IN THE SUPREME COURT OF FLORIDA

JOHN TROY,

Appellant,

v. CASE NO. SC04-332

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, STATE OF FLORIDA

_____

ANSWER BRIEF OF APPELLEE

_____

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STATEMENT OF THE CASE AND FACTS

Appellant was charged by indictment on October 11, 2001 with first degree murder of Bonnie Carroll, armed burglary and armed robbery. (R I, 13-16). A fourth count was added by information of attempted sexual battery with a weapon of Bonnie Carroll. (SR I, 44-55). Troy was separately charged by information on November 6, 2001 with armed burglary, aggravated battery, armed kidnapping and armed robbery of Tracie Burchette. (SR I, 40-43). Trial by jury resulted in guilty verdicts on all counts. (R V, 867-869; R XXVI, 2229-31). Following a penalty phase presentation of evidence, the jury recommended a sentence of death by a vote of eleven to one. (R VI, 1013; R XXXV, 3476-79).

GUILT PHASE:

Trial defense counsel secured an on-the-record concurrence by his client and in opening statement acknowledged that Troy killed Bonnie Carroll but urged that it was not first degree murder. (R XIX, 1239-43, 1233, 1249).

Melanie Kozak, a friend of Troy, lived with boyfriend Frankie Lacasso. She had contact with Appellant four times on September 11 and 12, 2001. At 5:30 p.m. he arrived in his mother's car and stayed for fifteen minutes on his way to a meeting downtown; he was calm and normal. He came over again at 7:30 or 7:45 and stayed for forty-five minutes. Troy returned a

third time –- this time on foot (usually he came in a car) -– about 10:30 or 11:00. He asked for a syringe to inject cocaine. (R XXIII, 1824-28). Appellant mentioned that he would be leaving the next morning (September 12) to stay with his grandfather in Tennessee; he did not seem violent and she was not scared. (R XXIII, 1829). He told her he might come back in the morning before he left for Tennessee. Troy returned unexpectedly about 2:00 a.m., arriving in a vehicle she had never seen before, Bonnie Carroll's old car. Troy said it was a male neighbor's car. She went with him in the car and he gave her forty dollars to buy cocaine for him. He claimed the neighbor lent him money to buy cocaine. She noticed scratches on his face and Appellant explained his girlfriend had thrown an ashtray at him. After she purchased the powdered cocaine he came into her house, cooked it up and injected it into his own arm with a syringe she gave him. Troy mentioned at this meeting he was going and "hiding out" with his grandfather in Tennessee. (R XXIII, 1830-1840).[1]

Karen Curry lived at the same Timberchase Apartment complex as Troy; he lived in Apartment 216. (R XIX, 1253-57). At about 12:30 a.m. the morning of September 12 she was interrupted while reading by pounding on the glass door that led to her bedroom. She asked who it was, he said John, and she responded that it

[1]He later told Melanie he couldn't kill her (Melanie) because he liked her (R XXIII, 1843).

was not a good time and he needed to go away. He left; she was scared to death and called the police. She informed the detective where Troy lived. The officer went up to talk to him but couldn't find him. (R XIX, 1263-65). Officer Derek Gilbert responded to Curry's call at 12:19 a.m. She seemed pretty shaken up and told him what occurred. Gilbert went to the Troy apartment, a female answered the door, allowed him in and a quick search demonstrated that he was not there. Gilbert told her of the downstairs complaint, then advised Curry to call 911 if there was anything more suspicious. Gilbert made a quick circle around but no one was out. (R XIX, 1273-82).

Victim Bonnie Carroll's mother Debbie Ortiz last saw her daughter alive at about 11:15 p.m. on September 11. After dinner and watching a movie together 20-year-old Bonnie and her 2-year-old daughter Cynthia went home at 11:15 p.m., a twenty-minute drive away. (R XX, 1303). Ortiz drove to her daughter's apartment complex the next day at about 5:25 p.m. Bonnie's car was not parked there; she entered the unlocked door and found Bonnie's icy cold body on the floor. She called 911. (R XX, 1307-09). Associate medical examiner Dr. Michael Hunter was contacted by his investigator at 2:05 a.m. and responded to the scene of the homicide on September 13. (R XX, 1337). There was a knife in close vicinity to the body, electrical cord beneath the victim and on the bed. Cord on the victim's thigh had been

tied. (R XX, 1342). His findings were consistent with the murder occurring around midnight of September 12. (R XX, 1345). His observations at the scene included a cloth tied around the victim's neck, numerous stab wounds to the front of the body, large incised wounds to the neck area, and blunt force impact injuries around the face. A portion of fabric was wedged within the back of her mouth and a large quantity of blood within the hair. (R XX, 1346). A knife was adjacent to the victim and a knife handle was found in a different location of the residence. (R XX, 1348). The autopsy revealed a double-knotted, loosely-tied cloth on the back of the neck, petechial hemorrhages in the eyes (possibly but not conclusively indicating strangulation). The hyoid bone and cartilages were intact but he couldn't completely rule out strangulation. As to the cloth found inside her mouth it had been folded over and wedged firmly in the back of the mouth; it was blood-soaked and difficult to remove. (R XX, 1352-57). Blood on the fabric indicated that she was alive at the time. There were multiple areas of blunt impact injuries to face, chin and scalp, small fresh injuries to the external genitalia and small faint bruising on both thighs. (R XX, 1359-61). No sperm was identified but Dr. Hunter thought all the factors were consistent with someone attempting to sexually batter the victim before she was killed. (R XX, 1366). Bonnie Carroll had forty-four individual stab wounds, three areas of

incise wound injury to the neck, a minimum of seven impact injuries to the face, multiple defense wounds on the hands, mostly on the front and areas of abrasions and contusions. (R XX, 1390-91). A knife blade was broken off within the victim's body; he became aware of it by doing an x-ray. A knife handle was recovered at the scene. The broken blade could actually have prolonged her life. A weapon was recovered at the scene so two weapons were associated with the injuries. (R XX, 1413-16). There were a minimum of fifty-four injuries to Bonnie Carroll. (R XX, 1453). There was no evidence of drugs in her system but a blood alcohol level of .037 would be consistent with having had a glass of wine. (R XX, 1460).

A series of stipulations were recited to the jury including: (1) one cutting from Appellant's blue jeans matched the DNA profile of Bonnie Carroll (and could not have originated from Tracie Burchette or Troy); (2) another cutting from Appellant's blue jeans matched the DNA profile of Tracie Burchette (and could not have originated from Carroll or Troy); (3) another cutting found on Appellant's jeans matched his profile (and could not have originated from Carroll or Burchette); (4) Appellant's t-shirt tested positive for blood and the DNA profile matched that of Burchette; (5) Appellant's left tennis shoe had blood matching the DNA profile of Carroll; (6) DNA from victim Carroll's fingernails revealed a mixture of profiles of

Carroll and Troy and subtracting her profile revealed a form profile matching that of Troy; (7) two pieces of broken glass were recovered from Carroll's bedroom; the DNA profile found on one piece lying on the bra of the victim partially under her matched her DNA and the other piece of glass found to the left of the victim's body on the floor matched the DNA profile of Troy; (8) DNA on a knife handle from the Carroll bathroom had a DNA profile of a mixture of the DNA matches that of Carroll and Troy; (9) a steak knife recovered from the Carroll master bedroom matches the DNA profile of Carroll and could not have originated from Troy; (10) an electrical cord recovered from the bedroom floor next to Carroll matches the DNA profile of the deceased; (11) a two-by-four piece of wood recovered in a ditch in Fort Myers matches the DNA profile of Tracie Burchette. (R XXI, 1494-97).

Latent print examiner Jackie Scogin got a match of a fingerprint of Troy to a glass found on the kitchen counter. (R XXI, 1515). Technician Valerie Lanham described a wallet at the end of the countertop with no currency inside. (R XXII, 1657). FDLE crime lab microanalyst Heather Velez testified that a knife handle (State Exhibit 5) and the knife blade (State Exhibit 25) had at one time been a single piece. (R XXII, 1669).

Appellant's former girlfriend Marilyn Brooks testified by

video. She moved in with Troy a week before September 11. (R XXII, 1695). Troy did not have his own car; she had one with power steering problems (it wouldn't hold fluid). If he wanted to use a car he would either use hers or his mother's. (R XXII, 1699). When Appellant returned home from work on September 11 and after dinner he left the residence in his mother's car for an appointment around 7:00 or 7:30. He was late in returning and she was upset with him. Later she found that he had lied about some things and they argued. (R XXII, 1702). Troy said he was going to go to the store and get something to drink. He walked. (R XXII, 1704). She expected him to be gone about twenty minutes but he was gone about an hour and a half and then he returned in a vehicle, dropped off by someone. (R XXII, 1706-1708). Brooks was angry, they argued about lying. She said she was going to leave and he tried to calm her down. (R XXII, 1709-12). She did not throw anything at him or hit him. (R XXII, 1714).[2]

Troy said he was going to walk by the lake to think about things. He did not return that night. (R XXII, 1718-19). Later that night an officer came to the apartment and informed her Troy had scared the lady downstairs (Karen Curry). (R XXII, 1720). Subsequently she learned that Tracie Burchette had been

[2]The State sought to introduce as motive testimony in a bench conference, that Troy admitted his bad urine test and the parole officer was about to violate him but the court ruled there was an insufficient nexus and would not allow it. (R XXII, 1715).

hurt and later that Troy had been arrested. (R XXII, 1730-31).

Detective Laura Jaress talked to officers at the homicide scene on September 12, interviewed Appellant's mother, learned that Troy may have been involved in another incident earlier in the day, and was made aware that Carroll's car was missing. She interviewed Tracie Burchette, who had a skull fracture, at the Bayfront Medical Center the next morning. (R XXIII, 1799-1812).

Glenn Mack, a neighbor of Tracie Burchette, saw her stumbling out of her house in shock, a bloody mess from top to bottom and all beat up at 7:30 a.m. on September 12. Her hands were taped or tied with electrical cord and tied behind her back. He called 911 and was present when police and paramedics arrived. (R XXIII, 1846-50).

Tracie Burchette, a nurse, was a friend and colleague of Appellant's mother and had training in dealing with difficult situations with psychiatric involuntary patients and effective aggression management. She had known Debra Troy for about eight months. (R XXIII, 1853-56). Appellant and Debra Troy had lived with her about seven to ten days and moved out. After his moving out Burchette did not want to have a relationship with John Troy. Once after he moved out she loaned him thirty dollars and shortly before September 11 Troy came over and tried to get money from her but she refused to give it to him since he still owed her and his credit was no longer any good. He once

asked to use her vehicle and she said no. (R XXIII, 1857-58). Appellant came over to her house around 6:30 a.m. on September 12 while she was sleeping. Troy claimed that he was on his way to work, that his car had broken down and asked to use the phone. He intimated another person was waiting in the car nearby. (R XXIII, 1859-61). She made coffee and they discussed the terrorist attack. Troy was coherent, not acting paranoid. He asked to use her computer and went into a bedroom; he returned a minute later and asked her to turn it on. She thought the request was odd since she always left the computer on. She leaned over to turn on the computer and Appellant repeatedly hit her with a two-by-four. (R XXIII, 1864-70). She began scratching him in the belief he would get away and she wanted to get DNA under her fingernails. He said he would stop hitting her if she stopped screaming. (R XXIII, 1872). Appellant told her he needed her car and money and that he had done something really bad. He mentioned he was going to kill himself and mentioned going to Tennessee. He asked her for her ATM card and the pin number and she gave him the wrong PIN number. He took her purse and tied her hands with cords. He put tape on her face and said he would call someone to rescue her –- he wanted an hour to get away. Troy opened the garage door and backed the car out, then returned and took a jar of coins which he said he would need. She called 911 from the

bathroom and made it outside where she met neighbor Glenn Mack. (R XXIII, 1873-82). A stipulation was read to the jury regarding her injuries and treatment at the hospital. (R XXIV, 1905-06).

Debra Troy, Appellant's mother, testified that John Troy was thirty-three years old. He did not have a car and relied on her car to go to work every day. It was imperative that if he borrowed it that he return it so she could have it. The car had been in the shop, a problem with the power steering. Most of the time she took him to work or to meet a ride for work. Someone named Jessie, a co-worker who had an old Cadillac, started picking him up for work between 6:00 and 6:30 a.m. (R XXIV, 1907-12). After dinner on the evening of September 11, Appellant had an appointment and she allowed him the use of her car. When he returned he phoned his grandfather and seemed edgy or nervous. He made a comment about not liking some guy. (R XXIV, 1915-17). Debra went to bed and stated she was unaware of any argument he had with Marilyn. She got up at 5:00 a.m., saw Marilyn crying and was told there had been an argument, that Appellant had left and not returned home. (R XXIV, 1918). Upon her return from work, she was concerned and started calling friends. She called Tracie's neighbor who asked if she knew Tracie had been attacked. She went to Glenn Mack and on her return, police and forensic people were at the apartment

complex. (R XXIV, 1919-21). When told that Appellant attacked Tracie, she worried he was depressed and suicidal or would be going to see his grandfather in Tennessee. (R XXIV, 1922-24). Debra Troy learned there had been a homicide in the building and that Appellant had been apprehended in Naples and arrested in regard to the Burchette incident. Subsequently, she visited Appellant in jail; he explained that Carroll invited him to her apartment, that an argument and physical struggle ensued. When she asked him why he left the house with a knife, he said he was feeling paranoid because he was using cocaine. (R XXIV, 1927-28). Troy admitted putting a scarf in Carroll's mouth because she was making noise and admitted stabbing her and taking her money, car and keys. Debra was unaware of any drug use; he appeared normal around her. (R XXIV, 1925-34).[3]

Deputy Kevin Angell, a traffic officer in Naples, was involved in a felony stop of a reported stolen vehicle. The female was Linda Pasnak and the male was Appellant Troy. Angell had been informed that Troy had a warrant for home invasion robbery and gave Miranda rights. (R XXIV, 1951-56). After talking to Pasnak, they received information about a bloody two-by-four and Fort Meyers police recovered it. (R XXIV, 1957-58). Troy claimed that he borrowed the car from Burchette, that his companion's name was Brenda and that he was going to work but

[3]The trial court wouldn't change its ruling about the urine test -- R XXIV, 1942.

had the day off. (R XXIV, 1967-71).

A stipulation was read to the jury that there had been an attempted transaction on Tracie Burchette's ATM card at SunTrust Bank in Arcadia at 8:24 a.m. on September 12, 2001 (R XXIV, 1988-89). The State rested. (R XXIV, 1996).

PENALTY PHASE:

Department of Corrections probation specialist Sandy Hotwagner was assigned to Troy's case on July 25, 2001 when he was released from prison and was to supervise him for the remaining time from July 2001 to June 4, 2003. (R XXVII, 2348-49). Co-worker Sheila Henderson instructed Troy on his orders of conditional release and Hotwagner instructed him a second time on his orders that same day. The conditions were explained to him and the punishment for violation can be a revocation of conditional release and a return to prison for completion of prison sentence. (R XXVII, 2350-54). Troy signed the terms and conditions of his conditional release on July 27, 2001. See also State Exhibit 1. (SR I, 72-73). On September 11 and 12 Appellant was on conditional release for three offenses of robbery with a deadly weapon. (R XXVII, 2355). Tennessee also had a hold on him for parole purposes for aggravated assault. (R XXVII, 2359). Hotwagner informed Troy she was going to have him take a urinalysis test for the presence of alcohol or drugs. Troy was nervous he was not going to pass because he said he

had used marijuana at DOC to celebrate his release from prison. (R XXVII, 2363-64). Appellant was given additional time for retesting (to allow the drugs out of his system). Troy was informed of the next scheduled drug test on August 23, 2001. (R XXVII, 2365). On September 11, 2001 he came in again for the next scheduled drug test. (R XXVII, 2373).[4]

Tennessee parole officer supervisor William Patterson, Jr. testified and described Troy's status of being on parole with the state of Tennessee. (R XXVII, 2374-84).

