resulted in a new trial. (XII 571-73, 636-37) The trial court also denied appellant's motion to dismiss. (XII 636-37)

Appellant filed numerous pretrial motions relating to the United States Supreme decision in ***Ring v. Arizona***, 536 U.S. 584 (2002). These included a motion to dismiss the indictment and request for specific jury findings as to penalty issues (XII 545-47, 565-67); a motion for statement of particulars as to aggravating circumstances and theory of prosecution (XII 591-96); a motion to bar imposition of the death sentence based on the unconstitutionality of Florida's capital sentencing procedure (XIII 777-840;XIV 865-78); specific objections to the court's proposed dialogue with respect to the jurors, to death qualification of the

jury, and general objections to instructions and procedures (XIV 846-59); a motion to bar death as a possible sentence based on double jeopardy grounds, i.e., the first jury in Jacksonville impliedly "acquitted" appellant of death since only nine jurors voted for death (XIV 860-62, 864) and objections to the trial court's penalty phase instructions (XIV 1013-22).

After an aborted attempt to pick a jury in Osceola County, Florida, the trial court dismissed the venire due to the taint of pretrial publicity. (XVI 1-XVIII 415; XIII 705-16) By stipulation, venue was changed to Hillsborough County, Florida. (XIII 716, 760)

Prior to trial, appellant filed a notice of intent to use similar fact evidence, specifically "reverse ***Williams***[5] Rule evidence" that Calvin Rewis was the actual murderer of Carla Larson. (XIII 722-59) The state responded with a motion in limine. (XIII 769-71) The trial court ultimately excluded the evidence which was subsequently proffered for the record. (XIV 937-82)

The subsequent trial in Hillsborough County resulted in the jury finding the appellant guilty of murder in the first-degree, carjacking, and kidnaping, all as charged in the indictment. The jury found appellant guilty of the lesser included

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

offense of petit theft, thereby acquitting him of robbery. (XIV 1003-6)

At the penalty phase, appellant insisted on representing himself with the Office of the Public Defender acting as stand-by counsel. The trial court conducted an inquiry pursuant to ***Faretta v. California***[6]. (XXVII 716-37)

Following the penalty phase, the jury returned a verdict recommending, by a nine to three majority, that John Huggins should be sentenced to death. (XIV 1023) The jury filled in the interrogatory verdict forms provided by the trial court. They concluded unanimously that the murder was committed while Huggins was felony probation; that Huggins had previously been convicted of a felony involving the use or threat of violence to some person; that the murder was committed while Huggins was engaged in the commission of the crime of kidnaping; that the crime was committed for financial gain; that the murder was especially heinous, atrocious or cruel, and there was no valid mitigation. (XIV 1024-26)

The trial court adjudicated appellant guilty. (XIV 1027; XXVIII 1904) Following a ***Spencer***[7] hearing (X340-432), the trial court sentenced John Huggins to death for the murder of Carla Larson. The court found no statutory mitigation factors, numerous non-statutory mitigation factors, and five aggravating

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[6] ***Faretta v. California***, 422 U.S. 806 (1975).

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

circumstances. (XI 433-67; XV 1172-89)

STATEMENT OF THE FACTS

Innocence/Guilt Phase

In June of 1997, Carla Larson was an engineer at Centex-Rooney, a large construction company. She was married to Jim Larson. The couple had a one-year-old daughter named Jessica. (XXII, 839-41) On June 10, 1997, the couple left for work separately. (XXIII 842) Carla Larson drove a white Ford Explorer which sported a Passport radar detector.[8] (XXIII, 842-45)

Carla Larson was working on the Coronado Springs Resort project near Walt Disney World. Carla told the office manager that she planned to pick up some food at lunch for an afternoon meeting. The office manager told Larson that a nearby Publix had recently opened saving her the longer trek to Goodings. She gave Larson directions to the Publix which was located on the corner of 192 and International Drive right off the Osceola Parkway. Larson left the job site shortly after noon and headed in the direction of Publix. (XXIII 854-58, 885-87) Records indicate she made a purchase at that Publix at about 12:15 p.m. that day. (XXIII 883; State's Exhibits 10 and 11)

At approximately, 12:30 to 12:45 p.m., members of a landscaping crew were

[8] The radar detector was "hard-wired" for the vehicle.

eating lunch by a lake in the woods off of Osceola Parkway. O'Hearn, the crew's foreman, noticed a white Ford Explorer driving down a dirt road approximately 150 feet away. The sole occupant appeared to be a man. O'Hearn could not determine the individual's race, hair details, or any other description. (XXII, 810-18)

Four Centex-Rooney construction workers were returning from lunch in Kissimmee that day. As they drove on Osceola Parkway, they noticed a white Ford Explorer driving out of the woods at a relatively high rate of speed. (XXII 783-88) None of the men could identify John Huggins as the sole occupant. In fact, one of the men saw Huggins on television following his arrest and described him as heavier and more pale than the person he had seen. (XXIII 806)

Christopher Smithson,[9] an employee of a subcontractor at the Coronado Springs project, left work that day sometime between 2:30 and 3:30p.m. As he headed east on Osceola Parkway, Smithson spotted a white Ford Explorer coming out of the woods at a rate of approximately twenty miles an hour. At trial, Smithson identified John Huggins as the driver of that SUV.[10] (XXIII, 911-18)

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[9] The state did not present Smithson's testimony until the second trial.

[10] Smithson first recognized the driver after Huggins was arrested and was featured on television. (XXIII, 917-18) Smithson said he called authorities but never received a follow-up interview prior to the first trial. (XXIII, 918) The Osceola Sheriff's Office had no record of any call from Smithson in June 10, 1997 through June 17, 1997. (XXV 1411-16)

Charlotte Green,[11] a resident of Melbourne, heard about Carla Larson's murder. Sometime later, she saw the appellant[12] driving a white SUV that she believed matched the description of Larson's missing vehicle. Green was headed back to Melbourne on the interstate when Huggins passed her before exiting. Green noticed that the back of the vehicle had been spray painted black which she found highly unusual.[13] (XXIII 991-94)

Two of Larson's co-workers found her body on June 12, 1997 in a wooded area off Osceola Parkway. Her nude body was located behind a palmetto bush and covered with debris and a towel. (XXIII 887-93, 1148) Dr. Shashi Gore, chief medical examiner for the Ninth Judicial Circuit, responded to the scene. (XXIV 1143-46) Dr. Gore concluded that the body had been lying there for two to three days. (XXIV 1147-48) Dr. Gore opined that Carla Larson died from asphyxiation due to severe neck injury and strangulation. (XXIV 1148-49, 1160) More than six months later Larson's purse and wallet were found in the median of the off

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[11] Like Smithson, Green did not testify at the first trial. (XXIV 1011-12)

[12] Although Green did not know Huggins, she claimed that she later recognized him as the man in traffic, when she saw his arrest featured in the media. (XXIV 1000)

[13] A couple of days later Green noticed the same vehicle parked near a fishing spot. Later that day she saw it was a burned-out hulk. (XXIII 995-996; XXIV 1001, 1006-8)

ramp that led from Osceola Parkway to World Drive. (XXIII 895-99) Although the purse had obviously been there for some time, there was no way to determine exactly how long. (XXIII 905) Approximately seven feet from where Carla Larson's purse was found, police seized a bottle with a local prescription filled on November 11, 1997 for a person named Donaway. (XXIV, 1095-97)

John Huggins was on a family trip to the area in June of 1997. (XXV 1263-68) They visited Gatorland and Disney World. John and his wife, Angel Huggins, stayed at a hotel with a gaggle of children and relatives. (XXIII 882, 969-82; State's Exhibit 14) When the group subsequently left the area to return to Angel's home in Melbourne, John Huggins did not accompany them. (XXIII 934-90)

On Friday, June 12, 1997, Kevin Smith, a friend of John Huggins, agreed to let Huggins park a white sports utility vehicle at his house for a few days. Kevin noticed the truck contained a hard-wired radar detector. Huggins told Smith that he had rented the vehicle. (XXV 1270-78) After Huggins picked up the truck a couple of days later, Smith found a radar detector hidden in a box on top of his outside hot water heater. (XXV 1284-97)

On the evening of June 26, 1997 the police received a call that a truck was burning on a vacant lot near Kevin Smith's house . An investigation revealed that the burned-out vehicle was Carla Larson's Ford Explorer. An arson investigator

concluded that the fire had been set intentionally. (XXIV 1110-13; XXV 1204-18, 1320-24) The investigation also indicated that the truck had been painted black in an unprofessional manner.

In June, 1997, Angel Huggins, appellant's wife, was living with her mother, Fay Blades in Melbourne, Florida. (XXV 1340-42) On June 10, 1997, Fay Blades arrived at her house after work and noticed a white sports utility vehicle parked in the carport. She had never seen the vehicle before that date and she never saw it again.[14] When she walked into the house, appellant's son Jonathan was visiting her house. (XXV 1343-47) John Huggins was not present. (XXV 1355)

On July 8, 1997, six detectives from the Orange County Sheriff's office searched the home of Fay Blades, John Huggins' mother-in-law, and a shed behind the house. (XXIV 1031-32) During two trips the detectives found nothing of evidentiary value even though they used an X-ray machine.[15]

Despite the fact that the police had searched the premises throughly, Fay Blades decided to conduct her own search. While doing some wash in the shed, she noticed a screwdriver sitting out on top of the box. This prompted her to

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[14] Several neighbors also noticed the sudden appearance of the vehicle in the neighborhood. (XXV 1225-40)

[15] The searches of the small shed were fairly exhaustive.

unscrew the electrical outlet cover just inside the shed door. Inside, she found some jewelry wrapped in a paper towel.[16] The jewelry belonged to Carla Larson. (XXIII 842-45, 850-51; XXV 1347-49, 1353-54, 1375-78) Blades turned the jewelry over to the authorities. A test for latent fingerprints on the tissue paper as well as the electrical outlet failed to incriminate John Huggins. (XXIV 1037, 1040-46)

On July 25, 1997, Steve Olson, a broadcast news reporter for WFTV Channel 9, conducted a videotaped interview of the appellant in the Seminole County Jail. (XXV 1261-62) During the interview, appellant admitted to being in the vicinity with his wife and children. He said that he did not think that he killed Carla Larson but admitted suffering blackouts which were recently exacerbated by taking medication and alcohol. Huggins expressed sympathy for Jim Larson, explaining that he had also recently lost a wife. (XXV 1263-68)

On May 12, 1998, Norm Henderson, a crime scene investigator with the Orange County Sheriff's office, traveled to the Orange County Jail to obtain appellant's hair samples pursuant to a court order. (XXV 1246-48) While Henderson observed, Dr. Blakely attempted to obtain pubic hair samples from the appellant. They discovered that the appellant's pubic region was completely

[16] Blades found the evidence in the first place she looked despite prior exhaustive searches by police. Police explained that the detective assigned that area was afraid of electricity. (XXIV 1180-93)

shaven.[17] (XXIV 1471-72; XXV 1248-50) Henderson did obtain head hairs from Huggins. (XXV 1252-53)

A forensic scientist examined 114 human hairs and 86 animal hairs that had been collected from the blue towel covering the victim's upper torso. (XXVI 1500-8) These hairs were compared to known standards from Carla Larson and John Huggins. (XXVI 1508-13) None of the samples recovered from the blanket could have come from John Huggins. (XXVI 1513-19) Mitochondrial DNA analysis on some of the 286 unknown hairs found on the towel and from the victim's pubic combings indicated that all were **inconsistent** with the hair of John Huggins. (XXVI 1514-19, 1526-30) A second forensic scientist concluded that four sample question hairs could not be excluded as belonging to Carla Larson. (XXVI 1530-46) However, both John Huggins and Jim Larson could definitely be excluded as contributors of any of the four questioned hairs. (XXVI 1546)

The state and the appellant entered into a stipulation regarding certain DNA results. Biological samples were obtained from the gold necklace, the diamond ring,

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[17] Huggins was housed at the Orange County Jail Annex, a very antiquated facility without air conditioning. It has since been closed. (XXV 1254-55, XXVI 1462-65) The facility was frequently invested with crab lice which normally afflict the pubic area. (XXVI 1465-68) Although medication and shampoo were provided, many inmates would also shave their hair especially in the pubic area. (XXVI 1465-71)

a pair of earrings, vaginal swabs, two slides and a blood sample from Carla Larson and eight cigarette butts from John Huggins. These were submitted to a lab where DNA was isolated and analyzed. Insufficient DNA was isolated from the jewelry. However, the DNA profile from the sperm extraction from the vaginal swabs was consistent with the DNA profile obtained from Jim Larson, the victim's husband. Jim Larson could not be excluded as a source of the genetic material, whereas John Huggins and Carla Larson could be excluded as possible contributors, assuming a single donor. (XIV 914-15; XXVI 1548-50)

Penalty Phase

Appellant insisted on represented himself at the conclusion of the guilt phase. The state presented documentary evidence relating to appellant's nine prior violent felony convictions. (XXVIII 1817-24; State's Exhibits 4,5,8, 9, 10, 11, 12, 13, and 14). The state also provided documentary evidence that Huggins was apparently on probation at the time of Larson's murder. (XXVIII 1820-21; State's Exhibit 7)

The state presented three victim impact witnesses, Carla's mother, husband, and her best friend. (XXVIII 1824-41) All of them told the jury that Carla Larson was a wonderful, Christian girl who was raised in a home where strong morals and ethics abound. She married Jim, her first true love. Carla was truly like a sister to her best friend Christie Lovell. Lovell could only imagine all the good that Carla

would be doing if she were still alive today. Carla's daughter, Jessica, would now have to grow up without the pleasure and security of knowing her mother's loving arms. (XXVIII 1829)

Phyllis Thomas, Carla's mother, told the jury how proud she was of Carla. Carla was special to everyone she touched. Carla's parents were truly proud of all of her scholastic and personal accomplishments. Carla's daughter was only one year old when Carla was murdered. Jessica, the very picture of her mother, reminded Phyllis so much of Carla as a child. Carla's murder made her parents' lives a "living nightmare." (XXVIII 1830-34) Carla was a wonderful wife, mother, friend, and worker. Jim wishes that he had more videotape of Carla now that she is gone. (XXVIII 834-41)

Appellant presented the testimony of only one witness, Sandra Huggins, his sister. (XXVIII 1843-50) The trial court took judicial notice of the mitigation evidence presented by the defense in the prior penalty proceeding in Jacksonville.[18] (SRA X 1706-1810; XI 1811-55) Additionally, the trial court considered a presentence investigation report. (XV 1182-84)

John Huggins' parents were divorced when he was eight years old. John

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[18] Of course, Huggins' "sentencing" jury never heard this wealth of evidence and did not have benefit of the PSI either.

went to live with his father who was a strong disciplinarian and a heavy drinker. John had a very poor relationship with his stepmother, who detested him and wanted him out of the house. John was abused as a child by his father. (XV 1182)

John Huggins was involved in the church[19] and did missionary work. Reverend Arlene Colter, a pastor from Melbourne, met John in May of 1989 when he helped her baptize some people. Although Huggins was quite young and of limited means, he helped at the ministry by bringing food, clothing, and equipment. Additionally, Huggins undertook extremely difficult missionary work in Haiti where he lived in severe conditions. He worked in medical clinics treating children, work that some volunteers simply could not stomach. At a point in his life, John struggled with drugs, alcohol, and women. Additionally, he lost one wife in a car accident. This caused him great grief. Since his incarceration, Huggins had ministered to fellow prisoners.

