IN THE SUPREME COURT OF FLORIDA

ANDREW MICHAEL GOSCIMINSKI,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. SC05-1126
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court
of the Nineteenth Judicial Circuit
In and For St. Lucie, County, Florida

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STATEMENT OF THE CASE AND FACTS

A jury found Andrew Michael Gosciminski, appellant, guilty of first degree murder, robbery with a deadly weapon, and burglary with assault with a deadly weapon. R6 952-54. It recommended a death sentence by a vote of 9-3. R6 1018. The court sentenced him to death for the murder, and to prison terms for the other offenses. R8 1298-1306. It found the CCP, felony mrder (merged with pecuniary gain) and HAC circumstances in aggravation, and found numerous mitigating circumstances. R8 1272-97.

A. Joan Loughman was beaten and stabbed to death in a Fort Pierce house belonging to her elderly father on September 24, 2002. She was in Florida to make arrangements for her father, who was moved from a hospital to a rehab center and then to Lyford Cove, a Fort Pierce assisted living facility, R21 1552-53, where appellant was outreach director. Around 8:47 or 8:56 a.m., she ended a telephone conversation her sister, Janet Vala-

Terry, saying there was someone at the door. R21 1558-59, 1582. Her body was found that evening. R21 1588-89, R22 1605. The time of death was not determined, but she did not answer phone calls at 12:41 p.m, 4:24 p.m, and later. R23 1789. Her jewelry was missing, including a two carat diamond ring with baguettes on each side. R21 1564-65, R32 2926. The home had no signs of forced entry. R21 1590, R22 1623. There were no usable prints at the scene, R22 1625-27, and the state presented no DNA evidence, blood stains, or the like, identifying the murderer.

Debra Thomas was living with appellant in Port St. Lucie (they were about to move to Vero Beach) at the time of the murder. She said that, for several days before September 24, he said he would get her a two carat diamond ring in West Palm Beach. R28 2355. On September 24, she found him washing his upper body at the bathroom sink. R28 2361. He had blood on his arm; his clothes were on the floor, soiled with blood. Id. He said he had to get rid of the clothes because of the blood. R28 2362. He said he had roughed some guy up while collecting money for his friend Dominick. Id. She never again saw the clothes (a tan shirt and brown loafers). R28 2363-65. At trial, she put the time between 11:00 a.m. and 1:00 p.m. R28 2361. She had told Det. Hickox appellant came home around 1:00. R28 2438-39. At deposition, she put the time around 1:00, saying he left

around 3:00. R28 2450, 2455.

Lois Bosworth, a company executive, met appellant at Lyford Cove around, or a couple of minutes before, 12:30. R26 2217-20. He wore a black Polo shirt, and khaki slacks. R26 2220. She did not see blood or scratches or bruises on him. R26 2226-27.

Debra Flynn, Lyford Cove's director, said appellant came to the office around 1:30 p.m. on September 24. R26 2126. In the past he would come to morning staff meetings, but his attendance had become very erratic. R26 2127. He wore a short sleeve shirt, pants, and casual shoes. R26 2128. His hair was slicked back, freshly combed, maybe still wet, he looked freshly cleaned. Id. His arms seemed shinier than usual, but he was never dirty. R26 2129. He was unusually quiet and subdued. Id. He told her and her assistant, Nicole Rizzolo, he had a ring for Thomas; he had a tissue with a white or platinum ring with a round diamond in the center and perhaps smaller diamonds or baguettes on either side. R26 2130-31. It was old, dirty, with black on it, did not look recently bought. R26 2131. She was not interested, was irritated about his work. R26 2132, 2123. He said he got the ring, a diamond bracelet and other jewelry in an estate sale. R26 2133-34. She saw the ring for less than a minute. R26 2143.

Nicole Rizzolo said he arrived after lunch, and met Bosworth

around 12:45 or 1:00. R26 2196, 2207. He showed Rizzolo and Flynn a white gold or platinum diamond ring; she estimated it was two carats, but was not good with jewelry. R26 2198-99. She did not look at it very long, was not interested in it. R26 2199. He said he got Thomas a tennis bracelet. R26 2199-2200. He pulled the ring from a napkin. R26 2200. At trial, she said he showed them the ring on September 24, but said at deposition that he did it before the murder. R26 2198, 2204-05.

Pamela Durrance, appellant's ex-wife, testified that during their marriage he sold jewelry from a briefcase. R25 2055-56. He did this seven or eight years before the trial. R25 2057.

Thomas said appellant gave her a white gold or platinum ring with a large diamond, and baguettes on either side the evening of the 24th. R28 2372. It was not in a box, it was dull, like it needed to be cleaned, didn't look new. R28 2373. She showed Maureen Reape the ring the next day and the day after that. R28 2374, R31 2752-53. On the 26th, she and appellant told Steven Jurina appellant got her a ring, but Jurina did not see it. R26 2230-33. Appellant told him it was a two carat round diamond worth about $15,000. R26 2232.

On October 1, appellant told officers he went to the house on the 17th to pick up furniture. R23 1805-06. He said the furniture was outside, in an alcove or entrance way. R23 1806. He

thought the maid had come to get a key, but he didn't actually see her, but Loughman said she was there. R23 1813.

On October 2, Det. Hickox secretly videotaped an interview with appellant. He said he moved furniture from the house to Lyford Cove on the 17th. SR1 34-36. Loughman said the maid was there to pick up keys, but he did not see her; the stuff was in the living room and part of it was outside, and she came in later to do the paperwork. SR1 36. He saw her maybe once or twice at the facility, and met her Monday night. SR1 36. They talked about 10 or 15 minutes, and she asked him to put a suit-case in her car. SR1 37. Asked about personal conversations, he said, "We talked about us, my move coming up, moving stuff like that." SR1 37-38. Asked about her jewelry, he said he didn't pay too much attention to that stuff. SR1 39. He said he would agree to give a DNA sample after talking to his lawyer, and calling him on his cell phone. SR1 40-42. Asked about the jewelry, he said he didn't "notice stuff like that. I deal with people, family members all day long that, it's irrelevant to what Dad or [Mom] may be able to take care of to us, which is why we do a confidentiality statement on what Mom or Dad can af-ford." SR1 43. Hickox said Joan's sister Janet said Joan said he was interested in her diamond ring and was going to buy his girlfriend a ring, but he did not recall the conversation, say-

ing he did not get that friendly with people, Joan just knew from conversation things like they were moving. SR1 43-44. He began to say what he had done on Tuesday, and his phone rang, and he went out to talk to his lawyer, and there was a discussion of arranging about the DNA. SR1 45-47. He said the day after seeing Joan he had a meeting with the head honcho at his company at 11, and he was packing for his move and went to the bank around 9:30 or 10:00. SR1 48. His lawyer called, and the interview ended. SR1 48-49.

On October 2, while Hickox spoke with appellant, Dets. Bender and Hall interviewed Thomas. They saw she had a white gold or platinum ring with two diamonds on the side of a large diamond, R30 2686, and said they were investigating a murder involving jewelry. R28 2394. She said it was an engagement ring appellant had given her previously. R28 2396. After they left, appellant called, saying they had "to get rid of that, Frankie said it's hot." Id. He came home, took the ring off the counter and went to the beach. R28 2398. That night, Debra met Ben Thomas, who was not related to her. R28 2403. They went to the police station, where she told what had happened to the ring. R28 2403-04.

Ben Thomas was married to Deborah Pelletier. In June or July 2002 he told her he was in love with Debra Thomas. R31

2763. Pelletier moved out of their Port St. Lucie home, and Ben Thomas and Debra Thomas briefly moved in. R31 2763-65. At the start of August, they moved out and Pelletier moved back in. R31 2766. Ben and Debra continued to live together until late August, when Debra moved back to live with appellant. R28 2347. She said did so because appellant threatened her, Ben Thomas, and her family. R28 2347-48. She married Ben Thomas in 2003. R28 2405.

At 8:45 a.m., September 24, Ben Thomas paid for breakfast at a cafe across the bridge from the murder scene. R29 2505-06, 2536. He worked for a diving equipment company, and said he was in the area to visit a dive shop. R27 2297-98, R28 2889-90.

Before the case went to the grand jury, Det. Hickox told Ben Thomas that "if they don't indict, he's a free man and that's what we're trying to prevent." R29 2544. He said they had "a lot of circumstantial evidence, but as you know, we don't have a smoking gun, we don't have the jewelry and especially we don't have the ring that he gave Deb. If we had that, this case would be a breeze and that's why we want to call Deb back in." Id.

Appellant was indicted October 22, 2002. R1 1. In November, Pelletier's father Joseph found a bag containing Loughman's jewels, including a tennis bracelet, in a shed at the Pelletier home. R31 2797-2802, 2774-75, 2784, R32 2900-04. The Pelleti-

ers gave them to Hickox; before meeting Hickox, Deborah Pelletier got a call from Ben saying it was the happiest day of his life, and it was going to be the best Christmas ever because she was going to join appellant in jail. R31 2784-85. After handing over the jewelry, she went to Chicago; while she was there, Ben Thomas made a false police charge that she had used his credit card. R31 2775, 2783.

A couple of weeks after October 3, 2002 and appellant's arrest, but before the jewels were found, Ben and his friends took stuff from Pelletier's house and garage. R31 2787-88.

An officer called Debra Thomas about finding the jewels, and she correctly identified the bag as for Geoffrey Beene Gray Flannel cologne before he described it. R28 2427-28. She said she bought it for appellant and he kept the bag in his drawer. Id. A credit card bill showed Ben made a $64.16 purchase at Geoffrey Beene on June 29, 2002. R3 462. He said he bought shorts. R29 2542.

Appellant began visiting Pelletier when she moved back into the house in August 2002, and sometime before the murder he helped her turn on the water at a shut-off outside the shed. R31 2770, 2781, 2783. Later, she told him about finding the jewels; he seemed a little taken aback and said something like, I'm done, it's over, and told her not to visit him again. T31

2780.

In February 2003, Loughman's fanny pack was found near the intersection of I-95 and Martin Highway. R32 2874-77, 2945.

Thomas Loughman, Joan's husband, said one of the rings (State's 5) in a ring lineup (State's 113) resembled Joan's missing ring. R32 2926. Exhibit 5 was number 3 in the lineup. R24 1875. Debra Flynn could not pick a ring from the lineup:

> none of them really looked like it. That the one that I chose, I chose because it, the stone was set lower and that it was dirtier looking, so that was the reason why I was choosing that stone. But I didn't really believe that any them looked like it.

R26 2139. She told the police "something like I would choose this one, except that it's larger and it's not dirty." R26 2184-85. She thought the ring she saw looked more flush, like number 4. R26 2185. She told the police she would choose number 3 "except for the fact that it doesn't have any black around it, that it doesn't look old and dirty as the ring that I saw." R26 2186. Nicole Rizzola said that Exhibit 113 was not the lineup the police showed her. R26 2200-01. In the lineup she saw, she picked a ring "kind of similar, but not the ring" appellant had. R26 2201. Debra Thomas picked ring 3 from the lineup. R28 2431. Officers Bender and Hall also picked number 3. R30 2688-90, 2711-12.

Kyle Lee, a Nextel employee, testified about calls to and from appellant's cell phone on September 24. R3 458. He produced a cell tower map, with an overlay showing purported areas the phone could have been in at the time of each call. R29 2586. There were calls from 6:31 through 8:08 (Becker Road tower), R29 2587-89; calls at 8:13 and 8:19 via a tower east of I-95 (St. Lucie West), R29 2595-2601; a call at 8:24 and a twelve-minute call at 8:25 (St. Lucie Stadium), R29 2601-02; calls at 9:12, 9:27 (voice mail access), and 9:28 (Favor Cove), R29 2603-05; a 10:23 call via a tower east of Highway 97 and south of Becker Road (Martin Highway tower), R29 2605; a call at 10:36 (Stuart), R29 2606-07; and calls at 11:29 and 11:39 (Becker Road). R29 2607.

Financial records showed: his net pay was $1384.20 for September 1-15, 2002, R3 442, and $1447.84 for the rest of the month, R3 444; $344.27 past due on an auto loan owed by him and Debra Thomas, R3 448; $157.75 past due on the electric bill in his mother's name on the house he lived in with Debra, R3 449; $51.32 over limit on a credit card, R3 451;[1] a $330.86 check account overdraft, R31 2823; and, on September 24, a $430 cash bank deposit in Palm City at 10:08 a.m., and a $57 check deposit

[1] The largest charge was for a $217 airline ticket for a trip Debra Thomas took to Arizona. R 3 451, R28 2442-43.

in Darwin Square in Port St. Lucie at 11:04 a.m. R31 2836-41.

Appellant testified that his job involved seeing to contacts and brochure stations at hospitals, doctor's offices, and businesses. R34 3150-52. On September 24, he had an 8:00 a.m. nursing home appointment in Port St. Lucie; when he got there, the person was unavailable. R34 3201-02, 3206. He headed toward his office, stopping to check brochures and see contacts. R34 3206-09. He stopped at an office, hospice, and the VA. R34 3209-10. After stops in Fort Pierce, he went south to a Palm City nursing home. R34 3211-12. He made a bank cash deposit, and went east. R34 3212-13. The cash was from a garage sale. R34 3186. He went to Publix to get boxes for the move. R34 3214. He went on making stops, and went to another Publix for boxes. R34 3214-17. At Darwin Circle, he deposited a check he had forgotten in his briefcase. R34 3217-18. He made stops until noon, when he went to his office, meeting Bosworth around 12:30. R34 3218-19, 3221. He was not on South Beach on September 24. R34 3220. After leaving that morning, he did not return home until 3:00 or 3:30. R35 3225.

Debra had alcohol and drug problems, and was very fond of Xanax, Hydrocodone, and OxyContin; not having her own prescriptions, she used his, mixing drugs and alcohol. R34 3164-65. They broke up in April 2002, and she went to Arizona, but they

got back together and she assured him she would stop. R34 3165-66. Her substance abuse returned in a few weeks. R34 3166. She went back to Arizona; the $217 credit charge was for the ticket. R34 3173. She returned in August, saying she was sober, but he soon found it was not true. R34 3175-76.

