IN THE FLORIDA SUPREME COURT

ROBERT SHANNON WALKER, II, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. SC04-2381

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

DENISE O. SIMPSON, ESQ.
LAW OFFICE OF
DENISE O. SIMPSON, P.A.
1717 K STREET NW, SUITE 600
WASHINGTON, D.C. 20036
(202) 746-9193
FLORIDA BAR NO. 0981486
COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

ROBERT SHANNON WALKER, Appellant, was the Defendant in the trial proceedings; this brief will refer to Appellant as Mr. Walker or Appellant. Appellee, is the State of Florida; this brief will refer to Appellee as the State or Appellee.

The record on appeal consists of eighteen volumes. Volumes one through seventeen volumes contain pleadings and testimony transcripts. Volume eighteen contains the exhibits that were filed in this case. The entire record has been transmitted to this Court. Each volume will be referred to by its designation in the Index on Appeal. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On January 27, 2003, Mr. William Davis found a crying, barefooted, and miserable Appellant stranded at the Penzoil gas station in Live Oak, Florida. (XIII. 1247-1248) Mr. Davis felt sorry for Appellant, purchased shoes for him, and took him to the bus station to help him get on his way. (XIII. 1248) It was after Mr. Davis's kindness that things changed for Appellant, and law enforcement arrived at the bus station and arrested him. (XIII. 1250) For Appellant this began the case of State of Florida v. Robert Shannon Walker.

Pre-Trial

Appellant was indicted for the capital crime of first degree Premeditated Murder, first degree felony of Kidnaping, and the second degree felony of Aggravated Battery. (IV. 497-4978) These crimes were alleged to have taken place on January 27, 2003, and David Hamman was listed as the victim. (IV. 497-498) Conflict counsel, Kenneth Studstill, was appointed to represent Appellant. (IV. 504) Attorney Studstill filed several pre-trial motions on Appellant's behalf. (IV. 514-574, 582-599, 612-672, VI. 889-894) Of particular note were Appellant's Motions to Declare § 921.141, FLA. STAT. unconstitutional, Motion

for Statement of Particulars as to Aggravating Circumstances and Theory of Prosecution, Motion for Findings of Fact, and Appellant's Motion to Suppress Appellant's Statements and Admissions to law enforcement. (IV. IV. 544-550, 624-672, V. 679-684)

On March 29, 2004 the parties appeared before the Honorable Charles M. Holcomb in Titsuville, Florida. The trial court heard all of Appellant's pre-trial motions except for the Motion to Suppress. (I. 10-12) In addition to arguing the merits of each motion, Appellant argued that Florida's death penalty scheme was unconstitutional under the dictates of *Ring, infra,* and *Apprendi, infra.* (I. 12-36) Yet, the trial court denied Appellant's motions because it felt bound to the present state of the law. (I. 51-55, 77-81 V. 687)

Motion to Suppress

On May 28, 2004, the trial court started Appellant's Motion to Suppress hearing. (I. 120-190) Appellant argued that his statement to law enforcement while he was in Suwannee County's custody was not voluntarily made, there was no proper warrant to seize any evidence, and his statements were made in violation of his rights under the United States' and Florida's Constitutions,

as he had invoked his right to counsel. (V. 679-680) To rebut Appellant's argument, the State called Agent Louis Heyn of the Brevard County Sheriff's Office Homicide Unit. (I. 123) Agent Heyn testified that in January 2003 at around 8:30 a.m. he responded to the scene of a homicide investigation in Brevard County. (I. 125) At around 9:00 or 10:00 a.m. he received a call that there were witnesses and a possible suspect in Suwannee County, Florida that may be related to the Brevard homicide. (I. 127-128) Agent Heyn and Agent Herrera left Brevard, and arrived in Suwannee around 2:00 p.m. to 3:00 p.m. (I. 127-129) They initially met with Lieutenant Warren of Suwannee Sheriff's Office, then with two witnesses, and then they met with Appellant. (I. 127-131) When Agent Heyn and Agent Herrera introduced themselves to Appellant, they explained that they were there to talk to him, and Appellant stated that he may need a lawyer. (I. 131) Agent Heyn and Agent Herrera started to leave. (I. 131) Appellant stopped Agent Herrera and said "you guys didn't get all dressed up and prettied up to come up here for nothing, let me think." (I. 131) Appellant started to talk to them about the case, but they explained that they would have to Mirandize him, and did so. (I. 133)

Appellant signed a Miranda waiver, and stated that he was willing to speak with them. (I. 134) Agent Heyn did not see any indication that Appellant was under the influence. (I. 137)

On cross examination, Agent Heyn did not recall being told of Appellant's sniffing methamphetamine or acting weird while traveling with the two witnesses, Ms. Ritter and Ms. Gibson. (I. 142) Agent Heyn acknowledged that during Appellant's interrogation he had his tape recorder out of view under the table, and Agent Herrera had his tape recorder out in the open on the table. (I. 144-146) However, Agent Heyn's hidden recorder did not work. (I. 144-146)

The State then called Agent Herrera who testified that during their meeting Appellant initially stated "I might want to talk to an attorney. (I. 156-157) Agent Herrera and Heyn started to leave, but Appellant made a comment along the lines of them not getting dressed up for nothing. (I. 156-157) They told Appellant they did not have to speak with them. (I. 157-158) However, Appellant was Mirandized, and signed a waiver. (I. 158-159) Agent Herrera admitted to trying and failing to covertly record Appellant's waiver. (I. 158-159) He testified,

as did Agent Heyn, that several times during the interview the tape was stopped based on Appellants request. (I. 135, 161) He also testified that to him Appellant did not appear to be on drugs. (I. 179)

Out of turn, Appellant called Leslie Ritter as his witness. Ms. Ritter testified that she first met Appellant when she, her friend Lori, and David Hamman went to Joel Gibson's apartment. (I. 181) Ms. Ritter witnessed Appellant and his girlfriend beating David Hamman with a stick or a flashlight. (I. 182) She saw Joel taking illegal drugs, but she was not sure if Appellant took any drugs that night. (I. 183) However, she did see Appellant "snorting" drugs the entire time they were driving together from Brevard to Jacksonville, and she knew with certainty that Appellant was high. (I. 184-185) Testimony was concluded that day, and the trial court reserved ruling. (V. 724-728)

The Motion to Suppress hearing continued on June 18, 2004, and the State called Florida Department of Transportation Officer Bobby Boren. (II. 195) Officer Boren testified that he was running radar along Interstate 10 in Suwannee County when "a pick up truck with two ladies came driving into the median where

I was at a high rate of speed." (II. 196) The women were yelling about someone trying to kill them, and being taken by someone in South Florida. (II. 197-199) The women had been screaming that there were drugs and guns in the truck, and he saw an automatic weapon in the open glove compartment of the truck. (I. 201-202) Based on their description a local be on the look out ("BOLO") call was done. (II. 200) He later learned the person was apprehended at the bus station in Suwannee County. (II. 200)

The State rested its presentation, and Appellant called Dr. Howard Bernstein as his witness. (II. 206) Dr. Bernstein is a psychologist who has a speciality in forensic psychology in criminal work. (II. 206) He reviewed Appellant's medical records from Suwannee County, and from the Brevard County Jail, and he spoke with Appellant on two occasions. (II. 207) Appellant was diagnosed with bipolar disorder with psychotic features which Dr. Bernstein described as "a good deal more serious (than) something we would call quote, depression, unquote." (II. 208) Appellant reported to Dr. Bernstein that he had been on a seven day dope binge, and that he was only getting two to three hours of sleep a day. (II. 209)

Appellant's drug use included "methedrine, and that was smoked as well as oral, cocaine and quote 'eating pills, snorting coke.'" (II. 209) Appellant also reported that before he was arrested he had his last hit where he "ate me a pill, did me a line. It was pretty strong, we didn't cut it with nothing." (II. 209) The arrest took place around 9:00 to 10:00 a.m., and Appellant gave his statement to law enforcement around 6:00 to 7:00 p.m. (II. 210) Dr. Bernstein testified that cocaine and amphetamines are "long lasting central nervous system stimulants and psychoactive stimulants." (II. 211) Thus, they "are longer lasting typically (than) the other kinds of drugs," and considering this "longer lasting effect plus the psychoactive influences it seems clear that he still was under the control because of the heavy load and the frequent dosing during the whole day." (II. 211) Dr. Bernstein believed that Appellant's statement was "less than voluntary knowing some what uncoerced." (II. 213) To clarify, Dr. Bernstein testified that Appellant's use of drugs affect on his past mental disorder made Appellant's statement less than intelligent. (II. 215) He also testified that Appellant's lack of sleep, and drug use would magnify the intensity of Appellant's mental illness. (II. 211)