The trial court found numerous mitigating factors.[20] Huggins has a positive attitude towards African-Americans which was demonstrated by his missionary

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[19] Huggins actually helped found a church in Oviedo.

[20] The trial court rejected proposed mitigation including: (1) there was no sexual attack on the victim; (2) there was no weapon used during the crime; (3) John was sentenced to an adult male prison when he was only fifteen years old; (4) Huggins waived extradition to face these Florida charges; (5) Huggins did not obstruct justice and he facilitated in his trial proceedings. (XV 1184-87)

work in Haiti. He can provide spiritual support in the prison community. As a child, John was hit and abused by his father. He witnessed acts of violence by his father upon his mother. His parents divorced while John was a boy, and he was separated from other family members. Despite all this, John Huggins became a caring parent and a loving stepfather. He is the sole surviving parent of his two children. He was an active participant in religious functions. He contributed his inheritance as well as two cars to the church. John was active in the "Love a Child" ministry in Florida. He served sick children as well as the poor in Haiti. He served the homeless through his contributions as well as his labor. Finally, the trial court found that John Huggins demonstrated good conduct during the trial proceedings. (XV 1184-87)

SUMMARY OF THE ARGUMENT

Appellant contends his convictions and death sentence were illegally and unfairly obtained. A major error occurred when the trial court allowed the admission of a 1998 photograph of appellant's shaved pubic region. The state offered this evidence ostensibly to prove consciousness of guilt, where the court had ordered hair extractions. However, the state failed to show that appellant knew investigators were coming that day or that appellant's pubic region was not already shaved prior to the court order. The photograph was intrusive, prejudicial, and showed no consciousness of guilt where other explanations existed for the shaved condition. ***Menna v. State***, 846 So.2d 502 (Fla. 2003).

After the state introduced this photographic evidence over objection, appellant presented evidence that the jail where he was housed was infested with crab lice at the time the state came for hair extractions. One treatment for the lice was shaving off all body hair. The prosecutor, not the defense, then elicited a hearsay statement attributed to the appellant. Over objection, the state convinced the trial court to instruct the jury that they could consider appellant's nine prior felony conviction in judging the credibility of appellant's purported statement that he shaved because of body lice. §90.806, Fla. Stat. (2002). Appellant objected on numerous grounds. Appellant contended that no hearsay statement was offered;

the incident was remote in time; the impeachment was on a collateral matter; and any slight probative value was outweighed by unfair prejudice. §90.403 Fla. Stat. (2002). The prosecutor featured appellant's felony record in closing argument.

Appellant also challenges the admissibility of blatant hearsay from Carla Larson's co-worker. Cindy Gerris testified over timely and specific objection that Larson told her she intended to go to Publix to buy food for a meeting later that afternoon. This was the only evidence establishing Larson's plans for later that day. The inadmissible hearsay improperly bolstered the state's entirely circumstantial case that Huggins abducted Larson from the Publix parking lot, robbed her, and killed her, leaving her body in the woods.

A black juror was improperly excluded from appellant's jury. The trial court granted the state's challenge for cause after the prosecutor doubted the claim that the juror could serve for two weeks without financial hardship. The prosecutor's focus was improperly motivated by race.

Admissible, relevant evidence that pointed the finger at Calvin Rewis, a known murderer, could have been the perpetrator of the crimes against Carla Larson. This "reverse ***Williams*** Rule" evidence should not have been excluded.

Appellant's convictions and death sentence were unfairly influenced when the state introduced inflammatory and irrelevant evidence at both phases of his trial.

This evidence included testimony and physical evidence that personalized the victim's identity as a young vibrant mother; unfair victim impact testimony and evidence; unfounded testimony from the medical examiner about the psychological effect of strangulation about which he was unqualified to testify; and gruesome photographs that were irrelevant to any material issue.

Appellant maintains that his retrial was unfair and unauthorized where the prosecutor engaged in deliberate misconduct at the first trial. The state's case became stronger in the intervening years. Assistant State Attorney Jeff Ashton should have been disqualified from further prosecution of appellant's case, where Ashton affirmatively concealed exculpatory evidence at the first trial.

Appellant contends that the evidence is insufficient to support his convictions. The state's case was entirely circumstantial. No physical evidence tied John Huggins to the crimes or to Carla Larson. Certainly the evidence is insufficient to prove kidnaping. The evidence of premeditation is also lacking. Additionally, the trial court should have granted appellant's request for a special jury instruction explaining the applicable law.

Similarly, the state's case concerning related aggravating factors is extremely weak. The trial court erred in concluding that the murder was committed during the course of a kidnaping, for financial gain, and that the murder was especially

heinous, atrocious, or cruel. The trial court's conclusions on these issues are based largely on speculation and assumption. A proper weighing of the remaining two, relatively unimportant, aggravating factors against the substantial, valid mitigation leads one to the inescapable conclusion that the death sentence is not justified in this case.

Appellant contests the continued viability and constitutionality of Florida's death penalty sentencing scheme following the decision of ***Ring v. Arizona***, 536 U.S. 584 (2002). Appellant recognizes the holdings of this Court to the contrary but argues for reconsideration nevertheless. Additionally, appellant's case is unusual in that the penalty phase was conducted following the issuance of the ***Ring*** opinion. Over objections, the trial court rewrote the jury instructions and procedures used and authorized by Florida statutes and rules of procedure. This action violated the separation of powers clause of the Florida Constitution and the United States Constitution.

ARGUMENTS

POINT I

UNDER THE PECULIAR FACTS OF THIS CASE, APPELLANT'S TRIAL WAS RENDERED UNCONSTITUTIONALLY UNFAIR WHEN THE TRIAL COURT ALLOWED THE STATE TO INTRODUCE EVIDENCE THAT APPELLANT HAD SHAVED HIS PUBIC REGION, WHICH SUBSEQUENTLY LED TO THE STATE INTRODUCING APPELLANT'S NINE PRIOR FELONY CONVICTIONS, EVEN THOUGH APPELLANT NEVER TESTIFIED.

Introduction

This was a circumstantial case. ***See*** Point VI. The state's case got stronger after the prosecutor's deliberate misconduct during the first trial led to a retrial several years later. ***See*** Point VIII. However, the evidence remained completely circumstantial. No hair, semen, or blood tied John Huggins to the disappearance or murder of Carla Larson. Although he was in the general geographic area at the time of Larson's disappearance, no one saw Huggins and Larson together. Several witnesses claimed to have seen Huggins in possession of a white Ford Explorer shortly after her disappearance. After Huggins was already incarcerated, his estranged mother-in-law found Larson's jewelry in her shed several weeks after the murder. She found the jewelry after police had repeatedly and exhaustively

searched that very shed.

In their quest for physical evidence, on May 5, 1998 the state obtained an order authorizing detectives to obtain both pubic and head hair samples from John Huggins. (SRB VII 1141) On May 12, 1998, investigator Henderson went to the Orange County Jail Annex to obtain the samples. (XXV 1248) Although Henderson collected appellant's head hair, he was unable to obtain a pubic hair sample because Huggins' pubic region had been completely shaved.[21] (XXV 1247-56) The state introduced the photograph of and testimony about appellant's shaved pubic area, ostensibly to prove consciousness of guilt. Prior to appellant's first trial in Jacksonville, he objected to the introduction based, in part, on relevance grounds, contending that the evidence did not establish consciousness of guilt where the state failed to prove that Huggins knew the date of the extraction. (SRA VII 1137-55) Appellant also argued that the photograph was invasive and that any probative value was outweighed by unfair prejudice.

Prior to the trial that is the subject of this appeal, appellant again filed a motion in limine to prevent the state from introducing irrelevant evidence, *inter alia*, the photographs showing Huggins' shaved genitalia and pubic region. (XIII 692-

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[21] Defense counsel was supposed to be present for the hair extraction but, through some mix up, was not there. (VI 164-65)

94) The trial court refused to exclude the evidence. (XIII 776) At trial, the state introduced the photograph of Huggins' shaved pubic area over appellant's objection. (XXV 1250; State's Exhibit 43)

In an effort to combat the evidence concerning appellant's shaved pubic region, appellant called Mark Thornton in the case-in-chief. Thornton, an Orange County correctional officer, described the antiquated, unairconditioned jail, since closed, where Huggins was housed during the summer months of 1997. (XVI 1462-68) Crab lice were a common problem at the facility.[22] When an outbreak occurred, inmates would be issued medication and shampoo. Additionally, clothes and bed linen were changed frequently to prevent reinfestation. (XXVI 1467) Also, inmates sometimes shaved body hair to combat the problem. (XXVI 1468-69)

During Thornton's testimony the following exchange occurred:

> [Defense counsel]: To your knowledge**,** did Mr. Huggins shave his pubic region after complaining of lice?
>
> [prosecutor] Mr. Ashton: Objection. Hearsay. Basis of knowledge.
>
> The Court: Overruled. **You can answer the question, if you have personal knowledge. Not what someone else told you**.

[22] The crab lice tended to occur primarily in the pubic area.

A. Yes, I did.

Q. Okay. And do you know whether he did, in fact, shave himself?

A. Yes, he did.

* * * * * * *

Q. Do you know whether Mr. Huggins limited himself in an attempt to rid himself of the crab lice solely to shaving or medical treatment?

A. I don't think I understand the question.

Q. Okay. Do you know if Mr. Huggins relied solely to shaving his body to rid himself of crab lice?

A. No. I don't know that he did rely solely on shaving his body.

Q. Do you know whether he ever obtained medical treatment or shampoo or change of uniform?

A. It is possible that he did.

Mr. Hill [Defense counsel]: I have nothing further. Thank you.

(XXVI 1469-70)(Emphasis added.) On cross-examination, the prosecutor asked Officer Thornton about the source of his information regarding Huggins' shaving his pubic region:

Mr. Ashton [prosecutor]: What's the basis of your

information that Mr. Huggins shaved his body hairs in response to crab lice?

A. Could you repeat that?

Q. What's the source of that information? Who did you get that from?

A. How do I know?

Q. Yes.

A. I saw it.

Q. You saw him what?

A. Naked.

Q. You saw him - -You saw him in the act of shaving, or you saw him and noticed he had been shaved?

A. **I saw him naked, and he had been shaved.**

Q. **But how do you know that the reason he shaved was because of crab lice?**

A. **That's what he said.**

Q. **So your answer to counsel's question was based upon what Mr. Huggins told you?**

A. **Pretty much.**

(XXVI 1470-71)(Emphasis added.)

Near the close of the evidence and testimony, the prosecutor announced his intention to request judicial notice of appellant's nine prior felony convictions. The prosecutor contended that the defense offered appellant's out-of-court statement that he shaved his pubic hair because of crab lice. The prosecutor contended that the nine prior felony convictions were admissible pursuant to Section 90.806, Florida Statutes (2002). Over appellant's numerous and vociferous objections, the trial court instructed the jury that John Huggins had nine prior felony convictions, which they could use in assessing his credibility regarding his hearsay statement that he shaved because of crab lice. (XXVI 1552-63)

Given the Testimony, The State's Impeachment of John Huggins Pursuant to Section 90.806, Florida Statutes (2002) Was Not Justified.

The provision of the evidence code at issue provides, in part:

> When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness....