Circle K convenience store employee Angela Smith (formerly Owens) testified that she was robbed in Pensacola on May 10, 1990. The assailant put a large kitchen knife to her neck. (R XXVIII, 2396-2402).

Pensacola patrolman Sergeant Alfred Fryer learned of three armed robberies of three Circle K's within three or four miles of each other in 1990. He became engaged in a high speed chase with Appellant. After the apprehension, Appellant confessed to all three robberies. Appellant's demeanor was normal and said he committed the robberies for money to buy drugs. A twelve inch steak knife and eighty-nine dollars in cash were recovered

[4]The State proffered Hotwagner's testimony that Troy was scheduled for a meeting at 6:00 p.m. on September 11 with First Step Drug Treatment for random drug testing of marijuana and cocaine and he came back positive for cocaine. (R XXVIII, 2391-92). Troy had been informed there would be no second chance; if he tested positive on the drug tests, a violation would be sent to the parole commission – he would be arrested and returned to

from the vehicle or his person. Troy mentioned only touching Angela Smith with his hands. (R XXVIII, 2405-2414).

The State introduced victim impact testimony from the victim's sister Amanda Green and parents Debbie and Bob Ortiz. (R XXVIII, 2423-30). State Exhibits 1-6 were introduced (R XXVIII, 2416-17, 2431).

The defense called a number of family members including Appellant's mother Debra Troy (R XXVIII, 2440-2471; R XXXIV, 3214-57), Appellant's father John Troy VI (R XXIX, 2555-2616), sister Natalie Wallace (R XXIX, 2627-39), grandmother Hilda Troy (R XXX, 2672-96), grandfather John Troy V (R XXX, 2696-2726), aunt Kate Tucker (R XXX, 2788-93), cousin Angie Mefford (R XXX 2796-2805), stepmother Vicki Pemberton (R XXXI, 2819-33), her aunt Gayle Dale (R XXIX, 2617-27), and Joey Dale (R XXIX, 2639-2664), Joel Troy (R XXXIII, 3157-73) and Shane Troy (R XXXIII, 3174-86). The defense also called Dr. Donald Marks (R XXVIII, 2473-2536) and psychiatrist Dr. Michael Maher (R XXXII, 2987-3086), a county jail nurse Debra Garrison (R XXVIII, 2537-44), teacher Marilyn Cannon (R XXX, 2768-87), Tennessee court reporter Betty Menck (R XXX, 2736-62) and a number of corrections officers (Kenny Byrd, Lisa Pitts, Jim Davis, Fred Holloway, Marshall Campbell)(R XXXI, 2834-2902). The defense additionally called substance abuse counselors T. K. Parson (R

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the prison system. (R XXVIII, 2394-95).

XXXI, 2902-47) and Sarah Gentile (R XXXIII, 3097-3141), former girlfriend Marilyn Brooks via closed circuit television (R XXXII, 2957-74), Deputies Raymond White (R XXXII, 2976-83) and William Franciosi (R XXXII, 2984-86) and three time convicted felon Gerald Brancik (R XXXIII, 3142-55).

Appellant's mother Debra Troy testified that after his arrest Troy admitted to her that he had been to a First Step meeting, had a positive result for cocaine in his urine and that he was going back to prison because of that test. (R XXVIII, 2445-46). One of the stress factors opined by defense witness Dr. Maher was that Appellant had returned to drug use and was afraid of a positive drug test. (R XXXII, 3022). Dr. Maher acknowledged his awareness that Appellant told his mother after his positive drug test that the First Step person had told him he was going back to prison. Troy told him he had a bad attitude about the drug testing. (R XXXII, 3075). Maher agreed that it was important to know that Appellant went to Melanie's house at about 10:30 or 10:45 p.m. before the murder and told her he was going to hide out in Tennessee because he had tested dirty on his urine. (R XXXII, 3081). At the Spencer[5] hearing Detective Grodoski testified in his interview with Appellant following the homicide that on the evening of September 11th he had gone to the First Step drug counseling and knew he was going

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

to get violated, that he wasn't going to pass the urine test because he had been using narcotics (cocaine and heroin) (R X, 1718-19) and was going back to prison.

On cross-examination Dr. Maher acknowledged that Troy's criminal history is consistent with antisocial personality traits (R XXXII, 3042), that deceit and manipulation are central features of antisocial personality disorder. (R XXXII, 3043). Maher agreed that the criteria in the Diagnostic and Statistical Manual, Fourth Edition for diagnosis of somebody with antisocial personality disorder includes a pervasive pattern and disregard for and violations of the rights of others as indicated by such things as failure to conform to social norms with respect to lawful behaviors by deceitfulness as indicated by repeated lying or conning others for personal profit or pleasure, impulsivity, irritability and aggressiveness as indicated by repeated physical fights or assaults and that Troy has demonstrated such factors. Another element of the disorder included lack of remorse as indicated by being indifferent or rationalizing having hurt, mistreated or stolen from another. (R XXXII, 3045-47). He opined that Appellant had a personality disorder with antisocial traits. (R XXXII, 3048-49).

The State called rebuttal witness William Patterson and introduced State Exhibits 9 and 10. (R XXXIV, 3284-94).

The trial court entered its Sentencing Order Following Jury

Recommendation of Death on January 23, 2004. (R X, 1623-1647). The court found as aggravators:

(1) The capital felony was especially heinous, atrocious, or cruel and assigned it great weight. (R X, 1630-32).

(2) That Appellant was previously convicted of a felony or of a felony involving the use or threat of violence and assigned it considerable weight. (R X, 1632-33). These included three armed robberies in Escambia and Santa Rosa counties, an aggravated assault with a weapon in Tennessee; and four offenses related to victim Tracie Burchette: burglary of a dwelling while armed with a dangerous weapon, aggravated battery, armed kidnapping, and robbery with a deadly weapon.

(3) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. (R X, 1633-34). Considerable weight was assigned to it.

(4) The court also assigned considerable weight to the during the commission or attempt to commit a robbery and sexual battery aggravator. (R X, 1634-35).

(5) The trial court also found the pecuniary gain aggravator but noted it would be improper doubling to consider with the robbery aggravator. (R X, 1636).

In mitigation the court found the presence of the two statutory mental mitigators (R X, 1636-39) as well as numerous

non-statutory mitigating factors. The non-statutory mitigators were assigned little or minimal weight. (R X, 1639-45). The court imposed a death sentence.

Appellant Troy now appeals the judgment and sentence of death imposed (R X, 1655) and the State has filed a notice of cross-appeal (R X, 1656).

SUMMARY OF THE ARGUMENT

Issue I: Florida Statute 775.051 did not violate Appellant's due process and equal protection rights under the Constitution. The United States Supreme Court has previously sustained the constitutional validity of a similar statute against a due process challenge in Montana v. Egelhoff, 518 U.S. 37 (1996). The district courts of appeal have approved the constitutionality of the statute. Cuc v. State, 834 So. 2d 378 (Fla. 4th DCA), rev. den., 847 So. 2d 975 (Fla. 2003); Barrett v. State, 862 So. 2d 44 (Fla. 2d DCA 2003). Appellant's accompanying challenge that the statue violates equal protection of the law is similarly meritless. The legislature's decision to create an exception to allow an intoxication defense for the use of a controlled substance under chapter 893 pursuant to a lawful prescription issued to a defendant by a practitioner as defined in F.S. 893.02 is not invidious discrimination but rather rationally related to promoting a public policy that lawful use of drugs under a physician's advice does not incur

criminal penalty if such use leads to unexpected consequences; such use might be characterized as involuntary intoxication warranting lenity under the law. See Brancaccio v. State, 698 So. 2d 597 (Fla. 4th DCA 1997); Carter v. State, 710 So. 2d 110 (Fla. 4th DCA 1998).

Issue II: A review of the totality of the evidence demonstrates that there was sufficient evidence in the circumstances to support a jury conclusion that Appellant attempted a sexual battery. Additionally, even if the evidence were deemed insufficient, any error would be harmless as to the first-degree murder conviction as there was overwhelming evidence of premeditation and felony murder (homicide committed during a burglary and robbery).

Issue III: Appellant was not denied a fair hearing at penalty phase by the trial court's ruling that if Appellant desired to address the jury during the penalty phase he must be subject to cross-examination under oath. See Johnson v. State, 608 So. 2d 4 (Fla. 1992); Chandler v. State, 702 So. 2d 186 (Fla. 1997). Appellant was given the opportunity to address the trial court prior to sentencing.

Issue IV: The trial court's exclusion of Michael Galemore's testimony did not violate the Eighth Amendment nor result in an unreliable penalty hearing. Galemore had no personal knowledge of Appellant and it was unnecessary for him to describe

conditions in prison. Appellant's proffer was also insufficient to demonstrate error to an appellate court.

Issue V: The lower court did not err in failing to instruct the jury on the statutory age mitigator for the thirty-three year old Appellant. There was no abuse of discretion. Caballero v. State, 851 So. 2d 655 (Fla. 2003). Even if there were error it would be harmless since the trial court found and gave weight to the mental and/or emotional mitigation factors to which age might be tangentially related.

Issue VI: The trial court did not err reversibly in its Sentencing Order. In context the trial court explained that an evaluation of the totality of the aggravation and mitigation demonstrated the appropriateness of the imposition of a sentence of death.

Issue VII: Appellant is not entitled to relief under Ring v. Arizona, 536 U.S. 584 (2002). In the instant case the jury returned unanimous guilty verdicts not only of first-degree murder but also of multiple counts of burglary, robbery, aggravated battery and kidnapping. See Doorbal v. State, 837 So. 2d 940 (Fla. 2003); Lugo v. State, 845 So. 2d 74 (Fla. 2003); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003). The death penalty is appropriate under this Court's proportionality jurisprudence.

Cross Appeal Issue I: The lower court erred in ruling,

pursuant to Gonzalez v. State, 829 So. 2d 277 (Fla. 2d DCA 2002) that the State's failure to provide notice it was seeking the death penalty precluded the State from having its mental health expert examine the defendant.

Cross Appeal Issue II: The trial court correctly ruled at the Spencer hearing that defense examination of Detective Grodowski opened the door to admission of Appellant's statements. Troy's admissions demonstrate that the homicide was committed to avoid arrest. The lower court erred in refusing to consider and find this aggravator.

ARGUMENT

ISSUE I

WHETHER F.S. 775.051 VIOLATES DUE PROCESS AND EQUAL PROTECTION GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Appellant Troy filed a pre-trial motion to declare F.S. 775.051 unconstitutional as violative of the right to due process of law (R III, 486-489) and another motion to declare the statute unconstitutional as violative of equal protection of the law (R III, 510-512). At a hearing on July 20, 2003, the trial court heard argument on the motion including the prosecutor's reliance on Montana v. Egelhoff, 518 U.S. 37 (1996) and Cuc v. State, 834 So. 2d 378 (Fla. 4th DCA 2003) and denied both motions to declare the statute unconstitutional. (R XI, 141-154; R IV, 672).

Whether challenged statutes are constitutional is a question of law which the appellate court reviews de novo. Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Commission, 838 So. 2d 492 (Fla. 2003). In Montana v. Egelhoff, 518 U.S. 37 (1996) the Supreme Court considered whether the Due Process Clause was violated by a Montana statute providing that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense." Id. at 40. The state court had reversed his conviction of two counts of deliberate homicide, reasoning that he had been deprived of his due process rights to have the jury consider his voluntary intoxication on the issue of his acting knowingly and purposely. In his plurality opinion Justice Scalia noted that the defendant's task was to establish that his right to have a jury consider evidence of his voluntary intoxication in determining whether he possessed the requisite mental state was a fundamental principle of justice. Historical practice had rejected inebriation as a defense and the defendant failed to show that the "new common law" rule -- that intoxication may be considered on the question of intent -- was so deeply rooted as to be a fundamental principle enshrined by the Fourteenth Amendment. That showing had not been met -- one fifth of the States either never adopted the "new common law"

rule or have recently abandoned it. Id. at 48. The Court found it understandable for States to resurrect the common law rule prohibiting consideration of voluntary intoxication in the determination of mens rea because that rule has considerable justification -- a large number of violent crimes are committed by intoxicated offenders, disallowance of consideration of voluntary intoxication has the effect of increasing the punishment for all unlawful acts committed in the state and thereby deters drunkenness or irresponsible behavior while drunk, serves as a specific deterrent, and comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences. Id. at 50. It also makes sense to exclude misleading evidence -- juries may be too quick to accept the claim that the defendant was biologically incapable of forming the requisite mens rea. Id. at 51. In summary, the previous rule allowing a jury to consider evidence of a defendant's voluntary intoxication where relevant to mens rea "is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental, especially since it displaces a lengthy commonlaw tradition which remains supported by valid justifications today." Id. at 51. Thus,

> The people of Montana have decided to resurrect the rule of an earlier era,

> disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue. Nothing in the Due Process Clause prevents them from doing so, and the judgment of the Supreme Court of Montana to the contrary must be reversed. (Id. at 56)

In a concurring opinion Justice Ginsburg agreed that States enjoy wide latitude in defining the elements of criminal offenses and that defining mens rea to eliminate the exculpatory value of voluntary intoxication does not offend a fundamental principle of justice.[6] Id. at 59.

A. Due Process of Law:

Since Egelhoff the Florida legislature has enacted F.S. 775.051. Voluntary intoxication is not a defense to any offense proscribed by law and evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense and is not admissible to show the defendant was insane at the time of the offense

[6]Not surprisingly, at least some of the lower federal Courts of Appeal have followed the decision in Egelhoff. See, e.g., Goodwin v. Johnson, 132 F.3d 162, 191 (5th Cir. 1998); Gary v. Dormire, 256 F.3d 753, 758-759 (8th Cir. 2001)("We reject the petitioner's argument that States must redefine the criminal offense to eliminate the mens rea element for voluntarily intoxicated defendants. As Justice Ginsburg explained, it does not violate the Due Process Clause for States to enact "a measure less sweeping, one that retains a mens rea requirement, but 'defines culpable mental state so as to give voluntary intoxication no exculpatory relevance.'" Id., at 60, n. 1 (citing Egelhoff, 518 U.S. at 73 (Souter, J., dissenting)).").

(other than an exception not applicable to the instant case).[7] Florida appellate courts have rejected constitutional challenges. See Cuc v. State, 834 So. 2d 378 (Fla. 4th DCA 2003), rev. den., 847 So. 2d 975 (Fla. 2003) (rejecting defense contention that trial court had violated the defendant's right to due process of law when it excluded the defense of voluntary intoxication pursuant to F.S. 775.051 and noting that in Montana v. Egelhoff, 518 U.S. 37 (1996) the people of the State of Florida have decided to resurrect the rule that intoxication is not a defense to specific intent crimes); Barrett v. State, 862 So. 2d 44 (Fla. 2d DCA 2003) (affirming first degree murder conviction and approving trial court's ruling that F.S. 775.051 is constitutional and finding that the due process analysis in

[7]Florida, in 1999, joined the group of forward-looking States listed in footnote 2 of Egelhoff to abandon the "new common-law" rule (that intoxication may be considered on the question of intent) and resurrected the common-law rule prohibiting consideration of voluntary intoxication in the determination of mens rea. It is, of course, not the first time that Florida has been in the vanguard of reform in criminal law matters. Recently, for example, Florida was cited by the United States Supreme Court as among the elite in legislatively proscribing the execution of mentally retarded criminal. See Atkins v. Virginia, 536 U.S. 304, 153 L.Ed.2d 335, 346 (2002)(". . . but in 2000 and 2001 six more States -- South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina -- joined the procession."). Obviously, there is an emerging consensus developing, much as the four States that have adopted legislation prohibiting execution of offenders under age eighteen since Stanford v. Kentucky, 492 U.S. 361 (1989). See Roper v. Simmons, ___ U.S. ___, 125 S.Ct. 1183 (March 1, 2005).