Appellant then took the stand. (II. 219) He testified that prior to January 2003 he had never been diagnosed with any mental condition. (II. 223-224) Unaware of his bipolar condition with psychotic features condition, he had been "smoking meth, and eating pills of meth, and doing cocaine, and rolling marijuana up and smoking that." (II. 219) Appellant felt high and speedy, and being in a dream like state while on drugs. (II. 220) When he was arrested in Live Oak, officers tried to speak with him, but Appellant told them he wanted a lawyer, and they left him alone. (II. 222-225) When the agents from Brevard County came in to see him they told him they wanted to clear some things up. (II. 226) Appellant told them that he wanted to speak with an attorney first. (II. 226) The officers did not leave immediately, and told him that they "didn't drive up here for nothing, you really need to talk to us." (II. 226) Appellant felt intimidated by the larger police officer because of a past beating he suffered by other law enforcement officers in Virginia. (II. 226-227) Appellant gave his statement, but he felt that his life was in danger if he didn't "because of (his) past experiences and their demeanor." (II. 227) He asked the Suwannee police officer for

a lawyer before he saw the Brevard County agents. (II. 231) He also testified that he was still under the influence when he spoke with the Suwannee officer. (II. 235) Appellant somewhat recalled the tape recorded statement where he was crying. (II. 236) Yet, he only found out through his Attorney showing him the medical records later that the Suwannee police had him on a special medical watch where he was observed every fifteen minutes. (II. 236-237)

The Motion to Suppress was continued to July 6, 2004. The State called Live Oak former officer now Detective Chuck Tompkins. (II. 242-246) Officer Tompkins testified that on January 27, 2003 he followed a BOLO, and found someone matching the description at the bus station. (II. 242-246) He did a pat-down of the man, and recovered two loaded 45 caliber magazines. (II. 246) Officer Tompkins asked the man who he was, and received no response. (II. 246) The man was placed in the patrol car, and the man stated to just shoot him. (II. 246-247) Officer Tompkins did not Mirandize the man because he did not ask him any questions. (II. 247)

Next was Live Oak Police Lieutenant “Buddy” Williams. (II. 257) He was patrolling a BOLO call for a suspect related

possible murder in South Florida, and he heard that Detective Tompkins was checking the bus station. (II. 257) When Lieutenant Williams arrived at the bus station, Appellant was on his knees, and officers Manning and Tompkins were also present. (II. 258) Appellant was making statements of "just shoot me," and he was kicking the car. (II. 259) Eventually Appellant calmed down, entered the police car, and Officer Tompkins took him away. (II. 259) Lieutenant Williams testified that his contact with Appellant took 45 seconds to one minute, no Miranda warning was given, and Appellant did not ask for an attorney. (II. 260) However, he observed that Appellant was engaged in "not normal behavior." (II. 262)

On cross-examination, Lieutenant Williams testified that Appellant's behavior went from distraught to calm, and he believed that it was very possible that Appellant was under the influence. (III. 267) The preceding was supported by Lieutenant Vernon Creech of the Suwannee Sheriff's Office's when he testified that he saw Appellant exhibiting symptoms of someone who was on methadone. (III. 290) This concluded all testimony.

On July 30, 2004, the trial court entered its Order Denying

Appellant's Motion to Suppress Statements and Admissions. (VI. 885-888) The trial court found that Appellant's claim that he was unlawfully detained, and that he was denied his Fifth and Sixth Amendment right to an attorney before he made statements to the Suwannee and Live Oak law enforcement were without merit. (VI. 886) He also found that Appellant knowingly waived his right to counsel and to remain silent, and also found that despite the evidence of Appellant's drug use, the totality of the circumstances showed that Appellant's statement was knowing and voluntary. (VI. 887-888)

Guilt Phase

Appellant's jury trial commenced on July 19, 2004. The State presented the following case: On the morning of January 27, 2003, Steve Roeske from St. Johns Water Management found a body in the Tom Lawton Recreation Area, and he called the police. (XI. 853-862) Brevard County Sheriff's Deputy Robert Williams and Sergeant Bruce Barnett responded to Mr. Roeske's call about this dead body. (XI. 863-867, 874-887)

The next witness was Loriann Gibson who had been dating Mr. Hamman for two weeks prior to his death. (XI. 884) At that point she did not know Appellant. (XI. 885) She testified that

on January 26, 2003, she, Mr. Hamman, and Leslie Ritter went to an apartment on Valkaria Road. (XI. 886-890) When they arrived, a man who she later learned was Joel Gibson let them into the apartment. (XI. 892) Ms. Gibson could not identify Appellant in court. (XI. 893) However, she testified that Appellant and a woman came out of the back bedroom of the apartment, and started beating Mr. Hamman with various objects. (XI. 891-893) Additionally, Ms. Gibson was made to strip to her underwear to see if she was wearing a wire. (XI. 894) Thirty minutes later, she was sent to the back bedroom where she stayed for approximately three hours. (XI. 898-899) During that time Ms. Gibson guessed that Mr. Hamman ran out of the apartment. (XI. 899) She heard "them say, 'Get the bags and stuff and put them in the trunk.'" (XI. 899) She then guessed that "they took him to wherever they shot him." (XI. 899) When Appellant and the woman returned, Appellant told her and Ms. Ritter to drive him out of Florida, and she saw Appellant put two loaded guns in the truck's glove compartment. (XI. 900-901) During the trip they stopped three times. (XI. 905) The last time Appellant left the key in the truck while they were in Live Oak, the women took this opportunity to drive away

without him, and they eventually found a police officer and explained their situation. (XI. 906-907)

On cross-examination, Ms. Gibson acknowledged that Mr. Hamman had threatened to kill her and Ms. Ritter because they had heard about the metamphetamine enterprise he was involved in. (XI. 927-930) She saw Joel Gibson doing drugs the night of the beating, she described Joel was the supervisor of the beatings, and she saw Joel dancing around doing meth. (XI. 935-942)

The next witness was Leslie Ritter. Ms. Ritter identified Appellant in court, but admitted that she never actually saw him kill anyone. (XI. 971-972, 984) She testified that Mr. Hamman was still conscious after the beating he received from Appellant and the woman. (XI. 975-979) She also confirmed that Joel Gibson was watching the beating, and he was taking drugs. (XI. 987)

Joel Gibson's neighbor, Dennis Goss, testified that during the early morning hours of January 27, 2003 he was awoken by his dog barking. (XII. 1059-1065) Mr. Goss heard noises like someone was being beaten near the railroad track to the east of the apartment. (XII. 1065-1066) Joel Gibson knocked on Mr.

Goss' back door, apologized for the noise, and told him someone had gotten "too big for their britches." (XII. 1065) Mr. Goss saw someone by the mailboxes go toward "the west end of the house, and then I saw Leigh Ford's car come out from around the side of the house and proceed up to the [area] where the noise came from." (XII. 1065) He believed Joel Gibson was down by the mailboxes. (XII. 1073-1074) He then saw Mr. Hamman's truck and Ms. Ford's car drive away in different directions. (XII. 1063, 1066-1067)

On cross-examination, Mr. Goss testified that he knew that Joel carried a .45 caliber which he thought was a Llama, and Appellant carried a Colt 45. (XII. 1061-1062, 1079) He also admitted that the beating he heard was not severe enough for him to call the police. (XII. 1080)

Florida Department of Transportation Officer Bobbie Boren testified that on the morning of January 27, 2003 he was monitoring traffic when a large white truck drove off the roadway and turned around. (XII. 1083-1087) Two very exited women came running out of the truck "yelling and screaming that someone had kidnaped them and had killed somebody, and they were telling me there were guns in the truck and this kind of thing."