§90.806(1), Fla. Stat.(2002). Although the recited, seldom used statute appears to allow exactly what the prosecutor below claimed it allows, the problem remains that **appellant never offered any hearsay statement**. In fact, if any hearsay was

elicited, **it was the prosecutor that elicited the information.**[23] The critical portion of the direct examination is set forth below:

> [Defense counsel]: To your knowledge**,** did Mr. Huggins shave his pubic region after complaining of lice?
>
> Mr. Ashton: [prosecutor] Objection. Hearsay. Basis of knowledge.
>
> The Court: Overruled. You can answer the question, if you have personal knowledge. Not what someone else told you.
>
> A. Yes, I did.
>
> Q. Okay. And do you know whether he did, in fact, shave himself?
>
> A. Yes, he did.

(XXVI 1469) There was no hearsay statement by Huggins elicited on direct examination. It was the prosecutor himself who later elicited the hearsay on cross-examination:

> A. I saw him naked, and he had been shaved.
>
> [Prosecutor]: **But how do you know that the**

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[23] Since this issue involves a question of law, the standard of review involves no more than a determination whether the issue was correctly decided. ***Padovano, Florida Appellate Practice***, §9.4 at 147 (2d. Ed. 1997); ***Inter - Active Services, Inc., v. Heathrow Master Association***, 721 So.2d 433, 434 (Fla. 5th DCA 1998).

reason he shaved was because of crab lice?

A. **That's what he said.**

Q. **So your answer to counsel's question was based upon what Mr. Huggins told you?**

A. **Pretty much.**

(XXVI 1471)

As can clearly be seen from the record quoted above, the prosecutor was responsible for eliciting the hearsay. The trial court specifically ruled that the witness could answer if he had personal knowledge **"not what someone else told you**." (XXVI 1469) Then and only then did the witness answer that he did know that Huggins shaved himself. The newly formulated question did not include the part about complaining about lice, nor did the witness answer in that manner. The witness testified only that John Huggins shaved himself. (XXVI 1469) The prosecutor later elicited the objectionable hearsay on cross-examination. (XXVI 1471)

Trial counsel made an exemplary record below. Trial counsel correctly pointed out that the witness did not testify about any statement made by John Huggins. (XXVI 1552-53) Trial counsel also pointed out that to allow, at this stage

in a capital trial,[24] the court to inform the jury that the appellant had nine prior felony convictions, was unfairly prejudicial. (XXVI 1554, 1558) Additionally, counsel pointed out that the impeachment was concerning a collateral issue, and did not relate to the offense itself. (XXVI 1554) Trial counsel also objected based on the observation that the statement was remote in time, where the attempted hair extraction was in 1998. Counsel pointed out that any medical records relating to crab lice had long since been destroyed when the jail was closed. (XXVI 1557-58) The prosecutor charitably pointed out that the state had not sought to introduce appellant's prior convictions based on their own presentation of the appellant's videotaped interview with the media after he was incarcerated. (XXVI 1555) Amazingly, the prosecutor claimed, "arguably we could have." (XXVI 1555)

Trial counsel maintained, "the record does not substantiate the state's claim that there is a statement or admission made by the defendant." (XXVI 1556) The trial court ruled that the witness indicated that Huggins complained of crabs. The trial court added, "it was more firmly elicited and elucidated on cross-examination." (XXVI 1556)

The trial court instructed the jury as follows:

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[24] Counsel correctly pointed out that it was unfair that the last thing the jury would hear would be the revelation that John Huggins was a nine-time convicted felon. (XXVI 1555)

> The Court: Ladies and Gentlemen of the Jury, a witness by the name of Mark Thornton, the correctional officer from Orange County testified, attributed certain statements that Mr. Huggins made to him, concerning crabs or body lice. In assessing the credibility of the statements of, not Mr. Thornton, but the statements of Mr. Huggins, which were related to us by Mr. Thornton, I am hereby instructing you of the following. **That the defendant has been convicted of a felony nine times.** You will receive an instruction from me, dealing with the credibility of, or believability of witnesses, and that will be one of the instructions I will give you in determining the believability or credibility of witnesses. You're hereby instructed that the prior convictions that I have just told you about should be considered only for the purpose of assessing the defendant's credibility of the statements he made that was related by witness Mark Thornton, and they are not to be considered as proof of guilt for the charged offenses. Everybody understand that?
>
> Jurors: Yes, Sir.

(XXVI 1562-63)

The Evidence That Huggins Shaved His Pubic Region Did Not Constitute Evidence of Consciousness of Guilt.

The Third District said in concluding that "[a] defendant's behavior is circumstantial evidence probative of his consciousness of his guilt, and ultimately guilt itself, only when it can be said that the behavior is 'susceptible of no prima facie explanation except consciousness.'" ***Herring v. State***, 501 So.2d 19, 20 (Fla.

3rd DCA 1986)(quoting ***State v. Esperti***, 220 So.2d 416, 418 (Fla. 2nd DCA 1969). Both ***Herring*** and ***Esperti*** involved a defendant's refusal to submit to a gunshot residue test. When Esperti was told that he had no choice but to submit to the test, he resisted by sitting on his hands, wiping his hands, and rubbing ashes on his hands after learning that cigarette ashes could be confused with gun powder. ***See State v. Esperti***, 220 So.2d 416, 417 (Fla. 2nd DCA 1969). Under those circumstances, the Second District concluded:

> The acts and conduct of the defendant in this case, if given any probative force whatsoever, **are susceptible of no prima facie explanation except consciousness of guilt;** and evidence thereof is, we think, relevant and certainly material. If the defendant is to avoid such an inference he would, of course, be free to offer a reasonable explanation.

Id. at 418 (Emphasis supplied.)

In ***Herring v. State***, 501 So.2d 19 (Fla. 3rd DCA 1986), the defendant was arrested and shortly thereafter, police requested that he submit to a hand swab gunshot residue test. He refused to submit but was not told that he was required to take the test, or that his refusal could be used against him. At trial, his refusal was introduced over objection and the prosecutor argued to the jury that the evidence "was convincing proof of the defendant's consciousness of his guilt." ***Herring***,

501 So.2d at 20. On appeal, the Third District reversed stating:

> The failure to communicate to Herring that the test was compulsory carried with it, we think, the implicit suggestion that the test was permissive and that he thus had a right to refuse. Consequently, even if the refusal had some arguable probative value, its admission would be unfair where the police may have led the defendant to believe that he had a right to refuse.

Herring, 501 So.2d at 21.

In ***Menna v. State***, 846 So.2d 502 (Fla. 2003) this Court was faced with a very similar issue. After her husband was shot, his dead body was taken to a hospital. Menna arrived at the hospital where she met with the chaplin. A deputy questioned her at the hospital and, at some point, he asked Menna to voluntarily submit to a hand swab examination to test for gunpowder residue. He told Menna that the test was noninvasive and would only take a few minutes. Menna declined to submit until she spoke to her attorney, but she was unable to reach him. Either before or during this process, Menna went to the bathroom a few times where she washed her hands. Apparently, no one ever informed Menna that her refusal to submit to the test could be used against her in court.

The trial court granted Menna's motion in limine. Ultimately, this Court affirmed the trial court's ruling. In doing so, this Court reaffirmed the holding in

Herring that:

> A defendant's behavior is circumstantial evidence probative of his consciousness of his guilt, and ultimately guilt itself, only when it can be said that the behavior is "susceptible of no prima facie explanation except consciousness of guilt."...

Menna, 846 So. 2d at 505 (quoting ***Herring***, 501So.2d at 20). This Court concluded that Menna was not told of any adverse consequences associated with refusing to take the test. Additionally, she was asked to submit to the test in a manner that made it seem optional. Thus, there were viable alternative explanations as to why she refused to take the test. ***Menna***, 846 So.2d at 508.

This Court is presented with a slightly different scenario than that presented in ***Menna***, ***Herring*** or ***Esperti.***[25] Specifically, John Huggins did not affirmatively nor actively "refuse" to submit to the extraction of his pubic hair. Instead, when investigators arrived to obtain hair samples from Huggins, they discovered a clean-shaven pubic region. There was no indication that Huggins knew when the court order would be carried out. There is no evidence that his pubic area was not already shaved at the time the trial court entered the order. There was no evidence that Huggins resisted the extraction of his head hair. It must be remembered that

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[25] Appellant submits that this issue is also a question of law that involves no more than a determination whether the issue was correctly decided.

Huggins was housed in an antiquated, unairconditioned jail during the hot and humid Florida summer months. The guards were even allowed to wear shorts. The place was infested with crab lice. His shaved public area was susceptible of explanation other than consciousness of guilt. John Huggins' shaved pubic area was not relevant to any issue of guilt.

Section 90.401, Florida Statutes (2002) defines relevant evidence as "evidence tending to prove or disprove a material fact," while Section 90.402, states that "[a]ll relevant evidence is admissible, except as provided by law." Although refusal evidence can be introduced in certain situations, the trial court must make a prima facie determination that the evidence is relevant with regard to the defendant's consciousness of guilt. ***Menna***, 846 So.2d at 506.

> This requirement implicitly recognizes that, as articulated by Judge Pearson in ***Herring***, there are potentially many reasons other than guilt, that a defendant might be motivated to refuse to submit to such a test. Furthermore, under some circumstances, such as those in ***Herring***, a refusal may be so ambiguous as to remove from its invocation any probative value in the refusal as to the issue to the defendant's alleged consciousness of guilt.

Menna, at 506-7. In ***Escobar v. State***, 699 So.2d 988 (Fla. 1997), the Court held that, where the defendant challenges the relevancy of such evidence, the state must

adduce evidence that the defendant's behavior was related to an attempt to avoid being held accountable for the crime at issue. There must be evidence which indicates a nexus between the evidence and the crime.

Here, John Huggins repeatedly challenged the relevance of the fact that his pubic area was clean shaven when investigators arrived to extract a hair sample. It is not as though the evidence would have led to anything. This evidence was discussed at length in the first trial in Jacksonville. After the failed attempt to obtain John Huggins' pubic hair in 1998, the state never made the attempt again. The state had Huggins' DNA as far back as 1997. (XXVI 1425-26) Subsequent DNA evidence established that none of the physical evidence from the crime scene (blood, hair, semen, DNA) tied John Huggins to the crime. Huggins' so-called "refusal" was simply a red herring in an attempt to bolster the state's already weak case.

The error was compounded when a prosecutor focused on this specific evidence during his closing argument. In fact, the prosecutor thought enough of this particular issue, that he concluded his initial closing argument by hammering on this very evidence:

> And lastly of all, you have the pubic hair issue....
> The defendant was in court with his attorney and
> the court ordered him to submit to pubic hair

> samples....**And what happens when the law enforcement officer goes there to get the samples? He has shaved every bit of pubic hair off of his body, which their own expert acknowledges makes analysis impossible. Makes it absolutely impossible**. Basically, what we have shown is the defendant made any hair analysis by the state absolutely impossible. Now, how has the defense responded to that? They have responded....that he shaved his pubic hair off because of an infestation of lice. You have to decide the credibility of the defendant as he made that statement. You got to decide whether that statement is believable or not. **And one of the things the court will instruct you, you may consider, among a lot of others, is the defendant's felony convictions**. **You have to decide whether a statement made by a nine-time convicted felon is worthy of your belief**....It's not. That...is an excuse. That, in fact, the reason that he shaved off his pubic hair was for exactly the reason that I discussed...designed to make it impossible to find evidence to convict him, and that's exactly what John Huggins did when he shaved off his pubic hair.

(XXVII 1621-24)

Conclusion

The trial court's ruling allowing the evidence, photograph, and testimony was error in the first place. The evidence did not show consciousness of guilt where appellant's "behavior" (having a shaved pubic region) is susceptible of numerous

explanations that do not show consciousness of guilt. Appellant's lawyer could not be present at the time of the extraction. There was no evidence that appellant's pubic region was not already shaved at the time of the court order. There is no evidence that appellant knew when the investigators were coming to extract the hair. The evidence was similar to an impermissible "straw man" set up by the prosecutor for the sole purpose of knocking it down. ***See, e.g., Morgan v. State***, 700 So.2d 29 (Fla. 2d DCA 1997)(Conviction reversed where prosecutor improperly created "straw man" alibi, where defendant did not assert alibi defense - error was compounding by closing remarks.)

The subsequent impeachment of appellant's alleged hearsay statement was completely unwarranted. Any hearsay elicited from the witness was elicited by the prosecutor, not defense counsel. Pursuant to Section 90.806, Florida Statutes, the trial court instructed the jury that, in judging appellant's credibility regarding his claimed reason for shaving, the jury could consider his nine prior felony convictions. The impeachment was unwarranted. Additionally, the impeachment was on a collateral matter[26] concerning a statement that was extremely remote in

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[26] It is well established that if a witness is cross-examined concerning a collateral or irrelevant matter, the cross-examiner must "take" the answer, is bound by it, and may not subsequently impeach the witness by introducing extrinsic evidence to contradict the witness on that point. ***Caruso v. State***, 645 So.2d 389,

time.[27] The trial court's jury instruction that John Huggins had nine prior felony convictions came at a critical juncture in his capital murder trial. The last bit of evidence heard by the jury prior to their instructions and argument was that John Huggins had nine prior felony convictions.[28] The prosecutor exacerbated the error by featuring appellant's nine prior felony convictions in his closing argument. In a circumstantial case, an error of this magnitude cannot be perceived as harmless error.

394 (Fla. 1994).

[27] A conviction used to impeach a witness cannot be too remote in time. ***See, e.g., White v. State***, 817 So.2d 799 (Fla. 2002).

[28] Status as a convicted felon is generally perceived as *per se* reversible error as evidence by the routine granting of motions to sever the charge of possession of a firearm by a convicted felon.