Debra wanted a new car, diamond ring, breast implants, she wanted to be on the checking accounts, to be on the house lease purchase option, to the beach. R34 3175. The overdue car payment was one she was supposed to pay. R34 3177. She was a jewelry hound and he bought her many pieces of jewelry, including four rings. R34 3157-58. Ring 4 in the lineup was the closest to a ring he gave her, but it was bigger and a little wider than one in the lineup. R34 3160-61, 3163. Ring 4 was dark or dirty looking, and antique style rings sometimes look dirty. R34 3161. She liked antiques and wore only flush mount jewelry. R34 3161-62. He bought the ring from her brother in August. R34 3163. Her brother and sister-in-law dealt in jewelry on eBay. R34 3159, R35 3528-29.

Debra went with him to get his paycheck at his office; Joan met him, and Debra commented about her jewelry and he commented about it briefly. R34 3188, 3191. They said they were looking for a larger diamond ring for Debra, even though they had bought the one ring. R34 3191. That night, Debra wanted to see the

beach at the new house, so they took a ride, and she offered to show where Joan's house might be on the island as he was unfamiliar with the area and Debra had lived there. R34 3189-90.

When he picked up furniture Joan's father's home, some of the furniture and a suitcase were outside the door. R34 3192-95. Joan said the maid was there, but he did not see her. R34 3195. Joan's father fell in Lyford Cove, and was hospitalized September 23. R34 3197. Appellant contacted Joan and helped her move a suitcase to the car. R34 3198.

Appellant had two prior convictions on bad check charges, which he said arose when a pet business he had with his ex-wife went out of business. R35 3308-09.

B. At the penalty phase, the state presented Thomas Loughman's statement regarding his wife's character.

Jerome Brinson, security chapel deputy, testified for the defense to 2½ years of experience in jail with appellant, who often came to the chapel; his behavior was exemplary, very respectful and courteous, he was very outstanding, had no problems with other inmates. Records of his attendance at mass and counseling were put in evidence. R38 3647-48. Sgt. Robert Wolff, a jail deputy, testified to appellant's good behavior. R38 2651-52.

Linda Winterton, director of health services at an assisted

living community, testified to appellant's good work as director of housekeeping at a Lake Worth facility where they both worked. R38 2655-58.

Dr. Michael Riordan, a psychologist, appellant's grandmother, his primary caregiver in his early years, died when he was very young. R38 3673. He was strongly attached to her, her loss had a significant impact. R38 3674-75. He did not feel the same support and nurturing from his parents, and was left alone to be involved in activities without a feeling of emotional support. R38 3675. He was a very obedient child. R38 3673. He had migraines, nausea, blurred vision and vomiting when a teacher disapproved of him. Id. He was active in school clubs, Cub Scouts, religious training, camera club, plays, and choir. R38 3674. His parents would let him off to go to activities, but were not involved. R38 3675. A work supervisor noted he was a dedicated, excellent worker; he was noted for pursuit of development through college. R38 3674.

He married pretty young when his girlfriend was pregnant, and was later separated from his child when the mother moved away; he wanted to provide the child military benefits, but was frustrated to the point of seeking and getting mental health treatment. R38 3676. He had depression and anxiety at times in his life, including this one. R38 3676-77.

He was in the Air Force and had good ratings for outstanding work, and was reported as having exceptional job knowledge. R38 3683. He was honorably discharged. R38 3682. In the military, he was provided with antianxiety medication; he was depressed and was diagnosed with a personality disorder at that point. R38 3685.

He had a history of very high ratings as an excellent employee, with good ratings at his last job, and was promoted; at Lyford Care, he finished courses showing an ability to continue his education and meet job requirements, with certificates for courses in fire, hazardous waste, blood borne pathogens, how to dispose of those; infection control; handling major incidents, emergencies, procedures and safety; HIV and AIDS, food handling and nutrition service; residents' daily living activities; training about abuse, neglect and exploitation and domestic violence; and mandatory state reporting in first aid. R38 3682-84. He was an outstanding, very knowledgeable employee, a great community asset, involved in volunteer services. R38 3684.

Based on interviews with appellant, psychological testing, and review of his record, Riordan concluded that he had a mixed personality disorder, also termed personality disorder not otherwise specified, with components including

> a strong need for approval and attention and support, which, theoretically, stems from his relationship with

> his parents where he tried to gain their nurturance and their support and was not even very successful in being able to achieve that so that there's this side of him that wants to please. It results in things like outstanding work records because he's trying to obtain the approval of his supervisors.

R38 3677-78. He always sought approval, was anxious and depressed when he could not get it; it is treatable; an he had a periodic depression disorder not otherwise specified. R38 3678-79.

Excluding the present case, Riordan saw no history of violence; his history was of seeking attention and approval. R38 3680. He sought to stand out among peers as the one to get excellent ratings and praise to the point of rubbing coworkers the wrong way, engendering bad feelings and bad will from them. Id.

Under stress or pressure, he had headaches or dizziness, chest pain, shortness of breath, high blood pressure. R38 3681. In October 2002 he was prescribed Zoloft for depression. R38 3685. In 2003 he received Prozac and Elavil, antidepressant medications, while in jail. R 38 3686. He reported a problem with alcohol in the past, and used marijuana in college. Id.

In Tampa he pulled a driver from a burning truck, which fit his tendency to go above and beyond. R38 2688.

Testing at the first interview showed memory problems consistent with depression, and his appearance and demeanor were consistent with depression. R38 3689-90. At the second inter-

view, he spoke of being more at peace in turning to the Bible, and felt less distress. R38 3690. Tests on both dates showed suicidal risk. R38 3690-91. A modified IQ test showed an estimated IQ of 120. R3692-93. Another test showed an estimated IQ of 117. R38 3693-94. The scores underestimated his actual IQ. R38 3694.

There were high scores for histrionic and self-defeating features, indicating he sought attention and approval and could end up getting exploited, degraded. R38 3697-99. Tests indicated he would shower a female partner with gifts, wanting to please and do whatever she wanted. Id. The narcissism scale was relatively lower, and he did not fit all the characteristics of a narcissistic personality. R38 3700. Scales for arrogance and schizoid traits, a limited ability to connect with others, were lower. R38 3700-02.

He fit the category of personality disorder not otherwise specified, primarily, histrionic; the primary diagnosis was personality disorder with the likelihood of intermittent depression and anxiety episodes. Id.

Riordan identified many mitigating factors, including appellant's personality disorder, his mother's dramatic and histrionic personality, the death of his primary support (his grandmother) at an early age, medical problems, history as a good

student and obedient child, migraines and nausea when faulted by a teacher, disordered development, no evidence of antisocial behavior or traits in childhood and he did not have an antisocial personality, attempts to provide military benefits for his daughter, anxiety, depression and physical reactions to stress and need for counseling and medication, suicidal risk, no evidence of malingering, academic record extending past childhood that was recognized in the military as he pursued a college education outside his work day, religious activities, Cub Scouts, choir and other school activities as a child, strong work ethic for which he was recognized at several jobs, honorable military discharge, good rehabilitation potential, having a business of his own showed initiative and work ability, high intelligence which could help in rehabilitation and adjustment to prison life, rehabilitation potential in that he was likely to follow the rules and make gains in psychotherapy, he was never in trouble with the law as a child, he was never convicted of a violent crime before this case, attempts to provide a stepfather role, an effort to be a good dad, he could do good for someone while in prison, and had a very good to excellent prognosis for prison behavior, there was no indication of possible violence in prison. R38 3704-15.

On videotape, Jack Raisch, a Catholic deacon and jail chap-

lain, said appellant regularly attended church services and counseling, progressed in his faith, made a big commitment to his journey of faith, and was very thirsty for God's word, with a good positive attitude despite his circumstances. R39 3778-82.

Appellant's aunt, Maria Portyrata, testified by videotape he was very close to her as a boy, would hang around her husband's boatyard, he was wonderful. R39 3791. He loved to swim and play on the beach and walk her dogs. R39 3792-94. He was accelerated in school and was really intelligent. R39 3794. He had a very good singing voice and would go to church with her. R39 3795.

His mother, Florence, testified by videotape. He was born in 1954 in Fall River, Massachusetts, after a long labor. R39 3800. He was very healthy. R39 3801. His father was a Navy project programmer. Id. Florence was a beautician and seamstress; her mother helped raise appellant his first few years. R39 3801-02. Her mother died when he was about 3 ½. R39 3803. He attended Catholic schools through grade ten, then a public high school. R39 3803-04. His first wife had a child, and he joined the Air Force. R39 3804-05. Florence's husband had a heart attack and they moved to Florida, where he died. R39 3806. Appellant moved Florence into his apartment, and she then

bought a house in Sebastian with him and his wife. R39 3808. He married Pamela Durrance in 1997. Id. He was a very good boy, involved in school and church activities including acting and Boy Scouts. R39 3809. He had very good grades, was a very good student. R39 3810. He wanted to be a doctor, but they could not afford it; when he came to Florida to help care for his father, he got a college certificate in medical technology, and worked at a mental health clinic. R39 3811. Pamela had a pet shop in Okeechobee. R39 3810-12. He never made Florence give him money; she gave it as an act of kindness, of love. R39 3812. Appellant, Florence, Pamela, and Pamela's children lived together; his marriage to Pamela ended after a dispute between Florence and Pamela's son. R39 3812-14. Debra Thomas, an alcoholic who drank day and night, lived with him and Florence. R39 3814. Debra had problems with the law, lost her license for DUI. R39 3814-15. Just before Florence's move to an Apopka nursing home, appellant asked for money to get back with Pamela, and she lent him $9000. R39 3816. He used to money to get a place in Vero Beach with Debra. R39 3817. He would put Florence's checks at the bank with her permission. R39 3818. He had never been violent. Id.

Dr. Gregory, Landrum, a psychologist, testified for the state. He never personally examined appellant. R38 3756. He

said appellant had traits and characteristics of a various personalities, including narcissistic, schizoid, and histrionic, but did not appear to meet criteria for one in and of itself. R38 3747. A personality disorder persistently and consistently affects behavior, education, experience, work history, and relationships. R38 3748. He did not see a pattern of behavior that would lead him to find a disorder that significantly impacted his life. R38 3749. He did not see him as vulnerable, though he seemed to exaggerate accomplishments perhaps for attention or favor. R38 3750. Suicide potential and depression seemed situational in the military and jail. R38 3751. School records showed he was pretty connected, could adjust well at work, including in the military; many positive words and accolades came his way, he was highly intelligent. R38 3752-53. Landrum reviewed voluminous discovery, and did not specifically recall domestic violence. R38 3753-54. Appellant would adjust positively in prison. R38 3755. What he did in the jail indicated he would be a model prisoner; his personality suggested striving to please, affiliate, present himself positively, so he could be involved proactively in groups or activities. R38 3755-56. He did not see psychological mitigation. R38 3757. Highlights in accomplishments and education were noteworthy. Id. Landrum did not diagnose antisocial personality disorder, which he would

probably see as mitigation. Id.

SUMMARY OF THE ARGUMENT

1. The court erred in denying the defense cause challenge to juror Schmidt. He was initially absolutely in favor of the death penalty in murder cases, then said he did not favor death for accidental vehicular homicides. His answers did not remove his bias favoring the death penalty for first degree murders.

2. It was error to let the state present testimony of how long it took officers to drive to and from the murder scene long after the crime without showing substantial similarity in driving conditions the days the officers drove and the day of the crime.

3. The court should have excluded evidence purporting to show where appellant's cell phone was at various times before and after the murder.

4. It was error to deny a discovery objection regarding a credit card bill showing Ben Thomas made a purchase at Geoffrey Beene less than three months before the murder.

5. The evidence does not support the convictions.

6. The court erred in not letting appellant ask Janet Vala-Terry if two carat rings are widely available for sale.

7. The court erred in not letting the state imply that appellant fashioned his testimony after seeing the evidence and hearing the witnesses.

8. The state improperly commented that appellant had not previously said Debra Thomas was with him when he met Loughmamn.

9. It was error to overrule an objection to questioning contending that the ring was black and dirty from Loughman's blood.

10. It was error to deny a mistrial when the state contended appellant stole from his mother while she was in a nursing home.

11. It was error to allow hearsay statements of Joan Loughman during the taped interview of appellant.

12. Error occurred when the state presented hearsay statements of Joan Loughman through her husband and sister.

13. It was error to exclude Det. Hickox's statement of opinion to Ben Thomas.

14. It was error to grant an objection to appellant's proper argument regarding circumstantial evidence and change the agreed-to jury instruction during appellant's final argument.

15. The court should have ordered disclosure or review of grand jury testimony.

16. It was error to let the state present incompetent evi-

dence that another person was cleared of the murder.

17. The record does not support the CCP circumstance.

18. The court failed to make a written finding of sufficient aggravators to support a death sentence.

19. The record does not support the HAC circumstance.

ARGUMENT

I. WHETHER THE COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE DEFENSE CAUSE CHALLENGE TO JUROR SCHMIDT.

William Schmidt's juror questionnaire showed he thought the death penalty was "Absolutely appropriate in every case where someone is murdered." R4 533. The judge instructed the venire in detail about the penalty and sentencing phases of a capital case. R18 1100-03. The state also gave a detailed discussion of sentencing procedure. R19 1191-95. On questioning by the state, Schmidt said he favored the death penalty in certain situations, he was somewhat 50/50, explaining (R19 1297):

> I mean, if it was an accidental murder, like a kid recklessly driving down the road or -- or he -- a tire blew out and he accidentally hit another car and killed somebody else, I don't believe that he should be -- you know, in the death penalty for him.
>
> MR. TAYLOR: Right.

> MR. SCHMIDT: Just because he took another life. But somebody that just walks into a convenience store and kills a clerk for $20, I do. I believe in that.

In response to leading questions from the state, he said he understood not every first degree murder charge warrants death, it had to be premeditated or felony murder to be first degree murder, he would go through the weighing process, he would automatically want death if "the evidence is there," he would have to hear all the evidence, he would recommend life imprisonment if he felt feel like the mitigation outweighed the aggravators, and would keep an open mind. R19 1297-1300.[2]

Appellant challenged him for cause; the judge said he would not grant it yet, but he could question him further. R19 1372.