Egelhoff applies equally under the Florida and United States Constitutions); Cobb v. State, 884 So. 2d 437 (Fla. 1st DCA 2004) (defendant's voluntary ingestion of prescription and over-the-counter medication in amounts exceeding prescribed dosages did not support a claim of involuntary intoxication, but rather supported only finding of voluntary intoxication which was not a defense to attempted murder and aggravated battery); Gibbs v. State, --- So. 2d ---, 30 Fla. L. Weekly D 530 (Fla. 4th DCA February 23, 2005).

Appellant correctly notes (Brief, p. 21) that during the jury charge at the end of trial -- when discussing simple battery as a lesser included offense to attempted sexual battery -- that voluntary intoxication is not a defense to any offense prohibited by law (R XXVI, 2204). The instruction was certainly adequate to convey the legislative intent expressed in F.S. 775.051.[8]

Appellant argues that the Montana and Florida statutes are different. Appellee would submit that both are very similar.

[8]Appellee understands Troy's complaint to be that no such instruction on the elimination of the defense of involuntary intoxication should have been given. If, however, the complaint is rather to the placement of the instruction at the attempted sexual battery -- simple battery discussion or that he was improperly denied a jury pardon to simple battery by the instruction, it would be meritless, especially given the specific concession by Troy and his counsel that Troy did cause the death of Bonnie Carroll (R XIX, 1239-43, 1249; R XXV, 2103,

Both F.S. 775.051 and Montana Code Ann. § 45-2-203 provide that voluntary intoxication is not a defense to a criminal action and that intoxication evidence is not admissible on the accused's mental state. Both statutes provide an exception for involuntary intoxication. The Montana statute adds the proviso to the proscription "unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition." In similar fashion F.S. 775.051 adds the exception for admissibility of such evidence "when the consumption, injection, or use of a controlled substance under chapter 893, Florida Statutes, was pursuant to a lawful prescription issued to the defendant by a practitioner as defined in s. 893.02, Florida Statutes." The House of Representatives Committee Analysis Comments indicated the desire to retain the law expressed in Brancaccio v. State, 698 So. 2d 597 (Fla. 4th DCA 1997) and Carter v. State, 710 So. 2d 110 (Fla. 4th DCA 1998).

Appellant contends that the views of the Egelhoff dissenters along with his reading of Justice Ginsburg's concurrence supports the conclusion that F.S. 775.051 must be declared unconstitutional as an improper evidentiary exclusionary rule.

2115).

All commentators are not so sanguine. One has observed that although the four dissenters in Egelhoff refused to read Montana's exclusionary statute as an implicit redefinition of the mens rea element of deliberate homicide and would have held a criminal judgment effected through an evidentiary proscription violated procedural due process, Justice Ginsburg's "liberal reading of Montana's exclusionary statute as an implicit redefinition of the state's substantive criminal law severely limits the practical import of her agreement with the dissent." Brett G. Sweitzer, Comment: Implicit Redefinitions, Evidentiary Proscriptions, And Guilty Minds: Intoxicated Wrongdoers After Montana V. Egelhoff, 146 U. Pa. L. Rev. 269, 285 (1997). While Appellant may posit that the legislature could have chosen a different or better way to accomplish its goal, Egelhoff does not condemn what it has done. As noted in footnote 4 of the plurality opinion, 518 U.S. at 50:

> As appears from this analysis, we are in complete agreement with the concurrence that § 45-2-203 "embodies a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions," *post*, at 57. We also agree that the statute "'extract[s] the entire subject of voluntary intoxication from the mens rea inquiry,'" *post*, at 58. We believe that this judgment may be implemented, and this effect achieved, with equal legitimacy by amending the substantive requirements for each crime, or by simply excluding intoxication evidence from the

> trial. We address this as an evidentiary statute simply because that is how the Supreme Court of Montana chose to analyze it. (emphasis supplied)

Justice Ginsburg in her concurrence responded to the criticism by Justice Breyer that the Montana statute could have been drafted differently. Ginsburg, Egelhoff at 60 n1:

> Justice Breyer questions the States' authority to treat voluntarily intoxicated and sober defendants as equally culpable for their actions. See *post*, at 80, 135 L.Ed.2d, at 390-391. He asks, moreover, *post*, at 79-80, 135 L.Ed.2d, at 390-391, why a legislature concerned with the high incidence of crime committed by individuals in an alcohol-impaired condition would choose the course Montana and several other States have taken. It would be more sensible, he suggests, to "equate voluntary intoxication [with] knowledge, and purpose," *post*, at 80, 135 L.Ed.2d, at 390-391, thus dispensing entirely with the *mens rea* requirement when individuals act under the influence of a judgment-impairing substance. It does not seem to me strange, however, that States have resisted such a catchall approach and have enacted, instead, a measure less sweeping, one that retains a *mens rea* requirement, but "define[s] culpable mental state so as to give voluntary intoxication no exculpatory relevance." See *post*, at 75, 135 L.Ed.2d, at 388 (Souter, J., dissenting). Nor is it at all clear to me that "a jury unaware of intoxication would likely infer knowledge or purpose" in the example Justice Breyer provides, *post*, at 79, 135 L.Ed.2d, at 390. It is not only in fiction, see J. Thurber, The Secret Life of Walter Mitty (1983) (originally published in *The New Yorker* in 1939), but, sadly, in real life as well, that sober people drive while daydreaming or

> otherwise failing to pay attention to the road.

Appellant's contention that F.S. 775.051 must be deemed unconstitutional as merely attempting to effectuate a change in evidentiary matters must be rejected. As stated in Barrett v. State, 862 So. 2d 44 (Fla. 2d DCA 2003):

> Substantively, section 775.051 addresses the mens rea element of criminal offenses by stating that voluntary intoxication is not a defense to criminal conduct and cannot be used to show that the defendant lacked the specific intent to commit a crime. This is consistent with the State's interest in making persons who voluntarily become intoxicated responsible for their behavior. *See Egelhoff*, 518 U.S. at 49-50, 116 S.Ct. 2013. However, the statute also addresses procedural matters by excluding, at trial, evidence of voluntary intoxication.
>
> Although section 775.051 has both substantive and procedural elements, this does not render the statute constitutionally infirm when the procedural provisions "are intimately related to the definition of those substantive rights." *See Caple*, 753 So. 2d at 54. As was the case with the Montana statute under Justice Ginsburg's analysis, section 775.051 effects a substantive change in the definition of mens rea, and it is not simply an evidentiary rule. *See Egelhoff*, 518 U.S. at 57-60, 116 S.Ct. 2013.

To the extent that the criticism of the Florida statute is that the placement in the statute books suggests that it was merely a change in the evidence code, that is mistaken. See Fla. H.R. Comm. On Crim & Pun. CS for HB 421 & 485 (1999) Staff

Analysis 7 (March 3, 1999) noting that an amendment "removed reference to the bill as creating section 90.959 of Florida Statute." This was done "in order that the new statute be placed somewhere other than in chapter 90, which is the evidence code." Thus, any complaint that the legislature should have indicated that it was doing something more than making evidentiary changes, it did so.

As in Barrett, s*upra*, and Cuc, *supra*, this Court should find that F.S. 775.051 is constitutional.

Nor can Appellant make a legitimate assertion that he has been improperly denied a legitimate defense of insanity. The defense mental health expert Dr. Maher testified at penalty phase that Troy's mental status did not rise to level of insanity (R XXXII, 3026-3028). Appellant did not meet the M'Naughton criteria for insanity -- he knew what he was doing was wrong and its consequences and knew right from wrong. Further, there was no problem with competency (R XXXII, 3076-3077). Additionally, he has a normal IQ (R XXXII, 3080).

B. Equal Protection of the Law:

In the lower court Appellant only argued as a violation of equal protection that it was improper for the Florida statute to provide as an exception "when the consumption, injection, or use of a controlled substance under chapter 893 was pursuant to a

lawful prescription issued to the defendant by a practitioner as defined in Florida Statute 893.02." Appellant argued that intoxication whether it be by a lawful prescription or not is still intoxication. The defense urged that a person with a lawful and prescribed drug could avail himself of a voluntary intoxication defense but that one unlawfully using drugs or intoxicated on alcohol could not. Troy maintained that such disparate treatment was blatant discrimination, unreasonable and arbitrary "because it denies the intoxicated alcohol abuser equal protection of the law." (R III, 511-512; R XI, 145-146). The prosecutor argued below that the legislature could reasonably classify different people differently. Troy did not have a valid prescription from a doctor and possessed a controlled substance illegally. The legislature could legitimately decide that those who illegally ingest such drugs as cocaine, heroin and arguably Paxil may not avail themselves of a voluntary intoxication defense but that those who are lawfully using prescription drugs furnished pursuant to a doctor's instruction and suffer a reaction to it may have a defense for their subsequent actions (R XI, 152-153).

To the extent that Appellant argues an additional or more expansive argument than that presented in the lower court, i.e., an equal protection challenge based on those who ingest or use

chemicals described in F.S. 877.011, such an argument is procedurally barred since not presented below in the trial court. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990); see also Woods v. State, 733 So. 2d 980, 984 (Fla. 1999) ("To preserve an argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below [citations omitted]"). The Woods Court added that "He did not bring to the attention of the trial court any of the specific grounds he now urges this Court to consider". Id. at 985. See also Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) ("Archer did not make the instant argument in the trial court [pertaining to his JOA], and, therefore, this issue has not been preserved for appellate review.").

In the absence of a fundamental right or a protected class, equal protection requires only that a distinction which results in unequal treatment bear some rational relationship to a legitimate state purpose. Duncan v. Moore, 754 So. 2d 708, 712 (Fla. 2000); Hechtman v. Nations Title Insurance of New York,

840 So. 2d 993, 996 (Fla. 2003).[9] To apply the rational basis test one must determine (1) whether the statute serves a legitimate governmental purpose and (2) whether it was reasonable for the legislature to believe that the challenged classification would promote that purpose. Hechtman at 996. The rational basis test is easily satisfied here as it serves a legitimate governmental purpose by promoting fuller accountability in the criminal law arena for those defendants voluntarily abusing alcohol or controlled substances and thereafter committing criminal offenses. Further, it is reasonable for the legislature to believe that the challenged classification (those who use alcohol or controlled substances under chapter 893) would promote that purpose. Moreover, it was reasonable for the legislature to carve an exception allowing it to be a defense where the use of a controlled substance under chapter 893 is pursuant to a lawful prescription issued to a defendant by a practitioner as defined in F.S. 893.02 since that

[9]If the interest being taken is a fundamental interest or if the classification being challenged is based on a suspect classification such as race, then the means or method employed by the statute must meet not only the rational basis test but also the strict scrutiny test. To withstand strict scrutiny, a law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest. Absent the involvement of a suspect class or a fundamental right, courts usually invoke the rational basis test. Westerheide v. State, 831 So. 2d 93, 110 (Fla. 2002). The instant case does not involve a fundamental right or a suspect

body could conclude that penal accountability should not attach to the lawful use of prescribed drugs where an unfortunate reaction to it has occurred. See Brancaccio v. State, 698 So. 2d 597 (Fla. 4th DCA 1997)(involuntary intoxication defense available since patient is entitled to assume intoxicating dose would not be prescribed or administered by a physician); Carter v. State, 710 So. 2d 110 (Fla. 4th DCA 1998) (defendant entitled to involuntary intoxication instruction where friend by accident gave defendant amitriptyline tablets instead of ibuprofen tablets).

In the instant case the statutory classification does not cause different treatment so disparate as relates to the difference in classification as to be wholly arbitrary; some inequality or imprecision will not render a statute invalid. Grant v. State, 770 So. 2d 655, 660 (Fla. 2000).

ISSUE II

WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO PROVE THE OFFENSE OF ATTEMPTED SEXUAL BATTERY AND TO USE IT AS AN AGGRAVATING FACTOR.

Appellant next claims that the evidence was legally insufficient to support a conviction for attempted sexual battery and for its use as an aggravating factor in the penalty

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class.

phase. Appellee disagrees.

In Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002) this Court explained:

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. See Tibbs v. State, 397 So. 2d 1120 (Fla. 1981). Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. See Donaldson v. State, 722 So. 2d 177 (Fla. 1998); Terry v. State, 668 So. 2d 954, 964 (Fla. 1996). If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. See Banks v. State, 732 So. 2d 1065 (Fla. 1999). However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence. See Orme v. State, 677 So. 2d 258 (Fla. 1996). Because the evidence in this case was both direct and circumstantial, it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases. See Wilson v. State, 493 So. 2d 1019, 1022 (Fla. 1986).

See also Fitzpatrick v. State, 30 Fla. L. Weekly S45 (Fla. Jan. 27, 2005)("…this Court need not apply the special standard of review applicable to circumstantial evidence cases because the State presented direct evidence in the form of DNA evidence and eyewitness testimony."). Appellee submits that direct evidence was introduced establishing Appellant's presence at the scene

including his admissions to his mother Debra Troy, technician Scogin's testimony of his fingerprint on a glass and the DNA and blood evidence introduced via stipulations. As noted in Orme v. State, 677 So. 2d 258, 262 (Fla. 1996) such evidence cannot be deemed entirely circumstantial. In any event, Troy's claim is meritless and must be rejected under either standard.

The evidence adduced below supporting the conclusion that Troy attempted a sexual battery on Bonnie Carroll included the following: (1) Bonnie Carroll's nude body was found on the floor on the side of the bed in her bedroom (R XX, 1309). (2) It was stipulated that DNA testing of Bonnie Carroll's fingernails revealed a mixture of the DNA profiles of Carroll and Troy and subtracting Carroll's profile out of the mixture the form profile matches the DNA profile of Troy (R XXI, 1496). (3) The victim's panties were lying inside out next to her body (R XXI, 1544). White electrical cords cut off from a floor fan were on the bed (R XXI, 1547, 1550). The victim's bra with a piece of glass in it was next to her left arm and at least one fingernail was missing from her hand (R XXI, 1555, 1563). A large rectangle was cut out of her black dress and state exhibit 24 was a piece of the black cloth removed from the victim's mouth (R XXI, 1576). (4) The safety pin on the bra was broken on the floor (R XXI, 1554). (5) After Appellant's arrest he told his

friend Marilyn Brooks that Bonnie “was coming onto him,” that she came out of the bedroom with lingerie but “that he wasn’t interested.” (R XXII, 1735). (6) Associate medical examiner Dr. Michael Hunter described his observations at the crime scene: there was a portion of cloth tied around the victim’s neck and a portion of fabric was wedged within the back of her mouth (R XX, 1345-46); many of her artificial fingernails had been broken off and were found surrounding the victim; there was injury to the hands and a fractured toenail (R XX, 1347-48). At the autopsy Dr. Hunter noted petechial hemorrhages in the eyes indicating the possibility of strangulation (R XX, 1354). The cloth found inside her mouth had been folded over and wedged firmly in the back of her mouth (R XX, 1357). There were multiple areas of blunt impact injuries to the face, chin and scalp (R XX, 1360). There were small injuries on the external genitalia and small faint bruising on both thighs (R XX, 1361). The injuries were consistent with a forceful act such as a perpetrator’s penis or fingers coming into contact with the victim’s vaginal area. There was a ligature present about one of her wrists (R XX, 1362-63). All these factors -- even including the absence of sperm -- were consistent with someone attempting to sexually batter the victim before she was killed (R XX, 1364-66). Dr. Hunter described the ligature abrasion-contusion on the victim’s

right wrist (R XX, 1449).