POINT II

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S TIMELY AND SPECIFIC OBJECTION AND ALLOWING THE OFFICE MANAGER TO TESTIFY TO BLATANT HEARSAY THAT ESTABLISHED THE ONLY EVIDENCE CONCERNING CARLA LARSON'S PLANS ON THE DAY OF HER MURDER.

Over a timely and specific objection, the trial court allowed Cindy Garris, the Centex-Rooney office manager at the Coronado Springs job site, to testify as follows:

> Q. Now, I want to direct your attention to June 10, 1997. Were you at work at the Coronado Springs project on that day?
>
> A. Yes.
>
> Q. And did you have occasion through your job to come in contact with Carla?
>
> A. Yes.
>
> Q. Now, on this particular day, around lunch time, did you - - were you involved in a conversation with Carla about her plans for the lunch hour?
>
> A. Yes, I was.
>
> Q. **Okay. Would you please tell us what Carla indicated her plans for the lunch hour were? What she was going to do?**

> Mr. Wesley (defense counsel): Objection to hearsay.
>
> The Court: Overruled.
>
> A. She was planning on going to the Goodings grocery store to pick up some food for a meeting, and she was going to get some lunch at the same time. She had asked me to go with her. I declined, told her that I had plans to go out with the receptionist. We sat there, chatting for about another five minutes before she departed.

(XXIII 855-56) Garris then explained that she told Larson about the opening of a new Publix Supermarket that was more conveniently located. Garris gave her directions to the new store. Garris testified that Carla Larson told her that she was going to drive to the Publix. Larson left the job site a little after noon. (XXIII 856-57) The state presented documentary evidence that she completed a transaction at that Publix a few minutes after noon that day. After that, the state had no evidence of her whereabouts until her body was found two days later in some nearby woods.

Section 90.802, Florida Statutes (2002) clearly states:

> Except as provided by statute, hearsay evidence is inadmissible.

Cindy Garris' testimony was blatant hearsay that should not have been admitted over appellant's timely and specific objection. This evidence was the only evidence introduced by the state that established Carla Larson's plans for that

afternoon. This was a circumstantial case that was grounded, in part, on the State's contention that Larson was a happily married young mother who would not voluntarily leave the shopping center with just anyone. The prosecutor specifically argued this point in response to appellant's motion for judgment of acquittal. (XXVI 1382-83) In denying the motion for judgment of acquittal, the trial court stated, in part:

> The record evidence shows that based upon the statement of intent that Mrs. Larson gave fellow co-workers, she went to Publix for the express purpose of picking up some items for a party that afternoon. With the express purpose of returning to her job to fulfill that obligation. One could rightfully conclude that when she left Publix, and did not return, she did not return because of some force that caused her not to. And you also are free to argue something else. But there is record evidence to support that....(XXV 1388)

The court also indirectly referred to this testimony in his findings of fact in support of the death penalty. (XV 1176)("There was absolutely no reason for Carla Larson not to return to work or home.")

Garris' testimony was blatant hearsay that did not fit under any exception to the hearsay rule. The state's case is grounded heavily in their contention that Carla Larson would not have voluntarily left the Publix shopping center with another man, stranger or not. In closing argument, the prosecutor conceded that the state could

not prove "precisely where Carla Larson was killed. While it is theoretically possible that Carla Larson was strangled to death in the parking lot of Publix...the more reasonable inference is that it didn't occur there. The more reasonable inference is that the reason that Carla was taken to the woods was so that she could be killed in private." (XVIII 1872) The evidence does not prove what happened to Carla Larson after she left that Publix. The objectionable, inadmissible hearsay testimony about her plans for that afternoon improperly bolstered the state's case. Appellant's subsequent convictions and resulting death sentence are based, in part, on evidence from a witness whom he could not confront. Amend. V, VI, VIII, XIV, U.S. Const.; Art. I, §§9 and 16, Fla. Const.

POINT III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ILLEGALLY EXCLUDE AFRICAN-AMERICANS FROM APPELLANT'S JURY RESULTING IN A DENIAL OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

During jury selection, perspective juror Coley was questioned about his ability to serve during a two week trial. The trial judge also ascertained that Coley could be fair at both phases of a capital trial. Coley assured the trial court that serving would not impose an unreasonable burden. (XVIV 175-77) When it was the prosecutor's turn to question Coley, the first substantive statement out of his mouth follows:

> Mr. Ashton: **I noticed from your jury questionnaire that you work at McDonald's?**
>
> Juror Coley: Yes.
>
> Mr. Ashton: What do you do there?
>
> Juror Coley: I'm a maintenance man.
>
> Mr. Ashton: Okay. Have you made arrangements with your employer to pay you while you are in jury service?
>
> Juror Coley: Well, I told him about it, but I ain't make (sic) arrangements about it.

> Mr. Ashton: Okay. I want to make sure that if you are here for two weeks, is it going to cause you any financial problems as far as paying your bills, things like that?...I want to make sure that won't cause you a financial problem or a hardship.
>
> Juror Coley: Well, see, I don't know how much they pay for jury duty.
>
> Mr. Ashton: ...[G]enerally they don't pay very much. Certainly not a reimbursement for lost wages. Some people can handle that; some people can't.
>
> Juror Coley: Oh, I can't....It would be a little bit of a problem, to tell you the truth.
>
> Mr. Ashton: Okay. **That's why I brought it up**. **I want to make sure you thought that through.**

(XVIV 178-79**)(**Emphasis supplied.) Coley admitted that he could not afford to serve on jury duty if his employer did not pay him. At that point, appellant objected, pointing out that the prosecutor brought up this issue after Coley had told the trial court that he could serve for two weeks without problem. Defense counsel pointed out that Coley was an African-American male and wondered why he merited the "special attention" of the prosecutor. (XVIV 180-81) During a break, Coley confirmed that he would not be paid by his employer during jury service. (XVIV 184-85, 197-99) Coley admitted that the five dollars a day jury service compensation would definitely cause him financial problems. Coley indicated that

he would be willing to serve if he were paid a fair daily wage. (XVIV 199)

Over appellant's objection, the trial court excused Coley on the basis of financial hardship. Defense counsel objected, contending that the state was unfairly excluding a black juror without being forced to follow the dictates of ***State v. Neil***, 457 So.2d 481 (Fla. 1984). The standard of review regarding issues of jury selection is whether or not the trial court abused its discretion. ***Franqui v. State***, 699 So.2d 1312 (Fla. 1997).

The exercise of a race-based peremptory challenge has long been declared invalid both by our state and federal supreme courts. ***See Batson v. Kentucky***, 476 U.S. 79, 80, (1986); ***State v. Neil***, 457 So.2d 481, 486 (Fla. 1984); ***see also Daniel v. State***, 697 So.2d 959, 960 (Fla. 2d DCA 1997). This Court has outlined and refined a procedure to be employed when an objection to such a challenge is made. ***Melbourne v. State***, 679 So.2d 759, 764 (Fla. 1996), enunciated the following three step process:

> [Step 1:] A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met..., the court must ask the proponent of the strike to explain the reason for

> the strike.
>
> [Step 2:] At this point the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation.
>
> [Step 3:] If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness.

(Footnotes omitted.)

Appellant's case presents a somewhat unusual situation since the state's challenge of juror Coley was not a peremptory challenge but was instead a challenge for cause. What makes the challenge improper and therefore reversible error is the racial motivation for the state's challenge. Juror Coley was a maintenance man at McDonald's. The prosecutor used this critical fact gleaned from Coley's juror questionnaire to avoid using a peremptory challenge and thus being asked for a race-neutral reason. In this way, the state was able to camouflage the pretextual nature of its cause challenge. ***See, e.g., Overstreet v. State***, 712 So.2d 1174 (Fla. 3rd DCA 1998). Appellant contended below and maintains on appeal that the state used Coley's socioeconomic status as a "backdoor" pretextual challenge to avoid the dictates of ***Neil***. (XIX 175-83)

The concept of requiring race-neutral reasons even for challenges for cause is not a new concept. The trial court in ***Aguilera v. State***, 606 So.2d 1194, 1198 (Fla. 1st DCA 1992) required the state to explain the basis for a cause challenge, although not totally convinced of the necessity for it. ***See also, Knowles v. State***, 543 So.2d 1258 (Fla. 4th DCA 1989) (where prosecutor removed one of two black jurors on the panel through challenges for cause, then struck a second black juror by use of a peremptory--defense counsel properly raised a challenge to state's striking a remaining black juror.) In ***Alen v. State***, 596 So. 2d 1083, 1090 (Fla. 3rd DCA 1992) (Hubbart, J. concurring), proposed:

> All challenges of perspective jurors should, I think, be based on objective nondiscriminatory reasons; none should be based on discriminatory reasons or purely subjective factors. I am well aware that the peremptory challenge has occupied an historically important role in guaranteeing a fair jury trial in this country and state and that its best aspects should be preserved if at all possible. For that reason, **I think the nondiscriminatory component of the peremptory challenge should be retained in an expanded system of challenge for cause.**

(Emphasis added.) Judge Hubbart continued:

> It is this objective, nondiscriminatory basis of the peremptory challenge which I think should be preserved if at all possible. This can be accomplished, I think, by expanding the traditional grounds for a challenge for cause so as to include

> any sound, strategic, nondiscriminatory reason why trial counsel might doubt a juror's impartiality or capacity to preform as a juror.

Id. at 1090.

In the instant case, defense counsel objected to the prosecutor's *sua sponte* development of Coley's financial inability to serve. Defense counsel accused the state of improper racial motives. Appellant pointed out that his own challenge for cause on a similar juror, Napier, was denied. Napier was also a maintenance man whose absence from work would have generated substantial problems for the business. (XIX 43-46, 62-63, 180-83, 197-99; XX 201-204) Appellant subsequently was forced to use a peremptory challenge on juror Napier after his repeated requests to excuse him for cause were denied. (XXI 547-48) The unequal treatment of the two perspective jurors is a clue to the improper racial motivation for the questioning and the challenge.[29] An explanation that is "race-neutral" on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice. ***Ehrnandez v. New York***, 500 U.S. 352, 379 (1991)(Stevens, J., dissenting.)

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[29] Appellant repeatedly requested that jurors be paid commensurate wages for jury service. Failure to do so denied appellant his constitutional right to a fair cross section of the community. (***See, e.g.,*** XIX 181-82)

POINT IV

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, THE TRIAL COURT ERRED BY EXCLUDING RELEVANT, ADMISSIBLE EVIDENCE THAT TENDED TO PROVE THAT ANOTHER INDIVIDUAL, NOT THE APPELLANT, KILLED CARLA LARSON.

This Court recently reiterated the standard for the admission of so-called "reverse ***Williams*** Rule evidence."[30] In ***Gore v. State***, 784 So.2d 418, 431 (Fla. 2001), this Court stated:

> In ***Rivera v. State***, 561 So.2d 536, 539-40 (Fla. 1990), this Court addressed the situation where a defendant, standing trial for murder, attempted to raise reasonable doubt in jurors' minds by introducing evidence that a murder of similar nature had been committed by someone other than the defendant and that the murder occurred while the defendant was in police custody. In addressing the matter, this Court stated that where evidence tends in any way, even indirectly, to establish reasonable doubt a defendant's guilt, it is error to deny its admission. §90.404(2)(a), Fla. Stat.

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[30] At trial, defense counsel refused to concede that this evidence was "reverse ***Williams*** Rule evidence", instead contending that the evidence was simply relevant evidence that the defense had a right to present to the jury in order to establish reasonable doubt. (VIII 296) Appellant contended that the evidence established pattern of criminality, motive, and opportunity. Rewis came to the attention of police when a witness came forward with information that Rewis might be responsible for Larson's murder. (VIII 298)

> (1985). However, the admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant. ***Id.*** at 539; ***See State v. Savino***, 567 So.2d 892, 894 (Fla. 1990)(defendant must demonstrate "a close similarity of facts, a unique or single 'fingerprint' type of information" in order to introduce evidence of another crime to show that someone other than the defendant committed the instant crime).

On June 6, 2002, appellant filed a notice of intent to similar fact evidence. The state then filed a motion in limine seeking to exclude that very evidence. After hearing argument, (VIII 296-301; XIX 21-23) the trial court excluded the evidence stating that it was not similar enough to the Carla Larson murder. The trial court allowed appellant to file a written proffer of the excluded evidence.[31] (XIV 937-82)

Specifically, appellant sought to introduce evidence that Calvin Rewis was responsible for Carla Larson's abduction and murder. Using evidence obtained in part from the state's own discovery and law enforcement records as well as testimony from witnesses, appellant sought to prove that Rewis, a violent felon with a penchant for stealing cars, was in Orlando on June 10, 1997, the day Carla Larson disappeared. Rewis failed to show up for work after Larson's disappearance.

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[31] Admission or exclusion of evidence is generally reviewed under an abuse of discretion standard. ***Lamarca v. State***, 785 So.2d 1209 (Fla. 2001).