The defense later asked jurors where they would put themselves on a scale with zero for one who would never recommend death and ten for one who would always vote for it. R20 1397-98. Schmidt said he would be about a five without hearing about the facts and evidence, and would go through the weighing process. R20 1404.

After appellant used all his peremptories, Schmidt came up as the twelfth juror. Appellant asked for a peremptory to use

[2] He was also asked about his close relations with police officers, R18 1145-46, 1248, whether he thought he would be a good juror and his and his wife's employment, R19 1247-50, and the presumption of innocence and reasonable doubt. R19 1316-19,

on him, noting that the court had denied the cause challenge; the court ruled Schmidt was not subject to a cause challenge and denied an additional peremptory. R20 1474-75.

The court then announced the final twelve jurors of the main panel, and the alternates were selected. R20 1475-77. The court told appellant it recognized he might not agree with its rulings on the cause challenges, and asked if he was satisfied with the jurors, "except for the Court's rulings concerning any challenges for cause", and he said he was. R20 1477. The jury was then sworn. R20 1479-81. Appellant asked to make Schmidt an alternate to "remove that as an appellate issue, to make this a much cleaner trial". R20 1490. The court denied the request after the close of the evidence. R20 1491, R36 3510-11.

This Court found error in similar circumstances in Overton v. State, 801 So.2d 877, 890-92 (Fla.2001), where juror Russell said he believed an innocent person should take the stand. When the judge said Overton did not have to testify and failure to do so could not be held against him, Russell said he could follow the law, was just expressing his feeling that an innocent person should testify, and could not see himself not testifying and trying to clear himself. He said he could follow instructions about not testifying, agreeing that it could not be considered

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1353-54.

and could not enter his deliberations whatsoever. It was the way he felt, that one who did not take the stand had something to hide, but he could shut that out if the judge said to. He repeated his personal belief, but again said he would close that out of his mind, and not consider it and or hold it against Overton. Id. 890-91. This Court found his assurances that he could follow the law did not negate his statement that one should testify. Id. at 892.

At bar, Schmidt originally indicated the death penalty was absolutely appropriate for every murder. After the judge and the state separately detailed the death penalty procedure, he said he was somewhat 50/50, explaining he did not believe in it for a murder where a kid's tire blew out and he accidentally killed somebody, but he believed in it for felony murder. He then said he would go through the weighing process, consider the evidence, and follow the law, would automatically want the death penalty if "the evidence is there," would put himself in the middle of the scale, and would still go through the weighing process.

These statements did not negate his view that he would not favor death for an accidental murder but would automatically favor it in other cases. One cannot be sentenced to death for accidental murders such as he envisioned. Statements that he

would consider the evidence and weigh the circumstances did not negate his view that felony murder merited a death sentence in and of itself. They just meant that he would hear the evidence to see if it was an accidental murder.

Overton relied on a Third District case which involved a situation like that at bar (id. at 892-93):

> The Third District reached a similar conclusion in Gibson v. State, 534 So.2d 1231 (Fla. 3d DCA 1988), in which it remanded for a new trial after one of the potential jurors stated during voir dire, "I feel if they are innocent, they can tell their side of the story to the judge." Id. at 1232. Although the juror ultimately indicated that if she had a reasonable doubt she would find the defendant not guilty, the appellate court concluded that her answers gave reasonable doubt as to whether she could render an impartial verdict. See id.

Overton did uphold denial of a challenge to juror Heuslein. Id. at 893-95. At the start of voir dire, he favored death for first degree murder. Id. at 894. But when he heard the procedure, he expressed "great deference" to the instructions, noting several times he would "'start from a clean slate,' follow the law, and abide" by the law requiring him to consider the circumstances. Id. He did not doubt "he could entertain the possibility of a life recommendation should the jury find Overton guilty of first-degree murder." Id.

Unlike Hueslein, Schmidt first indicated he absolutely favored death for all murders. Even after the judge and the state

explained the procedure in detail, he did not favor it for an accidental vehicular homicide, but that he did favor it for a felony murder. Even on leading questioning by the state, he said he would automatically want the death penalty if the evidence is there. He did not express "great deference" to the instructions.

Regarding Heuslein, Overton relied on Castro v. State, 644 So.2d 987 (Fla.1994), in which jurors expressed a strong presumption for death "before they were given any explanation about their role in the case." Castro, 644 So.2d at 990 (e.s.).

To repeat, Schmidt absolutely favored death for all murders before the start of the case. After two separate explanations of the jury's role, he favored it except in accidental murder cases. Subsequent answers did not negate his attitude: he thereafter said he would automatically favor death if the evidence was there.

Page 890 of Overton set out the following standard:

> ... Initially, it is clear that the test to determine a juror's competency is whether that juror can set aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. [Cit.] We added that "[a] juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." Kearse, 770 So.2d at 1128 (citing Bryant v. State, 656 So.2d 426, 428 (Fla.1995)). It is also well settled that the trial court has broad discretion in determining whether to grant or deny a challenge for cause based on juror in-

> competency, and the decision will not be overturned on appeal absent manifest error. [Cit.]

A cause challenge should be granted "if there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at trial". See Singer v. State, 109 So.2d 7, 23-24 (Fla.1959). Further:

> [A] juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind that will enable him to do so.

Id. at 24. Close cases should be resolved in favor of excusal. See Segura v. State, 921 So.2d 765, 766 (Fla. 3rd DCA 2006).

At bar, the court abused its discretion by making a ruling contrary to the foregoing case law. Judges do not have discretion to make rulings contrary to law. See Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla.1980). Schmidt's presence on the jury that convicted appellant and recommended his death sentence violated his rights under the Jury, Due Process, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

The error requires a new trial. In O'Connell v. State, 480 So.2d 1284 (Fla. 1985), the judge refused to let the defense

question two death-scrupled jurors, and refused to strike three jurors who would vote automatically for death. This Court wrote:

> We conclude that the combination of the two errors: 1) refusing to allow defense counsel to examine excluded jurors on voir dire, and 2) refusing to excuse three jurors for cause who would automatically recommend death in a capital case permeated the convictions themselves and therefore warrant a new trial.

Appellant recognizes that this Court ordered only resentencing in Hernandez v. State, 621 So.2d 1353 (Fla. 1993), in which the judge limited the questioning of jurors about penalty. Hernandez said: "unlike the situation in O'Connell where the convictions themselves were tainted by the error, only the death sentence is so affected under the present facts." Id. at 1356. A footnote followed this statement with annotated citations, but the footnote did not further explicate the distinction.

Hernandez was decided before Bottoson v. Moore, 833 So.2d 693 (2002), under which conviction of first degree murder without more makes one eligible for the death penalty. Before Bottoson, a conviction for first degree murder was a necessary step for death-eligibility, but not a sufficient one. Cf. Banda v. State, 536 So.2d 221, 225(Fla. 1998) (death not permissible under Florida law "where … no valid aggravating factors exist."). After Bottoson, a vote to convict for first degree murder is itself a vote for death eligibility. No further fact-finding is

required. (If further fact-finding were required, the statute would violate Ring v. Arizona, 536 U.S. 584 (2002).) The murder conviction is both necessary and sufficient for death-eligibility under Bottoson.

As the guilty verdict itself is now enough to qualify one for death, denial of the challenge was prejudicial as to both phases. This is especially so because the guilty verdict here supplied an aggravator the state relied on at penalty, felony murder. Indeed, the state presented no further evidence of aggravation at the penalty phase. This Court should order a new trial.

Alternatively, if this Court finds prejudice only as to penalty, it should order new jury sentencing proceedings.

II. WHETHER THE COURT ERRED IN ALLOWING TESTIMONY AS TO THE TIME IT TOOK OFFICERS TO DRIVE TO AND FROM THE SCENE OF THE MURDER LONG AFTER THE DATE OF THE MURDER.

Over defense objection, Det. Hickox testified that on April 12, 2005, he drove from appellant's home at 8:00 a.m. to a place on I-95 near the Mets Stadium at 8:25, and then drove 18 miles from there to the murder scene in 25 minutes. R27 2284-85. He had no evidence of any route taken by the perpetrator. R27 2284.

Counsel argued it was irrelevant and without foundation, that said the state had not shown the roads were those appellant

supposedly took, what speed limit he might have driven, or whether there was road congestion, and the state had to show the road and weather conditions, whether construction, the light signals, "all of those things were the same" R24 1877-80.

The judge agreed, but the state said, it was "crucial to our case. If we can't prove this, we have no argument in closing argument," and "the crux of our case" was showing appellant could make it in that time. R24 1881 (e.s.). Counsel replied (id.):

> They knew this was the crux of their case. They should have known this back when this happened and look at it very close in time and be able to engage the roadway construction, the traffic lights, check the weather that day and all that information to properly lay the foundation. And unless they do that, there is no foundation.

He argued the prejudice outweighed any probative value. R24 1883.

The judge ruled it admissible as going "to issues of credibility as opposed to admissibility", but then deferred ruling until the state introduced its cell phone evidence. R24 1884.

When the court returned to the issue, appellant argued one could not tell from Kyle Lee's testimony where he supposedly was at the time of the Mets Stadium call, and there was no

> evidence that he was on I-95, that he took the route that Detective Hickox conducted his experiment on. The

> zone is so large he could have been south of where he started, could have been north, he could have been west, east. He might not even be on that particular route. So the variables are very important as to the experiment conducted by Detective Hickox. We don't know what route was taken.

R27 2252-53. He said the state had not shown substantial similarity between the 2004 drive and the supposed 2002 drive. R27 2256. The court ruled the testimony relevant, but said Hickox could not give an opinion. R27 2269-70.

The state also presented testimony of Sgt. Hall that in March 2003 he drove from murder scene to the Palm City bank in 42 minutes. R27 2271-72, R30 2712-15. Appellant made the same objection, which the court again overruled. Id. Hall had no evidence of any route taken by the perpetrator. R27 2713.

No Florida case is directly on point, but cases govern the similar issue of test crashes. They require substantial similarity of test conditions and those at the time of the incident. See Dempsey v. Shell Oil Co., 589 So.2d 373, 380 (Fla. 4th DCA 1991) (substantial similarity rule requires "the important factors … be similar to those involved in the subject accident"). A ruling is reviewed for abuse of discretion. See Vitt v. Ryder Truck Rentals, Inc., 340 So.2d 962, 964-65 (Fla. 3rd DCA 1976).

The state did not show "substantial similarity" between the officers' drives and appellant's supposed drive. It showed no similarity of road conditions on September 24, 2002, and the

days of the officers' drives. Counsel gave their divergent lay opinions as to how conditions in the county had changed, R24 1883, R27 2255, but the state presented no evidence point despite appellant's objection. It presented no evidence comparing weather or traffic conditions on September 24 to when the officers drove. Without such a showing, the evidence had no probative value,it was irrelevant, its prejudice outweighed any probative value.

This Court reviews rulings on evidence for an abuse of discretion, but discretion "is limited by the rules of evidence." Johnston v. State, 863 So.2d 271, 278 (Fla.2003). The judge abused his discretion at bar.

> The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986). ljkkjh

The error was prejudicial. The state said the evidence was crucial, it hardly had a case without it. R24 1881. The judge said it was "very critical." R24 1886. It purported to be objective evidence untainted by the motives and erroneous memories. The state relied on it in final argument for its timeline. R36 3399, 3402-03. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of

the state and federal constitutions. This Court should order a new trial.

III. WHETHER THE COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING TESTIMONY AND EXHIBITS REGARDING THE AREA OF 100% MAXIMUM COVERAGE OF CELL PHONE TOWERS.

The state argued appellant's cell phone calls showed his movements on September 24, relying cell phone records, a map of cell phone towers, and a hand-drawn overlay diagram by Kyle Lee, a Nextel engineer, purporting to show the coverage area of the towers through which the calls passed. Appellant argued Lee was not qualified and a foundation could not be laid and that Lee could only say in deposition he was 85% sure a person or phone was in certain zones at a certain time. R21 1508-09. The judge said he would hear a proffer. R21 1510. When the court returned to the matter, the state said Lee would testify to an 85% likelihood that each call was made within a tower's general coverage area. R25 1960. Appellant contested the evidence's reliability, sought a Frye[3] hearing, and challenged Lee's expertise. R25 1961-62.

On proffer, Lee said he had a BS degree in electrical engineering, and was a manager responsible for Nextel's cell towers and network in South Florida. R25 1967, 2005. A tower's coverage area was cut into three sectors formed by antennas; each

sector had a main lobe (area of coverage) and as lobes extending several miles to the sides and back of the antenna. R25 1969, 1974, 1979, 1992. A map of area cell towers showed the three sectors of each tower, with colored zones showing the possible origin of a call received by the sector: roughly 85% of the time the phone was in the colored zone, so there was a 15% chance the phone was from outside the colored zone, but there was a point at which the tower could not receive the call. R25 2009-19, 1986-87. A sector's directional antennas cover mainly the area the antennas face, but the antennas can receive signals from the sides and rear. R25 1993-96. He did not have a definite distance at which the call could not be received. R25 1990. He said he could the sectors' lines of impossibility, "but they will be rough estimates." R25 2013 (e.s.).

He based his testimony on an Agilente Technologies propagation tool; this software tool provides a propagation estimate. R25 2007-08. He had no idea if Agilent's accuracy had been under scrutiny. Id. Nextel engineers entered data and the software tool estimated the propagation. R25 2007-08. Engineers did a drive test with equipment that collected signal strength and quality from cell phones, and input that data into the tool to make a more accurate prediction. R25 2008. He was not sure

[3] Frye v. United States, 293 F. 1013 (D.C.Cir.1923).

if the tool had been subject to peer review by an expert not employed by Nextel, but said it was used in the industry. R25 2008. Use in the industry did not show its accuracy. Id.

Appellant objected to the evidence's accuracy, saying the map was extremely prejudicial, deceptive, and did not show lines of impossibility, or how the back or side lobes could pick up from the same tower sector. R25 2028-29. He said it did not show where the phone could be at the time of each call. Id. He objected to Lee's qualifications, saying he had never been asked to do such a project before, and could not testify if he had ever been tested on this, or how often he was right and wrong. R25 2029-30. The judge ruled Lee was qualified to give the testimony. R25 2031.