A number of courts have noted that similar evidence suffices to demonstrate an attempted sexual battery. For example, in Rhodes v. State, 638 So. 2d 920 (Fla. 1994) the victim's decomposing body was found in debris being used to construct a berm from a demolished hotel. The only clothing found on the body was a brassiere around her neck; there was no physical evidence of sexual battery. This Court upheld the aggravating factor of homicide committed during an attempted sexual battery. Id. at 926. In Barwick v. State, 660 So. 2d 685, 694-695 (Fla. 1995) the defendant returned to the victim's apartment complex with a knife and entered her apartment; her body was found with the top portion of her bathing suit pulled up and the bottom portion pulled down in the back. Semen stains were found. This Court explained that to satisfy its threshold burden the State must introduce competent evidence inconsistent with the defendant's theory of events. (At trial Barwick contended that he did not intend to rape the victim when he entered her apartment but only intended to steal something and a struggle ensued when she resisted.) The Court also noted that the State need not conclusively rebut every possible variation of events which could be inferred from defendant's hypothesis of innocence; it is for the jury to decide whether the evidence

fails to exclude all reasonable hypotheses of innocence. Just as the totality of evidence was inconsistent with Barwick's theory that he entered the apartment merely to steal something, so too in the instant case the jury could reasonably reject Troy's version to his girlfriend that the victim came on to him but that he wasn't interested. See also State v. Ortiz, 766 So. 2d 1137 (Fla. 3rd DCA 2000)(finding it to be a jury question whether there was attempted sexual battery on victim who was found beaten and nude in an isolated part of a park with her shirt pulled up around her head and her shorts down around her ankle and inappropriate for trial court to assess the credibility of the medical examiner's opinion) and cases cited in footnote 6 of that opinion: State v. Menter, 680 A.2d 800 (N.J. Super. Ct. 1995); State v. Carter, 451 S.E.2d 157 (N.C. 1994); State v. Harris, 354 S.E.2d 222 (N.C. 1987); Dawson v. State, 734 P.2d 221 (Nev. 1987) (attempted sexual assault was supported by evidence, even though no physical evidence of rape discovered, the victim's body was found nude from the shoulders down). See also Dailey v. State, 594 So. 2d 254, 258 (Fla. 1991) (approving trial court's finding of attempted sexual battery as an aggravating circumstance where the victim's body was found completely nude floating in the Intercoastal Waterway, underwear found on the shore and jeans had been removed and

thrown in the waterway, victim had been stabbed both prior to and after removal of her shirt).

The State did offer evidence which was inconsistent with Appellant's version -- Troy told Marilyn Brooks that the victim came on to him, emerging from the bedroom in lingerie but that he wasn't interested (R XXII, 1735) yet the physical evidence at the scene showed the victim was nude, had been bound, her panties lying inside out next to her body, her bra with a piece of glass in it next to her left arm with the safety pin broken on the floor, a cloth cut from her dress folded and wedged firmly in the back of her mouth and injuries on the external genitalia with faint bruising on both thighs. This evidence sufficed to submit the case to the jury for their finding. Darling v. State, 808 So. 2d 145 (Fla. 2002); Beasley v. State, 774 So. 2d 649 (Fla. 2000); Floyd v. State, 850 So. 2d 383 (Fla. 2003). The theory advanced by Appellant below that he merely sought to subdue her or keep her quiet does not explain why or how Bonnie Carroll was found nude. An attempted sexual battery plus the injuries does explain it.

Appellant argues that the crime scene was more consistent with a killing in a frenzied rage that occurred without an attempted sexual battery. The State would submit that the entirety of the evidence is to the contrary. While Dr. Hunter

answered on cross-examination about a frenzy that the "numerous, closely packed stab wounds could be repetitive, quickly established injuries" (R XX, 1466), he clarified his understanding of the use of that word: "Well, I guess it means, you know, a very active act, repetitive act, something with, you know, considerable energy. I think that would be how I would define it." (R XX, 1468).

To the extent that Appellant argues this was a frenzied as opposed to a premeditated-type killing, Appellee submits that contention is meritless. Appellant brought a knife with him from his residence to the Carroll apartment and Dr. Hunter observed the subsequent disarray -- the drawers had clearly been opened and gone through, two electrical cords were present underneath the body or present on the bed (R XX, 1342). A portion of cloth had been tied around the victim's neck, numerous incised (or cutting) and stabbing wounds (R XX, 1345). Blunt force impact injuries focused primarily on the face, a portion of fabric had been wedged within the back of her mouth (R XX, 1346). The victim had defensive wounds (R XX, 1347). The cloth around the neck was double-knotted (R XX, 1342). There were petechial hemorrhages (ruptured blood vessels) in the eyes suggesting possible strangulation (R XX, 1354). The cut piece of fabric in her mouth had been folded into squares -- it

was difficult to dislodge from the back of her throat (R XX, 1357-58). It could be used to silence someone (R XX, 1359). There were multiple areas of blunt impact injuries to the face, chin and scalp -- more than one event and could have been caused from a fist or kicking (R XX, 1360). There was a ligature mark on one of her wrists (R XX, 1363). There were forty-four individual stab wounds, three areas of incise wound injury to the neck, a minimum of seven impact injuries to the face, multiple defensive wounds present on the hands (R XX, 1390). A knife blade was broken off and recovered within her body, discovered by x-ray (R XX, 1413). A second knife used in the assault was adjacent to the victim (R XX, 1416). Some of the wounds entered at different angles; something was changing (R XX, 1418). Another wound was consistent with a penetrating wound from a piece of glass (R XX, 1422). From the injuries occurring in different positions of the perpetrator and victim there was good evidence there was an interval between some of these injuries (R XX, 1454). All of these different acts on behalf of the perpetrator would take time (R XX, 1456). It would take some time to produce the ligature on the neck, on the wrist, the blunt force injuries, the multiple sharp force injuries. Dr. Hunter testified: “that’s not going to take just a little amount of time; that’s going to take a considerable

amount. But I just can't give you a number." (R XX, 1469). The totality of the evidence -- along with Troy's methodical cutting of the dress and folding of the portion to stuff in the victim's mouth -- belies any contention that the assault was a mere frenzy.

Harmless Error:

Finally, even if we were to assume that this Court agreed with Troy -- only arguendo of course -- that the evidence was insufficient to support a conviction for attempted sexual battery, the appropriate relief would only be to set aside the judgment and sentence on that count. Any such error would be harmless as to the judgment and sentence of death imposed. The evidence demonstrates overwhelmingly that Appellant killed Bonnie Carroll in premeditated fashion and during the course of a robbery and burglary when he took her automobile and property.

ISSUE III

WHETHER APPELLANT WAS DEPRIVED OF A FAIR PENALTY HEARING AND DUE PROCESS OF LAW WHEN THE TRIAL COURT (1) DENIED HIS REQUEST TO EXERCISE HIS RIGHT OF ALLOCUTION FOR THE PURPOSE OF EXPRESSING HIS REMORSE BEFORE THE CO-SENTENCING JURY; (2) IMPERMISSIBILY CHILLED APPELLANT'S RIGHT TO TESTIFY UNDER OATH CONCERNING HIS REMORSE (AND ALSO TO PRESENT OTHER EVIDENCE OF REMORSE) BY REFUSING TO RULE THAT THIS WOULD NOT "OPEN THE DOOR" FOR THE STATE TO INTRODUCE BEFORE THE JURY THE DETAILS OF THE CRIME (INCLUDING

A NEW AGGRAVATOR OF WITNESS ELIMINATION) FROM AN UNCONSTITUTIONALLY OBTAINED CONFESSION; AND (3) ALLOWED THE STATE TO INTRODUCE THE SUPPRESSED CONFESSON IN THE SPENCER HEARING.

Troy filed a motion to enforce right of allocution. (R III, 504-505). After jury selection but prior to the beginning of testimony, trial defense counsel argued his motion to enforce a right of allocution. The State argued that Appellant could allocute to the judge but that if he wanted to testify before the jury he should be subject to cross-examination. The court denied the motion to enforce allocution. (R XIX, 1168-1177; R IV, 747). At the end of the guilt phase, Appellant had not changed his plans. (R XXIV, 2003). Troy confirmed that he had not changed his mind about testifying. (R XXIV, 2007).

After the guilty verdict, during a hearing regarding penalty phase instructions, the court inquired on whether Appellant was going to testify. Trial defense counsel answered they were going to "proffer his allocution." (R XXVI, 2284). A discussion ensued about proffer versus testifying. Trial defense counsel noted that Appellant's testifying was unlikely since "the cross-examination is devastating." The court said it would allow the defense to make a proffer for the record but was not inclined to change its ruling about taking the stand and testifying in the penalty phase, and noted it would include the

right to remain silent in the instruction package. (R XXVI, 2285). The defense indicated its desire in mitigation to call a detective who took a confession (which had been suppressed) to ask whether Troy had confessed without hesitation and expressed remorse. Trial counsel did not want to open the door to the prosecution to introduce the substance of the confession. The State mentioned this would open the door to Appellant's admissions of witness elimination. (R XXVI, 2286-87). The court responded that if asked to rule on it today, the court would be inclined to allow cross-examination; it could possibly open the door. (R XXVI, 2288-89).

The subject came up again during the penalty phase. The defense inquired about asking Appellant's mother Debra Troy whether after the homicide Appellant had acknowledged guilt and expressed remorse for his criminal behavior.[10] The defense also sought to call the detective about Troy's alleged statement of remorse. The State responded that it would open the door to

[10]Her testimony on this would clearly be hearsay, but in any event the witness undoubtedly would be subject to cross-examination probing what he did admit to her and what he did not and how they may have contrasted with his admissions to other witnesses. See Griffin v. State, 639 So. 2d 966, 970 (Fla. 1994)(trial court did not abuse its discretion in sustaining prosecutor's objection to self-serving hearsay statements Griffin made to several witnesses indicating his remorse; noting that a defendant's right to introduce hearsay testimony at the sentencing phase is not unlimited, citing Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990), vacated on other grounds, 505

questioning about his statements (Troy had denied certain elements in his statements). The State also indicated the detective would say Troy's remarks were not said in a remorseful way. When the defense indicated that it was tentative because of the prosecutor's position, the court indicated it couldn't rule until it heard what they wanted to do but it didn't have a problem with the defense asking the questions. The defense responded that it couldn't ask those questions then (R XXXIV, 3253-3254). The court indicated that defense counsel would have to make the decision and accept the risk that the State might pursue matters opened up. Defense counsel concluded that he could not "expose my client to the risk of having the prosecutor" go into detail about the offense (R XXXIV, 3255). The court declined to make a preliminary ruling (R XXXIV, 3256) and the defense chose to avoid the area (R XXXIV, 3256).

Later, the court reminded Troy of his right to testify or not testify at the penalty phase. (R XXXIV, 3267). Appellant answered:

> After conferring with him [trial counsel] I made the decision not to testify; however, I would like a chance to express the shame and remorse that I feel over the incident with both of the cases to the jury.
>
> (R XXXIV, 3268)

U.S. 1215 (1992)).

The court replied that Troy could consult with his attorneys about being put on the stand for that. The court explained that he would be allowed to get on the stand, take an oath and say whatever he wanted to say in that respect, but that might allow the State to ask questions of him which might or might not be helpful to him. The court stated it would not allow the defendant to take the stand and state his feelings about what happened without being subject to cross-examination. The court said it would check back with Troy if Troy changed his mind. (R XXXIV, 3269). Defense counsel subsequently informed the court that Troy had not changed his decision on not testifying. (R XXXIV, 3293).

At the Spencer hearing on November 21, 2003 the defense called witnesses Tony Cummins and Detective Grodoski. (R X, 1681-1742; R XXXVI, 3489-3548). At that time Troy made a statement in allocution. (R X, 1738-1740; R XXXVI, 3544-46). Thus, Rule 3.720, Florida Rule of Criminal Procedure was satisfied and cases such as Ventura v. State, 741 So. 2d 1187 (Fla. 3d DCA 1999) do not mandate any relief.

(A) Allocution:

Appellant contends that the trial court erred in denying his requests for allocution to the jury -- without being subject to prosecutorial cross-examination -- for the purpose of expressing

remorse. The trial court properly denied such requests as Florida courts have rejected such arguments. See Johnson v. State, 608 So. 2d 4, 10 (Fla. 1992)(rejecting defense contention that videotape expressing remorse for the killings should have been shown to the jury, noting "The trial court, however, agreed with the prosecutor that Johnson should not be allowed to escape cross-examination by not testifying in person. We agree.");[11] see also Chandler v. State, 702 So. 2d 186 (Fla. 1997)(all witnesses who testify during trial place their credibility in issue and a party on cross-examination may inquire into matters that affect truthfulness of witness's testimony).

Appellant's complaint -- since he did address the trial court at the Spencer hearing -- concerns when and before whom he is given the opportunity to allocute. Troy maintains that since the jury represents the conscience of the community, and the jury bases its recommendation on the weighing of aggravation and mitigation that a request for allocution before the jury must be granted. He cites trial defense counsel's remark at R XXVI, 2284:

> Well, I feel very strongly, as you know, that it should be allowed in this portion, because you have to follow what the jury

[11]As this Court will recall, the defense in the Johnson appeal relied on State v. Zola, 548 A.2d 1022 (NJ 1988) and the Court rejected the claim without referring to Zola. Appellant's reliance on Zola remains similarly unpersuasive.

> decides. So it doesn't do us a heck of a lot of good to just do it in front of you later on. (emphasis supplied)

Trial counsel's statement was legally wrong. The case law is legion that the trial judge does not act and must not act as a rubber stamp of approval. See Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980)("this does not mean that if the jury recommends the death penalty, the trial court must impose the death penalty. The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed.")

Appellant is not aided by his reliance on foreign authority. For example, Capano v. State, 781 A.2d 556 (Del. 2001) involves the Court's interpretation and application of a statutory provision permitting summation by the defendant and/or his counsel. While apparently the Delaware courts regard the legislative right as an important one, they acknowledge that "it is not a *constitutiona*l right under the state or federal constitution." Capano at 664; Shelton v. State, 744 A.2d 465, 495 (Del. 1999)("our conclusion that the defendant has a right to allocution as defined and limited here is not a right granted by either the federal or state constitutions. It is a right that is grounded solely on the Superior Court Criminal Rule, the Delaware death penalty statute and Delaware decisional law. No federal constitutional, statutory or decisional law is

implicated, and federal decisional law is referred to only for the purpose of guidance.")