When he was arrested in Tampa in late June 1997, Rewis had a Centex-Rooney money clip in his possession.[32]

At the time of appellant's trial, Rewis was incarcerated for killing his partner in crime, William Glenn Lewis, during the first part of June, 1997. Rewis admitted responsibility for several homicides where he dumped the victims' bodies on top of the ground unburied. Other interesting facts about Rewis include:

> (1) Rewis stole his partner's bluish-green late model Ford Explorer (Carla Larson also had a white late model Ford Explorer);
> (2) At least one witness at a Publix where Larson disappeared saw a "bluish-green" truck parked next to a white Ford Explorer on the afternoon of June 10, 1997;
> (3) Rewis removed the hard-wired radar detector from Lewis' stolen Ford Explorer (Larson's hard-wired detector was also removed from her stolen Ford Explorer);
> (4) Kevin Smith, the state witness who claimed that Huggins apparently removed and left Larson's formally hard-wired radar detector at Smith's house, was an admitted drug dealer while Rewis was an admitted drug addict;
> (5) Rewis owned a green t-shirt--one witness said the driver of Larson's vehicle was wearing a faded green shirt;
> (6) Rewis killed Lewis by blunt force trauma to the

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[32] Appellant pointed out the special affinity for any jewelry with the initials "CR", since those were in fact Calvin Rewis' own initials. Additionally, Carla Larson was wearing a Centex-Rooney service pendant bearing the initials "CR" at the time of her disappearance.

> head followed by manuel strangulation (similar to Carla Larson);
> (7) Rewis dumped his victims' bodies in a wooded area (like Larson's);
> (8) Lewis' body was found near a highway, unburied, covered with cloth (like Larson's);
> (9) One of Rewis' aliases (Richard Mansfield) suggested a connection between Rewis and Angel Huggins, formally named Angel Mansfield;
> (10) At the time of Larson's disappearance, Rewis admitted that he was in desperate need of money and transportation.

(XIV 938-40) While all of the above cited evidence is compelling, perhaps most astounding is a comparison of Calvin Rewis' mug shot with the drawing prepared by the police sketch artist of the man that Bradley Wilson saw at the wheel of the white Ford Explorer coming out of the woods near Carla Larson's body. The drawing, which the witness rated a "seven" on a scale of one to ten, bears an eerie resemblance to the photograph of Calvin Rewis.[33] (XIV 976-77, 982; XXIII 800-804)

An accused has an absolute right to present a defense. ***Chambers v. Mississippi***, 410 U.S. 284 (1973). The right to call witnesses in one own's behalf has long been recognized as essential to due process. ***In re Oliver***, 333 U.S. 257

[33] Wilson thought that John Huggins did not look like the man he saw behind the wheel that day. (XXIII 806)

(1948). Technical rules of evidence cannot be applied so as to deprive a defendant of his constitutional right to confrontation. ***See Chambers v. Mississippi***, 410 U. S. 284 (1973). By excluding relevant, admissible evidence, the trial court denied appellant his constitutional rights to due process and to a fair trial. Amend. V,VI, VIII, and XIV, U.S. Const.; Art. I, §§9 & 16, Fla. Const.

POINT V

THE TRIAL COURT ERRED BY ADMITTING IRRELEVANT, INFLAMMATORY, AND PREJUDICIAL EVIDENCE THAT WAS NOT RELEVANT TO ANY CONTESTED ISSUE.[34]

Irrelevant Gruesome Photographs

Several times during the trial, appellant objected to the introduction of several gruesome photographs that depicted the victim in an advanced stage of decomposition. The trial court allowed the state to introduce over objection numerous photographs, at least one of them blown up to poster size. (State's exhibit 13; XXIV 1016-20)

Appellant objected and moved to exclude the unnecessarily gruesome photographs as unnecessarily prejudicial. Appellant relied on the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the parallel rights set forth in the Florida Constitution. (XXIV 1139-41) The parties below also referenced the full hearing on this issue found in the prior trial transcript. (SRB V 729-47) At that hearing, Dr. Gore testified that the photographs would be helpful, although he did admit he could describe his conclusions verbally to the jury

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[34] The admission of evidence is subject to an abuse of discretion standard of review. ***See Martin v. State***, 717 So.2d 462 (Fla. 1998)

without use of the photographs. The trial court allowed appellant a standing objection to the photographic evidence. (XXIV 1141)

The admission of this evidence denied John Huggins Due Process of law guaranteed by Article I, Sections 2,9,12,16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The photographs had no relevance to any issue in the case. Any possible relevance of this evidence is outweighed by the unfair prejudice. §90.403, Fla. Stat. (2002).

In ***Ruiz v. State,*** 743 So.2d 1 (Fla. 1999), this Court found error in the penalty phase admission of a two by three feet blow-up of a photo showing the bloody and disfigured head and upper torso of the victim. Because the prosecutor provided no relevant basis for submitting the blow-up in the penalty phase, this Court concluded that it was offered simply to inflame the jury. ***Id***. Appellant's trial also included a large (16X16) photograph of the victim's body where it was found in the woods. (XXIV 1016-20; State's Exhibit 13)

This Court has outlined the standard for the admission of potentially prejudicial photos.

> To be relevant, a photo of the deceased victim must be probative of an issue <u>that is in dispute</u>. In the present case, the medical examiner testified that

> the photo was relevant to show the trajectory of the bullet and nature of the injuries. Neither of these points, however, was in dispute. Admission of the inflammatory photo thus was gratuitous.

Almeida v. State, 748 So.2d 922, 929-30 (Fla. 1999). (Emphasis in original.) (Footnote omitted.) In a footnote, this Court quoted ***McCormick on Evidence***, 773 (John Williams Strong ed., 4th Ed. 1992):

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. (Footnote omitted.)

Almeida v. State, 748 So.2d at 929 (n.17).

The primary issue in appellant's trial was the identity of the murderer. Defense counsel repeatedly offered to stipulate to the identity of the victim. (XXIV 1050, 1062) Appellant unsuccessfully argued to the jury that he was innocent and that some other culprit was the actual perpetrator. Trial counsel pointed the finger at, *inter alia*, Kevin Smith, a friend of appellant's who testified that Huggins was in possession of a white Ford Explorer shortly after Carla Larson's disappearance. Additionally, the trial court's ruling prevented appellant from presenting reverse ***Williams*** Rule evidence which pointed the finger at another individual, Calvin

Rewis. ***See*** Point IV. In general, appellant contended that the evidence did not prove his involvement beyond a reasonable doubt.

Since the only real issue at trial was the identity of the true culprit, the state did not need to introduce photographs that showed maggots devouring the corpse. The medical examiner's description of the photographs are almost as horrible as the photographs themselves. The prosecutor felt the need to warn the jury before the especially goring depictions.

> Mr. Ashton [prosecutor]: Before we advance, just so everyone will be ready for this, was there a fairly good amount of decomposition in the head and face?
>
> Dr. Gore [witness]: Yes, Sir.
>
> Mr. Ashton: So the photographs of that area are rather decomposed?
>
> Dr. Gore: That's correct.
>
> Mr. Ashton: Okay.
>
> Dr. Gore]: **I hope you have a strong stomach**. Now this is the ID shot. That is identification shot that was taken later on in my office. Now obviously, the body is not identifiable by means of - - visual means. You can see the considerable swelling of the face, **the eyeballs popping out, and what you see, small, these are the maggots that, the activity of the maggots because the flies lay the eggs bust open, you get the**

maggots.

(XXIV 1150-51) (Emphasis added.) How ironic and illuminating that the doctor's "identification shot" was not usable to determine the identity of the victim! The cited testimony clearly reveals the irrelevance of the photographs.[35]

The doctor continued to describe the photographs pointing out the "generalized swelling" and " irregular discoloration of the skin." (XXIV 1151) The lips and tongue were all extensively discolored "resulting from the body lying there for almost two to three days." (XXIV 1151) The generalized discoloration of the body varied from dark to pale "depending upon the exposure to the sun, and the activity of the insects." (XXIV 1151) The doctor pointed out the greenish discoloration of the right breast area. (XXIV 1152) He also illustrated marbleization (where superficial blood vessels become prominent) and skin slippage where the skin is "completely taken off from both of the breast[s] area." (XXIV 1152-53)

Some of the photographs depicted the buttocks, the anus, and the perineal region showing "considerable discoloration, maggot activity, swelling, and changes

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[35] The prosecutor and the doctor offered the inflammatory photographs ostensibly to prove time of death. (XXIV 1151) However, the identity of Carla Larson's murderer was the critical issue at trial, not her time of death.

of decomposition." (XXIV 1153) The upper part of the thigh showed marbleization and was definitely severely decomposed. (XXIV 1154) A photograph of the left ankle area depicted a sore like lesion, which the doctor opined was probably "activity of the small rodents or animals wandering in the area. It could be possum, rats, or whatever." (XXIV 1154) The feet showed bite marks and decomposition such that "even the tendons are exposed. So that part has been chewed by these animals." (XXIV 1155) The jury was also exposed to photographs of Carla's larynx. After Dr. Gore had removed the skin to expose the area so that they could view the hemorrhage even though the body was quite decomposed. (XXIV 1155) The jury also saw a picture of Ms. Larson's buttocks that was not relevant to prove the cause of death nor to demonstrate any injuries that occurred prior to death. (XXIV 1168-69) The jury also heard and saw details regarding the parasite activity in Larson's anus and vagina. (XXIV 1169) Perhaps the icing on the proverbial cake was the photograph depicting the discoloration and decomposition of Carla Larson's hand with her wedding band still in place on her finger. (XXIV 1158)

Despite the fact that the trial court had granted him a continuing objection, defense counsel felt compelled nevertheless to move for a mistrial after the jury's exposure to the last gruesome photographs. Specifically, counsel recalled the prior

discussion of how "unpredictable" Dr. Gore tended to be as a witness. Appellant moved for a mistrial based on Dr. Gore's inappropriate and unexpected comment to the jury, "I hope you have a strong stomach." The trial court denied appellant's motion for mistrial. (XXIV 1159-60)

Any probative value of these gruesome photographs was outweighed by the extreme prejudicial effect. Section 90.403, Fla. Stat. (2002).

> [A] trial is conducted not only to determine that an atrocious crime has occurred, but to determine whether the accused committed the crime. Too often the former obscures the later.

Johnson v. State, 476 So.2d 1195, 1209 (Miss. 1985). (Emphasis Supplied.) Great care should be taken prior to waiving ghastly pictures in front of lay jurors who will never have seen anything similar before in their lives. The idea of a trial is not that jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt. In this case, it is clear that John Huggins was:

> denied a fair trial when the court allowed a gruesome, color photograph of the deceased's massive head wound to go to the jury. ...In this case, the photograph which was admitted could serve no purpose other than to inflame and prejudice the jury in the grossest manner.

People v. Garlick, 360 N.E. 2d 1121, 1126-27 (Ill. 1977).

Dr. Gore's Speculative Testimony Regarding Strangulation

Due to the inflammatory testimony of Dr. Gore, the medical examiner, at appellant's first trial in Jacksonville, defense counsel filed a motion in limine prior to the Tampa trial. (XIV 889-909) In addition to the inflammatory nature of Dr. Gore's testimony, appellant also contended that the doctor was not qualified to describe the feelings experienced during strangulation, Dr. Gore's opinion was not generally accepted in the scientific community, and that the testimony would confuse and mislead the jury. The trial court denied the motion but warned the prosecutor about allowing Dr. Gore to go "too far". (XXIV 1132-39) During his testimony, Dr. Gore described in vivid detail the horrible process of death by strangulation. Over repeated defense objections, Dr. Gore described in excruciating detail the feeling of impending death, severe fright, psychological pain, and prolonged suffering that he "imagined" Carla Larson endured. (XXIV 1161-64)

The doctor's testimony was irrelevant, inflammatory, and prejudicial where he was speculating about what actually happen. Dr. Gore indicated that there was no evidence that Carla Larson was unconscious when she was strangled. (XV 1179) However, there is also absolutely no evidence that she was, in fact, conscious. Dr. Gore was simply speculating about feelings that Larson may or

may not have felt. Additionally, Dr. Gore was qualified only in the field of forensic pathology. He was not qualified in the area of forensic psychology. Therefore, he should not have been allowed to testify about Larson's thought process as she was strangled.

In ***Hall v. State***, 568 So.2d 882-884 (Fla. 1990), this Court reversed a murder conviction where a religion professor was unqualified to testify regarding the defendant's "the devil made me do it" insanity defense. In ***Jordon v. State***, 694 So.2d 708 (Fla.1997), this Court ordered a new penalty phase where a therapist with a bachelors degree in psychology and a masters degree in counseling was qualified as an expert in offender profile evidence. The witness then testified that the defendant was a " sociopath without conscience" and experienced "euphoria from his aggressive." This Court concluded that the therapist did not demonstrate sufficient study of scientific literature outside her area of expertise and was therefore unqualified to offer that opinion.

Furthermore, Dr. Gore's opinion regarding the psychological effects of strangulation is not accepted by the scientific community. Without a basis for the testimony, his conclusions are merely speculation, theories, and conclusions. This type of evidence is inadmissible. ***See Brito v. County of Palm Beach,*** 753 So.2d 109, 111 (Fla. 4th DCA 1998). In ***Brito***, there was no error in a product liability

action in excluding an expert engineer's testimony. The engineer admitted that he was not aware of particulars supporting his opinion, and the only record evidence to support his opinion was his own testimony. "An expert cannot simply assume the facts which form the basis of his opinion." ***Id***.

The Contents of the Victim's Purse and Her Status as a Young Mother

In addition to the gruesome photographs and the speculative testimony regarding strangulation, the trial court allowed the introduction of evidence that revealed Carla Larson as a young, happy, vibrant mother. This evidence had no relevance. Any slight probative value was outweighed by the severe and unfair prejudice. §90.403, Fla. Stat. (2002).