Appellant said under Frye the evidence was not accurate and unreliable and mistakes can be made, it was extremely prejudicial and the probative value did not outweigh prejudice. R25 2033. He argued the map was deceptive as Lee could only put the call within a large area, and it was not helpful to the jury. Id. He said the prejudice was huge with such a color coded map, noting it did not show the back or side lobes, and 85% is not at a level the court should accept. Id.

Concerned the map would be misleading in that it showed an 85% likelihood the person was in the area at the time of the

call, R25 2034, the judge asked if Lee could plot the outer limits of possibility, and he said he could do it "off of my head or I can go back to the office." R25 2040. He said both would be very similar. Id. He said that there were "a lot of different factors that come into play," "lots of different factors that would determine the actual area of impossibility, including interference and terrain. So I'm trying to take that into consideration when I'm giving." R25 2040-41. He said he could draw it with a pen in a "few minutes." R25 2041. He produced an overlay for the map to show "areas of impossibility" of the tower sectors. R26 2093-95. Another engineer had gotten figures from his laptop including the height of each tower. R26 2097-99. Lee did not use the Agilent propagation tool, and instead "did it in my head." R26 2098.

Appellant maintained his earlier objections, including the Frye objection. R26 2100. He said the map was overly suggestive and deceptive, and objected to the science. R26 2100-01. The judge overruled the objections, saying calculations of cell service areas and what can be picked up as a signal by a tower did not involve new technology. R26 2101-03. He said it would help the jury determine the facts. R26 2102. When Lee testified before the jury, the court recognized appellant's continuing objection to the testimony and exhibits, including cell

phone records. R29 2558-59, 2577. Appellant also objected to the diagram with the overlay as substantive evidence, saying it should be used only as a demonstrative aid and not be sent to the jury room for deliberations:

> The rough circles that were drawn are around the previously colored zones is very rough in nature. And if they go back and start looking at street names and seeing if it falls in this magic marker line, that's really not assisting them. In fact, it's more deceptive to them, so.

R29 2577-78. The court overruled the objection. R29 2584.

The proponent of new and novel scientific evidence must show that the undergirding scientific principles are generally accepted by a clear majority of the relevant scientific community. See Hadden v. State, 690 So.2d 573, 576 (Fla.1997) (text and footnote 2). A ruling is reviewed de novo. Id. at 579.

At bar, the state presented a Nextel manager with a BS degree in engineering who drew an overlay supposedly showing the line at which it was 100% impossible for a phone to communicate with each cell tower sector. It presented no scientific evidence that such a line could be drawn accurately, much less that it could be based on calculations made in one’s head without normal instrumentation used in the industry. It did not show such was well-established or its undergirding scientific principles are generally accepted by a clear majority of the relevant scientific community.

Lee did not even use the Agilent tool used in the industry: he just "did it in my head." R26 2098. He drew lines by hand in a few minutes with a pen. R25 2041. The lines were "rough estimates." R25 2013. He did not say he used the drive test information in drawing the lines. Regardless, there was no evidence as to how the drive test's developmen and reliability, or what factors affected its reliability. There was no evidence of when it occurred, or if it involved conditions relevant to those at bar. There was no testimony about the effect of atmospheric conditions and how they might affect the test. There was no testimony about the effect of the power of the test equipment in relation to the power of appellant's cell phone. Common experience shows that an important factor affecting the ability of a phone and a tower to communicate is the phone battery's strength. The record does not show if the drive test tested the ability of towers to communicate with phones operating a low, medium, or high battery power, or whether it considered other factors.

Lee said vaguely that terrain affects the reach of a cell tower, but he did not testify to any scientific evidence showing that a hard line could be drawn at which it would no longer be possible to communicate with a cell tower.

The court erred and abused its discretion. The state did not show scientific acceptance for the idea that the limits of coverage of a cell phone tower can be determined with 100% accuracy.

The only thing the record shows about Lee's background and qualifications is that he has a BS in electrical engineering from some institution, he once worked for a Nextel contractor and he then had a management position at Nextel with responsibility for the performance of its towers and network. He did not say if his work was purely administrative or involved scientific work. On proffer he vaguely said he had "driven in this service area, collected data before," R25 2022, but his testimony did not show familiarity with such basic matters as possible sources of error in the drive test or propagation estimate. The state did not show he had special expertise in the field. Amazingly, it did not even ask proffer his education: the defense brought out his engineering degree. R25 2005. The state did not show how long he worked at Nextel, or how long he was in his current position.

An expert's qualification is within the judge's sound discretion, Penalver v. State, 926 So.2d 1118, 1134 (Fla.2006), but the proponent must show relevant expertise. See Husky Indus., Inc. v. Black, 434 So.2d 988, 992 (Fla. 4th DCA 1983). The

state did not present show expertise as to the 100% range of cell towers. Even if it had, he said on the proffer he could only give "rough estimates." R25 2013. He then produced a hand drawn overlay.

Even if the testimony and the exhibits were admissible, the prejudicial effect outweighed the very limited probative value. Far from treating the overlay's lines as "rough estimates," the state presented it to the jury as if it was totally accurate. It used it to attack appellant's denial that he was in the area of the murder. R35 3300-01. It used it in an attempt to establish he was at the site where the fanny pack was found. R35 3304-05. It later again relied on the exact accuracy of Lee's hand-drawn sketch, telling jurors appellant was at that exact site (R36 3391-92):

> The fanny pack that he didn't have time to go through? He had to get out of there. Fanny pack that he went, threw it at 95 and Martin Highway, the same place that at 10:36 he's sitting on Martin Highway, cell tower down there.

It presented it as precisely accurate (R 36 3403-04) (e.s.):

> Then at 10:36, 10:36 he calls that cell phone that Debra -- I'm sorry, Pamela Durrance has in his mom's name. 10:36. And where is this hitting? Not this side of the Stuart tower, not this side of the Stuart tower, but this side of the Stuart tower. And what does this encompass? It encompassed Martin Highway. The realm of impossibility is right there at the intersection of 95 and Martin Highway. Just so happens that the victim's fanny pack is found on this side of 95 in Martin Highway. I can't recall any of his tes-

> timony ever giving an explanation of why he's out west of 95 on this day on Martin Highway. He has to stop, get out of his car, look through that fanny pack, discard what he can't get, get what he can.

Relevant evidence "is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." §90.403, Fla.Stat. This Court reviews a ruling for a clear abuse of discretion, and generally defers to the trial court. See Floyd v. State, 913 So.2d 564, 575 (Fla.2005).

The judge abused his discretion. The overlay was deceptive and did not help the jury. It showed "rough estimates," but the state did not make the jury aware of this, treating it as highly accurate so that appellant's movements could be tracked to the murder scene and the Martin Highway site.

It was error to admit the testimony and exhibits, and admit the overlay as substantive evidence and not as a demonstrative exhibit. The testimony and evidence were not harmless beyond a reasonable doubt. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

> IV. WHETHER THE COURT ERRED IN OVERRULING THE DISCOVERY OBJECTION AND DENYING A MISTRIAL, AND LETTING THE STATE PUT INTRODUCE THE CAPITAL ONE CREDIT CARD STATEMENT.

The following occurred on appellant's cross-examination of Ben Thomas on Friday, May 22, 2005 (R29 2540):

> Q During the time period that you were seeing Debra Thomas in June of 2002 you purchased a bottle of Jeffery Bean [sic] Cologne in Vero Beach?
>
> A Why do you say that?
>
> Q Well, charge was made to your credit card for Jeffery Bean Cologne, Gray Flannel?
>
> A Could I see it?
>
> Q Are you denying that charge?
>
> A How much is the charge? I don't recall ever buying Jeffery Bean Cologne.
>
> Q $64?

The state objected that counsel had to show Thomas "the receipt," and at the bench the judge overruled the objection, but said counsel would have to show him the receipt if he went further to refresh his memory and refer to it, and counsel agreed. R29 2540-41. Thomas testified he spoke to the Geoffrey Beene store the night before his cross-examination, and he recalled buying two pairs of shorts for $29.99 each, and the total with tax would be about $64. R29 2542. He said he spoke to the state about Geoffrey Beene "some time prior to this." R29 2543. At the end of the cross, the state asked to see "the receipt" counsel had referred to. R29 2546. Counsel said he did not have a receipt, and had based his questions on Deborah

Pelletier's e-mail to her father about the purchase. R29 2547.[4] At the end of court that day, the state gave appellant the credit statement, R3 461-62, and said it might call a rebuttal witness from Geoffrey Beene. R29 2633-34.

On Monday, defense counsel[5] said he had used Pelletier's e-mail on Ben Thomas's cross, he was unable to investigate the matter and the state was now saying it would call a rebuttal witness from Geoffrey Beene, and because he did not have the credit statement he had been unable to talk about it in opening and was not prepared to cross Ben Thomas. R30 2641-42. He said it was crucial, exculpatory, and the state had failed its discovery obligation. R30 2642. He said if he had the receipt he could have talked about it more in opening, could have gone over

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[4] Ms. Pelletier wrote her father on November 27, 2002:

> ... . Also, yesterday I found a credit card charge for about $64 at Geoffrey Beene - the name on that pouch. I had the credit card statements out for the police. I was looking them over again when it jumped out at me. Ben bought something at Geoffrey Beene on June 29, while he was in Vero. He spent a day or two there with Debra when he was supposed to be on a business trip. ... . I looked up Geoffrey Beene on the Internet and there it was - men's cologne - and it comes in that particular type of pouch.

SR1 63. She wrote in the same letter that her attorney had said the police should see the credit card statement. Id.

[5] The court reporter attributed these remarks to the court, but it was obviously defense counsel talking.

it with Hickox, and could have examined Ben Thomas more effectively. R30 2643. He said it was a major discovery violation, and moved for a mistrial. Id.

The state said it had not had the original statement, and had got it from Pelletier on Friday night. R30 2645. When the judge asked if she ever had a copy, the prosecutor said Pelletier's attorney had faxed Hickox a copy, and Hickox's report would show when that happened. R30 2645-46. She said the state had complied with discovery by providing copies of the e-mail and Hickox's report. R30 2646. She said she personally did not know the state had a copy before trial started, adding: "When this issue came up we asked [Hickox] had he received something. We did have it in his report but we didn't have that copy." R30 2647-48. It was never made clear when the prosecutor actually first got a copy.

The court reviewed Hickox's report, R30 2648, which said that at a December 16, 2002, meeting Pelletier's attorney handed him

> a photocopy of a Capital One credit card bill, which she says is a joint account used by herself and Ben Thomas. Item number 47 on the bill indicates that on June 29 2002, that credit card was used to purchase a bottle of Geoffrey Beene Cologne, in Vero Beach. The cost of the cologne was $64.16.

SR1 68-69. The state said it complied with discovery by giving appellant the report, and he could inspect the credit statement

at the police department. R30 2651.

The judge said the state must disclose papers it plans to use at trial, and appellant argued that that provision applied. R30 2654-55. He said the state had never given him a copy, and:

> They never made this available to us, Judge. I went to the Fort Pierce Police Department. They didn't give me this statement when I was there to review all the evidence. We sat there in a room for hours going through this evidence, photographing it, measuring it, inspecting it. It was never there.

R30 2656-57. The state said that the exhibits were kept in books, R30 2657, and defense counsel said,

> We were not provided a book, Judge. We asked to see all the evidence in this case. They came out with this -- all this mountain of evidence. We went through each one, one at a time. It was not in any of that evidence.

R30 2657-58. He said it was not provided at deposition. R30 2658.

The judge failed to inquire into and determine what had become of the exhibit, why the police did not show it to counsel, when exactly the prosecutor got a copy, and why it did not immediately give appellant a copy.

Counsel argued that if he had had the statement he would have had the account number and could have investigated the matter with the credit card company or Geoffrey Beene. R30 2660.

The judge said the defense could have pursued the matter

with Deborah Pelletier, and "just because the Defense didn't fully investigate it, that doesn't strike me that somehow the State has somehow violated the discovery rules." R 30 2661-62. He denied a mistrial, saying that, absent an additional showing that the state actually knew it was a bottle of cologne that was bought, there was no Brady violation, but the defense could renew its motion "if it can be demonstrated that a bottle of cologne was purchased and the State had access to that information and withheld it, you can renew that motion and I may have to grant it." R30 2662-63. The credit card bill came into evidence over defense objection. R30 2676.

The court erred in overruling the defense objections and denying a mistrial. Any finding of no discovery violation was clearly erroneous. The state put the bill in evidence. As the judge acknowledged and appellant argued, R30 2654-55, the state must disclose papers it intends to use at trial. See Fla. R. Crim. P. 3.220(b)(1)(K). There is no rebuttal exception to the discovery rules. See Kilpatrick v. State, 376 So.2d 386, 388 (Fla.1979) (discovery rule "recognizes no rebuttal witness exception"); Lowery v. State, 610 So.2d 657, 660 (Fla. 1st DCA 1992) ("no exception to the disclosure rule for impeachment or rebuttal evidence"); Elledge v. State, 613 So.2d 434, 436

(Fla.1993) ("neither a rebuttal nor impeachment exception"); Charles v. State, 903 So.2d 314, 317 (Fla. 2nd DCA 2005) (same).

Also, under rule 3.220(b)(4) the state must disclose evidence tending to negate the defendant's guilt. It does not require a strict showing that the evidence actually negates guilt. Cf. Perdomo v. State, 565 So.2d 1375, 1376 (Fla. 2nd DCA 1990) ("While the reports were of debatable exculpatory value, appellant should have had the benefit of the information contained within them.").

Discovery's chief purpose "is to assist the truth-finding function … and to avoid trial by surprise or ambush." Scipio v. State, 928 So.2d 1138, 1144 (Fla.2006). This Court has "repeatedly emphasized not only compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules in both the criminal and civil context." Id. (e.s.).

> Of course, the policy of avoiding trial by ambush or surprise has even greater application in the criminal context, where the stakes are much higher and the obligation of the State to see that justice is done is much greater than that of the private litigants in a civil dispute.

Id. at 1145.