Appellee would note that a number of federal courts have held that there is not a constitutional right for a defendant's allocution (statement that is unsworn and without subject to cross-examination) to a jury. United States v. Hall, 152 F.3d 381, 396 (5th Cir. 1998)("We conclude that a criminal defendant in a capital case does not possess a constitutional right to make an unsworn statement of remorse before the jury that is not subject to cross-examination. . . We simply cannot conclude that fundamental fairness required that Hall be allowed to make such a statement without being sworn or subject to cross-examination."); United States v. Barnette, 211 F.3d 803, 830 (4th Cir. 2000)(noting that Hall, *supra*, held there was no such constitutional right "and we follow that case"); see also State v. Colon, 864 A.2d 666, 794-795 (Conn. 2004)("We are persuaded by these authorities and conclude that a defendant does not possess a federal constitutional right of allocution in a capital sentencing hearing. It is clear to us that the purpose of allowing allocution, namely, to permit the defendant to introduce to the jury information relevant to the defendant's plea for mercy, is equally served by the structure of our capital sentencing scheme, which permits a capital defendant to present any information relevant to any mitigating factor during

the penalty phase hearing, regardless of its admissibility under evidentiary rules applicable to criminal trials. *See* General Statutes (Rev. to 1997) § 53a-46a (c). Thus, in accordance with the majority of the courts that have addressed this specific issue, we conclude that a defendant does not possess a right of allocution under the federal constitution in capital sentencing proceedings."); State v. Lynch, 787 N.E.2d 1185, 1206 (Ohio 2003)("In sum, Ohio and several other states permit defendants to present an unsworn statement to the jury during the penalty phase of a capital trial. However, the majority view does not support a holding that a defendant has a constitutional right even to make an unsworn statement, let alone an unsworn statement in a question-and-answer format. We find that the trial court did not violate Lynch's constitutional rights by denying his request.").[12]

Appellee fully respects the right of other jurisdictions to provide its own rules and procedures in implementing its capital statute. But the Constitution does not require engrafting such

[12]While Appellant below relied on United States v. Taylor, 11 F.3d 149, 151 (11th Cir. 1994) for the proposition that the defendant's right to be present and to speak at sentencing is constitutionally based (R III, 505), Troy has failed to acknowledge that the Court of Appeals subsequently explained that the Circuit law was that the right to allocution is not constitutional. United States v. Tamayo, 80 F.3d 1514, 1518-1519 n.5 (11th Cir. 1996); United States v. Fleming, 849 F.2d 568, 569 (11th Cir. 1988); Lilly v. United States, 792 F.2d 1541, 1544 n.4 (11th Cir. 1986).

local rules on Florida's death penalty scheme. The legal scholar Wigmore has called cross-examination the greatest engine ever invented for discovering the truth. 5 Wigmore, Evidence § 1367 (1976 ed). If indeed it serves so vital a role in the legal system, it is difficult to comprehend the importance of denying its value by this Court's creation of a requirement that a criminal defendant be allowed without challenge to submit his self-serving comments to the jury. Neither statute nor rule has required it. This Court's jurisprudence previously has not recognized it, and Appellee submits the Court should decline the invitation to adopt such a requirement now, as have federal appellate courts.

While it is undoubtedly correct that evidence may be properly admitted to a jury that a capital defendant has remorse or feels repentant for his actions in mitigation at the penalty phase, none of the Florida decisions cited by Appellant remotely suggest that it is permissible to present to the jury inadmissible testimony or untrustworthy evidence that has not been tested by the requirement that a witness submit to the solemnity of an oath and subject their testimony to cross-examination. For example, in Nibert v. State, 574 So. 2d 1059 (Fla. 1990) the evidence that was introduced showed Nibert felt a "great deal" of remorse. Id. at 1062. Similarly in Stevens v. State, 613 So. 2d 402 (Fla. 1992) the jury recommending life

imprisonment had been presented valid evidence that the defendant "has felt remorse for his participation in the robbery and other offenses that led up to the co-perpetrator committing the murder." Id. at 403. In Parker v. State, 643 So. 2d 1032 (Fla. 1994) this Court found the trial court's override of a life recommendation to be improper where numerous witnesses testified at penalty phase concerning his background and character -- he had a difficult childhood, his alcoholic father beat and abused his mother; he abused drugs and alcohol at an early age; he had a positive adult relationship with his children whom he helped to raise and care for, and he had assisted his neighbors. Id. at 1035. But nothing in Parker indicates that he and his attorney were permitted to use witnesses who refused to take an oath or subject themselves to cross-examination. While it may be more "convenient" for a capital defendant, his family, friends or criminal colleagues to dispense with such impediments as an oath or challenge by cross-examination, Appellee would strenuously contend that the serious demands of a criminal trial not be dispensed with in order that even manipulative and cunning criminal defendants feel more at ease.[13]

[13]No serious comparison can be made between the instant case involving Troy's deliberative conduct in taking a knife with him to the victim's apartment and commission of multiple felonies including murder and robbery followed by his kidnapping, burglary and assault on Tracie Burchette to obtain her automobile and the override cases. Troy acted alone. In

Appellant's complaint at Brief p.78 that the State would have suffered no unfair prejudice to change the rules of the game and allow Troy to relate his alleged remorse to the jury unimpeded by such constraints as taking an oath and being subject to cross-examination is meritless. Appellee reiterates that if, as Wigmore and others assert, cross-examination is essential in discovering the truth then it should not be so lightly shortchanged here. Appellant's expression of outrage need not long detain this Court and the State perceives no need to apologize for its argument rejecting the illegitimate demand to address the jury without exposure to cross-examination. If trial counsel correctly evaluated that prosecutorial cross-examination would be devastating and advised his client to avoid the experience, that is a circumstance that most if not all defendants have to confront. See McGautha v. California, 402 U.S. 183, 213 (1971)("The criminal process, like the rest of the

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Stevens, *supra*, the jury recommending life could have relied on the fact Stevens did not know of or participate in the murder itself which was committed by a co-perpetrator outside of Stevens' presence after the victim had attempted an escape, he had suffered horrible abuse as a child, was a good worker, parent and provider for his family, was intoxicated and felt remorse for the offenses leading up to the co-perpetrator committing the murder. Id. at 402-403. In Parker, *supra*, none of the defendant's accomplices received a death sentence for the Sheppard murder, there was no evidence to establish that he personally shot Padgett or the other two victims; testimony about the extent of his role in the crimes was in conflict and Groover (not Parker) may have been the dominant actor in the murders. 643 So. 2d at 1034.

legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. [citation omitted] Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.") McGautha recognized that it has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination and it is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. Id. at 215. The State does not even now recede from what Appellant would have this Court believe for the first time to be unacceptably harsh. The Court should not recede from such precedents as Johnson, *supra*, and Chandler, *supra*, merely because Troy deems it outrageous. The record is silent whether the prosecutor thought Troy's allocution might "have an impact" on the jury. If the prosecutor did harbor a concern of Troy's ability to mislead or manipulate the jury, that too would not be unreasonable. Even the defense mental health expert Dr. Maher acknowledged Troy's history consistent with antisocial personality traits and that deceit and manipulation are central features of antisocial personality

disorder (R XXXII, 3042-3043).

(B) Specter of Improper Impeachment:

Appellant also contends that the prosecutor engaged in the threat of improper and unlawful cross-examination. Troy argues that such threatened cross-examination of him was improper because beyond the scope of direct examination and unlawful because in violation of the Fifth Amendment. Appellee disagrees.[14]

In Coco v. State, 62 So. 2d 892 (Fla. 1953) this Court explained about cross-examination:

> Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief by the witness on cross-examination. (Id. at 895)

See also Butler v. State, 842 So. 2d 817, 823-824 (Fla. 2003)("A prosecutor can use cross-examination to delve further into

[14]We are of course engaged at this stage in a certain amount of speculation since in fact Troy did not testify -- indeed his attorney insisted that exposure to prosecutorial cross-examination would be devastating and that counsel could not allow that. (Appellee presumes that counsel was referring to permissible valid cross-examination as well as whatever improper cross-examination he now intimates.) This Court has long held that reversible error cannot be predicated on conjecture or speculation. See, e.g., Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974).

issues raised during the direct examination and to impeach a witness's credibility. . . . cross-examination is not limited to the exact details testified to on direct examination but extends to the whole subject and all matters that modify, supplement, contradict, rebut or make clearer the direct testimony."); accord, Francis v. State, 808 So. 2d 110, 140 (Fla. 2001); Chandler v. State, 702 So. 2d 186, 196 (Fla. 1997); Geralds v. State, 674 So. 2d 96, 99 (Fla. 1996); Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978).

Appellant asserts that the "rule of completeness" only applies to written or recorded statements and does not apply to conversations and unrecorded interviews. But Professor Ehrhardt and the courts do not entirely agree with him:

> Although the language of section 90.108 does not cover testimony regarding part of a conversation, a similar consideration of the potential for unfairness may require the admission of the remainder of the conversation to the extent necessary to remove any potential for prejudice that may result from the original evidence being taken out of context.

Ehrhardt, Florida Evidence, § 90.108(1), p. 51 (2004).[15]

[15]In footnote 7 in that section Ehrhardt cites such supporting decisions as Steinhorst v. State, 412 So. 2d 332, 338 (Fla.1982)(right to question witnesses to the whole of the conversation he spoke on direct); Louette v. State, 12 So. 2d 168, 174 (1943)("entire conversation or admission"); Christopher v. State, 583 So. 2d 642, 645—46 (Fla. 1991); Eberhardt v. State, 550 So. 2d 102 (Fla. 1st DCA 1989)(Once testimony regarding conversation between officer and the defendant was offered by the prosecution, the trial court erred in sustaining

As stated in Eberhardt v. State, 550 So. 2d 102, 105 (Fla. 1st DCA 1989):

> Because portions of the defendant's conversation with the officer were admitted on direct examination, the rule of completeness generally allows admission of the balance of the conversation as well as other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two. (emphasis supplied)

In Ramirez v. State, 739 So. 2d 568 (Fla. 1999) this Court noted that the concept of "opening the door" is based on considerations of fairness and the truth-seeking function of a trial. Id. at 579. The Court alluded to McCrae v. State, 395 So. 2d 1145 (Fla. 1980) where it held that the prosecutor could permissibly elicit the nature of the defendant's prior felony conviction on cross-examination where the defense had "tactfully attempted to mislead the jury into believing that [the defendant's] prior felony was inconsequential." Id. at 579-80. The Court explained that while the phrase "opening the door" has been utilized interchangeably with the rule of completeness, the latter is a separate evidentiary concept that falls within the general principle of door opening and F.S. 90.108 "has been

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hearsay objection regarding the remainder of the statement which in fairness should have been considered by the jury.); Guerrero v. State, 532 So. 2d 75 (Fla. 3d DCA 1988); United States v.

applied to verbal statements as well. See Christopher v. State, 583 So. 2d 642, 646 (Fla. 1991); see also Reese v. State, 694 So. 2d 678, 683 (Fla. 1997)." Id. at 580.

In the instant case it would be entirely proper for the prosecutor to cross-examine Troy concerning his alleged remorse in the partial disclosure he made to law enforcement officers (or indeed to cross-examine Troy's surrogate Detective Grodowski as occurred at the Spencer hearing). While Appellant suggested that he admitted guilt or accepted responsibility for the Carroll criminal episode, it is not entirely clear the extent of his acceptance of responsibility and in turn the sincerity of his proffered remorse. While Appellant's counsel below sought to leave the jury with the impression that Troy was completely open and cooperative with the officers, the record reflects that Troy also would not allow the officers to put his statement on tape because he needed to have something for his attorney to work with (R X, 1708; R XXXVI, 3514).[16] While Troy characterizes his conversation with the officers as remorseful, Detective Grodowski noted that Appellant was not crying and coolly explained what had happened (R X, 1735; R XXXVI, 3541). While Troy had informed his girlfriend Marilyn Brooks that Bonnie

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Castro, 813 F.2d 571, 576 (2d Cir. 1987).

[16]Troy's representation to the officer that the case would not be going to trial and that he wouldn't be fighting it (R X,

Carroll "came onto him," emerging from the bedroom in lingerie but that he was not interested (R XXII, 1735), he related to Detective Grodowski that he dragged her into the bedroom for her to clean up before sex, that they were going to have some kind of sexual contact, that he tied her hands and feet with electrical cord and because she was tied up he cut her clothes off her (R X, 1706-07; R XXXVI, 3512-13). As in McCrae, *supra*, the prosecutor could permissibly make inquiry to give a more complete rendition than the misleading suggestion of the defense that Troy was open, thorough and accepting of total responsibility for his conduct. If Appellant wanted to convey to the jury with his testimony that he did not know why the Carroll episode occurred, he could legitimately be examined regarding his admission to the detective that he brought a knife with him and obtained another knife from her kitchen (R X, 1730; R XXXVI, 3536) and significantly that he had to eliminate her as a witness to stop her from talking once she got out and that he could not believe she wasn't dead and stabbed her some more, after his first assault on her (R X, 1708, 1728, 1730; R XXXVI, 3514, 3534, 3536). The United States Supreme Court recognized in Harris v. New York, 401 U.S. 222 (1971) that while a criminal defendant has a privilege to testify in his own defense or to

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1737; R XXXVI, 3542) proved not entirely accurate.

refuse to do so, such a privilege cannot be construed to include the right to commit perjury. Thus, if a defendant takes the stand a prosecutor may "utilize the traditional truth-testing devices of the adversary process" including impeachment by use of his statements to police otherwise inadmissible pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Id. at 225. Here, Troy ultimately made the decision not to testify.

If Appellant had elected to testify that he accepted responsibility for his criminal actions to Bonnie Carroll, it would be legitimate cross-examination to develop precisely the context and extent of his acceptance of responsibility -- and to point out possible inconsistencies in what he related to others. The jury had returned a verdict of guilty of attempted sexual battery. Troy told girlfriend Marilyn Brooks after the homicide that the victim came on to him, emerging from the bedroom in lingerie but that he was not interested, that he tied her up not to hurt her but to get out of the apartment, that he didn't remember and blacked out; he acted shocked that she would ask whether he had sex with the victim. (R XXII, 1732-40). Troy told his friend Melanie Kozak after his arrest for the homicide that in contrast to the victim he couldn't kill her (Melanie) because he liked her. (R XXIII, 1841-42). Troy told Detective Grodowski that he and the victim were going to have some kind of

sexual contact. (R X, 1706; R XXXVI, 3512). If Appellant desired to explain to the jury that Troy had accepted responsibility, the fact-finder would be entitled to consider -- through cross-examination -- which version of Appellant's account to various witnesses he continued to adhere to, and which he was abandoning or receding from.

If Appellant wanted the jury to hear and believe the version to Marilyn Brooks that he tied the victim up in order to get out of her apartment and not to hurt her but that she got loose and they fought and he didn't remember the rest, it would be eminently appropriate to point out that he informed Grodowski -- quite differently -- that when tying Carroll with electrical cord that he thought to himself that she could call the police if he let her go and he knew at that point he would have to eliminate her. He was concerned that his return to prison would be for years instead of months. (R X, 1703; R XXXVI, 3509). Troy related that he stabbed her enough that he thought she was dead, and was surprised to see on his return from the kitchen that she was still alive and trying to get off the floor. He couldn't believe it, stabbed her some more and put a pillow over her. (R X, 1705; R XXXVI, 3511). The teaching of cases like Coco, *supra*, Butler, *supra*, Francis, *supra*, Chandler, *supra*, Geralds, *supra*, and Coxwell, *supra*, unquestionably authorize

inquiry into the "entire matter," and matters "that may modify, supplement, contradict, rebut or make clearer" the facts testified to on direct.

Had Mr. Troy elected to have surrogates testify about his expression of remorse to them, again too those witnesses could have been examined as to the entirety of his statements to those witnesses so that the jury would have a complete understanding and context to judge his credibility.

As to Appellant's request below that he would like to call the detective to whom Troy spoke to testify that Appellant confessed without hesitation and expressed remorse -- this limitation urged by trial counsel is similar to the misleading effort employed by the defense in McCrae, *supra*. As the more complete examination of Detective Grodowski at the Spencer hearing demonstrates Troy's physical demeanor did not conform to the expression of remorse (no crying, etc.). Moreover, to the extent that he confessed without hesitation suggests that Troy was entirely open and not selective in his admissions, it is misleading. In fact, Troy was not complete in his assistance to law enforcement officers -- he would not allow the officers to put his statement on tape because he needed to have something for his attorney to work with (R X, 1708; R XXXVI, 3514). Similarly, Troy's representation to officers that the case would

not be going to trial, that he wouldn't be fighting it turned out not to be entirely accurate (R X, 1737; R XXXVI, 3542). Obviously, the jury should have been allowed to hear this to evaluate Appellant's sincerity had Grodowski testified before the jury.

Moreover, Troy had told his girlfriend Marilyn Brooks that Bonnie Carroll "came onto him," emerging from the bedroom in lingerie but that he was not interested (R XXII, 1735). Yet, he told Detective Grodowski that he dragged her into the bedroom for her to clean up before sex, that they were going to have some kind of sexual contact, that he tied her hands and feet with electrical cord and because she was tied up he cut her clothes off her (R X, 1706-07; R XXXVI, 3512-3513). Consequently, whether trial counsel wanted either Grodowski or Appellant to testify that he admitted responsibility, it would be legitimate cross-examination to explore what he was admitting to and what he was not.