(XII. 1083-1088) Officer Boren saw a gun in the open glove compartment, and he contacted headquarters and requested assistance from the Suwannee County Sheriff's Office. (XII. 1088-1089) Suwannee County Sheriff's Office Lieutenant Creech arrived, spoke to the women, and put out a BOLO for the man the women were describing. (XII. 1089-1092) This man was last seen at the Penn-Oil Truck Stop. (XII. 1089-1092) Officer Boren identified photographs of the weapons, the shoes, a 7-Eleven bag, and some cloth that was in the front seat area white truck. (XII. 1092-1094)

Next, Live Oak Officer Chuck Tompkins testified to going to the Penn-Oil gas station to follow up on a BOLO for a "white male wearing a camoflauge jacket and a camoflauge cap." (XII. 1098) After speaking with the clerk at the station, Officer Tompkins went to the Greyhound bus station. (XII. 1098-1099) Within five minutes of arriving there, they saw a man fitting the BOLO. (XII. 1100) They secured him with handcuffs, patted him down, and recovered from the man "a folding knife, two fully loaded 45 magazines, and one live round, one spent casing, and a slapjack," and a wallet. (XII. 1101-1105) Officer Tompkins did not ask the man any questions, but the man made statements

of “Shoot me. Just let me run and shoot me.” (XII. 1105) Officer Tompkins could not identify Appellant in court. (XII. 1106-1107) Additionally, on cross-examination, he testified that he could not tell if the man was under the influence. (XII. 1108-1109)

Agent Laufenberg of the Brevard County Sheriff’s Office was the State’s next witness. Appellant objected to Agent Laufenberg testifying to the photographs of blood stains because they had not been tied up to the victim. (XII. 1124-1155) Despite arguments of the probative versus prejudice, the trial court asking the State why they would take the risk of admitting the evidence, and Appellant’s motion for mistrial, verbal evidence about the blood was admitted. (XII. 1156-1170) Photographs of the blood stains in the apartment unit on Valkaria Road were latter admitted without any objection by Appellant as to the predicate. (XII. 1171-1177) Agent Laufenberg took swabs of the blood stains at Joel Gibson’s apartment, and submitted one for testing. (XII. 1174-1175, 1238-1239) While he did not object to the strap used to tie Mr. Hamman’s hands being admitted into evidence, Appellant objected to the prejudicial nature of the photographs of the victim’s

hands being tied, but this was overruled. (XII. 1195-1200, XIII. 1213–1218) Agent Laufenberg testified about the projectiles that were sent to the lab and items recovered from the search of the apartment on Valkaria Road. (XIII. 1219-1234) These included a magazine for a 45-caliber handgun, a tool that had no purpose, and a homemade club. (XIII. 1219-1234)

Mr. William Davis from Live Oak took the stand, and testified to meeting a man at the Penn-Oil gas station who needed a ride. (XIII 1245-1247) The man was crying pretty hard, he was barefooted, and he was in misery. (XIII. 1247) The man was trying to get home to a small town in Tennessee or Kentucky, so Mr. Davis took him to the bus station. (XII. 1247-1248) Mr. Davis was unable to identify Appellant in court. (XIII. 1251)

Next Agent Herrera testified to reading Appellant his Miranda rights. (XIII. 1270-1288) Appellant acknowledged that he understood his rights, and gave a taped statement. (XIII. 1270-1288)

Then the State called Joel Gibson's girlfriend, Lisa Protz. (XIII. 1296) She testified that around 3:00 a.m. on January 27, 2003, Appellant arrived at her home in a white truck. (XIII. 1298-1300) Appellant asked for a "(g)asoline can, gas, tape and

some rope," but she did not ask him what he wanted the items for. (XIII. 1300-1301) During this time Joel Gibson called her house. (XIII. 1301-1302) She overheard Appellant tell Joel that he was at her house. (XIII. 1302) Appellant also had a gun which she believed he had in the front of his pants. (XIII. 1303) However, despite her statement that she should be able to recognize Appellant, she could not identify him in court. (XIII. 1303-1304)

Dr. Sajid Qaiser, a medical examiner, was the State's next witness. Dr. Qaiser conducted the autopsy of Mr. Hamman's body. (XIII. 1320) During his external examination, he observed multiple blunt-force injuries and multiple gunshot wound to Mr. Hamman, and his x-rays showed the presence of projectiles in Mr. Hamman's head. (XIII. 1320-1321) Over defense objection to the gruesome nature of the photographs, the photographs were admitted into evidence. (XIII, 1322-1326, 1332-1333) Dr. Qaiser testified to Mr. Hamman's blunt force trauma injuries which would have been caused by the use of an item such as a rod or a baton. (XIII. 1337-1339) Mr. Hamman had road rash injuries, and six gun shot wounds. (XIII. 1346) Two of the wounds were exit and entry, three were entry, and one was a graze. (XIII. 1346)

Two of these wounds were inflicted at close range. (XIII. 1348) On cross-examination, Dr. Qaiser testified that methamphetemine could cause a person to act abnormal, and it can keep a person awake for days. (XIII. 1362-1363) He also affirmed that Mr. Hamman died of gunshot wounds. (XIII. 1363)

FDLE criminal laboratory analyst William Schwoob testified to receiving a folding knife, a black jack, “two magazines with cartridges and one loose cartridge” from the Suwannee Sheriff’s Office, and what appeared to be blood stains in the truck. (XIII. 1383-1384, XIV. 1413-1432)

San Mateo Sheriff’s Officer firearm and tool mark examiner Gerald Smith testified to the bullets that were fired from the Llama gun (XIV. 1453-1463) As far as ammunition, the Llama could hold up to seven Remington-Peter hollow points in the magazine, and one extra in the chamber of the gun. (XIV. 1463-1464) Officer Smith testified that the hollow points found in the magazines that Officer recovered from Appellant, looked similar to the ammunition cartridge cases already admitted into evidence. (XIV. 1466)

FDLE senior lab analyst Timothy Petree testified to examining Mr. Hamman’s blood, and to swabs taken of stains.

(XIV. 1483-1489) There was a DNA match between the swabs, and Mr. Hamman. (XIV. 1489) He did a DNA profile of blood found on the 45-caliber pistol, and found that Mr. Hamman's DNA could not be excluded as a contributor to the mixture. (XIV. 1489-1491)

Brevard County Sheriff's Detective Louis Heyn was the State's final witness. He testified to traveling to Suwannee County with Agent Herrera as part of a suspected homicide investigation, and eventually meeting with Appellant. (XIV. 1513-1517) Neither officer made any inducements, threats, coercion or promises to Appellant, and Appellant waived his Miranda rights and gave them a statement without an attorney present. (XIV 1518) The State played the audio tape of Appellant's statement to the jury. (XIV. 1523-1618) On the tape, Appellant testified to being scared all day because of Mr. Hamman's statements that he was going to call the DEA on them. (XIV. 1547-1548) Appellant hit Mr. Hamman with a flashlight because he wanted to give him a taste of his own medicine due to the fear he caused. (XIV 1550-1551) Appellant stated that when Mr. Haman came over to Joel's apartment, he had him sit on the couch and strip so they could check him for wires. (XIV. 1552-1553) Appellant stated that Mr. Haman did run away while he was

naked. (XIV. 1553) However, Appellant only stated that he "tapped that boy up side the head a couple of times." (XIV. 1553) Appellant was afraid of Mr. Hamman, and this was heightened by the threats Mr. Hamman made to his family. (XIV. 1573-1575) Appellant made statements about using the 45 caliber Llama gun. (XIV. 1577-1578, 1583-1584) However, when asked where Mr. Hamman was when he shot him, Appellant stated "I never said I shot him. But, I never – but I was standing there." (XIV. 1593) When Detective Herrera asked Appellant if Mr. Hamman said anything to him before he shot him, Appellant said "I was so freaked out. It's hard for me to remember...I'm not saying - - I'm just - - I have to think for a moment." (XIV. 1595) Detective Herrera asked where Mr. Hamman was when he shot him, and Appellant responded that Mr. Hamman was beside the truck. (XIV. 1595-1596) He stated he may have killed Mr. Hamman, but he denied being a cold killer. (XV. 1618) On cross examination, Deputy Heyn testified that during the interview Appellant appeared in control and coherent, but every once in a while he was "incoherent and a little upset." (XV. 1620)

The State rested. (XV. 1636) Appellant Motioned for Judgment of Acquittal based on the State's case being one of circumstantial evidence case which did not rebut a reasonable hypothesis of innocence. (XV. 1637-1642) After further arguments by the State and Appellant, the trial court denied the Motion. (XV. 1642-1649) Closing arguments were presented. (XV. 1679-1754) The jury was instructed. (XV. 1754-1783) Appellant objected to the missing "ill will" portion of the written second degree murder instruction, but noted that the trial court read it correctly to the jury. (XV. 1763, 1787) The jury recessed at 12:15 p.m., and reached a verdict at 3:55 p.m. (XV. 1789-1790) Appellant was found guilty as charged. (XV. 1789-1792)