The police had a copy in late 2002. When counsel came to look at the exhibits, the police did not show it to him. That the prosecutor herself did not know about the exhibit is irrele-

vant. Cf. Gorham v. State, 597 So.2d 782, 784 (Fla.1992) (prosecutor "is charged with constructive knowledge and possession" of evidence held by police); Wilson v. State, 789 So.2d 1127, 1129 (Fla. 2nd DCA 2001) (police knowledge "imputed to the prosecutor"); Rojas v. State, 904 So.2d 598, 600 (Fla. 5th DCA 2005).

It was error to relieve the state of its duty by saying appellant might have discovered the exhibit on deposition of Deborah Pelletier. Cf. Lynch v. State, 925 So.2d 444, 446 (Fla. 5th DCA 2006); Blatch v. State, 495 So.2d 1203, 1204 (Fla. 4th DCA 1986) (state did not disclose statement; "The trial court ruled that the defense, having been advised of the names of the officers, had an obligation to depose them. This is not the law."); Martinez v. State, 528 So.2d 1334 (Fla. 1st DCA 1988) (quoting Blatch). The record does not show counsel was even aware of the exhibit's significance when he deposed Pelletier.

The judge did not properly explore the question of prejudice. He put the burden on the defense to prove lack of prejudice.

Even where there is an adequate inquiry so that the resolution of a discovery issue is subject to review for an abuse of discretion, the standard for deeming the violation harmless is extraordinarily high. Cox v. State, 819 So.2d 705, 712

(Fla.2002) says:

> As the trial court held a Richardson hearing in response to the appellant's motion for a mistrial, its decision is subject to reversal only upon a showing that it abused its discretion. See State v. Tascarella, 580 So.2d 154, 157 (Fla.1991). However, where the State commits a discovery violation, the standard for deeming the violation harmless is extraordinarily high. A defendant is presumed to be procedurally prejudiced "if there is a reasonable probability that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." Pomeranz v. State, 703 So.2d 465, 468 (Fla.1997) (quoting State v. Schopp, 653 So.2d 1016, 1020 (Fla.1995)). Indeed, "only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." Id.

The issue of procedural prejudice looks to whether there is a "reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." State v. Schopp, 653 So.2d 1016, 1020 (Fla.1995). "[E]very conceivable course of action must be considered." Id. Further (id. at 1020-21 (e.s.)):

> If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.

The underscored statement above demonstrates the judge's error. He put the onus of showing prejudice on appellant. He

said appellant had to show the item purchased was cologne and the state knew it was cologne. He did not properly inquire into prejudice.

The procedural prejudice could not have been clearer. In addition to the prejudice already discussed, it is noteworthy that the state had discussed the matter with the witness, and he said he had spoken with Geoffrey Beene the night before cross, and he bought shorts there on June 29. The defense was unprepared for this testimony, and could not counter it. The judge should have sustained the objection and ordered a mistrial. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions, and this Court should order a new trial.

V. WHETHER THE EVIDENCE SUPPORTS THE VERDICTS.

The Due Process Clauses of the state and federal constitutions require that the state prove guilt beyond a reasonable doubt. Suspicions alone cannot satisfy the state=s burden, nor can the improper stacking of inferences. See Ballard v. State, 923 So.2d 475, 482 (Fla. 2006).

The evidence most favorable to the state shows appellant was interested in Loughman=s ring, phone records showed he was somewhere within miles of the murder scene on September 24, around noon he had blood on his arm and clothes, later that day he had

a ring similar to Loughman=s but he got rid of it on October 2, saying it was hot, and on September 24 he was within miles of where the fanny pack was found months later, he had minor financial problems, the jewels were found in a Geoffrey Beene cologne bag at a location to which he had minimal contact, he had a Geoffrey Beene cologne bag in his drawer, and he said he was done, it was over when he heard about jewelry in the shed.

The stacking of inferences necessary to get from this evidence to the conclusion of guilt does not satisfy the constitutional standard of proof beyond a reasonable doubt. This Court should reverse and order appellant be discharged.

VI. WHETHER THE COURT ERRED IN NOT LETTING APPELLANT PRESENT EVIDENCE THAT TWO CARAT RINGS WITH BAGUETTES ON EACH SIDE ARE WIDELY AVAILABLE ON SALE IN JEWELRY STORES.

An important issue was whether appellant showed co-workers and gave Debra Thomas Loughman's ring stolen. If her ring was unique, it increased the likelihood that it was the ring appellant had. But if similar rings were commonly available, it would diminish the value of the state's identification evidence about the ring.

Joan Loughman's sister Janet testified on direct about her jewelry, including the diamond ring allegedly taken in the murder. R21 1563-65. The following occurred on cross (R21 1582):

Q Okay. Do you have a lot of knowledge of jewelry

as well?

A Not as much as my sister.

Q Okay. That ring that you described earlier, the two carat with the baguettes on each side, that's a very popular design, isn't it?

A I don't know if it's popular

Q It's in the newspaper every weekend on sale at various jewelry stores?

A All right.

MR. TAYLOR: Okay. I believe he's calling for hearsay.

THE COURT: Objection sustained. The jury will disregard the last question.

The court erred. The hearsay rule does not exclude verbal acts such as offers to sell and their rejection. Cf. Burkey v. State, 922 So.2d 1033, 1036 (Fla. 4th DCA 2006). A newspaper ad is an offer to sell, and is not hearsay, unless used to prove such things as market value. Compare In re Marriage of LaBass & Munsee, 66 Cal.Rptr.2d 393, 397-98 (Cal. App. 1997) (help wanted ads admissible to show that offers of employment existed) to State v. Reese, 844 N.E.2d 873, 878-80 (Ohio App. 2005) (newspaper ad placed by non-merchant for heirloom ring not admissible to prove market value; ad might have been admissible for other purposes).

Saying one saw ads for an item differs little from saying one saw it for sale in stores. If someone testified to seeing

such rings for sale in a Bloomingdale's display case it would not be hearsay. In this regard, there is no difference between a newspaper ad and a display case.

As noted above, the rules of evidence limit a judge's discretion. Cf. Johnston v. State, 863 So.2d 271, 278 (Fla.2003) In criminal cases, the Due Process and Compulsory Process Clauses of the state and federal constitutions guarantee the defendant's right to present evidence. Cf. Donohue v. State, 801 So.2d 124, 126 (Fla. 4th DCA 2001) (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

The error was not harmless beyond a reasonable doubt. There was an important question whether the ring was unique. The state presented testimony that a jeweler made a replica of Loughman's diamond ring, and the replica was in the lineup. R32 2926. Witnesses said appellant and then Debra Thomas had a similar ring. The defense questioning went directly to an important issue. If Loughman's ring was truly unique, that would help the claim that appellant was the killer. But if similar rings are commonly available in everyday commerce, that would make more likely any misidentification. The error was not harmless beyond a reasonable doubt. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court

should order a new trial.

VII. WHETHER THE COURT ERRED IN ALLOWING THE STATE TO IMPLY ON CROSS-EXAMINATION THAT APPELLANT HAD FASHIONED HIS TESTIMONY AFTER SEEING ALL THE EVIDENCE AND HEARING ALL THE WITNESSES.

The following occurred on cross of appellant (R35 3231-32):

Q You have heard every witness testify?

A Yes.

Q You have seen documents, transcripts and depositions before this trial began; correct?

A Yes.

Q And you have had time to fashion your testimony accordingly, haven't you?

Maybe I should use the word boast instead of fashion.

MR. HARLLEE: Objection, argumentative.

MR. TAYLOR: Q Have you had time to fashion your testimony after seeing all this documents and hearing all these witnesses through this trial?

A No more time than anyone else.

THE COURT: Excuse me?

MR. HARLLEE: Same objection, Judge.

THE COURT: The objection is overruled.

MR. TAYLOR: Q Answer the question, please.

A No more time than anyone else.

Q But you're the witness who has sat here through the whole thing, haven't you?

A Yes, sir.

The court erred. "The proper function of questions is to interrogate, and not to serve as argument, or to form a subtle purveyor of argument." Roe v. State, 96 Fla. 723, 119 So. 118, 122 (1928). Martin v. State, 356 So.2d 320, 321 (Fla. 3rd DCA 1977) involved a similar objection and ruling:

> Q Mr. Martin, you never fired at Mr. Bryant?
>
> A I told you, I disabled the vehicle.
>
> Q Did you tell the police at the scene you did not fire at Mr. Bryant?
>
> A I may have recall telling the policeman. I was highly emotional, but, I walked out towards Mr. Bryant's car.
>
> Q (By Mr. McHale) Mr. Martin, why did you not tell anyone this story before today?
>
> MR. GOULD: I object to that question, also, as being argumentative.
>
> THE COURT: Overruled, sir.
>
> THE WITNESS: Are you saying why didn't I tell anyone this story?
> Q Before today.
>
> A This is where I assume it should be to tell. Everybody is witnesses that comes up.
>
> Q You waited until the trial to tell this story?
>
> A What story?
>
> Q What actually happened, according to you?
>
> A I was advised of my rights at the police station.
>
> Q Were you told you could make a statement if you wanted to?

A He advised me, the detective who was the detective advised me of my rights.

Q Did he tell you not to say anything?

A He said if I wished to I could. If I didn't, I didn't have to.

Q Why did you not tell him actually what happened?

MR. SOBEL: I object.

THE COURT: Sustained.

The Third District reversed the conviction, writing that the state improperly commented on Martin's right to remain silent.

As noted in Roe, an argumentative question is one that seeks to present argument rather than to develop legitimate evidence. Out-of-state authority supports this rule:

> A question is argumentative if its purpose, rather than to seek relevant fact, is to argue with the witness or to persuade the trier of fact to accept the examiner's inferences. The argumentative question, in other words, employs the witness as a springboard for assertions that are more appropriate in summation. There is a good deal of discretion here because the line between argumentativeness and legitimate cross-examination is not a bright one. Argumentative questions often tend to harass witnesses[.]

State v. Culkin, 35 P.3d 233, 257 (Haw.2001).

The questioning at bar was argumentative as "a subtle purveyor of argument." The state put before the jury that appellant sat through the trial and listened to the witnesses before testifying. It treated the legal requirement that he be at his

trial as a reason to disbelieve him. It sought no relevant fact, it simply sought to persuade the jury to accept its inferences.

The error was not harmless beyond a reasonable doubt. Appellant's credibility was crucial to the defense. The state impugned the integrity of his testimony, suggesting gross impropriety because, pursuant to his constitutional rights, he had not testified before, and was present at trial. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

VIII. WHETHER THE COURT ERRED IN DENYING A MISTRIAL AND TAKING NO CORRECTIVE ACTION WHEN THE STATE COMMENTED ON APPELLANT'S NOT HAVING PREVIOUSLY SAID THAT DEBRA THOMAS WAS WITH HIM WHEN HE MET JOAN LOUGHMAN.

A comment on the right to remain silent "is serious error." Rimmer v. State, 825 So.2d 304, 322 (Fla.2002). Such a comment is viewed from the jury box: the question is whether the remark is "fairly susceptible of being interpreted by the jury as a comment on silence." Fitzpatrick v. State, 900 So.2d 495, 516 (Fla.2005) (e.s.). Such comments are "of almost unlimited variety." State v. DiGuilio, 491 So.2d 1129, 1132 (Fla.1986).

Appellant testified Debra Thomas was with him when he met Loughman once when he got his paycheck. R34 3188. Debra com-

mented about Joan's jewelry. R34 3191. The state argued to the jury that this was "the first time we hear[d]" Debra was with him when he spoke with Loughman. R36 3420-22. Jurors could reasonably take the remark a comment on silence. From their viewpoint, the comment covered the entire period from the crime, including the time from arrest to trial. The remark was fairly susceptible of being taken by jurors as a comment on silence, and the judge erred by not taking corrective action and ordering a mistrial.

The state argued to the jury that Debra Thomas did not know about Loughman's jewelry (R36 3420-21):

> ... . Second of all, how does Debra Thomas know about this jewelry on Joan Loughman's hands, wrists and neck? How does she know? According to the defendant's testimony, he didn't tell her about it, according to Debra Thomas' testimony, he didn't tell me about it. … . But how does she know? For the first time we hear the defendant take the stand, and he sort of rushed over it, you know, oh, I was at Lyford Cove, picked up my paycheck and Debra Thomas happened to be me [sic].
>
> MR. HARLLEE: Judge, may we approach?
>
> (The following occurred at the bench:)
>
> MR. HARLLEE: Judge, we'll move for a mistrial. This is a direct or indirect comment on the defendant's Right to remain silent. Mr. Taylor said for the first time we hear that Mr. Gosciminski takes the stand. That is an indirect, possibly a direct comment on his Right to remain silent.
> MR. TAYLOR: He makes a videotaped statement and doesn't mention that at all. First time we hear is when he takes the stand.

THE COURT: Motion for mistrial is denied.

After a recess, the judge said about his ruling (R 36 3422):

> My recollection of the motion to suppress, when we did the videotape, at no point in time did Mr. Gosciminski raise any issue about wanting to consult with Counsel or because of giving a DNA sample. There was no assertion of the Right concering making any statements or speaking to law enforcement. So that's an additional -- on [sic] additional reason for denying the motion for mistrial.

The judge and state seemed to think that the state may comment on omissions in a person's responses to police questioning. Such is not the law.

On October 2, 2002, the day before the arrest, R1 9-11, Hickox questioned appellant about his dealings with Loughman, secretly taping the discussion. R9 10, 26. The questioning focused on his own involvement with Loughman, and the interview ended as he wanted to speak with a lawyer about giving DNA samples. R3 369-88. Hickox did not ask if Debra Thomas or anyone else was with him when he met Loughman. Id. Hickox did not advise him of his right to remain silent on October 2. R9 32. Appellant made no statement when arrested the next day. 3. R9 37. On October 4, his attorney filed a written invocation of the right to remain silent. R1 4. This is not a case where he made a statement after he was advised of, and waived, his constitutional rights.