Irrespective of whether the lower court failed to consider Detective Grodowski's testimony for purposes of finding the avoid arrest/witness elimination aggravator (F.S. 921.141(5)(3)) nevertheless, as part of this Court's proportionality review this Court can consider the totality of the crime in the record. See Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997)("Although

the trial court did not find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, this was a particularly brutal murder.").

(C) Harmless Error:

The sockdolager is that any complaint that Troy may have pertaining to the trial court's determination at the Spencer hearing that the prosecutor could elicit additional details from investigating officers regarding Troy's admissions about the homicidal incident must be deemed harmless error (if error occurred). Appellant cannot point to any harmful error that occurred with the recommending jury since that body heard no testimony nor received evidence about Troy's admissions. Similarly, no prejudice occurred with the trial court since Judge Haworth specifically stated in his Sentencing Order:

> Accordingly, in an admitted abundance of caution, and solely as a matter of law, the court has elected to deny the State any advantage from its use. The case for the death penalty in Mr. Troy's case will stand or fall on its own, independently, based on the other evidence without consideration of facts disclosed in defendant's confession to Officer Gradoski.
>
> In preparing the Sentencing Order the court has disregarded the Spencer hearing testimony of Officer Gradoski in regard to the contents of the confession in any way that might benefit the State. The court has considered it only for the purpose offered by the defense, that is, as bearing on the mitigating claims of remorse and prompt

> confession. Consequently, there is insufficient evidence before the court to find this [avoid arrest] aggravator exists.

(R X, 1636)(emphasis supplied)

Since the trial court did not use any of this evidence to benefit the State, any alleged error in the ruling at the Spencer hearing must be deemed harmless error.[17]

ISSUE IV

THE TRIAL COURT=S EXCLUSION OF MICHAEL GALEMORE=S TESTIMONY DID NOT VIOLATE APPELLANT=S EIGHTH AMENDMENT RIGHT TO A RELIABLE PENALTY HEARING OR HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

During the penalty phase, defense counsel informed the court of the desire to call DOC employee Robert Galemore who had no personal contact with the defendant nor any knowledge of the facts of the case. The purpose would be to address the issues that life imprisonment without parole would be considered close custody, that the inmate would be supervised in a particular fashion, that the inmate would have to follow the rules of the prison. He would address the issue of drugs in prison, the issue of leadership in prison by an inmate, that a specific leader is prohibited by the rules but that the Department of Corrections encourages positive leadership when it can be found.

[17]As argued *infra*, the State submits that the trial court should have considered the evidence favorable to the prosecutor and supportive of the avoid arrest aggravator.

(R XXX, 2726-2727). Defense counsel alluded to Defense Exhibit Q pertaining to common misperceptions about prison about prison life. (R XXX, 2727; see also Supp. R. II, 162-165). Defense counsel further indicated that he would ask what the conditions of confinement would be on death row and that he expected the answer to be that you are basically locked into your cell and you don:t work. The defense cited Ford v. State, 802 So. 2d 1121 (Fla. 2001) and added that Galemore could address the issue of inmates having access to drugs in the Department of Corrections. (R XXX, 2728-2729). The prosecution argued that the court would instruct the jury that life means life imprisonment and that the conditions of confinement are not pursued in any case. The proposed testimony did not support any mitigation and the witness had not met Appellant nor knew where he would be sentenced to if life were imposed. (R XXX, 2729-30). The court reviewed the Ford decision, noted that this Court had found harmless error in that case, and concluded that it didn:t really stand for the proposition that the defense is allowed to introduce the type of testimony proffered for witness Galemore. The court indicated that the defense could argue to the jury potential parole ineligibility as a mitigating factor as noted in Ford, *supra*, and Walker v. State, 707 So. 2d 300 (Fla. 1997). Since the proffered testimony of Galemore did not address the

issues of whether Troy was well suited to prison or posed a threat to prison personnel and fellow inmates and since Galemore had no knowledge of Mr. Troy, his testimony seemed not to be relevant or probative. The court granted the State=s motion to exclude him as a witness. (R XXX, 2764-2765). Defense counsel repeated that jurors may have a misperception of life imprisonment and that Galemore can address drugs in prison, i.e., small amounts get in from time to time but they take strong measures to keep them out of prison. (R XXX, 2765-66). The defense requested and the court accepted that the witness would have testified to substantially this proffer. (R XXX, 2767).

Initially, relief must be denied because Appellant=s proffer of the testimony of Galemore is insufficient to apprise this Court of the content of his testimony. See, e.g., Kormondy v. State, 845 So. 2d 41, 53 (Fla. 2003)(ATherefore, it cannot be determined from the record that the defendant was deprived of his opportunity to cross-examine or impeach the witness.@); Morrison v. State, 818 So. 2d 432, 448 n.8 (Fla. 2002)(noting that F.S. 90.104(1)(b), requires for appellate preservation that counsel must Amake an offer of proof of how the witness would have responded if allowed to answer the question" so the appellate court will not be required to speculate on the

excluded evidence); Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990)(similarly required a proffer of what the witness would have said so the appellate court will not have to speculate on the admissibility of such evidence); Finney v. State, 660 So. 2d 674, 684 (Fla. 1995)(AWithout a proffer it is impossible for the appellate court to determine whether the trial court=s ruling was erroneous and if erroneous what effect the error may have had on the result.@); United States v. Winkle, 587 F.2d 705, 710 (5th Cir. 1979)(counsel stating that witness would testify as to his version of the conversations not sufficient to make known to the court the substance of the evidence); Blackwood v. State, 777 So. 2d 399, 419 (Fla. 2000)(requiring a proffer of the contents of the excluded evidence to the trial court). In the instant case while Appellee acknowledges that the lower court accepted the defense request that Galemore would have testified Aalong the lines counsel indicated" (R XXX, 2767), the fact remains that the record does not tell us what the testimony would have been, for example concerning his addressing Athe issue of drugs in prison.@ (R XXX, 2727). Troy=s proffer is fatally deficient. As explained, *infra*, even if adequately preserved, the claim for relief must be denied.

A trial court=s ruling on the admission of evidence is reviewed by an appellate court under an abuse of discretion

standard. Randolph v. State, 853 So. 2d 1051, 1062 (Fla. 2003). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000); Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990); Overton v. State, 801 So. 2d 877, 896 (Fla. 2001); Banks v. State, 732 So. 2d 1065, 1068 (Fla. 1999); Quince v. State, 732 So. 2d 1059, 1062 (Fla. 1999); Hawk v. State, 718 So. 2d 159, 162 (Fla. 1998); White v. State, 817 So. 2d 799, 806 (Fla. 2002). The lower court did not abuse its discretion.

To the extent that Appellant argues that the ruling on Galemore testifying violated any federal Constitutional right of Appellant, such a claim is both procedurally barred and meritless. It is barred because Appellant did not preserve the claim for appellate review by presenting his federal claim to the trial court as required by state law. The only case law he relied on below was Ford, *supra*, which described the resolution of a state law question. 802 So. 2d at 1121. Appellant may not permissibly change the basis of an objection for the first time on appeal. See Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990); see also Woods

v. State, 733 So. 2d 980, 984 (Fla. 1999)(ATo preserve an argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below [citations omitted]@). The Woods Court added that AHe did not bring to the attention of the trial court any of the specific grounds he now urges this Court to consider@. Id. at 985. See also Archer v. State, 613 So. 2d 446, 448 (Fla. 1993)(AArcher did not make the instant argument in the trial court [pertaining to his JOA], and, therefore, this issue has not been preserved for appellate review.@).

The claim is also meritless. The prosecutor was certainly correct that Galemore=s proffered testimony did not relate to the circumstances of the offense or to the character of the accused. As noted by Walker v. State, 707 So. 2d 300, 315 (Fla. 1997) and Ford v. State, 802 So. 2d 1121, 1136 n.36 (Fla. 2001) both Florida and U.S. Supreme Court case law are satisfied when the defendant is afforded the opportunity to argue to the jury potential parole ineligibility as a mitigating factor. The Legislature of course has remedied any possible uncertainties when it amended Section 775.082(1) to provide that defendants facing the death penalty pursuant to Section 921.141 for crimes committed on or after October 1, 1995 shall be punished by death or life imprisonment and shall be ineligible for parole.

Section 775.082, Fla. Stat.; Walker, *supra*, at 315 n.11. The law does not require the jury to hear evidence of conditions of life in prison.[18] The record reflects that trial counsel did in fact argue that a lifetime to be spent in prison without parole was a mitigating circumstance:

> MR. TEBRUGGE: Ten years from now, if you choose life imprisonment without possibility of parole, John Troy will still be in prison. Twenty years from now, if you choose life imprisonment without possibility of parole, John Troy will still be in prison. Thirty years from now, if you choose life imprisonment without possibility of parole, John Troy will still be in prison. John Troy will be in prison until the day he dies and that is the way that it should be. Lock him up, throw away the key, but please don:t allow the state to kill him.
>
> If you choose life in this case, it will be no cause for celebration. It will merely be the sad end to a tragic case. There are no winners in this courtroom and certainly not John. There has already been enough pain, and death, and loss.
>
> MS. RIVA: Objection, Judge, improper argument.
>
> THE COURT: I:m gonna allow it.
>
> (R XXXV, 3431-32)
>
> * * *
>
> MR. TEBRUGGE: When it comes to the choice that you have to make today, in order to choose death, I submit to you that you have to be sure that there is no alternative.

[18]Similarly, it is improper for a defense attorney to argue to the jury a description of an electrocution. See Shriner v. State, 386 So. 2d 525, 533 (Fla. 1980); Porter v. State, 429 So. 2d 293, 296 (Fla. 1983).

> MS. RIVA: Objection, Judge.
> THE COURT: Overruled.
> MR. TEBRUGGE: In the State of Florida the death penalty is reserved for the worst of the worst, for the most aggravating and least mitigated of killers. In this case there is an alternative. Choose life instead.
>
> (R XXXV, 3432-33)

To the extent that Appellant is offering some complaint that it was unfair or improper for the prosecutor to cross-examine relatives (e.g. John Troy VI, Natalie Wallace and Hilda Troy) about whether they were aware that drugs can sometimes be present in a prison setting since it had been in Troy=s prior prison experiences, it certainly was appropriate to inquire as to the completeness of their knowledge (Hilda Troy for example attested to her unconditional love for him, irrespective of her unawareness of the details of the Bonnie Carroll homicide (R XXX, 2696)). Since John Troy VI noted on direct examination that Appellant is Abest placed in a situation where he cannot have@ such things as drugs available to him (R XXIX, 2587), inquiry was appropriate whether and to what extent he appreciated what happened in a prison setting. Moreover, Appellant fails to point out that Natalie Wallace answered the prosecutor=s question affirmatively that she knew there were drugs in prison since Amy husband=s in prison@ (R XXIX, 2638). No additional testimony by Galemore was required.[19]

[19]The instant case is unlike Skipper v. South Carolina, 476 U.S.

Finally, even if the Court were to find that it was error to exclude the testimony of Galemore based on the proffer made, clearly such error would be harmless beyond a reasonable doubt. See Ford, *supra*, at 1136 (the asserted mitigating factors occupy a minor and tangential position in the present record, the present case contains vast aggravation, and the trial court recognized and gave weight to numerous other mitigators).

ISSUE V

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN FAILING TO INSTRUCT THE JURY ON THE AGE MITIGATOR.

Appellant requested the statutory age mitigator, asserting AIt could be argued that for a 33-year-old Defendant having to serve life imprisonment without possibility of parole is potentially even a worse sentence due to the amount of time that he may actually serve.@ (R XXXIV, 3324). Defense counsel added that there was some testimony about emotional immaturity that Amay@ be relevant. The prosecutor objected, contending that age should be linked with some other characteristic of the defendant

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1 (1986) and Simmons v. South Carolina, 512 U.S. 154 (1994). In Skipper the state impermissibly excluded testimony that the defendant had made a good adjustment in prison; here Galemore did not even know the Appellant. Simmons held that in a capital trial where the defendant=s future dangerousness is at issue and state law prohibits release on parole the defense must be allowed to argue parole ineligibility. In Florida of course future dangerousness is not an aggravator and the defense was allowed to argue in mitigation his parole ineligibility.

or the crime and Appellant was not young or old with a low IQ. (R XXXIV, 3325). Appellant has a normal IQ (R XXXII, 3080). The court denied the request. Appellee submits that the first stated reason -- life without parole as possibly a worse sentence than death -- does not provide a valid justification for consideration of age as a mitigating factor; arguably the second reason proffered -- his alleged emotional immaturity -- presents a closer question but the defense certainly made no effort to rebut the prosecutor=s contention of the inapplicability of the age mitigator. In any event, at the subsequent Spencer hearing held on November 21, 2003, while the defense presented additional testimony from witnesses Tony Cummins, Gregory Grodoski as well as a statement from Mr. Troy, the defense did not seek to present evidence or argument pertaining to age as a mitigator. (R X, 1681-1741; R XXXVI, 3487-3547). Appellee would submit that Appellant=s failure to avail himself of the opportunity at that point to argue the presence of the age mitigator constitutes a procedural default and waiver precluding a subsequent challenge now to the failure to give an age mitigator instruction.

This Court has held that whenever a murder is committed by a minor the mitigating factor of age must be found and weighed but when the defendant is not a minor, as here, no per se rule exists which pinpoints a particular age as an automatic factor

in mitigation. Shellito v. State, 701 So. 2d 837, 843 (Fla. 1997); Nelson v. State, 850 So. 2d 514, 528 (Fla. 2003). This Court has also stated that the determination of whether age is a mitigating factor depends on the circumstances of each case and is within the trial court=s discretion. Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988); Caballero v. State, 851 So. 2d 655, 661 (Fla. 2003). Under this Court=s review for abuse of discretion, the Court will uphold the trial court=s determination unless it is arbitrary, fanciful or unreasonable so that no reasonable person would adopt the trial court=s view. Caballero at 661. Additionally, in Blackwood v. State, 777 So. 2d 399, 410 (Fla. 2000) the Court held that even if the trial court had erred in not considering the defendant=s age in mitigation, the error would be harmless since the trial court had considered and gave significant weight in his sentencing order to the fact that Blackwood had no significant history of prior criminal activity (the mitigator to which his age of forty-two related) and it did not appear the jury=s recommendation of the judge=s imposition of a sentence of death would have been any different. This Court has opined that the trial judge is in the best position to judge a non-minor defendant=s emotional and maturity level. Kearse v. State, 770 So. 2d 1119, 1133 (Fla. 2000).

Appellee would respectfully submit that the trial court did not abuse its discretion in the instant case. Even if the lower

court did err, however, such error would be harmless beyond a reasonable doubt. The reason for that is the trial court in fact found as mitigating factors those elements that the defense through Dr. Maher had propounded as mitigation. The court found and gave moderate weight to the statutory mental mitigator that the homicide was committed while the defendant was under the influence of extreme mental or emotional disturbance (AThese mental and emotional stressors . . . when combined with his use of illegal drugs that night . . . amount to extreme mental or emotional disturbance@ - R X, 1637). The trial court also found the presence of the other statutory mental mitigator, i.e., the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and afforded it considerable weight. The court found that the evidence supported the conclusion that Troy was under the combined influences of marijuana, alcohol and cocaine when the attack occurred. (R X, 1639). The trial court found and gave little weight to Appellant=s dysfunctional family background (R X, 1639-40); found and gave little weight to Appellant=s many positive characteristics (R X, 1640); found as supported by the evidence the fact that Troy was sexually molested as a teenager, testified in court and was stigmatized in his small town -- and gave it little weight (R X, 1641); found and gave little weight to Appellant=s history of severe

drug abuse which started in his mid-teens (R X, 1641); found and assigned little weight that Appellant=s mental health problems began to manifest contemporaneously with his drug use (R X, 1641); the court found he had behaved well in the Sarasota County jail and assigned that factor little weight (R X, 1642). The court assigned little weight to Appellant=s offer to plead guilty to all charges provided the State would drop the death penalty (R X, 1642). The court considered the contributions he could make if sentenced to life in prison and assigned it little weight (R X, 1642). The court assigned little weight to Appellant=s difficulty in adjusting outside prison (though it was not much different than that experienced by other freed inmates (R X, 1643). The court found and gave little weight to the fact that he was the father of three children and that after his arrest he cooperated with the police and confessed his guilt. (R X, 1643). The court found that Appellant was intelligent, obtained his G.E.D. and was a prolific letter-writer (R X, 1644) and could assist others if sentenced to life imprisonment. The court assigned little weight to insincere expressions of remorse. The court examined all potential mitigation evidence in the record -- whether or not advanced by the defendant and found none. (R X, 1645). The additional fact that Appellant was over thirty years of age at the time of this extremely brutal murder is de minimis on any weighing scale.