Penalty Phase

The next day the jury returned for the penalty phase. (XVI. 1815-1816) The State called the victim's sister, Michelle Hamman. (XVI. 1837) Ms. Hamman testified about Mr. Hamman's physical injury from a car accident, the difficulties he had in walking, and the fact that he lived with his Mother so she could take care of him. (XVI. 1837-1843) Appellant presented the testimony of Dr. Robert Radin who worked with Circles of Care in

Brevard. (XVI. 1844) Dr. Radin met with Appellant at the Brevard County Jail through the forensic unit, and saw him once for an initial evaluation, and ten times for medication checks. (XVI. 1846-1847, 1851) He diagnosed Appellant with a bipolar disorder, which he did not believe was a long-standing illness. (XVI. 1848-1854) However, Appellant's next witness, Dr. Bernstein termed Appellant's bipolar disorder as a "severe and chronic mental disorder." (XVI. 1872-1875) Dr. Bernstein testified that if a person suffering from a bipolar disorder used methamphetamines over a few days his condition "most likely not be normal." (XVI. 1877) Closing arguments were presented, and the jury was charged. (XVI. 1881-1926) The trial court corrected the instruction for the one aggravator, and explained to Appellant that there would now only be three instead of four aggravators for the jury to consider. (XVI. 1926-1934) After listening to Appellant's tape recorded statement, the jury came back with a verdict with seven of the twelve members of the jury recommending death. (XVII. 2030-2034)

Sentencing

On August 5, 2004, the trial court issued an order setting a *Spencer* hearing for August 30, 2004, and both Appellant and

the State submitted sentencing memorandums for the hearing. (VI. 904-917, 920-923) Seven days before the hearing, Appellant filed an amended Motion to Declare § 921.141, FLA. STAT. unconstitutional (VI. 918-919) The Spencer hearing took place, and arguments were presented. (II. 296-414) Sentencing took place on December 13, 2004. Before the trial court made a finding, counselor June Robert testified about of Appellant's drug problems. (III. 417-425) But she also testified that Appellant was an outgoing and well spoken man, and she never saw him act out of control in any way. (III. 417-425)

The trial court made oral findings that the State had proven the following three aggravating factors: 1) that the capital felony was committed while Appellant was committing a kidnaping; 2) the capital felony qualified as heinous, atrocious or cruel; 3) and the capital felony was done in a cold calculated and premeditated manner without any moral or legal justification. (III. 425-459) The trial court also found that no statutory mitigating factors existed, and four non-statutory mitigating factors were established. (III. 459) The trial court filed its written sentencing order on December 13, 2004. (VI. 961-977) The trial court adjudicated Appellant guilty on

all counts and was sentenced as follows: sentenced to death on count one First Degree Murder; sentenced to thirty years on count two for kidnaping to run consecutively to count one; and sentenced to fifteen years on count three Aggravated Battery to run consecutively to count one but concurrent with count two (III. 460-461, VI. 953-958, 976-977)

Appellant filed his timely Notice of Appeal to the Florida Supreme court on December 16, 2004, and began the appeal process of his convictions. (VI. 981)

SUMMARY OF ARGUMENT

Issue I.

The trial court committed reversible error in denying Appellant's Motion to Suppress his statements to Brevard County Law Enforcement. Appellant was under the influence of methamphetemine, and also suffering under the aggravation of his bipolar disorder at the time he waived his *Miranda* rights, and spoke with the agents without an attorney present. The State failed to present substantial and competent evidence to counter this fact. In light of this, the trial court's factual findings, and legal conclusions were error that Appellant's waiver of his Miranda rights was not done knowingly and intelligently. Therefore, as the evidence shows that Appellant's waiver was not entered into knowingly and intelligently, this court must grant Appellant's motion to suppress his statement.

Issue II.

The trial court committed reversible error by not declaring Florida's death penalty scheme unconstitutional. Florida's death penalty jury advisory scheme does not meet constitutional muster. The United States Supreme Court's dictates in *Ring, infra*, and *Apprendi, infra*, require a unanimous beyond a reasonable doubt

finding by a jury of the aggravating elements in a death case. These elements make it possible to sentence a defendant past the statutory maximum for first degree murder. Under Apprendi *and* Ring a unanimous jury, and not a single trial judge must make this final decision. By failing to have jury make this final finding, Appellant's and all Florida capital defendant's Florida and Federal Right to Counsel, Right to Trial, and Equal Protection under law are violated. Thus, Florida's death penalty statute should be declared unconstitutional.

Issue III.

The trial court erred by denying Appellant's Motions for Judgment of Acquittal. Appellant's capital murder case was a purely circumstantial evidence case. The State's evidence failed to rebut and was consistent with the reasonable hypothesis that Joel Gibson shot and killed Mr. Hamman. Therefore, the trial court should have granted Appellant's motion for judgment of acquittal.

Issue IV.

The trial court erred in finding three aggravating elements in Appellant's case. The first aggravator that the capital murder was committed during the course of committing a kidnaping

is contradicted by the fact that the jury did not find Appellant guilty of felony murder. The second and third aggravators of heninous, atrocious and cruel, and cold and calculated premeditation were contradicted by Appellant being under the influence of drugs, and suffering from a severe bipolar disorder at the time of the crimes. Additionally, the evidence showed that the killing was done in a frenzy. The killing was not done as a contract killing or witness elimination. Also, Appellant's actions were done for the moral justification of protecting his family. Furthermore, the trial court erred in not finding all of Appellant's mitigating factors which were supported by the evidence. The court also erred in not giving greater weight to the mitigating factors that were in fact established.

Issue V.

The trial court abused its discretion when it allowed into evidence photographs of blood stains, and the blunt trauma injuries to the dead body of the victim. These photographs were irrelevant and prejudicial. By having the jury exposed to this evidence, it unfairly influenced the jury's decision. Therefore, their admission was reversible error.

Issue VI. and VII.

The trial court committed reversible error by denying Appellant's Motion for Notice of Aggravating Factors and Theory of Prosecution, and his Motion for Findings by the jury via a special verdict form. This court recently in *Steele*, addressed both of these issues. Under *Steele*, Appellant's first Motion should have been granted, and under *Apprendi* and *Ring* his second motion should have been granted.

ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENT AND ADMISSIONS HE MADE TO BREVARD COUNTY LAW ENFORCEMENT, AND BECAUSE THE EVIDENCE SHOWED THAT DUE TO APPELLANT'S EXCESSIVE DRUG USE AND AGGRAVATED BIPOLAR CONDITION HIS WAIVER OF HIS MIRANDA RIGHTS WAS NOT DONE KNOWINGLY AND INTELLIGENTLY.

Standard of Review

Reviewing a motion to suppress is a mixed question of law and facts. *J.C.M. v. State*, 891 So.2d 573 (Fla. 1st 2004). The trial court's factual decisions are clothed with a presumption of correctness. *Connor v. State*, 803 So.2d 598, 608 (Fla. 2001). However, legal conclusions by the trial court are subject to the de novo standard of review. *See e.g., State v. Taylor*, 784 So.2d 1164 (Fla. 2d DCA 2001). In this case, the trial court's factual findings and legal conclusions were clearly erroneous, and constitute reversible error.

Preservation

This issue was preserved for appellate review when the trial court denied Appellant's Motion to Suppress. (VI. 885-888)

Merits

A person accused of a crime is guaranteed the right not to

be a witness against himself, and to counsel to assist him with his defense. *See*, U.S. Const. Amndt. V, VI. and XIV, and Fla. Const. Art. I §16. When a defendant invokes his right to counsel, that request must be unequivocal. *Davis v. United State*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); and *Walker v. State*, 707 So.2d 300 (Fla. 1997). If a defendant chooses to waive his right to be silent and speak to law enforcement without counsel, that defendant must knowingly and intelligently waive his right to counsel. *Miranda v. U.S.*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). If that waiver is challenged, it is up to the State to prove by a preponderance of the evidence that this waiver was knowing and voluntary. *Ross v. State*, 386 So.2d 1191, 1194 (Fla. 1980). When determining the voluntariness of a confession where the defendant is under the influence of some type of intoxicating agent, the totality of the circumstances must be examined. *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). In Appellant's case, the totality of the circumstances shows that Appellant's drug induced condition, combined with his previously undiagnosed bipolar condition vitiated the possibility that he knowingly and intelligently waived his rights.