The objectionable evidence included the contents of Carla's purse and wallet. This evidence included make-up, a change purse, a Toys R Us credit card, and a photograph. (XXIV 1046-68; SRA V 816-19) Additionally, defense counsel objected to evidence that Carla was the mother of a very young daughter. There was testimony about the car seat used to transport her baby daughter to daycare. There was also testimony from Carla's husband about their daughter.[36] (XXIII 841) Appellant also moved for a mistrial after the prosecutor mentioned Carla's

[36] Appellant filed a pretrial motion in limine to exclude this testimony. (XXII 758)

baby in opening statement. (XXII 766, 820-22) Contending the evidence was offered only to engender sympathy, appellant also moved for a mistrial after the contents of Carla's purse were revealed to the jury. (XXIV 1062) Like the gruesome photographs and Dr. Gore's speculative testimony regarding strangulation, the evidence and comment cited above were irrelevant to any probative facts in issue. This is especially true where the defense stipulated that the purse belonged to the victim. (XXIV 1048). Appellant also stipulated to the identity of the victim. (XXIV 1050, 1062) All relevant evidence is admissible, except as provided by law. §90.402, Fla. Stat. (2002). Relevant evidence is evidence tending to prove or disprove a **material fact**. §90.401, Fla. Stat. (2002). This evidence did not prove any **material** fact. At the very least, any slight probative value is outweighed by the unfair prejudice engendered by this inflammatory material. §90.403, Fla.Stat. (2002)

Inflammatory Victim Impact Evidence

Even though appellant was *pro se* at the penalty phase, he specifically objected to testimony from any family members regarding victim impact. Appellant contended it was a violation of his Sixth, Eighth, and Fourteenth Amendments rights. (XXVIII 1808) Nevertheless, the trial court allowed Carla Larson's husband, mother, and best friend to read emotional, heart-wrenching statements

telling the jury how wonderful Carla Larson was and how their lives were destroyed when she was killed. (XXVIII 1823-40) Appellant also objected to the introduction of photographs that featured the victim with her baby daughter. The trial court gave the usual limiting instruction which futilely instructs the jury to ignore any feelings of prejudice, bias, or sympathy engendered by the victim's family. (XXVIII 1824-25)

Appellant recognizes this Court's position on victim impact evidence. ***See, e.g., Windom v. State***, 656 So.2d 432 (Fla. 1995). Nevertheless, appellant maintains this type of evidence inflames the jury and distracts them from the proper weighing of the aggravating factors and the mitigating circumstances. The result is a denial of appellant's constitutional right to a fair trial and to Due Process of law. Amend. V,VI, VIII, & XIV, U.S. Const.; Art. I, §§9 &16, Fla. Const.

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE STATE FAILED TO RULE OUT THE REASONABLE HYPOTHESIS THAT JOHN HUGGINS DID NOT COMMIT THE PREMEDITATED NOR FELONY MURDER OF CARLA LARSON.

A person accused of a crime is presumed innocent unless and until proved guilty beyond and to the exclusion of a reasonable doubt. "It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we 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." ***Cox v. State***, 555 So. 2d 352,353 (Fla. 1989), quoting ***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).

Cox v. State, supra, 555 So. 2d at 353. ***See also Long v. State***, 689 So. 2d 1055, 1057-58 (Fla. 1977); ***Jaramillo v. State***, 417 So. 2d 257 (Fla. 1982).[37]

In the instant case, the circumstantial evidence in its totality raises more questions than it answers as to who killed Carla Larson. No hair, semen, or blood connected John Huggins to the disappearance or murder of Carla Larson. Although he was in the general geographical area at the time of Larson's disappearance, no one saw Huggins and Larson together. Several witnesses claimed to have seen Huggins in possession of a white Ford Explorer shortly after her disappearance. After Huggins was already incarcerated, his estranged mother-in-law found Larson's jewelry in her shed several weeks after the murder. She found the jewelry after police had repeatedly and exhaustively searched that very shed.

Defense counsel below pointed out that the evidence did not exclude numerous reasonable hypotheses of innocence. Counsel argued that the death could have occurred at a site other than where the body was recovered; Larson could have been killed in the heat of passion; her death was accidental; or she was killed without premeditated design. (XXV 1380-92) Appellant also argued that the

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[37] In reviewing a motion for judgment of acquittal, the standard of review is *de novo*. ***Pagan v. State***, 830 So. 2d 792 (Fla. 2002).

evidence was insufficient to prove that John Huggins killed Carla Larson. Appellant further contested the sufficiency of the evidence to prove that Larson was kidnaped. For a capital murder case, appellant's is among the weakest undersigned counsel has ever seen. This is particularly true as to the kidnaping, carjacking, and circumstances of the murder. The state's evidence of premeditation was scant as well.

Premeditation is the essential element which distinguishes first degree from second degree murder. ***Coolen v. State***, 696 So. 2d 738, 741 (Fla. 1997). Under Florida law, premeditation means "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide." ***Spinkellink v. State***, 313 So. 2d 666, 670 (Fla. 1975), quoting ***McCutcheon v. State***, 96 So. 2d 152, 153 (Fla. 1957). As this Court explained in ***Coolen***:

> While premeditation may be proven by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. ***Hoefert v. State***, 617 So. 2d 1046 (Fla. 1993). Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. ***Hall v. State***, 403 So. 2d 1319 (Fla. 1981).

See also Kirkland v. State, 684 So. 2d 732, 734-35 (Fla. 1996); ***Mungin v.***

State, 689 So. 2d 1026, 1029 (Fla. 1995); ***Norton v. State***, 709 So. 2d 87, 92-93 (Fla. 1997); ***Green v. State***, 715 So. 2d 940, 943-44 (Fla. 1998); ***Randall v. State***, 760 So. 2d 892, 901-02 (Fla. 2000); ***Carpenter v. State***, 785 So. 2d 1182, 1196-97 (Fla. 2001); ***Olsen v. State***, 751 So. 2d 108, 110-11 (Fla. 2d DCA 2000).

A homicide by manual strangulation, which occurs during fighting activity and under unexplained circumstances, does not necessarily establish premeditation; it could be equally consistent with an unpremeditated "depraved mind" second-degree murder. ***See Green v. State***, 715 So. 2d 940 (Fla. 1998). As the Supreme Court of Washington recognized in ***State v. Bingham***, 719 P. 2d 109, 113 (Wash. 1986):

> . . . to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder. Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection.

In the instant case, there was no evidence of a preconceived plan.[38] There

[38] ***See Norton***, 709 So. 2d at 93; ***Green***, 715 So. 2d at 944.

were no prior statements or indications of an intent to kill.[39] No steps were taken to procure a weapon.[40] There were no witnesses to the events immediately preceding the homicide.[41] The indications of struggle and fighting activity are consistent with a killing committed with a depraved mind but without premeditation.[42] The state's circumstantial evidence in this case falls far short of proving premeditation beyond a reasonable doubt. The evidence is just as consistent that Larson's vehicle and property was taken as an afterthought and, as such, was not the primary motive for the murder.[43] "Circumstances that create nothing more than a strong suspicion that a defendant committed the crime are not sufficient to support a conviction." ***Cox***

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[39] ***See Kirkland***, 684 So. 2d at 735; ***Mungin***, 689 So. 2d at 1029; ***Randall***, 760 So. 2d at 902; ***Olsen***, 751 So. 2d at 111.

[40] ***See Kirkland***, 684 So. 2d at 735; ***Norton***, 709 So. 2d at 93; ***Green***, 715 So. 2d at 944; ***Olsen***, 751 So. 2d at 111.

[41] ***See Kirkland***, 684 So. 2d at 735; ***Mungin***, 689 So. 2d at 1029; ***Norton***, 709 So. 2d at 92; ***Green***, 715 So. 2d 944; ***Olsen***, 751 So. 2d at 111.

[42] A rage is inconsistent with premeditation. ***Mitchell v. State***, 527 So. 2d 177, 182 (Fla. 1988). Contrast ***Gore v. State***, 784 So. 2d 418, 429 (Fla. 2001) ("the evidence suggests that Gore acted with deliberation by removing the victims from their vehicles prior to stabbing them. Further, there was no evidence that any of the victims resisted or struggled with Gore, an indication that Gore acted calmly and with deliberation).

[43] ***See, e.g., Moody v. State***, 418 So.2d 989 (Fla. 1989)(Circumstance improperly found where defendant committed an arson of the victim's home after the killing.)

v. State, 555 So. 2d 352, 353 (Fla. 1989); ***see Long v. State***, 689 So. 2d 1055, 1058 (Fla. 1997). Accordingly, this murder conviction cannot stand.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED INSTRUCTION REGARDING CIRCUMSTANTIAL EVIDENCE, A VIOLATION OF HUGGINS' FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

Appellant requested, in writing, a special jury instruction relating to the special treatment of circumstantial evidence.[44] (XIV 918) During the charge conference, the trial court denied the request stating that this Court, "many, many, many years ago, did away with the circumstantial evidence instructions, ...". (XXVI 1583) The trial court further stated that this Court concluded that there was no need for a circumstantial evidence instruction and, therefore, denied appellant's request.[45] Under the special circumstances of this case, the trial court's ruling was error.

In ***In re Standard Jury Instructions in Criminal Cases***, 431 So. 2d 594 (Fla. 1981), this Court left to the trial court's discretion whether to instruct the jury on circumstantial evidence. It never disapproved the guidance given the jury, it merely said the court had the choice of whether to give it to the fact finder or not.

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[44] The proposed instruction was based on this Court's opinion in ***Cox v. State***, 555 So.2d 352 (Fla. 1989).

[45] The trial court was apparently under the misapprehension that he had no discretion to give the proposed instruction to the jury. That misunderstanding should be reversible error in and of itself.

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge in his or her discretion, feels that such is necessary under the peculiar facts of a specific case. However, the giving of proposed instructions on reasonable doubt and burden of proof, in our opinion, renders an instructional circumstantial evidence unnecessary.

In re Standard Jury Instructions in Criminal Cases, 431 So.2d at 595.

Since then courts have consistently rejected, usually summarily, attacks on trial courts' refusal to specifically instruct the jury on circumstantial evidence. ***See Petri v. State***, 644 So.2d 1346, 1355 (Fla. 1994); ***Trepan v. State***, 621 So.2d 1361, 1366 (Fla 1993); ***Kelly v. State***, 543 So.2d 286, 288 (Fla. 1st DCA 1989); and ***Rivers v. State***, 526 So.2d 983, 984(Fla. 4th DCA 1988). As far as undersigned counsel can determine, no Florida court has reversed a trial court's decision refusing to give this instruction. Nevertheless, appellant contends that the trial judge abused its discretion in denying Huggins' requested guidance on circumstantial evidence.

What makes this case so special that the circumstantial evidence instruction should have been given? Several factors combine to compel the conclusion that the trial court should have instructed the jury on circumstantial evidence.

First, the state's circumstantial case has a deceptively compelling quality.

The state argued that Huggins, a stranger on vacation with his family, abducted Carla Larson from a shopping center, took her to some nearby woods, strangled her, and stole her vehicle. No physical evidence tied Huggins to Larson. The state had several witnesses who placed Huggins at the wheel of a vehicle like Larson's at the time of her disappearance and several days afterwards.

The state had a compelling case, one that proved that Huggins possibly committed felony or premeditated murder. It was not, however, one that excluded every reasonable hypothesis of innocence. Had the jury received an instruction on circumstantial evidence, it would have had explicit guidance that it could have so concluded. Instead, the jury was forced to deduce the concept from the burden of proof and reasonable doubt instructions. Although the state's evidence appeared deceptively strong, John Huggins had reasonable and uncontroverted explanations for the state's evidence. Under these peculiar circumstances, the jury should have received explicit guidance on how to consider circumstantial evidence.

Circumstantial evidence is a subtle legal concept. The jury here could be excused for not fully understanding that the presumption of innocence requires (not permits) the jury to accept a reasonable hypothesis of innocence. ***Davis v. State***, 90 So. 2d 629, 631 (Fla. 1956); ***McArthur v. State***, 351 So. 2d 972 (Fla. 1977). Guidance, as provided in the old standard instruction that "The circumstances must

be consistent with guilt and inconsistent with innocence" was essential. It articulated and emphasized that point with greater clarity than either the reasonable doubt or burden instructions do and with more authority than counsel's argument could have commanded. Such special, specific guidance was needed here considering the apparently strong circumstantial case the state presented.

In short, if this Court has recognized that special rules of appellate review apply to issues involving circumstantial evidence, ***State v. Law***, 559 So. 2d 187, 188 (Fla. 1989), the court in this case should have given the jury particular guidance on how to consider this evidence. After all, if the defendant is entitled to an instruction on his theory of defense, ***Hooper v. State***, 476 So. 2d 1253 (Fla. 1985), the jury in this particularly treacherous case should have been given specific guidance so they could have avoided the emotional bogs the facts of this case produced. With the defendant on trial for his life, the court should have given the guidance he requested on the rules for considering this special type of evidence. This court should reverse the trial court's judgment and sentence and remand for a new trial.

POINT VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE PROSECUTOR.

Appellant filed a total of four unsuccessful motions to disqualify Jeff Ashton, the assistant state attorney. These were based on Ashton's prior conduct of failing to disclose exculpatory evidence; losing potential impeachment evidence; failure to fully comply with discovery; and the use of perjured testimony.[46] (I 44; XII 480-81, 488, 513-15, 527-28, 568-70, 635) This issue was extraordinarily well preserved at the trial level.