In Robbins v. State, 891 So.2d 1102 (Fla. 5th DCA 2004), Robbins shot a man, drove to a police station, then, unable to get an officer's attention, drove toward a hospital before being stopped. He told an officer that he had been in a fight and had been hit with sticks and bottles. A knife was found at the shooting scene, and Robbins testified at trial he thought he was attacked with a knife. The officer said he never heard him mention a knife. The judge sustained an objection and gave an instruction to disregard, but denied a mistrial. Nevertheless, the state's final argument referred again to Robbins' not mentioning the knife to the officer. The Fifth District found an abuse of discretion in denying a mistrial, writing at page 1106:

> the questions and remarks during closing argument concerning the failure of Robbins to offer exculpatory statements about the knife after his arrest are fairly susceptible of being construed by the jury as comments on Robbins' right to silence.

Robbins relied on State v. Smith, 573 So.2d 306 (Fla.1990), which found a violation the right to silence when the state introduced evidence about what Smith did not say when in a spontaneous statement at the scene, and argued the matter to the jury. Smith said at trial he had in shot self-defense a man who approached him menacingly after making sexual advances to his stepdaughter. He had told the police they had the wrong person, he had not done anything, and shot someone going for his daugh-

ter. An officer testified he did not say anything about being frightened of the victim or his daughter being sexually assaulted or that he acted in self-defense. This Court found improper the comment on Smith's failure to offer an exculpatory statement, ruling it amounted to a comment on his right to remain silent. Id. at 317.

There is a limited exception that the state may impeach with prearrest silence truly inconsistent with the defendant's trial testimony. State v. Hoggins, 718 So.2d 761, 770 (Fla.1998).

Likewise, despite the right of confrontation, a defendant may not impeach an officer with a failure to mention a fact in a report unless the fact's absence flatly contradicts his testimony:

> Absent some singular importance attaching to the point in question, which goes to a material and critical fact in serious contention in the trial, a negative basis is not the kind of use of a police report which justifies breaching the normally protected police reports and investigative notes, reports and files. A permissive use would open up unjustified inquiry in almost every case as to why an officer failed to do a certain thing in one instance and did it in another, amounting to just 'fishing' in a sense. The inquiry must be upon a crucial point and preferably upon a positive statement in such a report, which the witness at trial flatly refutes, thus placing his credibility and the point involved in vital focus so that it becomes critical to the defense. Such an instance might be where the defendant was shot and bleeding and the officer indicated in his report that he was not injured; that he was alone when he testified there were two men, etc. The distinction becomes clear when one realizes the pressures of an investigation and the

> fact that certain data is to be reported at one time and other data upon other forms at a later date; that time is often critical and that insignificant points serve no purpose in such a report, though developing unforeseen seeming importance later.

State v. Johnson, 284 So.2d 198, 200 (Fla.1973) (e.s.).

Hickox did not ask if Debra or anyone else was with him when he met Loughman. The questioning drew to a close as appellant grew increasingly concerned whether he needed to talk to his attorney before giving a DNA sample. R3 388. Debra's presence with him once when he met Joan was not inconsistent with his police statement. It was improper to argue to the jury that he said for the first time in his trial testimony that Debra was with him one time when he met Joan.

Regardless, the state did not limit its comment to to the jury appellant's October 2 statement. As phrased, it told to the jury he came up with his statement for the first time at trial. From the jury's standpoint, the remark was not limited to a claim of pre-arrest silence. The state said, "For the first time we hear the defendant take the stand, and he sort of rushed over it, you know, oh, I was at Lyford Cove, picked up my paycheck and Debra Thomas happened to be me [sic]." Thus, the comment referred to the entire period leading up his trial testimony. The state told the judge it was referring to the police questioning, but it did not say that to the jury. The jury had

heard it say on appellant's cross that he had fashioned his testimony after hearing the witnesses. R 35 3231-32. It would understand that the state was contending he fashioned the testimony after his arrest.

As the judge did not recognize the error and take corrective measures, the state must show it was harmless beyond a reasonable doubt. Compare State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986) (harmless beyond reasonable doubt standard applied when judge denied motion for mistrial as to comment on silence without taking corrective action)[6] to Goodwin v. State, 751 So.2d 537, 547 (Fla.1999) ("harmless error analysis under DiGuilio is not necessary where … the trial court recognized the error, sustained the objection and gave a curative instruction").

At bar, unlike in Goodwin, the judge did not recognize the error, sustain the objection, or give a curative instruction. He compounded the error. Cf. Wheeler v. State, 425 So.2d 109, 111 (Fla. 1st DCA 1982) (golden rule argument; "The court's overruling of the objection compounded the prejudice.").

[6] It is clear from the lower court opinion that DiGuilio made a motion for mistrial without his making, or the court ruling on, any objection: "At that point [the comment on silence], defense counsel interrupted, asked the court to excuse the jury, and promptly moved for a mistrial on the ground that the foregoing testimony was an impermissible comment on defendant's right to remain silent. The motion was denied and the trial continued." DiGuilio v. State, 451 So.2d 487, 488 (Fla. 5th DCA

The case was entirely circumstantial and without physical evidence linking appellant to the crime. The jewels turned up in the former home of Debra Thomas's lover, who was in the area at the supposed time of the murder. Appellant's testimony that Debra knew about, and was interested in, the jewels went to his defense. The improper attack on his testimony was not harmless beyond a reasonable doubt. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

IX. WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S QUESTION TO APPELLANT SUGGESTING THAT THE RING WAS BLACK AND DIRTY FROM THE BLOOD OF JOAN LOUGHMAN.

On cross of appellant, the state asked about Debra Flynn's testimony that the ring had black around it. R35 3285. It then said: "The black, the blood that you didn't even bother wiping off that ring before you wanted to show off to these people?" Id. Counsel objected there was no scientific evidence of blood on the ring, and no good faith basis for the question, and moved for a mistrial. R35 3286. The judge overruled the objection and motion, saying a crime scene photograph showed "a large pool of dried blood that is very black looking". R35 3287-88. The

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1984).

state moved to another question without seeking an answer.

Other than the state's statement in the form of a question, nothing indicated the black on the ring was blood or looked like blood. Yet the state said to the jury: "This ring that is dirty and that's got black around it, black like the dried blood of the victim, dirty because he took it off her dead fingers." R36 3407. And: "Just so happens Bender and Hall, Reape and Debra Thomas pick that ring. Just so happens Debra Flynn went to pick Number 3 but it's dirtier and black. Is that from the blood?" R36 3442.

The judge erred in letting the state put before the jury its unsupported opinion that the black dirt on the ring was dried blood. The state did not ask its witnesses who had seen the ring whether the blackness on it was consistent with dried blood. Debra Thomas, a nurse, would be familiar with dried blood. The state did not ask her if there could have been dried blood on the ring. Debra Flynn, who ran an assisted living facility, would also be familiar with dried blood. The state did not ask her about it. The same is true for Nicole Rizzolo. The officers who saw the ring well enough to pick it from a lineup presumably had experience noting signs of blood, but they did not mention seeing anything like dried blood. Maureen Reape got a "good look" at the ring on September 25, R31 2751, and looked

at it “carefully” the next day, 26, R31 2752, but the state did not ask her about seeing dried blood.

In fact, the testimony about the blackness on the ring did not indicate there was blood on it. Flynn said, “it was old and dirty,” did not look like “like something that was just bought,” and “just looked dirty. It looked like more black was on, around it.” R26 2131. It “was just older. It was not striking because of the black around it. ” R26 2132. It looked “old and dirty”. R26 2193. Rizzolo said it was “old and dirty”. R26 2201. Debra Thomas said it was “rather dull,” “looked like it needed to be cleaned,” “didn’t look new.” R28 2373. It “looked old”. R28 2431. The testimony was that it had the kind of darkening consistent with being old. There was no testimony it was consistent with dried blood. Neither Flynn nor Rizzolo testified to anything resembling dried blood on the paper in which appellant had the ring.

The prosecutor simply put before the jury his personal opinion that there was blood on the ring. He did not even bother to get an answer to his question, and then argued it to the jury as if fact supported by evidence. There was no good faith basis for the question. One seeking to introduce damaging evidence in cross-examination must have a good faith basis for the question. In Duncan v. State, 776 So.2d 287 (Fla.2nd DCA 2000), the state

tried to impeach an alibi witness with a statement her husband supposedly made at deposition that was not in evidence. The state then argued the statement to the jury. On post-conviction, Duncan contended counsel was ineffective for not objecting. The Second District agreed, saying such questioning "is itself testimonial, that is, the question suggests that there is a witness who can testify that such a statement was made." Id. at 288 (quoting Tobey v. State, 486 So.2d 54, 55 (Fla. 2d DCA 1986)). Failure to present anything supporting the question indicated a lack of good faith, which normally requires that the questioner has "the intent and ability to later prove" the fact. Id. (again quoting Tobey). Even if the state believed it had a good faith basis for the question, its final argument "was based on facts that were not introduced into evidence and was unquestionably improper." Id. at 289.

Similar concerns apply at bar. The state had no intent or ability to prove there was blood on the ring. It could have asked Flynn, Rizzolo, Debra Thomas, Maureen Reape, and the officers about blood on the ring, but did not. It does not appear that there was any evidentiary basis for its question. The resulting argument was based on facts not in evidence and compounded the prejudice arising from the erroneous approval of the state's question.

In citing Tobey, Duncan made a "but see" citation to Carpenter v. State, 664 So.2d 1167 (Fla. 4th DCA 1995), in which the state had given the defense Jaworski's statement that Carpenter discussed the crime with him. When Carpenter denied the discussion on cross, the state sought to show him the statement, but the judge sustained a defense objection, told the jury it was not in evidence and not to consider the question. It does not appear that the state again mentioned the statement. On appeal, Carpenter argued reversal was required solely because the state had not introduced the statement. The court rejected the argument, ruling the state had a good faith basis for the question and did not need to put the statement in evidence, concluding (id.at 1169) (e.s.):

> Although we affirm, we reiterate … that before asking the incriminating question, counsel should first give the court an opportunity to determine whether the question is proper, i.e., whether counsel is proceeding in good faith, since "wafting before the jury … questions which have no basis in fact … can be fatal to the defendant." United States v. Nixon, 777 F.2d 958, 970 (5th Cir.1985).

Carpenter does not support appellee. At bar, the judge overruled the objection, and did not take the corrective action taken in Carpenter. While the state in Carpenter had a specific document supporting the question, at bar it had only a conjecture based on a photograph. It was not seeking to develop facts on this point: it did not even bother to get an answer. It pre-

sented the defense and the court with a fait acompli by "waft[ing] before the jury" a question with no basis in fact and without a prior opportunity to object and determine the issue, and then argued to the jury that the ring was black from the victim's blood.

The error was not harmless beyond a reasonable doubt. The state worsened the error by arguing it to the jury. Further, its case was circumstantial and relied on witnesses with reason to have an animus against appellant. It presented the jury a highly emotional image of the ring covered with Joan's blood without a factual basis. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

X. WHETHER THE COURT ERRED IN DENYING THE MOTION FOR MISTRIAL WHEN THE STATE SUGGESTED THAT APPELLANT HAD STOLEN FROM HIS MOTHER WHILE SHE WAS IN A NURSING HOME.

The state asked on cross if appellant borrowed $9000 from his mother in September 2002 and did not paid her back, and he replied she had not asked him to. R35 3252. It then asked about him and his mother not being in contact with each other since then. R35 3252-53. Counsel objected that the testimony was outside the scope of direct, and noted appellant was in jail since 2002. R35 3253-55. The judge said prejudice far out-

weighed probative value, and counsel said the state was getting into a character issue. R35 3256. The state said it would move on. R35 3257.

Shortly after, the state asked about the check appellant deposited September 24. He said it was a check his mother sent him monthly for cell phone bill and he put in his account. R35 3268. The state asked if she did not authorize him to put it in his account, and he said it was not true. Id. Counsel objected that the state had improperly suggested a collateral crime. Id. The judge sustained the objection and told the jury to disregard, but denied a mistrial. R35 3268-70. Appellant renewed his mistrial motion the next day, pointing out that the state had presented no rebuttal, and again after his mother's testimony at penalty. R36 3352-53, R39 3837-38.

A ruling on a motion for mistrial is reviewed for an abuse of discretion. Goodwin v. State, 751 So.2d 537, 546 (Fla.1999).

Faced with conflicting facts and a no concrete evidence of guilt, a jury can latch onto a defendant's moral faults as the final item to justify conviction. Collateral crime evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Castro v. State, 547 So.2d 111, 114 (Fla.1989); Valley v. State, 919 So.2d 697, 699

(Fla. 4th DCA 2006).

At bar, the state put before the jury that appellant committed a crime of dishonesty against his own mother while she was in a nursing home. This is pretty raw stuff, and was extremely prejudicial at bar. The case was circumstantial and lacked concrete evidence linking appellant to the crime. Testimony that he had blood on him on the day of the murder came from Debra Thomas, whose lover Ben Thomas was in the area of the murder at the time it supposedly occurred. Testimony about the ring was in conflict, and the jewelry was found at Ben Thomas's former home.

The suggestion that appellant committed a crime of dishonesty against his mother while she lived in a nursing home deprived him of a fair trial. It was an abuse of discretion to deny a mistrial. Cf. Kelly v. State, 842 So.2d 223 (Fla. 1st DCA 2003) (error to deny mistrial as to remarks "calculated to generate hatred and ill will towards the defendant as a result of her saying that her son fired the second shot"). The implication of a crime of dishonesty impeached appellant's credibility, which was crucial to his case. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

XI. WHETHER IT WS ERROR TO ALLOW HEARSAY STATEMENTS OF JOAN LOUGHMAN IN THE VIDEOTAPE.

During the playing of the taped interrogation, counsel made a hearsay objection to Hickox's statements to appellant about remarks made by Loughman to her sister Janet about appellant's interest in her ring. R24 1900.

The state, which had put the tape into evidence, argued that the question and answer were admissible under the rule of completeness. R24 1901. It said appellant's denial of any memory of the conversation with Loughman would be rebutted by other witnesses. Id. The judge asked if the state was contending it was factually accurate that the Janet said that Loughman made the statement, and the state said it was "factually accurate," but argued that it was admissible not for the truth of the matter but for impeachment. R24 1902. The judge said the defense would make a hearsay objection to the sister's testimony, and that the statement on the tape was "triple hearsay because it's the sister relating something the victim said." Id. When the state argued appellant was going to deny the conversation occurred, the judge said he could see it perhaps coming in as rebuttal, but it would be inadmissible until then. R24 1904. The judge denied a motion for mistrial, with leave to renew it if the state did not get the statement in through another witness, and also denied it because "I think there has been a waiver

here. I mean, you knew this was coming, you even agreed to the transcript being presented to the jury, and if that was a concern, I think that should have been raised before we got this far." R24 1905. Other parts of the taped statement were later redacted, but the redacted tape and transcript still contained discussion of the conversation between Joan and Janet. SR1 43-44.