Appellant testified that he asked Suwannee police for a lawyer, and he also asked the Brevard County Sheriff's agents for a lawyer. (II. 222-226) These requests were unequivocal. The State then had to show by a preponderance of the evidence that despite these unequivocal requests, he knowingly and intelligently understood and waived his right to remain silent, and spoke with the Brevard County Sheriff's agents without an attorney present. This was not possible. Both the State and Appellant's witnesses proved that on January 26-27, 2003, Appellant used drugs and he used them to excess. Appellant's witness Leslie Ritter testified that she saw Appellant "snorting" drugs the entire time they were driving together from Brevard to Jacksonville, and she knew with certainty that Appellant was high. (I. 184-185) Appellant testified that on January 26, 2003 he was "smoking meth, and eating pills of meth, and doing cocaine, and rolling marijuana up and smoking that." (II. 219) Appellant described his state of being as feeling high and speedy, and being in a dream like state while on drugs. (II. 220) State's witness Lieutenant Williams of the Live Oak Police testified that Appellant's behavior was not normal. (II. 262). He also testified that Appellant's behavior went from distraught

to calm, and he believed that it was very possible that Appellant was under the influence. (III. 267) Also, Lieutenant Vernon Creech of the Suwannee Sheriff's Office's testified that Appellant exhibited symptoms of someone who was on methadone. (III. 290) Thus, the only reasonable factual conclusion that the court could have reached was that Appellant was impaired. Erroneously the court did not reach this conclusion.

In supporting its erroneous ruling, the trial court's order pointed out that 8-10 hours passed between the time that Appellant was initially detained, and when he was interrogated by law enforcement. (VI. 887) It is correct that the arrest took place around 9:00 to 10:00 a.m., and that Appellant gave his statement to law enforcement around 6:00 to 7:00 p.m. (II. 210) However, this time lag made no difference in light of Dr. Bernstein's testimony. (II. 210) Dr. Bernstein testified that cocaine and amphetamines are "long lasting central nervous system stimulants and psychoactive stimulants." (II. 211) He opined that since these drugs "are longer lasting typically (than) the other kinds of drugs," and considering this "longer lasting effect plus the psychoactive influences it seems clear that (Appellant) still was under the control because of the heavy

load and the frequent dosing during the whole day." (II. 211) Also, Appellant's lack of sleep, the affect his drug use had on his past mental disorder made his statement less than intelligent, and Appellant's lack of sleep his drug use would magnify the intensity of his mental illness. (II. 211-215) A mental illness of which Appellant was unaware before his arrest. (II. 223-224)

There was no competent evidence presented by the State to counter the argument that Appellant was under the influence of these drugs when he gave his statement. They had Agent Heyn and Agent Herrera's statements that they did not observe that Appellant was under the influence. However, considering the excessiveness of Appellant's drug use, under the totality of the circumstances, Appellant could not have knowingly and intelligently waived his *Miranda* rights before he gave his statement to the police. The weight of the evidence shows that Appellant was under the influence. With that taint, he could not have knowingly executed the waiver form. Thus, the trial court's finding that Appellant knowingly and intelligently waived his right to counsel was wrong.

Again, when a defendant files a motion to suppress his

confession, the burden shifts to the State to prove by a preponderance of the evidence that the confession was voluntary. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); and *Roman v. State*, 475 So.2d 1228, 1232 (Fla. 1985). In Appellant's case, the totality of the circumstances shows that Appellant was under the influence, and any waiver and subsequent statement to the police was not done knowingly and voluntarily. The trial court's factual decision was an abuse of discretion, and his legal findings were clearly erroneous. Appellant's Motion to Suppress should have been granted. This case should be remanded with directions to the trial court to suppress Appellant's statement, and order a new trial without the use of this statement.

ARGUMENT

ISSUE II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION TO DECLARE 921.141, FLA. STAT. UNCONSTITUTIONAL BECAUSE A JURY NOT A JUDGE SHOULD MAKE A UNANIMOUS BEYOND A REASONABLE DOUBT DETERMINATION AS TO DEATH PENALTY AGGRAVATORS.

Standard of Review

The denial of Appellant's motion was a question of law, and is subject to the de novo standard of review. *North Florida Women's Health and Counseling Services, Inc., v. State*, 866 So.2d 612 (Fla. 2003).

Preservation

This issue was preserved for appellate review when the trial court denied Appellant's Motion to Declare § 921.14, FLA. STAT., unconstitutional because it only required a majority of jurors in the penalty phase make a recommendation of death. (I. 53, VI. 918-919) Any other arguments not specifically addressed or ruled on in Appellant's motion is fundamental error, and can be considered by this court. §924.051(3), FLA. STAT.

Argument

Right to a Jury Trial

The Sixth Amendment to the United States Constitution guarantees a criminal defendant a "right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,...and to be informed of the nature and cause of the accusation...." *See also,* Fla. Const. Art. 1 § 16. The Sixth Amendment has been strictly interpreted to honor a defendant's right to a jury trial. Case in point, the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In Apprendi, the Court dealt with the Sixth Amendment and a hate-crime enhancement where the judge and not a jury decided the applicability of the enhancement. In honoring the right to a jury trial, the Court held as follows:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that [Jones v. U.S., 526 U.S. 227] case" "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S., at 252-253 (opinion of STEVENS, J.); see also *id.*, at 253 (opinion of SCALIA, J.)

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). In *Harris v. United States*, 536 U.S. 545 (2002), the United States Supreme Court held that under *Apprendi*, "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." The Court applied *Apprendi*'s rule to death penalty cases, and found that aggravating factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

In Florida, the maximum penalty for capital first degree murder is life without parole. §775.082, FLA. STAT. A separate finding of at least one aggravating element must be made to sentence a person past this statutory maximum. In Florida that finding is done only by the trial judge, and not a unanimous decision by a jury. §921.141, FLA. STAT. The jury's role is merely advisory, and only requires a majority of the jurors to make a recommendation of death. The trial court makes the final decision as to whether the necessary elements are met to impose a sentence of death. §921.141(3), FLA. STAT. This statutory scheme

is contrary to *Ring*, and is thus unconstitutional.

In *King v. Moore*, 831 So.2d 143 (Fla. 2002), this court denied the defendant relief under *Ring v. Arizona*, 536 U.S. 584 (2002). This court noted that the United States Supreme has "repeatedly reviewed and upheld Florida's capital sentencing statute over the past quarter of a century and although King contends that there now are areas of 'irreconcilable conflict' in that precedent, the Court in *Ring* did not address this issue." *Id*. *See also*, *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002). This court has denied retroactive application of *Apprendi* and *Ring* to defendants who were convicted before *Ring* was decided. *See, e.g., Johnson v. State*, 904 So.2d 400 (Fla. 2005). However, this court has yet to apply *Apprendi* and *Ring* in cases where retroactive application is not an issue, and declare Florida's death penalty statue unconstitutional by violating established Federal and Florida constitutional principles. The time for such a finding is now.

The right to a jury trial to establish an element which increases the statutory maximum of a crime continues to be affirmed by the United States Supreme Court. *See, Blakely v. Washington*, 542 U.S.___, 124 S.Ct. 2531, 159 L.Ed. 2d. 403

(2004). In turn all States except for Florida follow the rule of *Apprendi* and *Ring*. In Florida, the aggravating factors under § 921.14, FLA. STAT., set the outer limits of a sentence by authorizing death. Under *Apprendi* and *Ring*, these factors are elements of the crime which must be proven beyond a reasonable doubt to a unanimous jury.

Florida follows the principle that a factor that enhances the statutory maximum should be treated as an element of a crime, and requires a unanimous jury finding. *See,* Fla.R.Crim.P. 3.440. In *State v. Overfelt*, 457 So.2d 1385 (Fla. 1984), this court required a jury finding that a firearm was used. before enhancing a defendant's sentence or applying the minimum mandatory. *See also, State v. Tripp*, 642 So.2d 728 (Fla. 1994) and *State v. Hargrove*, 694 So.2d 729 (Fla. 1997). Therefore, it us still unfathomable that Florida's death penalty statute that ignores *Ring* and *Apprendi* can still withstand constitutional challenges.

Waiting for the Legislature to act is not the answer. Appellant urges this court to uniformaly apply the law of the land, and find that Florida's present death penalty scheme is unconstitutional.