ISSUE VI

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN THE SENTENCING ORDER STATEMENT THAT THE LAW REQUIRED THE DEATH PENALTY IN THIS CASE.

Upon finishing his comprehensive and well-reasoned findings of aggravating and mitigating circumstances covering some twenty-five pages, the trial judge added the following conclusion:

> **On balance the court has concluded the aggravating circumstances far outweigh the mitigating ones beyond and to the exclusion of any reasonable doubt, and that Florida law requires the death penalty to be imposed.** In reaching this conclusion, the court has focused not on the quantity of aggravators or mitigators, but on their distinct qualities considering the totality of the circumstances. Terry v. State, 668 So. 2d 954 (Fla. 1996); Floyd v. State, 569 So. 2d 225 (Fla. 1990).
>
> **The defendant meets four aggravating circumstances, three of which have been determined to have considerable weight**: the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; the defendant was previously convicted of eight felonies involving the use or threat of violence to the person; the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery and sexual battery. **The fourth circumstance was given great weight**: The murder was especially heinous, atrocious, and cruel.

As to mitigating circumstances, the court assigned moderate weight to the fact that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, and great weight to the fact that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

At the core of both of these statutory mitigators is his pervasive drug addiction. **However, the evidence does not support the conclusion that he was acting in a blind rage with free will totally suspended. Despite the consumption of cocaine, alcohol and marijuana he still retained the capacity to stop.** Notwithstanding the level of voluntary intoxication, **he had sufficient abilities and capacity to contemplate his actions before he had completed the infliction of forty-four knife wounds and seven or more blunt head injuries.**

Upon thorough reflection and examination, the statutory and non-statutory mitigating circumstances collectively and comparatively add little in the way of counterbalance. In light of the legal principles that apply in this case, the factors presented for mitigation are substantively inadequate to outbalance the aggravating circumstances. They do not approach equipoise.

The court has considered all aspects of defendant=s character and record that might reasonably serve as a basis for imposing a sentence less than death. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). When all the mitigating evidence is weighed together with the aggravating circumstances, **the court has concluded that the aggravating ones substantially outbalance the mitigating**

> **ones. The jury recommendation is supported by the record beyond a reasonable doubt and must be respected.**
>
> (R X, 1645-46)
> (emphasis supplied)

Appellant=s argument that reversal is warranted pursuant to Smith v. State, 866 So. 2d 51 (Fla. 2004) is meritless.[20] As in so many areas of criminal appellate law, context is critical.[21] In Smith, this Court found the trial court=s statement in the sentencing order that the law Arequired@ the imposition of the death penalty to require a remand ABecause it is not evident to this Court whether the trial court simply misstated the law or would have considered imposing a sentence of life imprisonment if he thought it permitted and thus misapplied the law.@ 866 So. 2d at 67. (emphasis supplied). While there may well have been ambiguity present in the Smith case -- an uncertainty by the trial court as to whether it could impose life or was mandated by the legislature to impose death -- no reasonable person can honestly conclude that an examination of the trial judge=s comments in their entirety and in context *sub judice* similarly betray such uncertainty. Rather, Judge Haworth was expressing the view that Athe aggravating circumstances far outweigh the

[20]Appellee notes that the judge entered his findings on January 23, 2004, prior to this Court=s January 29, 2004 Smith decision.

[21]See, e.g., Craig v. State, 510 So. 2d 857, 865 (Fla. 1987)(noting that a prosecutor=s argument should be examined in context).

mitigating ones beyond and to the exclusion of any reasonable doubt,@ that the court Ahas focused not on the quantity of aggravators or mitigators, but on their distinct qualities considering the totality of the circumstances@ (R X, 1645), that three of the aggravators were determined to have considerable weight and a fourth aggravator (HAC) was given great weight; that the court determined that moderate weight was appropriate to one statutory mental mitigator and great weight to the other statutory mental mitigator. The court=s analysis further explained that despite the consumption of cocaine, alcohol and marijuana, Troy retained the capacity to stop, that Ahe had sufficient abilities and capacity to contemplate his actions before he had completed the infliction of forty-four knife wounds and seven or more blunt head injuries.@ Id. at 1646. The court determined Athe statutory and non-statutory mitigating circumstances collectively and comparatively add little in the way of counterbalance.@ The factors presented for mitigation are Asubstantively inadequate to outbalance the aggravating circumstances. They do not approach equipoise.@ (R X, 1646) (emphasis supplied). The court correctly -- and properly -- determined that the jury recommendation was supported by the record beyond a reasonable doubt and must be respected.

A fair and honest review of the trial judge=s analysis can lead to no other conclusion than -- far from being compelled by

legislative mandate -- that the facts and evidence when considered along with the appropriate aggravating and mitigating circumstances fully merited the resultant imposition of a sentence of death.

Furthermore, this Court has rejected similar defense challenges urging that the trial court erroneously felt obligated to impose a death sentence. In Kilgore v. State, 688 So. 2d 895 (Fla. 1996) the defense argued that the trial judge had improperly inserted a Alicense to kill@ phrase in the sentencing order and thus denied individualized determination of the appropriate sentence. This Court ruled that in context the sentencing order was simply an effort to evaluate the specific evidence in the case and apply it to Kilgore, and the challenged language came after an express evaluation of both aggravating and mitigating factors. Id. at 900. See also Johnson v. State, 593 So. 2d 206, 209 (Fla. 1992), finding meritless a claim the trial court had erroneously applied the death sentence as if it were mandatory based on the judge=s statement that under the evidence and law Aa sentence of death is mandated.@ In the instant case, it is abundantly clear that the trial judge was simply applying the law correctly to the evidence presented and in context was not merely deferring to an unstated vague legislative mandate. Troy=s claim must be rejected.

ISSUE VII

WHETHER FLORIDA=S DEATH PENALTY STATUTE AND THE PROCEDURE BY WHICH APPELLANT WAS SENTENCED TO DEATH ARE CONSTITUTIONALLY INVALID.

Appellant finally argues that the death penalty statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). Troy relies on Justice Anstead=s dissenting opinion in Conde v. State, 860 So. 2d 930, 959-960 (Fla. 2003) but acknowledges that Justice Anstead=s view has not found favor among a majority of the Court. See, e.g., Jones v. State, 845 So. 2d 55, 74 (Fla. 2003); Windom v. State, 886 So. 2d 915, 937-938 (Fla. 2004)(J. Cantero, concurring). Appellant=s claim must be rejected.

As Troy acknowledges, this Court has consistently and persistently rejected Ring-related arguments and variants since King v. Moore, 831 So. 2d 143 (Fla. 2002) and Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). See e.g., Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003); Hernandez-Alberto v. State, 889 So. 2d 721, 733 (Fla. 2004); R. Johnson v. State, --- So. 2d ---, 30 Fla. L. Weekly S215, 218 (Fla., March 31, 2005).

Appellant is not entitled to relief under Ring. The jury in the instant case returned guilty verdicts unanimously on -- aside from first degree murder -- the offenses of burglary of a dwelling while armed with a dangerous weapon, robbery with a deadly weapon, attempted sexual battery, burglary of a dwelling

while armed with a dangerous weapon, aggravated battery, armed kidnapping and robbery with a deadly weapon (R XXVI, 2230-2231; R V, 867-869). The defense declined the opportunity to poll the jurors (R XXVI, 2231). The trial court found as to aggravating factors: (1) that the capital felony was especially heinous, atrocious or cruel; (2) that Appellant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person (there were eight such convictions, four for the offenses against surviving victim Tracie Burchette, two armed robberies in Escambia County, an armed robbery in Santa Rosa County, and an aggravated assault in Tennessee); (3) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation; and (4) the capital felony was committed while the defendant was engaged in the commission of or attempt to commit a robbery and sexual battery of Bonnie Carroll[22] (R X, 1630-1636).

Ring is inapplicable because unlike the situation in Arizona, the maximum sentence for first degree murder in Florida is death. See Mills v. Moore, 786 So. 2d 532, 536-538 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Shere v.

[22]The court also found the facts for the pecuniary gain aggravator were considered in the commission of a robbery aggravator, but it would be improper doubling to consider them separately (R X, 1636).

Moore, 830 So. 2d 56, 61 (Fla. 2002).

And since the jury decided unanimously Appellant=s guilt in the instant case of the offenses involving victims Carroll and Burchette and there are other prior violent felony convictions, Ring relief is unavailable. See Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003); Lugo v. State, 845 So. 2d 74, 119 n 79 (Fla. 2003); Blackwelder v. State, 851 So. 2d 650, 653-654 (Fla. 2003).

PROPORTIONALITY

Finally, Appellee would respectfully submit that the imposition of a sentence of death satisfies the proportionality requirement of this Court's jurisprudence. The instant case involves (at least) four valid aggravators: (1) the HAC aggravator which this Court has on numerous occasions described as among the most serious aggravators, Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992), Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999), Hurst v. State, 819 So. 2d 689 (Fla. 2002); (2) prior violent felony convictions, eight in number; (3) homicide committed by a person under sentence of imprisonment or placed on community control or felony probation; (4) capital crime committed during or in the attempt to commit robbery and for sexual battery and for pecuniary gain.[23] The mitigation

[23]The State also argues that Appellant opened the door for evidence to support a finding of avoiding or preventing a lawful arrest. See Cross Appeal Issue II, *infra*, pp 91-98.

proffered was insubstantial except for the two statutory mental mitigators. Even the presence of those two mitigators does not defeat a finding of proportionality. See Robinson v. State, 761 So. 2d 269 (Fla. 1999). In light of the overwhelming aggravation in this case, the Court should find the death penalty to be proportionate. See Nelson v. State, 850 So. 2d 514 (Fla. 2003)(six aggravators found); Bowles v. State, 804 So. 2d 1173 (Fla. 2001)(proportionality found where aggravators included prior violent felony convictions, on felony probation when murder committed, during a robbery and for pecuniary gain, HAC and CCP); see also Johnston v. State, 841 So. 2d 349 (Fla. 2002); Israel v. State, 837 So. 2d 381 (Fla. 2002). The lower court's decision imposing a sentence of death should be affirmed.

CROSS APPEAL ISSUE I

WHETHER THE LOWER COURT ERRED IN DETERMINING THAT THE STATE'S FAILURE TO TIMELY FILE ITS WRITTEN NOTICE OF SEEKING THE DEATH PENALTY PURSUANT TO RULE 3.202 REQUIRED THAT THE STATE NOT BE PERMITTED TO HAVE ITS EXPERT EVALUATE THE DEFENDANT PRIOR TO PENALTY PHASE AS COMMANDED BY GONZALEZ V. STATE, 829 SO. 2D 277 (FLA. 2D DCA 2002).

Appellant was charged with first degree murder by indictment filed October 11, 2001 (R I, 13-16). On May 15, 2002, prosecutor Roberts sent a letter to Appellant=s trial counsel advising that Aas things stand right now, the State intends to seek the death penalty in the above-referenced case@ (R VIII,

1395).

On June 13, 2003, the State filed a Motion to Compel seeking disclosure of the defense penalty phase witnesses asserting that the defense had elected to participate in discovery (R III, 398-399). The defense filed a Response arguing that the State had failed to provide formal notice of its intent to seek the death penalty (R III, 410-412). The lower court heard argument on the motion on June 19, 2003 (R X, 1673-1680). The State argued that although there was reciprocal discovery it had not received any defense witnesses with respect to the penalty phase. The defense argued that when the State does not comply with rule 3.202 "they're not entitled to penalty phase discovery at this point in time." The defense argued that if they were required to supply discovery the next question would be when and that their penalty phase was an ongoing process up until the trial date. The State responded that if the defense supplied witnesses after guilt but before the penalty phases "there will be absolutely no time for that to be meaningful for the State to do depositions, to talk to the witnesses, to perhaps get rebuttal witnesses." (R X, 1676). The prosecutor added "I think the whole point behind the rule is both sides should be well aware of what is going to be presented, both with the guilt and penalty phase. I think that's been the philosophy of the cases all along . . ." (R X, 1678).

On June 24, 2003, the trial court entered its order on the Motion to Compel. The lower court noted this Court=s adoption of Rule of Criminal Procedure 3.202, Amendments to Florida Rule of Criminal Procedure 3.220 - Discovery (3.202 - Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial), 654 So. 2d 915 (Fla. 1995) amended in November 1995 in Amendments to Florida Rule of Criminal Procedure 3.220 - Discovery (3.202 - Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial), 674 So. 2d 83 (Fla. 1995). The court determined that the ruling in State v. Clark, 644 So. 2d 556 (Fla. 2d DCA 1994) - that the criminal rule obligating a defendant to furnish the prosecutor with a written list of names and addresses of witnesses the defendant expects to call applied to the penalty phase of a capital trial even as to a defendant not yet convicted of capital murder - remained Agood law.@ The court further noted that Rule 3.202 modified Clark=s application where the State anticipates the defendant calling a mental health expert to establish mental mitigation in the penalty phase. Here, although the State failed to file its notice of intent to seek the death penalty as required by the rule and thus was barred from obtaining pre-guilt phase disclosure of the identity of any expert witness the defendant intended to use to establish mental mitigation testimony, that rule did not purport to restrict disclosure of additional information otherwise

appropriate for disclosure under Rule 3.220. The State=s Motion to Compel discovery of defendant=s penalty phase witnesses was granted, except for names and addresses of mental health experts the defendant expected to establish mental mitigation (R III, 447-449).

At the Spencer hearing, the State renewed its objection. The prosecutor argued that due to the Court=s acceptance of the ruling in Gonzalez v. State, 829 So. 2d 277 (Fla. 2d DCA 2002), the State was unable to have its expert (it hired Dr. Meyers) examine the defendant for a psychological evaluation. The prosecution asserted that its hands and the court=s hands had been tied by the Gonzalez ruling. The State added that it objected to the Gonzalez ruling "precluding the State from being able to have this examination done," noted that the prosecutor sought to obtain this additional evidence, and also introduced prosecutor Roberts= letter of May 15, 2002 (R X, 1683-1684). The State submits that the lower court erred in its mechanistic adoption of the Gonzalez ruling that the State's failure to provide notice pursuant to Rule 3.202 operates to preclude the State from obtaining a mental evaluation by its expert prior to the penalty phase. The rule by its terms does not impose any sanction; the failure of the State to give its notice merely means that the rule is inoperative. But the inapplicability of the provisions of the rule does not mean the State is

sanctioned; rather, the case proceeds as before the rule was adopted -- the trial court has discretion to permit an evaluation by the State's experts. Gonzalez's harsher sanction is inconsistent with this Court's repeated statements to provide a level playing field and this Court should clarify the matter so that trial courts do not perceive they have been divested of jurisdiction to act.