The state's argument about the rule of completeness was nonsense. The rule of completeness does not let a recording's proponent introduce the entire thing regardless of evidentiary objections to parts of it. It lets the "adverse party" (here, appellant) demand introduction of parts the proponent has omitted. § 90.108(1), Fla. Stat.

Hickox's report of Janet's report of Joan's statement was triple hearsay. The state introduced it to prove the conversation did occur. It had impeaching value only if it showed that Joan's account was accurate. Thus, the state introduced it to prove the truth of the matter asserted contrary to section 90.801(1)(c), Florida Statutes. Statements of the decedent of dealings with the accused are hearsay. See Wright v. State, 586 So.2d 1024, 1030 (Fla.1991).

As the judge did not recognize the error and correct the error, the state must show the evidence was harmless beyond a rea-

sonable doubt. Compare State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986) (harmless beyond reasonable doubt standard applied when judge denied motion for mistrial regarding comment on silence) to Goodwin v. State, 751 So.2d 537, 547 (Fla.1999) ("harmless error analysis under DiGuilio is not necessary where, as occurred in Goodwin, the trial court recognized the error, sustained the objection and gave a curative instruction").

Unlike in Goodwin, the judge did not recognize the error, sustain the objection, or give a curative instruction. He at first agreed with the objection, but then decided the evidence was admissible if the state put on someone to repeat the hearsay. This ruling worsened the prejudice. It led to Janet Vala-Terry's and Thomas Loughman's testimony as to Joan's hearsay statements, as discussed below.

The case was circumstantial and not supported by forensic evidence. The use of improper hearsay to attack appellant's exculpatory statement was not harmless beyond a reasonable doubt. The state relied on the statement in final argument. R36 3430-31.

Finally, the judge's concern about the lateness of the objection is understandable, but it did not come so late that he could not have corrected the error. Section 90.104(1) (a), Florida Statutes requires a "timely objection." An objection is

timely if the judge has the chance to correct the error. In Jackson v. State, 451 So.2d 458 (Fla.1984), a witness said Jackson called himself a "thoroughbred killer." The defense objected several questions later. (The questioning is set out in footnote one of Jackson.) This Court found the objection timely:

> An objection need not always be made at the moment an examination enters impermissible areas of inquiry. ... . [O]bjection was made during the impermissible line of questioning, which is sufficiently timely to have allowed the court, had it sustained the objection, to instruct the jury to disregard the testimony or to consider a motion for mistrial.

Id. at 461. See also Evans v. State, 800 So.2d 182, 188 (Fla.2001) (mistrial motion during the line of questioning "properly preserved for appeal despite the fact that the witness was allowed to answer the question."), Taylor v. State, 855 So.2d 1, 26-27 (Fla.2003).

It is noteworthy that the state apparently anticipated evidentiary problems, telling the judge, "We have some case law." R24 1902. A proponent of questionable evidence has some duty to bring the matter to the court's attention before putting it before the jury. Cf. DeFreitas v. State, 701 So.2d 593, 600 (Fla. 4th DCA 1997), which says:

> We have further concluded that the dignity of the office of prosecuting attorney demanded, at the very least, a request for a side bar conference or a proffer outside the presence of the jury to determine the

> admissibility of this highly inflammatory evidence. We note that although the prosecutor was well aware of the questionable admissibility of this evidence, he did not request a side bar or a proffer, thus depriving the trial court of the opportunity to determine the admissibility of this evidence before it was imparted to the jury. [FN omitted.] Had a side bar or proffer been requested and thereafter the trial court allowed this evidence, there would have been no sustainable basis for this particular aspect of Appellant's prosecutorial misconduct claim.

The judge took no steps to correct the error and denied the motion for mistrial. The error was not harmless beyond a reasonable doubt. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

XII. WHETHER THE COURT ERRED IN ALLOWING JOAN LOUGHMAN'S HEARSAY STATEMENTS TO HER HUSBAND AND SISTER.

Laughman's husband testified she told him "Michael was interested in her diamond engagement ring and asked her what size it was and she indicated it was two carats and that Michael indicated that he was looking for a two carat ring to give to his girlfriend or fiance." R32 2924. Appellant argued the testimony was irrelevant and hearsay; the judge disagreed, saying that it was admissible as impeachment to contradict the police statement. R32 2904-23. Her sister Janet testified she said "Michael was buying a ring for his wife and he noticed her jewelry, how, you know, good it was," and he wanted her "to look at

a diamond to see the quality of it before he gave it to his girlfriend. There was more than one phone conversation in which she mentioned Michael and his interest in her jewelry." R33 3000. The judge again overruled appellant's objections. R33 2992-93.

Joan's statements to her husband and sister could impeach the police statements only if she and appellant did in fact discuss the jewelry. Her statements went to the truth of the matter asserted, that is, that the discussions occurred as she reported them.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. See §90.801(1)(c), Fla. Stat. A decedent's statements of prior dealings with the accused are hearsay. In Wright v. State, 586 So.2d 1024 (Fla. 1991), the state presented the decedent's statement to her mother that Wright had broken her nose and was no longer allowed in the house. The state argued the statement was not hearsay as it showed only that "something was said" to the mother. This Court disagreed, holding the only relevance "was to prove the truth of the matters asserted". Id. 1030. Improper admission of such hearsay has been held to require reversal when it tended to establish the state's theory of motive. Cf. Bailey v. State, 419 So.2d 721, 722 (Fla. 1st DCA 1982) (victim's statements in-

troduced to prove defendant's state of mind or motive; error not harmless where evidence was almost wholly circumstantial).

The judge based his ruling on the following statement in Ehrhardt's treatise on Florida Evidence (R32 2916):

> In the criminal case the prosecution may offer statements made by the defendant which are exculpatory, then demonstrate the falsity of the statement in order to imply the defendant's guilt. These statements by the defendant are admissible during the prosecution's case in chief.

Regardless whether this statement is true in the abstract, it does not authorize inadmissible hearsay. Professor Ehrhardt's statement occurs in section 803.18, page 852, of Florida Evidence (2005 ed.). The accompanying footnote (number 13) cites: Smith v. State, 424 So.2d 726, 730 (Fla.1982), Finlay v. State, 424 So.2d 967, 969 (Fla. 3rd DCA 1983), and Brown v. State, 391 So.2d 729, 730 (Fla. 3rd DCA 1980). In Smith, the state simply pointed to contradictions in Smith's statements. Finlay found error in admitting the fact Finlay gave a false name regarding an unrelated crime. In Brown, the state introduced evidence rebutting an alibi in Brown's police statement. None of these cases authorize use of incompetent hearsay to rebut an accused's statement to the police.

The state may not use the deceased's statements to refute taped statements the state has introduced:

> Notably, four of these statements that the State

> claims Martin's testimony would rebut were introduced at trial via the taped statements the State submitted in its case-in-chief. However, the State may not introduce rebuttal evidence to explain or contradict evidence that the State itself offered.

Stoll v. State, 762 So.2d 870, 875 (Fla. 2000); Peterka v. State, 890 So.2d 219, 244 (Fla.2004) (Stoll "rejected … argument that a witness's testimony as to the victim's state of mind was relevant to rebut the defendant's taped statements introduced by the State in its case-in-chief.").

The error was not harmless beyond a reasonable doubt. The judge noted "this is potentially a very damaging item of testimony." R32 2914. The state dwelt on it in final argument to attach appellant's police statements. R36 3429-32. The judge used the statements in giving great weight to the felony murder circumstance. R41 3962-63.

The state's case was made of disputed circumstantial evidence. No evidence linking appellant to the crime was at the scene. There was no evidence found in extensive searches of his home, prior home and car. The jewels were found on property to which he had little connection. Debra Thomas had ample motive to remove him from her life, and no physical evidence supported her testimony. Her lover, Ben Thomas, was in the area on the morning of the murder, and had a direct connection to the property where the jewels were found. The cell phone and drive time

evidence was speculative. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

XIII. WHETHER THE COURT ERRED IN EXCLUDING HICKOX'S STATEMENT TO BEN THOMAS OF HIS OPINION THAT HE WOULD NOT BET HIS HOUSE ON AN INDICTMENT WITHOUT MORE EVIDENCE.

The defense sought to introduce a discussion between Hickox and Ben Thomas before the indictment and before the jewelry was found. R24 1920-1925, 1939-49, R27 2274-81. Hickox had said: if the grand jury did not indict, appellant would be free, which they were trying to prevent, he Hickox would not gamble his house on getting an indictment, they had circumstantial evidence but not a smoking gun, but it would be a breeze if they had the ring, which was why they wanted to call Debra Thomas back in. R3 454.

Noting the jewelry was found a few weeks later, counsel argued the discussion planted the seed for Ben Thomas to hide it so it could be found, strengthening the state's case, and the evidence went to the motive and bias of both men. R24 1921-22. He said it was relevant to show Ben Thomas was trying to set appellant up, and law enforcement sought evidence to connect him to the crime. R24 1946. The judge ruled some of the discussion admissible, but sustained an objection to Hickox's expression of

his personal opinion about the strength of the case. R29 2504-21. The passage in question is as follows (the part not introduced pursuant to the judge's ruling is underlined):

> MR. HICKOX: ... . And, of course, if they don't indict, he's a free man and that's what we're trying to prevent.
> [BEN THOMAS]: How does it look?
>
> ... <u>You're a gambling man</u>.
>
> MR. HICKOX: <u>It's - if I were to gamble, I don't think I'd put my house on it, let me put it that way</u>. We have a lot of circumstantial evidence but, as you know, we don't have a smoking gun, we don't have the jewelry and especially we don't have the - the ring that he gave Deb. If we had that, this case would be a breeze and that's why we want to call Deb back in. ... .

R3 454, R29 2520.

It was error to exclude Hickox's remark that if he were to gamble he would not bet his house on an indictment. A defendant has the constitutional right to present impeachment evidence, even if it is inadmissible under state law. In <u>Davis v. Alaska</u>, 415 U.S. 308 (1974), the judge forbade cross-examination of Green, a state witness, as to his juvenile probation status, a matter privileged under state law, rejecting argument that it was relevant to whether it motivated or influenced his testimony. The Supreme Court reversed, writing that a witness's partiality is "always relevant," and "exposure of a witness' motivation in testifying is a proper and important function of the

constitutionally protected right of cross-examination." Id. at 316-17. Davis had the right to sought to show "possible bias". Id. 317. Regardless whether the evidence would actually have affected the jury's view of Green's credibility, Davis had the right to present the evidence. Id. at 317-18.

This Court long ago recognized the constitutional right to present evidence a state witness's possible motive or bias. Selph v. State, 22 Fla. 537 (1886), held a witness's attendance at an "indignation meeting" was "clearly illegal" when introduced by the state, but could be elicited by the defense to show bias. Id. at 540. A witness's "mind and interest in respect to the prisoner are always pertinent inquiries". Id. at 541. See also Eldridge v. State, 27 Fla. 162, 9 So. 448, 450 (1891); Bryan v. State, 41 Fla. 643, 26 So. 1022, 1028 (1899) (questions as to interest, motives, or animus "are not collateral or immaterial" and "it is not within the discretion of the court to exclude it"). "Considerable latitude should be accorded a defendant in attempting to establish bias, including allowing inquiries that might at first blush appear to be lacking any basis at all thus far in the trial, so long as counsel states a basis tending ultimately to show such bias." Purcell v. State, 735 So.2d 579, 581 (Fla. 4th DCA 1999).

The court erred in limiting Hickox's remarks to Ben Thomas.

The deleted remark that he would not stake his house on an indictment was reasonably calculated to create in Ben Thomas's mind the view that, in the personal view of a police professional with complete knowledge of the facts, the case was not a sure thing without more evidence. It gave him a powerful motive to produce evidence. Jurors could conclude Hickox was less interested in the truth crime than in making a case against appellant. The error was not harmless beyond a reasonable doubt. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions.

> XIV. WHETHER THE COURT ERRED IN SUSTAINING OBJECTIONS TO DEFENSE ARGUMENT ON CIRCUMSTANTIAL EVIDENCE AND ALTERING THE AGREED-TO INSTRUCTION IN THE MIDDLE OF APPELLANT'S FINAL ARGUMENT.

Appellant sought a jury instruction on circumstantial evidence. Both parties submitted instructions. R6 1016 (state's proposal), 1017 (defense's proposal). The judge decided to give an instruction combining the two proposals (R35 3342) (e.s.):

> THE COURT: Counsel, I'll tell you what I'm inclined to do, and that is to give the first paragraph of the draft by the defense, which would say circumstantial evidence is legal evidence in a crime or any fact to be proved may be proved by such evidence. A well-connected chain of circumstances is as conclusive in proving a crime or fact as is positive evidence. It's value is dependant upon it's [sic] conclusive nature and tendency. Then shift to the State's instruction draft, which says, circumstantial evidence is sufficient to convict the defendant of any crimes charged

> if the circumstantial evidence proves each element of each crime beyond and to the exclusion of every reasonable doubt, and the circumstantial evidence rebuts every reasonable hypothesis of innocence. If the circumstances are susceptible to two reasonable construction, one indicating guilt and the other innocence, you must accept the construction indicating innocence. Then stop.

In final argument, appellant relied on the instruction, saying that the judge would instruct the jury as to

> a well-connected chain, a chain of circumstances. And a chain, as you can visualize, has links and goes together. And if one link is missing, that chain is broken. Okay. And when that chain is broken, that is reasonable doubt and you must do with the innocent construction.

R36 3445. Apparently the state misheard, and objected that counsel was arguing that there "must be a chain, series of events in order to convict." Id. Defense counsel replied that he was using the exact words of the instruction. Id. The judge said, "The instruction says a well-connected chain of circumstances not events. But I'll instruct the jury that I'm the only one to give them the law, what the attorneys say is not instruction of the law you rely on. R36 3445-46. He then so instructed the jury. Id.