Equal Protection

Florida's failure to follow *Apprendi* and *Ring* violates Appellant's federal and state Equal Protection rights. This court recently in *Steele v. Florida*, 2005 Fla. LEXIS 2043, 31 Fla. L. Weekly, 575 (Fla. October, 12, 2005) stated its "considered view...that in light of developments in other states and the federal level, the Legislature should revisit (the capital sentencing statute) to require some unanimity in the jury's recommendation." *Id.* Appellant agrees with this court. As this court pointed out in *Steele*, Florida is now the "only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both where aggravators exist and whether to recommend the death penalty." *Id*. In light of the preceding, and in addition to the Sixth Amendment and Florida Constitution Article 1 § 12 violations, the question now is whether Appellant's and all Florida capital defendant's Equal Protection Rights are violated by Florida's capital scheme. The answer is yes.

Under the Federal and Florida's constitutions, every person is guaranteed Equal Protection of law. *See*, U.S. Const. Amndt. XIV., Article 1, § 2, FLA. CONST. In *Steele*, this Court gave a

detailed description of every other State's capital sentencing scheme. The common thread in every state is that they require a unanimous jury finding of death by the jury, and not by the trial court. This common thread recognizes a defendant's constitutional right to a jury trial as found in the United States Constitution's Sixth Amendment. *See also*, Art. 1, §9, FLA. CONST. Every capital defendant in the United States is afforded this unanimous jury finding, except for capital defendants in Florida. While the argument may be made that all capital defendants under Florida's capital scheme are being treated equally, that does not address the issue. The Federal constitution has been interpreted to provide certain very basic rights to all citizens. The State can give a defendant more rights, but it cannot take away basic fundamental rights guaranteed by the United States Constitution. By enforcing the jury advisory, mere majority system, Florida takes away not only Appellant's basic fundamental rights to a jury, but every capital defendant in Florida.

The undersigned knows that there is a separation of powers between the Legislative, the Executive, and the Judicial Branches at the federal and state level. The undersigned is not arguing

for a breach of these powers. The undersigned is asking this court to enforce its power. Interpreting the law to find that Florida's capital scheme violates clearly established federal law is within this court's power. All capital defendants in the United States are receiving their fundamental right to a jury trial guilt phase and penalty phase. All capital defendants but the ones in Florida. This is inequitable. Therefore, this court should enter a ruling declaring Florida's death penalty scheme as provided in § 921.141, FLA. STAT. is unconstitutional by violating a defendant's right to Equal Protection under law.

ARGUMENT

ISSUE III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE'S CIRCUMSTANTIAL EVIDENCE CASE WAS CONSISTENT WITH AND DID NOT REBUT APPELLANT'S REASONABLE HYPOTHESIS OF INNOCENCE AS TO HIS CAPITAL MURDER CHARGE.

Standard of Review

The standard of review of a denial of a Motion for Judgement of Acquittal is de novo. *State v. Law,* 559 So.2d 187 (Fla. 1999).

Preservation

This issue was preserved for appellate review when the trial court denied Appellant's Motion and renewed Motion for Judgment of Acquittal. (XV. 1637-1649)

Merits

When Appellant's first degree murder case is boiled down to its basics, it is a purely circumstantial evidence case. The State presented many inferences to show that Appellant probably was the one who called Mr. Hamman. However, its evidence also was consistent with the theory that Joel Gibson killed, not Appellant, Mr. Hamman.

It is an established principle that a judgment of acquittal should be granted in a circumstantial evidence case where "the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence." *McArthur v. State*, 351 So.2d 972, 976 (Fla. 1977) (citation omitted).

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

Davis v. State, 90 So.2d 629, 631-632)(Fla. 1956). In such a case, the judge is charged with reviewing the evidence "in the light most favorable to the State to determine the presence of competent evidence from which the jury could infer guilty tothe exclusion of all other inferences." *State v. Law*, 559 So.2d 187,

189 (Fla. 1989). "Although the jury is the trier of fact, a conviction of guilty must be reversed on appeal if it is not supported by competent, substantial evidence." *Crain v. State*, 894 So.2d 59, 71 (Fla. 2004) (citations omitted) A reversal is warranted in Appellant's case.

The State's evidence showed that Mr. Hamman died of a gun shot wound, not of a beating. (XIII. 1363) The State relied solely on stacked inferences to establish that Appellant shot Mr. Hamman. Yet, no matter how many inferences the State presented to show that Appellant was guilty, those inferences did not rebut the reasonable hypothesis of innocence that Joel Gibscon murdered Mr. Hamman. As a matter of fact the State's evidence was consistent with the theory that Joel Gibson was the murderer.

The State's medical examiner testified that methamphetimines could cause a person to act abnormally. (XIII. 1362-1353) The State's witnesses testified that Joel Gibson was doing drugs at the apartment. (XI. 935-942) They saw Appellant and his girlfriend hitting Appellant repeatedly while at Joel's apartment. (XI. 891-893, 975-979) They also presented evidence that Joel was an active participant because he was present during the beating, and he was described as supervising or watching the

beating. (XI. 935-942, 987) Mr. Haman was still conscious after being beaten by Appellant and his girlfried. (XI. 975-979) Thus, Mr. Hamman was alive when last seen by the only people who could be called eyewitness to a crime. However, the only crime the State's eyewitnesses saw was an Aggravated Assault.

The State's case for murder falls apart, and becomes consistent with Appellant's hypothesis of innocence when their eyewitness testified that she heard "them" or "they" leave the apartment. (XI. 899) The they or them had to be Appellant, Ms. Ford, and Joel because they were all at the apartment, and there was no evidence that Joel stayed in the apartment. (XI. 866-899) Dennis Goss testified that he heard sounds of someone being beaten coming from Joel's apartment. Joel even came over to his apartment to apologize for the noise, and reported that it was due to someone being "too big for their britches." (XII. 1065-1066) Mr. Goss believed that Joel was down by the mailboxes in the apartment complex. (XII. 1065) Then he saw Appellant's girlfriend's car, and Mr. Hamman's van leave the apartment complex, but driving in different directions. (XII. 1063, 1066-1067) This was consistent with Joel leaving the apartment. The State presented evidence that six bullets from a .45 caliber

Llama pistol were found in Mr. Hamman's body. (XIII. 1346) In his taped statement Appellant made comments about using the 45 caliber Llama gun Joel gave him. (XIV. 1577-1578) However, when asked where Mr. Hamman was when he shot him, Appellant stated "I never said I shot him. But, I never – but I was standing there." (XIV. 1593) It is just as consistent to say that Appellant shot Mr. Hamman as it is to say that Joel Gibson shot Mr. Hamman. Mr. Goss testified that Joel, not Appellant carried the Llama gun. (XII. 1061-1062, 1079) Therefore, it is just as likely that Joel, the supervisor or the beatings and of Appellant's actions, would be the one to use his own weapon to kill Mr. Hamman. If Appellant was only standing there, then that leaves unrebutted his hypothesis of innocence that Joel actually shot Mr. Hamman.

"When the State has presented sufficient evidence to establish the guilt of one accused of a serious crime, it is the responsibility of the courts to acknowledge that evidence." *Ballard v. State*, 2006 Fla. LEXIS 273 (Fla. February 23, 2006). However, this court went on further to note that, "it is equally the duty of the courts to ensure that the State is held to its burden of proof when someone is charged with a serious crime and liberty and life are at risk." The State failed to meet its

burden of proof, and the trial court erred in denying Appellant's Motion for Judgment of Acquittal. Therefore, Appellant's case should be remanded with directions to the trial court to grant Appellant's Motion for Judgment of Acquittal as to his capital murder charge.

ARGUMENT

ISSUE IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS WEIGHING OF THE AGGRAVATING ELEMENTS AND MITIGATING FACTORS FOUND IN APPELLANT'S CASE.

Standard of Review

Whether a factor is mitigating is a question of law and subject to the de novo standard of review; if a mitigator is established or not is a question of fact subject to review for substantial and competent evidence; and determination of the weight of the evidence assigned to each aggravating element or mitigating factor is subject to the abuse of discretion standard of review. *Campbell v. State*, 571 So.2d 415 (Fla. 1990).

Preservation

This issue was preserved for appellate review when the trial court entered its Sentencing Order. (VI. 961-997)

Merits

Aggravating Elements

Appellant believes that the trial court erred in finding that there were any aggravating elements, let alone the three the court found. Pursuant to §921.141(5)(d),(h),(i), FLA. STAT., the trial court found the following three aggravating elements in

Appellant's case: 1) The capital felony was committed while the Defendant was engaged in the commission of a kidnaping; 2) The capital felony was especially heinous, atrocious, or cruel (HAC); and 3) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner (CCP) without any pretense of moral or legal justification. (VI. 962-968) The court gave great weight to all three factors. (VI. 974) This was error.