Appellant would like to make clear that this issue does not involve the disqualification of the **entire** Office of the State Attorney. ***See***, ***e.g.***, ***Castro v. State***, 597 So.2d 259 (Fla. 1992) and ***Schwab v. State***, 636 So.2d 3 (Fla. 1994). Appellant sought to disqualify **only** Assistant State Attorney Jeffrey Ashton from participating in Huggins' prosecution. The essence of Appellant's claim is that Jeffrey Ashton had an inherent and actual bias, where Ashton affirmatively hid exculpatory evidence at Huggins' first trial. John Huggins personally filed a bar

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[46] Appellant filed several unsuccessful, related motions including a motion to dismiss the indictment based on the state's misconduct (XII 571-73, 636-37);and a motion to preclude the state from introducing any new evidence at his second trial. (XII 581-86, 620-21).

grievance against Jeff Ashton because of his unethical conduct. The grievance was still pending when the first motion to disqualify was filed. (I 48-49) Appellant was still complaining about his bar complaint against Jeff Ashton at the ***Spencer*** hearing. (X 419-24; Exhibit A)

Under the due process clause, an accused has a right to a "disinterested" prosecutor. ***See***, ***e.g.***, ***People v. Superior Court of Contra Costa County***, 19 Cal.3d 255, 561 P.2d 1164, 137 Cal.Rptr. 476 (1977) (disqualifying the district attorney from prosecuting a charge of murder when victim's mother was in his employ and was embroiled in custody litigation with victim's ex-wife who was one of the defendants). ***See also United States v. Heldt***, 668 F.2d 1238, 1274-78 (D.C. Cir. 1981). A state attorney may be disqualified from advising and participating in the duties of a grand jury. ***In Re Standard Jury Instructions***, 575 So.2d 1276, 1281 (Fla. 1991).

Prosecutors, in an adversary system, "are necessarily permitted to be zealous in their enforcement of the law." ***Marshall v. Jerrico, Inc.***, 446 U.S. 238, 248 (1980). However, Huggins' prosecution presents the spectacle of a prosecutor's using the "awful instruments of the criminal law," ***McNabb v. United States***, 318 U.S. 332, 343 (1943) (Frankfurter, J.), not for purpose of private gain, but to

personally validate a prosecution and resulting death sentence. Death is different. ***Beck v. Alabama***, 447 U.S. 625 (1980). Heightened due process applies. ***Id***. "[T]he integrity of the judicial process has...been brought into question." ***Castro v. State***, 597 So.2d 259, 260 (Fla. 1992). The resulting denial of due process of law mandates a new trial. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17, Fla. Const.

POINT IX

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN, DURING THE COURSE OF KIDNAPING, AND THAT THE MURDER WAS HEINOUS, ATROCIOUS, OR CRUEL.

Introduction

Carla Larson's nude body was found in a wooded area approximately two miles from the Publix grocery store where she had shopped shortly after noon on June 10, 1997. The medical examiner concluded that she was killed as a result of asphyxiation due to severe neck trauma and strangulation. Her jewelry, purse, and vehicle were gone. The state's case postulated that John Huggins forcibly abducted Carla Larson from the Publix shopping center, took her to a wooded area nearby where he killed her. Subsequently, Huggins had her vehicle in his possession prior to burning it two weeks after the crime. Additionally, the state contends that Huggins hid her jewelry in the shed belonging to his estranged mother-in-law.

The evidence simply does not support the trial court's finding that the murder was committed while Huggins was engaged in the crime of kidnaping; nor that it was committed for pecuniary gain; nor that it was especially heinous,

atrocious or cruel.[47]

During the Course of a Kidnaping

In finding that the murder was committed while engaged in the crime of kidnaping, the trial court wrote:

> It was uncharacteristic for Carla Larson not to return to work or to return home at the end of a work day. She had an excellent relationship with her husband and child. There was absolutely no reason for Carla Larson not to return to work or home. Additionally, there was absolutely no reason for her to go to the wooded area where her body was eventually found. The only credible reason for her failure to return to work or home and to be in the wooded area where her body was subsequently located, was that she had been kidnaped by the defendant. The record in this case clearly supports that Carla Larson was taken by force or threat of force, against her will, and taken to the place where she was murdered and robbed.

(XV 1176) This conclusion by the trial court regarding this particular aggravating factor is filled with rampant speculation. While it is easy to assume that the course of events occurred as set forth by the trial court, the findings of "fact" are merely

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[47] At trial, the state has the burden of proving aggravating circumstances beyond a reasonable doubt. ***Robertson v. State***, 611 So.2d 1228, 1232 (Fla. 1993) A trial court's decision to find an aggravating factor is a mixed question of law and fact that will be sustained on review if the court applied the right rule of law and if competent substantial evidence supports it ruling. ***Willacy v. State***, 696 So.2d 693 (Fla. 1997)

on assumption. Interestingly, in arguing to the jury, the prosecutor conceded that the evidence did not prove precisely where Carla Larson was killed. He admitted that it was "theoretically possible that Carla Larson was strangled to death in the parking lot of Publix...", but submitted that the "more reasonable inference is that it didn't occur there." (XXVIII 1872)

It is just as reasonable to assume that Carla Larson met a charming individual at the grocery store, perhaps even someone she knew from a prior encounter.[48] It is just as logical to assume that she willingly accompanied that individual from the Publix to the area in the woods.[49] While there is no evidence to prove this scenario set forth by undersigned counsel, neither is there support for the scenario speculated by the trial court. This Court cannot allow an aggravating factor to stand based on such gross conjecture.

Pecuniary Gain

The same logic applies to the trial court's finding that the murder was committed for pecuniary gain. In order to establish this aggravating factor, the state

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[48] She may have even had plans to meet with someone. The only evidence refuting this hypothesis is the inadmissible hearsay from Carla's co-worker. ***See*** Point II.

[49] Other workers in the area saw fit to share a picnic lunch in the same general vicinity where Carla Larson's body was found.

must prove beyond a reasonable doubt that the murder was motivated, at least in part, by desire to obtain money, property, or other financial gain. ***Clark v. State***, 609 So.2d 513 (Fla. 1992) The trial court wrote:

> The evidence in this case showed that the defendant was in possession of the victim's white Ford Explorer within hours after her disappearance....However, the defendant returned to Melbourne that same afternoon driving Carla Larson's white Ford Explorer. The evidence clearly showed the defendant was in possession of the Explorer from June 10, 1997, until June 26, 1997, when it was discovered burning in a field.... Further, when the victim's nude body was found, her diamond ring, diamond earrings and necklace were missing from her person....her purse was found some distance away from the body....Mrs. Blades found, hidden behind an electric outlet in the shed, a diamond ring, earrings and a necklace that were later identified as belonging to the victim, Carla Larson. Were these items - - the Ford Explorer, the diamond ring, diamond earrings and necklace - just taken as an afterthought and merely to facilitate the defendant's escape? Or rather, were they purposely taken as a means of approving his financial worth and providing a benefit to the defendant?...If the taking of this vehicle was merely an afterthought, then it would seem logical that the defendant would have simply abandoned the vehicle after facilitating his escape from the scene of the murder and returning to his family where ready transportation was awaiting him. But the defendant did not abandon the vehicle. Instead, he kept the Explorer and used it until it was no longer feasible to openly drive it. The defendant's actions

> clearly indicate that he intended to benefit by taking the Explorer and its subsequent use by him. Further,...[the victim's jewelry was [removed from her person, but they were taken and hidden in Melbourne. These items were not simply discarded some distance from the body like the victim's purse. Why were these items not discarded like the purse? The answer is simple - - they were taken because of their financial worth. It was not an afterthought to take a diamond ring from the finger of the dead body of Carla Larson. It is not an afterthought to take diamond earrings from the ears of the dead body of Carla Larson. It is not an afterthought to take a necklace from around the neck of the dead body of Carla Larson. Nor, would it be an afterthought to take those items from the living Carla Larson. **The defendant had to make a conscious decision to take those items of jewelry for his own pecuniary benefit.** The record supports the finding that the murder was committed for pecuniary gain.

(XV 1177-78) (Emphasis added.)

Undersigned counsel agrees with the trial court that the murderer had to make a conscious decision to take those items of jewelry. Counsel also agrees that the jewelry was taken from the dead body of Carla Larson. The ring from the body's finger, the earrings from the ears of the dead body, the necklace from the neck of the dead body. However, undersigned counsel cannot be so sure, as is the trial court, that the dominant motive, as required by the statute and the case law, was for financial gain. Once again, the trial court is merely assuming that it was not a mere

afterthought. The Court is engaging in mere speculation that it was for financial gain. In fact, the evidence is just as consistent that the jewelry and vehicle were removed from the scene in order to make the identification of the body more difficult. In fact, the state's theory at trial was based, in part, on the contention that the murderer stripped the body of all clothing and all physical items to avoid detection, not for financial gain. The state's case for this aggravating factor would be much stronger if John Huggins had sold the jewelry or rented or sold the vehicle. Instead, in an act just as consistent with avoidance of detection, he hid the jewelry. Likewise, the SUV was burned to a hulk in an act that the state construed as an attempt to avoid arrest. Neither of these actions indicate a man out for financial gain.

We simply cannot know the real reason that the vehicle and jewelry was taken from the scene of the murder. The murder must have been "integral step in obtaining some sought-after specific gain." ***Hardwick v. State***, 521 So.2d 1071, 1076 (Fla. 1988). This Court has rejected this particular circumstance where the defendant had taken a car but later abandoned it, reasoning that escape, not financial gain, was the motive. ***Allen v. State***, 662 So.2d 323 (Fla. 1995). If the taking of the property occurred after the murder as a afterthought, the circumstance is not applicable. ***Mahn v. State***, 714 So.2d 391, 402(Fla. 1998) and ***Clark v.***

State, 609 So.2d 514 (Fla. 1993).

Especially Heinous, Atrocious, or Cruel

The trial court also found that the murder was especially heinous, atrocious, or cruel. In finding this particular factor, the trial court recited the medical examiner's graphic description of strangulation and details of how the victim felt, including "frightening fear." (XV 1178-79) After citing that portion of the testimony, the trial court wrote:

> **Dr. Gore also indicated that there was no evidence that Carla Larson was unconscious when she was strangled.** Henry David Thoreau said, "nothing is so much to be feared as fear." **Carla Larson was more than likely abducted in the parking lot of Publix** and was driven more than two miles to a dirt road that led to a wooded area. **One can only imagine the alarm, the anxiety, the apprehension, the fright, and the terror that she felt as she was forced to ride to her demise. What fear and horror she must have felt when she was forced to walk from her vehicle into the wooded area** - - Carla Larson's **own death march to Bataan. No one can truly know the emotional strain and physical pain** she had to endure as she struggled to breathe as the defendant strangled her to death. **No one can truly know the dread and terror** that she endured when she was no longer able to breathe, knowing that her life was slipping away. During her last moments on earth, Carla Larson knew what Thorau meant by the statement that

> "nothing is so much to be feared as fear." The horror, the agony, the emotional strain and the fear **she must have felt knowing of her impending death is beyond comprehension**.

(XV 1179-80)

Although this Court has traditionally recognized that most strangulations are, by their nature,[50] especially heinous, atrocious or cruel, such is not always the case. The trial court's language is very telling. After describing the extreme fear and horror that a conscious person would feel while being strangled, the trial court writes that Dr. Gore indicated that "there was no evidence that Carla Larson was unconscious when she was strangled." (XV 1179) Nor is there any evidence that she was conscious.

Ironically, the prosecutor admitted in his closing argument that the evidence did not indicate "precisely where Carla Larson was killed. While it is theoretically possible that Carla Larson was strangled to death in the parking lot of Publix...the more reasonable inference is that it didn't occur there. The more reasonable inference is that the reason that Carla was taken to the woods was so that she could be killed in private." (XXVIII 1872) Where the state concedes that they have no idea how or where the crime occurred, a death sentence should not be grounded on

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[50] ***See, e.g., Mansfield v. State***, 758 So.2d 636 (Fla. 2000).

speculation and presumption. Huggins' death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Constitution of the State of Florida.

POINT X

THE DEATH PENALTY IS NOT WARRANTED IN THIS CASE WHERE THE SEQUENCE OF EVENTS LEADING TO THE VICTIM'S DEATH ARE STILL UNKNOWN AND WHERE ONLY TWO VALID "GARDEN VARIETY" AGGRAVATORS EXIST, WHILE THE MITIGATION IS SUBSTANTIAL.

We will probably never know the circumstances of Carla Larson's death. The jury convicted John Huggins based entirely on circumstantial evidence. Even if this Court decides that the evidence is sufficient to exclude every reasonable hypothesis of innocence,[51] the evidence does not exclude the possibility that Huggins acted without premeditation. Nor does the evidence exclude the hypothesis that the killing was not committed during the course of a felony. It is certainly reasonable to conclude from the evidence that Carla Larson met John Huggins at the Publix and willingly accompanied him as they left the area. This Court cannot rule out a hypothesis that supports other than a conviction for first-degree murder.

With that in mind, this Court must consider that the trial court found five aggravating factors. Three of these [(1)during the commission of a kidnaping; (2)

[51] ***See*** Point VI.

pecuniary gain; and (3) HAC] are not supported by the evidence. ***See*** Point IX. Only two aggravating factors remain, i.e., (1) prior violent felony convictions, and (2) probationary status. Both of these "garden variety" aggravators are found in the vast majority of first-degree murder cases, capital or not. Florida reserves the death penalty for the most aggravated and least mitigated of first-degree murderers. ***State v. Dixon***, 283 So.2d 1, 7 (Fla. 1973). The totality of the circumstances of this case, compared with other capital cases, render the death sentence a disproportionate penalty.