In Dillbeck v. State, 643 So. 2d 1027, 1030-31 (Fla. 1994) -- a decision prior to Rule 3.202's adoption -- this Court approved of a trial court exercising its discretion to require a defendant to undergo a mental health evaluation by a State expert where the defendant was presenting evidence from his own expert who had evaluated him. This Court reasoned that requiring such examination would "level the playing field" and increase the fundamental fairness of the proceedings. This Court stated that "No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved." Id. at 1030. To avoid further debate about the issue, this Court adopted an interim procedure for compelling such examinations and submitted the issue to the Criminal Rules committee so that a permanent procedure could be adopted. Id. at 1031.

Since the issuance of Dillbeck, this Court has held that requiring a defendant to undergo a mental health evaluation when

the defendant intends to rely on testimony from mental health experts who have evaluated him is entirely proper, even where the evaluation was compelled before Dillbeck was issued or a permanent rule promulgated. Elledge v. State, 706 So. 2d 1340, 1345 (Fla. 1997). In doing so and rejecting other arguments against such examinations, this Court has stressed that such evaluations are a matter of fundamental fairness. Elledge, 706 So. 2d at 1345; see also Kearse v. State, 770 So. 2d 1119, 1125-27 (Fla. 2000) (rejecting claims of ex post facto violation, violation of Fifth Amendment right to self-incrimination, and limitation on right to present mitigation and claim that rule created unconstitutional one-sided discovery obligation); Davis v. State, 698 So. 2d 1182, 1191 (Fla. 1997)(rejecting claim that examination violates Fifth Amendment right against self-incrimination).

Effective January 1, 1996, this Court promulgated Fla. R. Crim. P. 3.202, to effectuate the intent of Dillbeck to level the playing field. Amendments to Florida Rule of Criminal Procedure 3.220 - Discovery, 674 So. 2d 83 (Fla. 1995). Florida Rule of Criminal Procedure 3.202 provides:

> (a) Notice of Intent to Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment. Failure to give timely written notice under this subdivision

does not preclude the state from seeking the death penalty.

(b) Notice of Intent to Present Expert Testimony of Mental Mitigation. When in any capital case, in which the state has given notice of intent to seek the death penalty under subdivision (a) of this rule, it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present such testimony.

(c) Time for Filing Notice; Contents. The defendant shall give notice of intent to present expert testimony of mental mitigation not less than 20 days before trial. The notice shall contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental health experts by whom the defendant expects to establish mental mitigation, insofar as is possible.

(d) Appointment of State Expert; Time of Examination. After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony. (emphasis supplied)

> (e) Defendant's Refusal to Cooperate. If the defendant refuses to be examined by or fully cooperate with the state's mental health expert, the court may, in its discretion:
>
> 1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert; or
>
> (2) prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant.

By its plain terms, the rule only applies in those cases in which the State provides timely notice of its intent to seek the death penalty.

In Gonzalez v. State, 829 So. 2d 277 (Fla. 2d DCA 2002), the Second District Court of Appeal determined that if the State provided late notice, a trial court would depart from the essential requirements of law by requiring the defendant to undergo an examination. It was Gonzalez that the trial court in this matter followed. However, Gonzalez is contrary to the purpose of the rule, Dillbeck, Elledge and numerous other cases of this and other Florida Courts regarding the remedy for violation of a timing provision of a rule or statute.

As previously noted, this Court had determined in both Dillbeck and Elledge that a trial court had discretion in permitting an evaluation of a defendant by the State's experts

even when no rule applied. As such, the provision of Fla. R. Crim. P. 3.202(a), which states that the rule does not apply unless the State provides timely notice, should not affect the discretion that the trial court has always possessed even before there was a rule. By following Gonzalez's determination that it did not possess this discretion, the trial court erred.

Moreover, a determination that a trial court still has discretion to require a defendant to undergo an examination is entirely consistent with the purpose of the rule and holding of this Court in Richardson v. State, 246 So. 2d 771 (Fla. 1971). As stated earlier, the purpose of Fla. R. Crim. P. 3.202 is to ensure a fundamentally fair penalty phase proceeding by leveling the playing field between the State and the defense. See Amendments, 674 So. 2d at 83; Dillbeck, 643 So. 2d at 1030-31. This purpose would be thwarted if a defendant could prevent the examination merely because a notice was served late in an instance, such as here, where the defendant is not prejudiced by the late filing of the notice. In Richardson, this Court was confronted with a claim a conviction should have been reversed because the State had not complied with the timing requirements of the rule of criminal procedure governing discovery. Richardson claimed that anytime the State did not strictly comply with the letter of the rule a non-listed witness should be precluded from testifying on behalf of the State or a

mistrial should be declared if the undisclosed information benefited the defense. This Court rejected such a mechanistic approach to violations of rules of criminal procedure. Instead, this Court noted that the purpose of all rules of criminal procedure was to ensure that a fair trial was held and that such purpose would be thwarted if a defendant who was not harmed by a technical violation of a rule was granted relief. This same principle that a party cannot benefit from an opponent's technical violation of a rule of procedure unless the party is prejudiced has been applied to other violations of timing provisions of other rules of criminal procedure. Morgan v. State, 453 So. 2d 394 (Fla. 1984)(error to preclude insanity defense because of late notice where State not prejudiced by late notice); Miller v. State, 632 So. 2d 243 (Fla. 3d DCA 1994)(late filing of Williams Rule notice did not preclude presentation of Williams rule evidence where defendant not prejudiced by late notice); Slaughter v. State, 330 So. 2d 156 (Fla. 4th DCA 1976)(mandating Richardson inquiry before striking alibi defense, where notice filed late). In accordance with Richardson and the purpose of Fla. R. Crim. P. 3.202, the trial court erred in failing to permit the State to have its expert evaluate the defendant for purposes of addressing penalty phase mitigation. This Court should enter its order disapproving Gonzalez and explain that Rule 3.202 does not impose a

mandatory, exclusive sanction on the prosecution precluding the State from obtaining a mental examination pertaining to mitigating circumstances the defense expects to establish through expert testimony. Contrary to Gonzalez there is no irreparable injury to the defendant or improper disclosure of confidential work product, as this Court has previously noted in Dillbeck, Elledge and Kearse. This Court should announce that the trial court retains discretion to permit an evaluation by the State's expert in order that there be a level playing field in the presentation of mental health mitigation -- irrespective of the State's failure to timely file its notice of seeking the death penalty. The defense should be required to establish prejudice before the sanction of non-examination be imposed. Since Troy cannot show prejudice, the lower court should have allowed examination by the State's experts.

CROSS APPEAL ISSUE II

THE LOWER COURT INCORRECTLY REFUSED TO CONSIDER THE TESTIMONY OF DETECTIVE GRODOWSKI AT THE SPENCER HEARING THAT WAS BENEFICIAL TO THE STATE, AND IN FAILING TO FIND THE AVOID ARREST AGGRAVATOR.

In its Sentencing Order Following Jury Recommendation of Death, the lower court addressed the State's suggestion of the applicability of F.S. 921.141(5)(e), that the capital felony was committed for the purpose of avoiding or preventing a lawful

arrest (R X, 1635-1636):

> The State argues the murder of Bonnie Carroll was committed for the purpose of preventing a lawful arrest, that her throat was slashed after the stabbings to keep her from identifying him. To support this aggravator prosecutors have to use statements Troy made to Sarasota Police Officer Gregory Gradoski after his arrest. This confession, though found to be voluntarily, [sic] was suppressed in the guilt and penalty phases as a consequence of it being obtained after the defendant had requested an attorney. Such a result is mandated by the rationale expressed in Arizona v. Roberson, 486 U.S. 675 (1988). Testimony concerning the statement was admitted only at the Spencer hearing when the defense called Gradoski to the stand and counsel referred him to a portion of it to establish the non-statutory mitigating circumstances of remorse and prompt confession.
>
> Without asking for the verbatim substance of the admission, defense counsel asked Gradoski whether Troy was "remorseful for his actions" during the confession interview. When the witness said he could not recall, counsel asked him to refresh his memory by referring to pages 13 and 14 of his report. With memory refreshed, the witness confirmed that defendant had indeed made a remorseful statement. Defense counsel said he was attempting to show by this questioning first, that Troy had confessed, and second, that he had shown remorse soon after his arrest.
>
> By using the police interview to prove mitigating evidence, the court ruled the defense had opened the door for the State to qualify, explain, limit or rebut the claim of remorse and to introduce evidence of additional aggravators using the same

> confession. See Ramirez v. State, 739 So. 2d 568 (Fla. 1999). However, while such a ruling appears to be an appropriate discretionary one under section 90.108(1) of the Florida Evidence Code, as well as under general concepts of evidentiary door opening, the legal precedent for it in a death penalty case is not clear.
>
> Accordingly, in an admitted abundance of caution, and solely as a matter of law, the court has elected to deny the State any advantage from its use. The case for the death penalty in Mr. Troy's case will stand or fall on its own, independently, based on the other evidence without consideration of facts disclosed in defendant's confession to Officer Gradoski.
>
> In preparing the Sentencing Order the court has disregarded the Spencer hearing testimony of Officer Gradoski in regard to the contents of the confession in any way that might benefit the State. The court has considered it only for the purpose offered by the defense, that is, as bearing on the mitigating claims of remorse and prompt confession. Consequently, there is insufficient evidence before the court to find this aggravator exists.
>
> (emphasis supplied)

At the Spencer hearing, on cross-examination by the prosecutor, Detective Grodowski testified that Troy talked about tying the victim Bonnie Carroll with an extension cord, that he thought she could call the police if he let her go, that he knew he would have to eliminate her (R X, 1703; R XXXVI, 3509). Troy thought that his seventeen months for a drug violation would now turn into seventeen years (R X, 1703-04; R XXXVI, 3509-10).

Troy stated that he cut her and thought he had killed her, that she tried to defend herself with a piece of glass, that he dropped his knife and was able to get the piece of glass away from her and stab her with that glass (R X, 1704; R XXXVI, 3510). At one point he stabbed her enough so that he thought she was dead; he then went to get her purse, money and keys in the kitchen. When he heard a noise coming from the bedroom he armed himself with a kitchen knife in the kitchen, walked back into the bedroom and found Bonnie trying to get up off the floor. He couldn't believe it, that she wasn't dead. He went in and stabbed her some more. He thought he cut her throat at that time (R X, 1704-05; R XXXVI, 3510-11). Troy indicated that he tied the victim with electrical cord so that her hands and feet were tied, that he cut her clothes off because she was tied up (R X, 1707; R XXXVI, 3513). Troy mentioned that he had to "eliminate" her so she couldn't be a witness (R X, 1708; R XXXVI, 3514). Troy would not allow the officers to put his statement on tape because he needed to have something for his attorney to work with (R X, 1708; R XXXVI, 3514). Troy said he had to eliminate her to stop her from talking once she got out (R X, 1728; R XXXVI, 3534). The witness reiterated Troy said he couldn't believe she wasn't dead and stabbed her some more (R X, 1729; R XXXVI, 3535). Troy admitted he had brought one knife

with him and obtained another knife from her kitchen (R X, 1730; R XXXVI, 3536). Troy was not crying and coolly explained what happened (R X, 1735; R XXXVI, 3541). In response to defense counsel's question the witness declared that Troy made a statement that this case would not be going to trial, that he wouldn't be fighting it (R X, 1737; R XXXVI, 3542).

The trial court had properly ruled at the Spencer hearing that the State could properly cross-examine the detective to give a more complete recital of Troy's admissions to which the defense opened the door on direct. There is no constitutional violation pursuant to Miranda and its progeny since Appellant elected to call the officer, knowing that it would likely lead to his full disclosures on cross-examination. Chandler, *supra*.

In Ramirez v. State, 739 So. 2d 568 (Fla. 1999) this Court determined that since the defendant did not elicit any portions or parts of the co-defendant's confession from the officer during cross-examination and thus the rule of completeness did not apply to permit introduction of the details of the co-defendant's confession on redirect:

> This inquiry opened the door only to allow the State to explain that Grimshaw's confession contradicted these assertions. It did not open the door to the questions on redirect regarding the details of what Grimshaw stated when Grimshaw was unavailable for cross-examination.

(Id. at 581)

The Court also noted that it was violative of the defendant's constitutional rights to allow admission of the details of a non-testifying co-defendant's confession where the defendant has not had an opportunity to confront or cross-examine that witness. Id. at 581. Of course, unlike Ramirez, the instant case does not involve the problem of lack of confrontation in a co-defendant's statement; here Troy made his admissions to Grodowski and there was no impediment to his responding to the admissions he initiated, if he chose.

The Supreme Court has held that a defendant may be impeached with his prior inconsistent statements -- even if obtained in violation of the requirements of Miranda v. Arizona -- since there is no constitutional right to give false evidence to the jury. Harris v. New York, *supra*.

In addition, this Court has determined that a prior inconsistent statement which would be admissible in the guilt phase only for purposes of impeachment and not as substantive evidence could be used as substantive evidence in the penalty phase even though not permissible to use the statement as such in the guilt phase. Rodriguez v. State, 753 So. 2d 29, 47 (Fla. 2000). The Rodriguez court explained:

So long as the prejudicial nature of the

> hearsay does not outweigh its probative value and the defendant has an opportunity to rebut the hearsay, it is admissible.

In that case the statement was admissible as substantive evidence in the penalty phase under section 921.141 because it was relevant and probative to the aggravating circumstances of both CCP and that the murder was committed to avoid arrest. Rodriguez had an opportunity to rebut Malakoff's testimony regarding this statement and:

> …we find that the trial court properly considered Malakoff's statement as substantive evidence in the penalty phase proceeding.

In the instant case, Appellant's statements to the officer constitute admissions against interest, which constitute an exception to the hearsay rule. See F.S. 90.803(18)(a). And false statements can be introduced to show consciousness of guilt -- admissible under F.S. 90.801(c) since not offered for the truth of the matter asserted, hence not hearsay. Troy had the opportunity to rebut the testimony, and the admissions to Grodowski were not unduly prejudicial but rather properly relevant and probative to demonstrating the presence of the avoid arrest aggravator.

The testimony elicited through Detective Grodowski established the additional aggravating factor of homicide committed to avoid arrest, F.S. 921.141(5)(e). Troy admitted

stabbing Carroll enough so that he thought she was dead, went to get her purse, money and keys in the kitchen and when he walked back into the bedroom and saw her trying to get up off the floor, he could not believe she wasn't dead, went in and stabbed her some more (R X, 1704-05; R XXXVI, 3510-11). He admitted he had to eliminate her so she couldn't be a witness, to stop her from talking once she got out (R X, 1728; R XXXVI, 3534). Troy's admissions establish this witness elimination/avoid arrest aggravator. Smith v. State, 424 So. 2d 726 (Fla. 1982); Kokal v. State, 492 So. 2d 1317 (Fla. 1986); Koon v. State, 513 So. 2d 1253 (Fla. 1987); Philmore v. State, 820 So. 2d 919, 935 (Fla. 2002)("We conclude that the trial court did not err in finding that the avoid arrest aggravator was proved beyond a reasonable doubt. First, Philmore confessed that the reason for killing Perron was witness elimination."); Urbin v. State, 714 So. 2d 411 (Fla. 1998); Consalvo v. State, 697 So. 2d 805 (Fla. 1996).

Since Grodowski's testimony regarding admissions by Troy were properly allowed into evidence at the Spencer hearing, the court erred in failing to credit that testimony and in failing to find in its Sentencing Order that the avoid arrest aggravator was established beyond a reasonable doubt.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the judgment and sentence of death should be affirmed. Additionally, the Court should disapprove Gonzalez v. State, 829 So. 2d 277 (Fla. 2d DCA 2002) and clarify that the State may have its expert evaluate a defendant despite the failure to give timely notice of seeking the death penalty and should conclude the lower court erred in not finding the avoid arrest aggravator.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P. O. Box 9000, Drawer PD, Bartow, Florida 33831, this ____ day of May, 2005.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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