The only evidence that suggests that Appellant could have shot Mr. Hamman, was his contradictory and inconclusive statement to the police. In the recorded statement, Appellant makes statements about using the Llama pistol that Joel gave him. (XIV. 1593) But, when asked where Mr. Hamman was when he shot him, Appellant stated "I never said I shot him. But, I never – but I was standing there." (XIV. 1593) This not only shows that the State did not prove beyond a reasonable doubt that Appellant shot Mr. Hamman, but it also supports the following arguments that the trial court was wrong in finding the three aggravating elements.

As to the first aggravating element, the trial court found that the capital felony was committed when Appellant was engaged in a kidnaping. The trial court reasoned that it "is not

rational to believe that Hamman was free to leave while being beaten for two or there hours by Walker and Ford." (VI. 962) The court then finds that Mr. Hamman was being held against his will, and Mr. Hamman's "escape clearly proves he was not allowed to leave as they chased him down and placed him in the trunk of Ford's automobile to drive him to a remote area." (VI. 963) Problem, the jury's verdict states that Appellant was convicted of premeditated murder, not felony murder. (V. 812-813) If felony murder was not proven beyond a reasonable doubt to the jury, it is unreasonable for the trial court to find that it was proven beyond a reasonable doubt as an aggravating element. Therefore, this aggravating element should be vacated.

Next, the trial court found that the capital felony met the HAC element, and the CCP element. However, these elements should be vacated because the evidence in the record showed that Appellant was impaired by drugs and his bipolar condition. *See, e.g. Jones v. State*, 332 So.2d 615 (Fla. 1976). Appellant told Dr. Bernstein about his drug use. (XVI. 1854-1857, 1876-1877) Appellant presented the testimony of Dr. Radin who confirmed Appellant's bipolar disorder. (VI. 969, XVIII. Exhibit 1) Also, Dr. Radin and Dr. Bernstein agreed that a person with a

bipolar disorder who self medicates himself with methamphetamine would aggravate his mental condition. (XVI. 1854-1855, 1870, 1876-1877) Dr. Radin classified Appellant's condition, post arrest as moderate. (XVIII. Exhibit 1) This was the same Dr. Radin who had to be incarcerated by the trial court to secure his attendance at Appellant's penalty phase. (IV. 780) While the record does not directly show that Dr. Radin's detention affected his analysis of Appellant, it should be given some consideration. Meanwhile, Dr. Bernstein classified Appellant's condition as severe and chronic. (XVI. 1875) He also testified that a person under the influence of methamphetamine, and coupled with sleep deprivation would not behave normally. (XVI. 1877-1879) There was sufficient evidence to show that Appellant was impaired. This would this counter the trial court's finding beyond a reasonable doubt that Appellant's actions met the HAC element.

As to the CCP element it is only reserved "primarily for execution or contract murders or witness elimination murders." *Hansborough v. State*, 509 So.2d 1081, 1086 (Fla. 1987). Appellant's intent was only to scare Mr. Hamman, not to murder Mr. Hamman. To prove the CCP element, the State has to prove the

following four points beyond a reasonable doubt:

> (1) The murder was the product of cool and calm reflection and not an act promoted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit the murder before the fatal incident; (3)the defendant exhibited heightened premeditation (premeditated); and (4) the defendant has no pretense of moral or legal justification.

Jennings v. State, 718 So.2d 144 (Fla. 1998), quoting *Walls v. State*, 641 So.2d 381, 387-388 (Fla. 1994)

In Appellant's case, his actions were emotional. He was in a rage, scared to death of Mr. Hamman's statements that he called the DEA, and his threats to Appellant's family. (XIV. 1562-1564, 1571-1572) Appellant was under the influence of methamphetamine, and deprived of sleep. Thus, if he did commit the murder, it was in an emotional frenzy, panic, or fit of rage. There was no careful prearraged plan to murder Mr. Hamman, and Appellant's only intent was to scare him. Also, Appellant's moral justification for his actions was protecting his family. Mr. Hamman made statements about knowing where Appellant's family lived, about raping Appellant's mother, and sending the video to his father once a year. (XIV. 1571-1572) Any person will do whatever it takes to protect their family, and Appellant was no

different. Therefore, one could look at Appellant's conviction in the light of his committing a moral act to protect his family. This would also defeat a CCP finding.

As argued in issue three of this brief, there is lingering doubt as to whether or not Appellant or Joel Gibson shot Mr. Hamman. Therefore, based on this doubt and the arguments presented in this section of Appellant's brief, the trial court's finding these three aggravating elements is reversible error. Appellant would ask that this Honorable court order that this court vacate the aggravating elements, remand Appellant's case, and direct the court to enter a sentence of life without parole. §775.082, FLA. STAT.

Mitigating Circumstances

Appellant argues that the trial court committed reversible error in not finding any aggravating elements. Thus, as there should be no aggravating elements, the mitigating elements that were found would de facto outweigh any aggravators. In the alternative he also argues that if the aggravating factors existed, the trial court erred in not finding that the mitigating circumstances outweighed them.

The mitigating factors found by the trial court could fit

under the statutory provision of the "existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty." §921.141(6)(h), FLA. STAT. Even if they do not fit under the statue any mitigating factor can be considered by the court. Appellant argues that the trial court erred in not finding that all of Appellant's mitigating factors existed, and erred in his weighing the mitigators he found.

First, the trial court only gave moderate weight to the fact that on the day of the crime, Appellant had a bipolar disorder, and was under the influence. (VI. 975) This should be afforded great weight as it would directly contract the HAC and CCP elements. Second, the fact that the State was not seeking the death penalty against co-defendant Leigh Ford should be afforded great weight. The State's witnesses testified to Ms. Ford beating Mr. Hamman just the same as Appellant. The other evidence against Appellant to show that he murdered Mr. Hamman was circumstantial. Circumstantial evidence would also have been used against Mr. Ford if she went to trial. Thus, all things between Appellant and Ms. Ford can be considered equal. Being equal, they should have been afforded the same treatment. Thus,

the trial court should have given this fact greater weight in its consideration. Third, the trial court gave moderate weight to Appellant's statement to the police. By the trial court's own finding, Appellant's statements did assist the police "in processing the crimes of which (he) was convicted." (VI. 972) As there were no eyewitnesses to Appellant shooting Mr. Hamman, greater weight should be afforded this statement because it became the crux of the State's case.

Fourth, the mitigating circumstnace that Appellant did not resist arrest is established. While the trial court makes the valid point that no-one has the right to resist arrest. Considering the circumstances, Appellant could have caused a potentially deadly scene at the bus station when confronted with armed police. However, he complied with his arrest. Thus, this circumstance should be at least given some weight.

The fifth mitigating circumstance that should have been found was that Appellant tried to protect his girlfriend. In his recorded statement, he did try to protect Ms. Ford by telling the police that she left the scene, and it that point it would appear that Mr. Hamman was alive. (VI. 971) Appellant would argue that he could have made a statement that Ms. Ford was present during

the shooting, or even worse that she shot Mr. Hamman. However, he chose to protect Ms. Ford. His actions should be granted moderate to great weight.

Sixth, the trial court rejected Appellant's argument that he did not attempt to gain any information from providing information. However, this should be an independent mitigator. The trial court is required to consider any factors in Appellant's background. As the letter from Appellant's sister and his friend Pamela Townsend shows, Appellant was a soft hearted man. (VI. 922-923) This was supported by Appellant's friend, June Robert who testified that Appellant was an outgoing and well spoken man, and she never saw him act out of control in any way. (III. 417-425) Giving a statement without working out a deal, and giving a statement which did not implicate Ms. Ford in the murder confirms the soft-hearted side of Appellant. Therefore, the trial should have found this as a mitigating factor, and should have assigned it some to great weight.

Seventh, Appellant could have harmed Mr. Davis, but instead chose not to. While the trial court found that Appellant would not have motive "to harm a person helping him to further his flight from justice," the reality is that Appellant probably

could have overpowered Mr. Davis and stolen his truck. However, in line with his character as described by his friend Pamela Townsend, sister and Ms. Robert, Appellant did not hurt Mr. Davis. Thus, this mitigating circumstance was established, and the court should have assigned it some weight.

Eighth, the trial court interpreted Appellant's letter to the court as showing remorse, and granted some weight. Appellant urges this court assign this mitigator more weight because of Appellants statements that "he would run, shoot me, I hate myself, I'll have to live with this for the rest of my life..." (VI. 974) Appellant is remorseful, and greater weight should be afforded this element.