Weighed against the two "garden variety" aggravators, is the substantial mitigation accepted by the trial court. Although the trial court found no statutory mitigators, the trial court found that the evidence established at least fourteen non-statutory mitigating factors. The trial court's weight given to each non-statutory mitigator varied from very little weight, slight weight, and some weight. Additionally, the court rejected several of appellant's proposed non-statutory mitigators as not mitigating. Specifically, the trial court rejected as mitigation that John provided some care for his ill father (the extent, duration, and sacrifices are unknown); John was sentenced to an adult prison at the age of fifteen; appellant waived extradition and did not obstruct justice in that he facilitated the trial; that there was no sexual attack on the victim; and no weapon was used. (XV 1180-87)

Additionally, the trial court gave very little weight to several mitigating factors relating to John's abusive childhood and family separation. The trial court concluded that there was no evidence that the separation was traumatic nor that the abusive childhood had any effect on him.

The substantial non-statutory mitigating evidence established that John was abused as a child by his alcoholic father who divorced John's mother. John capped his abusive childhood when he was sentenced to adult prison at the age of fifteen. Nevertheless, John Huggins, at times, led a rich, charitable life. He overcame drugs and alcohol, helped start a church, and donated a large percentage of his income and property to the church. Most impressively, John Huggins exhibited exemplary behavior as a missionary ministering to the sickest, poorest children in this hemisphere.

John Huggins has something to offer. He is able to provide spiritual support in the prison community. (XV 1185) Since his incarceration, he has ministered to fellow prisoners. (XV 1183) Elsewhere in this brief counsel has argued the fallacy in the trial court's finding of three of the five aggravating factors. The two remaining aggravating factors are not weighty. John Huggins was on probation when this crime was committed. However, it should be noted that he was on probation for possession of an unauthorized driver's license and issuing a

worthless check. (XV 1175) Although both felonies, these are certainly not the most serious offenses on the books. The remaining aggravating factor involves Huggins' nine prior felony convictions involving the use or threat of violence to a person. These convictions include five counts of robbery with a weapon, one count of simple robbery, two counts of battery on a law enforcement officer, and one count of robbery with a firearm. (XV 1175) Five of these offenses apparently arose from one incident on September 5, 2000. (XV 1175) Certainly this Court recognizes that most capital murderers have much more extensive, violent records.

Additionally, John Huggins is already sentenced to multiple, consecutive life sentences for the aforementioned prior felony convictions. He could have entered guilty pleas in Carla Larson's case and escaped the death penalty.[52] He chose not to do so. John Huggins should not be penalized for exercising his right to a jury trial. John Huggins' death sentence is disproportionate and must be reversed.

Any other result would violate due process and subject Huggins to cruel and unusual punishment in violation of the Eight and Fourteenth Amendments of the United States Constitution and Article I, sections 9 and 17 of the Florida Constitution.

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[52] The plea offer was apparently contingent a full admission. (XIX 23-25)

POINT XI

THE TRIAL COURT ERRED IN SENTENCING JOHN HUGGINS TO DEATH BECAUSE SECTION 921.141, FLORIDA STATUTES, UNCONSTITUTIONALLY ALLOWED THE TRIAL COURT TO DO SO WITHOUT, AMONG OTHER THINGS, AN UNANIMOUS DEATH RECOMMENDATION FROM THE JURY. ADDITIONALLY, THE TRIAL COURT'S ACTION IN REWRITING THE JURY INSTRUCTIONS AND CHANGING THE PENALTY PROCEDURES VIOLATED THE SEPARATION OF POWERS CLAUSE OF FLORIDA'S CONSTITUTION.

Florida's Death Penalty Statute Violates the Sixth Amendment

Given the current state of Florida law, Huggins acknowledges the futility of raising issues claiming that the United States Supreme Court's opinion in ***Ring v. Arizona***, 536 U.S. 584 (2002), and ***Apprendi v. New Jersey***, 530 U.S. 166 (2000) should give him sentencing relief. At the trial level, Huggins raised the ***Ring/Apprendi*** issues completely, throughly, and repeatedly. ***See, e.g.,*** (XII 545-47, 565-67, 591-96; XIII 777-840; XIV 846-78, 1013-22; XXVIII 1855-62) When the issue was first raised, the trial court and the prosecutor uttered prophetic words indeed. The ***Apprendi*** opinion had been issued, but the ***Ring*** opinion had not when the claim was first argued. In response to appellant's argument, the

prosecutor stated:

> ...[O]ur position is that Apprendi would not apply. I will, however, acknowledge that **should the court in Ring and related cases find that Apprendi does apply, it will invalidate the sentencing scheme of the State of Florida**.

(VI 150)(Emphasis supplied). In denying the motion at that time, the trial court uttered these ironic words:

> The defendant's motion to dismiss the indictment for specific jury findings as to penalty issues and for related relief is hereby denied. The court believes Apprendi does not necessarily apply. And I agree with Mr. Ashton [the prosecutor], **if it does, then the whole scheme that we have in Florida is basically out of the window and it would have to be rewritten by the legislature.**

(VI 151)(Emphasis supplied.) Subsequently, the United States Supreme Court issued its opinion in ***Ring v. Arizona***, 536 U.S. 584 (2002). Unfortunately, the prosecutor and the trial court reassessed their prior positions. Ultimately, the trial court denied all of appellant's motions.

Interestingly, the trial court did submit interrogatory verdicts as to each aggravating and each mitigating factor submitted for the jury's consideration.[53]

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[53] The trial court did so after previously refusing to grant appellant's request for the exact same relief. (VI 152, 171-72) Ironically, the court refused to grant

However, the trial court specifically instructed the jury that they need not be unanimous. (XXVIII 1889) Based upon a separation of powers argument, appellant objected to the trial court, in essence, rewriting Florida's capital sentencing scheme. ***See, e.g.***, (XXVIII 1855-58)

Despite the United States Supreme Court's ruling in ***Ring v. Arizona***, 536 U.S. 584 (2002), this Court, as a court, has steadfastly refused to find the State's death penalty statute, in part or in total, in violation of the Sixth Amendment to the United States Constitution. ***Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002); ***Kormondy v. State***, 845 So.2d 41 (Fla. Feb. 13, 2003). Huggins raises this issue, in hopes that this Court has now seen the error of its ways and to preserve this issue and avoid the trap of procedural bar. Because this issue involves a pure question of law, this Court can review it *de novo*. ***See, e.g., City of Jacksonville v. Cook***, 765 So.2d 289 (Fla. 1st DCA 2000).

Huggins specifically argues that the Sixth Amendment requires Florida juries to unanimously recommend death before the trial judge can impose that sentence.[54]

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appellant's request for a special jury instruction on circumstantial evidence, because the judge claimed that he **almost never** deviated from the standard jury instructions. ***See*** Point VII.

[54] Although the interrogatory verdicts indicated unanimity as to each aggravating factor, the jury was less than unanimous (9 to 3) in their vote to impose

Relying on precedent from the United States Supreme Court and a pre-***Furman v. Georgia***, 408 U.S. 238 (1972), death penalty case this Court has held that jury unanimity in capital sentencing is not a requisite of Due Process of law. ***Alvord v. State***, 322 So.2d 533 (Fla.1975); ***Johnson v. Louisiana***, 406 U.S. 356 (1972) "We do not find that unanimity is necessary when the jury considers this issue." This Court has reaffirmed that position recently. ***Evans v. State***, 800 So. 2d 182, 197 (Fla. 2001); ***Sexton v. State***, 775 So. 2d 923, 937 (Fla. 2000); ***Bottoson v. Moore***, cited above (Shaw, concurring).

Johnson, however, was a non-capital case, and that is a significant distinction. In death sentencing, the United States Supreme Court has found that states must ensure not only that defendants receive due process, but a "super due process." ***See, Eddings v. Oklahoma,*** 455 U.S. 104 (1982); ***Skipper v. South Carolina***, 476 U.S. 1 (1986). For example, capital defendants have a due-process right to a state-provided psychiatrist to help prepare his defense. ***Ake v. Oklahoma***, 470 U.S. 68 (1985). The sentencer cannot consider information unavailable to the defendant. ***Gardner v. Florida***, 407 U.S. 349 (1977). This Court has also said sentencing orders, unlike their non-capital counterparts, must

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the death sentence. (XXVIII 1899-1904; XIV 1023-26).

be unmistakably clear. ***Mann v State***, 420 So. 2d 578, 581 (Fla. 1982); the sentencers can only consider specifically, legislatively created aggravators, ***State v. Dixon***, 283 So. 2d 1 (Fla. 1972); and only relevancy limits mitigation. ***Lockett v. Ohio***, 438 U.S. 586 (1978).

Thus, with the jury being a key, core part of Florida's split-sentencing scheme, ***Espinosa v. Florida***, 505 U.S. 1079 (1992), an equally vital component is their unanimity in recommending death. The utter finality of that punishment and the heightened due process required before it can be imposed demands no less than the community's united decision that a defendant deserves to die. In short, before a judge can impose a sentence of death ***Ring*** requires the jury to have authorized it. ***See also, United States v. Harris***, 536 U.S. 545, (2002). Huggins simply argues that without the united, unanimous voice of the community, it has not approved a death sentence.

At trial, the appellant also challenged the sufficiency of the indictment contending that it failed to charge capital murder where the aggravating factors were not included in the indictment. The ***Ring*** decision essentially makes the existence of a death qualifying aggravating circumstance an element to be proved to make an ordinary murder case a capital murder case. The Court in ***Apprendi*** described its

prior holding in ***Jones v. United States***, 526 U.S. 227 (1999).

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable is starkly presented. Our answer to that question was foreshadowed in ***Jones v. United States***, [citation omitted], construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and a notice of jury trial with guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." [citation omitted] The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. 466, 476. It is clear that in Florida as in Arizona, the aggravating circumstances actually define those crimes which are eligible for the death penalty.

> With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them - facts in addition to those necessary to prove the commission of the crime - whether the crime was accompanied by aggravating circumstances sufficient to require death or whether there were mitigating circumstances which require a lesser penalty.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1973)

Because the Supreme Court applied the requirement that a jury find the aggravating sentencing factor beyond a reasonable doubt in capital cases, it would appear the Supreme Court ought to hold that the ***Apprendi*** requirement of alleging the aggravating sentencing factor in the indictment also applies to capital cases once that issue is presented. Therefore, this Court should find that Section 921.141 is unconstitutional on its face, because it does not require a death qualifying aggravating factor to be alleged in the indictment charging first-degree murder. In the absence of that allegation, an indictment does not charge a capital offense, and no death sentence can constitutionally be imposed for the charged murder.

The Trial Court's Modification of The Statute, Instructions, and Procedures Relating to Florida's Death Penalty Sentencing Scheme Violates the Separation of Powers Doctrine.

To the extent Florida's death penalty statute is substantive, it can be amended only by the legislature. ***See Morgan v. State***, 415 So.2d 6 (Fla. 1982)(rejecting argument that death penalty statute violates separation of powers because it is procedural). To the extent the statute is procedural, it has been adopted by this Court in ***Florida Rule of Criminal Procedure 3.780***. ***Id***. Trial courts cannot create new rules in criminal procedures; only this Court has the authority to promulgate rules of procedure.

Just two weeks before this Court decided ***Bottoson v. Moore***, 833 So.2d 693 (Fla. 2002), this Court reiterated that a trial court may not modify the standard jury instructions on statutory mental mitigators to omit the adjectives "extreme" and "substantial" because, to do so would "in effect...rewrite the statutory description of mental mitigators, which is a violation of the separation of powers doctrine, Art. II, §3, Fla. Const." ***Barnhill v. State***, 834 So.2d 836, 849 (Fla. 2002); ***accord Johnson v. State***, 660 So.2d 637, 647 (Fla. 1995); ***see also, State v. Elder,*** 282 So.2d 687 (Fla. 1980)("the court is responsible to resolve all doubt as to the validity of a statute in favor of its constitutionality,...The court will not, however, abandon judicial restraint and invade the province of the legislature by rewriting its terms"). Florida constitutional principles of separation of powers and statutory construction thus precluded the trial court from ignoring the plain and unambiguous language of Section 921.141, Florida Statues. In others words, the intent of the Florida Legislature is clear from the statute, and the judiciary is not free to rewrite it.

As individual trial judges attempt to improvise their own remedies to the constitutional infirmities in the statute, capital defendants throughout the state are being sentenced to death under procedures that literally vary from judge to judge. This is the epitome of arbitrary and capricious imposition of the death penalty and a clear violation of the Eighth and Fourteenth Amendments to the United States

Constitution as well as Article I, Sections 9 and 17 of the Florida Constitution. ***See Furman v. Georgia***, 408 U.S. 238, 248-49 (1972)("A penalty...should be considered 'usually' imposed if it is administered arbitrarily...")(Douglas J., concurring)(citations omitted); ***accord Id.*** at 310 (Stewart, J. concurring). Only the Florida Legislature can mend the constitutional defects in the statute. Until it does so, there is no constitutionally valid means of imposing a death sentence in Florida. The Appellant, therefore, respectfully asks this Honorable Court to declare Section 921.141 unconstitutional for any or all of the reasons presented here, and remand his case for imposition of a life sentence.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to grant the following relief: as to Points I through V, VII, and VIII reverse and remand for a new trial; as to Point VI, reverse and remand for discharge; and as to Points IX through XI vacate the death sentence and remand for imposition of imprisonment without the possibility of parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Charles Crist, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. John Huggins, #059121, Florida State Prison, 7819 N.W. 228th St., Starke, FL 32026, this 25th day of August, 2003.

_____
CHRISTOPHER S. QUARLES
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, 14 pt.

_____
CHRISTOPHER S. QUARLES
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