Finally, the jury's advisory recommendation is afforded great weight. However, in this case the recommendation was only seven to five. (XVII. 2030-2034) The trial court could have exercised mercy in Appellant's case, and Appellant believes that the trial court should do so. Also, the victim himself was as the trial court found, a bad person. (VI. 974) While this in of itself does not justify killing someone, it should have at least been established and afforded some weight.

Appellant requests that this court find that the trial

court’s decision was error. He requests that the aggravating elements be vacated, and that his death sentence be vacated. In the alternative, he asks this court to assign greater weight to the mitigating factors, and finding that the mitigating factors the court did not find established as proven. Then he requests hat this court find that these mitigating factors outweigh the aggravating factors, and vacate his death sentence.

ARGUMENT

ISSUE V

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING IN PHOTOGRAPHIC EVIDENCE WHICH WERE GRUESOME AND UNDULY PREJUDICIAL.

Standard of Review

The admission of photographic evidence within the trial court's discretion. A trial court's decision to let in photographs "will not be disturbed on appeal unless there is a clear showing of abuse." *Davis v. State*, 875 So.2d 359, 373 (Fla. 2004).

Preservation

This issue was preserved for appellate review when the trial court admitted gruesome and prejudicial photographs over Appellant's objections, and Appellant's motion for mistrial. (XII. 1155-1170, 1174-1179, 1238-1239, XIII. 1322-1326, 1332-1333)

Argument

The trial court abused its discretion in admitting State's exhibits 50 to 54 and 75 to 89 because they were not relevant and they were extremely prejudicial. "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, FLA.

STAT. "All relevant evidence is admissible, except as provided by law." § 90.402, FLA. STAT. This court has "consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence." *Arbelaez v. State,* 898 So.2d 25, 44 (Fla. 2005) (citation omitted). However, in Appellant's case, the objected to photographs should have been excluded because any possible probative value was "substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, FLA. STAT.

Appellant objected to State's Exhibit 49 to 54 which were photographs of blood stains, and the dead body of the victim. (XII. 1165) He argued that the blood stains were irrelevant because the blood had not been tied to the victim, and that it would be more probative than prejudicial to admit the evidence. The State argued that it was corroborative evidence, but also agreed that Appellant would be correct in arguing that the blood was not the victims. (XII. 1166-1167) The trial court even pointed out that it did not see the evidentiary value in the photographs because witnesses had already testified to seeing the

blood stains. (XII. 1167-1168) Despite this lack of evidentiary value, i.e. irrelevant evidence, the trial court allowed this unnecessary and prejudicial evidence to be presented to the jury. It was even more prejudicial because Exhibit 49 was a photograph of the victim's body lying in the street. The jury had the picture of the dead body, a trail of blood, no evidence that the blood was connected to Mr. Hamman, and it was highly improbable that this did not prejudice the jury.

Appellant also objected to Exhibits 75, and 80 through 89 which were various pictures of the victim's body. The trial court found that these photographs would assist the medical examiner in explaining to the jury the cause of Mr. Hamman's death, "and the jury's understanding the cause of death, as well as any aggravators – which is already in evidence with the beatings – then they are relevant." (XIII. 1325) This is not correct. First, the trial court stated that evidence of aggravators was already in evidence. Therefore, admitting the photographs for that reason was cumulative to any aggravators. Second, Dr. Qaiser testified extensively about the bruising to Mr. Hamman, when referring to exhibits 75 and 80 through 89. (XIII. 1334-1346) However, this evidence was not relevant to Mr.

Hamman’s cause of death because Dr. Qaiser testified that Mr. Hamman died of gunshot wounds. (XIII. 1363) Therefore, at a very minimum exhibit 75, and 80-89 were cumulative. At their worst they were also prejudicial by nature of their gruesome nature, and not independently relevant to show cause of death. Therefore, the trial court committed reversible error by allowing in these photographs as well.

ARGUMENT

ISSUE VI.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION FOR STATEMENT OF PARTICULARS AS TO AGGRAVATING CIRCUMSTANCES AND THEORY OF PROSECUTION BECAUSE DUE PROCESS REQUIRES THAT APPELLATN RECEIVE SUCH NOTICE.

Standard of Review

The denial of Appellant's motion was a question of law, and is subject to the de novo standard of review. *North Florida Women's Health and Counseling Services, Inc., v. State*, 866 so.2d 612 (Fla. 2003).

Preservation

This issue was preserved for appellate review when the trial court denied Appellant's Motion for Statement of Particulars as to the Aggravating Circumstances and Theory of Prosecution. (I. 77-87, 544-550)

Argument

At the March 29, 2004 motion hearing, Appellant argued that the State should provide him with a Statement of Particulars as to aggravating elements they planned to present at penalty pahse. Appellant pointed out that under *Darden v. United States*, 430 U.S. 349 (1977), failing to provide notice to a defendant with

aggravating circumstances violates due process. *See also, Stuben v. State*, 366 So.2d 657 (Fla. 1978). In denying Appellant's motion, the trial court noted "I have to uphold some of the laws I don't agree with, but I have to uphold them anyway because that's my duty." (I. 80-81) The trial court unfortunately did not uphold the law correctly in Appellant's case.

This court recently *State v. Steele*, 2005 Fla. LEXIS 2043, 31 Fla.L.Weekly S74 (Fla. 2005) held that in death penalty cases a trial court does not depart from the essential requirements of law by requiring the State to provide a capital defendant pre-trial with notices of the aggravating circumstances it planned to use at penalty phase. Considering that this court in *Steele* found that notices of aggravating elements for penalty phase does not depart from the essential requirements of law, Appellant argues that he should have been given such notice when he requested it pre-trial. Instead he was summarily denied this opportunity. (I. 53) Due process requires that Appellant be given ample notice and an opportunity to be heard. *See,* Amdnt. XIV, U.S. CONST., and Article 1, § 9, FLA. STAT. The trial court's order denied Appellant of this opportunity. *Steele* should be applied, and the trial court's order should be reversed.

ARGUMENT

ISSUE VII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION FOR FINDINGS OF FACTS IN A SPECIAL VERDICT FORM BY THE JURY BECAUSE UNDER *APPRENDI* AND *RING*, SUCH A FINDING IS WARRANTED.

Standard of Review

The denial of Appellant's motion was a question of law, and is subject to the de novo standard of review. *North Florida Women's Health and Counseling Services, Inc., v. State*, 866 So.2d 612 (Fla. 2003).

Preservation

This issue was preserved for appellate review when the trial court denied Appellant's Motion. (I. 53, IV. 589-591)

Argument

The undersigned is aware that this court in *Steele, supra*, recently ruled that a trial court departs from the essential requirements of law by using a "penalty phase special verdict form detailing jurors' determinations on aggravating circumstances." *Id.* However, Appellant presents the following brief argument to protect this argument for any possible future appeals. Under the dictates of *Apprendi, supra*, and *Ring, supra*,

penalty special verdict forms are necessary for the jury to find each aggravating element beyond a reasonable doubt. Under *Ring*, aggravators are elements of the crime, and must be decided beyond a reasonable doubt by a jury. Having a jury enter a finding as to each aggravating element is not contrary to their role, and does not run afoul of a defendant's Sixth Amendment Rights, or any corresponding Florida constitutional right. Therefore, the denial of this Appellant's request for a special verdict was reversible error.

CONCLUSION

Based on the foregoing discussions, Appellant respectfully requests that this court reverse his capital conviction, and any other conviction this finds is deficient. He also requests that this court vacate Appellant's death sentence, and remand his case for a new trial.

Respectfully submitted,

DENISE O. SIMPSON, ESQ.
LAW OFFICE OF
DENISE O. SIMPSON, P.A.
1717 K STREET NW, SUITE 600
WASHINGTON, D.C. 20036
(202) 746-9193
FLORIDA BAR NO. 0981486
COUNSEL FOR APPELLANT

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the following Initial Brief was sent by electronic transmission (e-mail) on March 14, 2006 to Barbara C. Davis, Assistant Attorney General, Florida Attorney General's Office, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, FL 32118, a hard copy was also sent by U.S. Mail to Barbara C. Davis, Assistant Attorney General, and to Robert Shannon Walker, DOC #126605, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026-1160 this 15th , day of March 2006.

_____
Denise O. Simpson, Esq.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Denise O. Simpson, Esq.
Attorney for Appellant