Defense counsel later argued that, whereas appellant looked clean at his office at 12:30, Debra Thomas said he at home covered with blood at 1:00. R36 3452. He continued:

> So how does a 12:30 meeting with nothing on him and then gets home at 1:00 and have blood all over him?

> Another little problem with the chain. Actually, a big problem.
>
> Now, the state has tried to come up with motives in this case and one of their biggest theories is, well, Michael was in financial straights. Well, let's go back to this instruction again. If circumstances are susceptible of two reasonable –

R36 3452-53. The state objected he was making the chain of events a requirement for a conviction "when that is not a requirement of circumstantial evidence," and "taking each piece of evidence that we looked at and if there's two separate ways to look at it, you've got to look at it for innocence." R36 3453-54. The judge said it would be improper to argue as to each piece of evidence that there is two ways to look at it. R36 3456. The state argued counsel was "fraudulently" saying the state had to have "a well-connected chain of circumstances" to prove its case. R36 3457. The judge said, "to the extent that the defense now seems to be piecemealing it, I agree the State has a legitimate concern that the instruction is being used and argued in an inappropriate way." R36 3459. Counsel said he was following the agreed instruction. R36 3461. Over objection, the judge rewrote the instruction, R36 3462-64, telling the jury that he had made a mistake in formulating the instruction, and saying (R36 3465-66 (e.s.)):

> ... the last paragraph should have been worded, and is now going to be worded when I give it to you, that <u>if the chain of circumstances</u> are [sic] susceptible of

> two reasonable constructions, one indicating guilt and the other innocence, you must accept the construction indicating innocence. That is the accurate statement of the law.

Later, defense counsel argued there was a lack of "hard or positive evidence," and continued (R36 3475) (e.s.):

> ... . And there is a distinction and the instruction points it out.
>
> What it says is if circumstantial evidence is sufficient to convict, if the circumstantial evidence proves each element, each crime beyond and to the exclusion of every reasonable doubt. But what it says up here is a well-connected chain of circumstances is as conclusive in proving a crime or fact as is positive evidence. So there is, there is a difference between the two. Circumstantial evidence is different from positive, objective, scientific evidence. This is the law that you have to follow.

The state objected without grounds. Id. Counsel said he was following the instruction, but the judge said there is no such distinction. R36 3475-76. Counsel replied, "Circumstantial evidence is as conclusive as is positive evidence. So there's other obviously a distinction between the two." R36 3477. The judge disagreed and instructed (id.):

> Member [sic] of the Jury, disregard the last argument. There is nothing in the instruction that makes a distinction between circumstantial evidence and positive evidence. Both are legal evidence and there is no distinction as to the strength of either one.

After the final arguments, the judge instructed the jury on circumstantial evidence as follows (R6 1003) (e.s.):

> Circumstantial evidence is legal evidence and a crime

> or any fact may be proved by such evidence. A well-connected chain of circumstances is conclusive, in proving a crime or fact, as is positive evidence. The value of the circumstantial evidence is dependent upon its conclusive nature and tendency.
>
> Circumstantial evidence is sufficient to convict Michael Gosciminski of a crime charged, or any lesser included crime, if the circumstantial evidence proves each element of the crime beyond and to the exclusion of every reasonable doubt and the circumstantial evidence rebuts every reasonable hypothesis of innocence.
>
> If the chain of circumstances are [sic] susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept the construction indicating innocence.[7]

A judge has broad discretion as to instructions and the decision to instruct on circumstantial evidence lies within that discretion. But here the judge agreed to an instruction consistent with prior law, then told the jury defense argument relying on it was incorrect, and altered it in a way contrary to settled

[7] The text is from the written instructions the judge gave the jury. The charge as transcribed by the court reporter has typographical errors to the point of not being reliable. Notably, the first sentence of the first paragraph is missing several words: "Circumstantial evidence is legal evidence in a crime if facts may be proved by such evidence." R36 3502. Also, the third paragraph of the court reporter's transcription omits the phrase "chain of" before the word "circumstances": "If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept the construction indicating innocence." R36 3502-03. Regardless, the judge had previously told the jury that the correct phrase was "If the chain of circumstances are susceptible ...", R36 3465-66, and the written instructions containing that phrase were given to the jury for its consideration in its deliberations.

law. Circumstances (not a chain of circumstances) must show guilt:

> It is well settled that circumstantial evidence may be relied upon to establish guilt, but the value of this evidence consists in the conclusive nature and tendency of the circumstances relied upon. They must not only be consistent with guilt, but must be inconsistent with innocence.

Simmons v. State, 99 Fla. 1216, 128 So. 486 (1930) (e.s.). The "circumstances proven must not only be consistent with the conclusion necessary to establish the guilt of the accused, but must be inconsistent with every other reasonable hypothesis." Free v. State, 142 Fla. 233, 194 So. 639, 640 (1940) (e.s.). Myers v. State, 43 Fla. 500, 31 So. 275, 280 (1901) (e.s.) approved an instruction that

> Absolute, metaphysical, and demonstrative certainty is not essential to proof by circumstances; it is sufficient if they, with all the other evidence, produce moral certainty, to the exclusion of every reasonable doubt.

The instruction originally decided on at bar correctly said that if the "circumstances" (not a chain of circumstances) are susceptible to a reasonable construction of innocence, the jury must acquit. Counsel's argument properly relied on this wording. It was error to change the instruction to require only that a "chain of circumstances" be inconsistent with guilt. As counsel argued, a chain is only as good as its individual links. The jury must test the reliability of each link.

In this regard, a chain of circumstances is like a pyramid of inferences. Every step of the pyramid and every of the chain must be tested. A conviction may not be based on a pyramid of hypotheses. See Gustine v. State, 86 Fla. 24, 97 So. 207, 208 (1923).

At bar, appellant correctly said the circumstances making up the chain of inferences must be tested. The circumstances themselves, not a just a chain of uncertain and untested circumstances, must point only to guilt.

Counsel also correctly followed the altered instruction and Florida law in arguing that circumstantial evidence is different from direct evidence in that the state must disprove any reasonable hypothesis of innocence in a circumstantial case. R36 3475. The standard governing circumstantial evidence is different from the one governing direct evidence. See Heiney v. State, 447 So.2d 210, 212 (Fla.1984) ("When a case is based on circumstantial evidence, a special standard of sufficiency of the evidence applies.").

The error was not harmless beyond a reasonable doubt. The day before final argument, the judge finalized the instruction, and counsel prepared his final argument based on it. To interrupt counsel, tell the jury that his argument was incorrect, and amend the instruction in during his argument disrupted his pres-

entation of his case. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

XV. WHETHER THE COURT SHOULD HAVE GRANTED DISCLOSURE OR REVIEW OF GRAND JURY TESTIMONY.

Appellant moved for disclosure or review of grand jury testimony of the state's witnesses. R2 251-56. The judge denied the motion. R3 415. At a minimum, the court should have reviewed the testimony in camera to see if it contained matters that could aid appellant. On such a determination, or on a showing of conflicting statements by a major state witness or some other adequate showing, a court must order disclosure of grand jury testimony.

Pennsylvania v. Ritchie, 480 U.S. 39 (1987), held a defendant charged with rape of a minor was entitled to in camera review of the minor's welfare file, which was confidential under state law. Ritchie had asserted it "might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence." Id. at 44. Subsequent to Ritchie, the state supreme court held in camera review by the judge did not safeguard the defendant's confrontation rights, and therefore defense counsel is entitled to see the records. Commonwealth v. Lloyd, 567 A.2d 1357 (Pa.1989).

Hopkinson v. Shillinger, 866 F.2d 1185, 1220-21 (10th Cir. 1989), applied Ritchie to state grand jury testimony where exculpatory evidence "could have been presented" to a post-trial grand jury investigating Hopkinson's cohorts. On rehearing en banc, the court denied relief on other grounds, but let stand the grand jury decision. Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) (en banc). Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987), applied Ritchie to Florida grand jury proceedings, holding due process required in camera review of state grand jury testimony.

Keen v. State, 639 So.2d 597, 600 (Fla.1994), held a court must grant disclosure of grand jury testimony on a showing of particularized need. It noted two ways such a need may be shown. First, to determine "particularized need," the court has discretion to inspect the testimony in camera. Id. at 600. Second, contradictory statements of a major state witness will establish the need: "Contradictory testimony at a deposition and at trial" requires review of grand jury testimony to determine its usefulness to the defense, and the "threshold for in-camera inspection is lower than the showing needed to obtain a release of the grand jury testimony." Id. This Court reversed Keen's conviction because the judge should have at least made in camera review because of contradictory statements of the state's main

witness. Id.

Important state witnesses changed their accounts at bar. Debra Thomas said at deposition that appellant came home about 1:00, R28 2452, and did not leave until 3:00, R28 2455, which did not fit the testimony of other witnesses. At trial she said he was there between 11:00 and 1:00, and she did not know when he left. R28 2361, 2371. She said counsel had confused her at the deposition. R28 2455. Thus, her grand jury testimony was vital since counsel was not there to confuse her.

She originally told the police appellant gave her the ring before the murder. R28 2396. After meeting Ben Thomas, she said appellant gave it to her on September 24. R28 2403-04. At deposition she said there was more than one diamond on each side of the ring, R26 2188, and at trial she said it had "perhaps some smaller diamonds on either side," R26 2130, and had several diamonds around it on the sides. R26 2185. But on October 12, 2002[8] she told the police there was "a little smaller diamond on each side of the ring." R26 2190. Counsel told the court (R26 2164):

> I thought I knew a lot of things from deposition testimony about this witness, and on direct examination, about every single thing I heard in here, that's changed.

[8] This interview was before the grand jury proceedings that produced the original indictment on October 22, 2002. SR1 1.

Nicole Rizzolo said at trial appellant showed her and Flynn the ring on the day of the murder, R26 2198-99, but said at deposition he did it before the murder. R26 2205-07.

Maureen Reape said at trial that she did not know Debra Thomas's brother and did not know he sold jewelry, R31 2757, but said at deposition she knew he was in the jewelry business and Debra had gotten jewelry from him. R31 2758. She said at trial she saw the ring on September 25, and did not remember if Debra said she had got the ring that morning. R31 2750-51, 2759. At deposition she said she may have got the ring the morning they met. R31 2760.

When the case came up for trial, witnesses mentioned things not previously disclosed. On the day of opening statements, the state disclosed Flynn's statements that appellant said on September 24 that he had just gotten a tennis bracelet and rings for Thomas in an estate sale, and a month before he said he had a knife like one taken from a patient. R3 437, R21 1501-04. The next day, it disclosed similar statements by Rizzolo. R3 438, R23 1731. (The court ruled the statements about the knife inadmissible. R26 2109-10.) Also on the day of opening statements, the state disclosed Pelletier's statements that appellant had told her he was getting Debra Thomas a two carat ring, and he knew a guy down south named Dominic. R3 437, R21 1502, 1504-

07.

The record shows that before the grand jury proceedings Hickox told Ben Thomas directly and Debra Thomas indirectly the state needed more evidence for the grand jury, and the case was shaky without the ring and they would be in danger (R3 454):

> MR. HICKCOX: ... . We have a lot of circumstantial evidence but as you know, we don't have a smoking gun. We don't have the jewelry and especially we don't have the - the ring that he gave Deb. If we had that, this case would be a breeze and that's why we wanted to call Deb back in. We wanted to make sure that Deb knows the importance of the Grand Jury coming up next week and I want her to realize the fact that, if we don't have enough evidence in Grand Jury's eyes, they will let him go. And if he gets out we don't know what he'll be like, right? I mean we don't know - she moved in with you; he won't be pleased about that. So, we don't know what type of behavior he will exhibit.
>
> [BEN THOMAS]: No, I mean all our lives are in extreme danger.
>
> MR. HICKCOX: Uh, that's what Debbie thinks as well. ... .

The tremendous pressure Hickcox put on Debra Thomas and Ben Thomas may have affected their grand jury testimony in important ways that cannot be discerned from the present record.

On November 11, the jewels were found. On January 23, 2003, the state resubmitted the case to the grand jury for reasons not shown on the record. SR1 3. One may assume the discovery of the jewels and other investigative activity may have greatly altered the evidentiary picture from the time of the first indictment.

At a minimum, there should have been examination of the grand jury transcripts to see what changes in the evidence provoked the extraordinary measure of resubmitting the case to the grand jury.

The judge should have at least granted in camera review. Given the changes in the witnesses' accounts during the course of the case, the judge should have ordered disclosure to the defense. The convictions and sentences violate the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. As in Keen, this Court should order a new trial.

XVI. WHETHER THE COURT ERRED IN ALLOWING HEARSAY THAT ANOTHER PERSON WAS ELIMINATED AS A SUSPECT IN THE CASE.

Hickox said on direct that neighbors were suspicious of a handy man. R23 1795-96. He said the man was interviewed and gave an alibi. R23 1796. The defense made hearsay and relevance objections. Id. The state said it was not hearsay, but showed the investigation. R23 1796-97. The judge ruled (R23 1796-98):

> Well, you've made it clear in opening statement, you're contending that they didn't get the right guy, however, so it certainly seems to me that it's relevant to rebut the inference that they didn't properly investigate it or whatever. I am still concerned about the hearsay nature of it though. I mean, if you just want to elicit that he did interview him and eliminated him as a suspect, that's proper. I'll al-

low that.

[Bench conference ends.]

Q After your interviews and investigation, did you eliminate this person as a suspect?

A Yes, sir, we did.

The state may not indirectly use hearsay by having a witness testify to the results of an interview or actions taken after it. In Keen v. State, 775 So.2d 263 (Fla. 2000), an officer testified at Michael Keen's murder trial that he interviewed the defendant's brother, Patrick, after receiving information from insurance companies that the death of Michael's wife was a murder. Without saying what Patrick said, the officer testified that he pursued his investigation and contacted Shapiro, the state's main witness. As at bar, the state said the evidence only showed the investigation. This Court held the evidence was hearsay. Id. at 274). Following Keen, Schaffer v. State, 769 So.2d 496 (Fla. 4th DCA 2000), found improper evidence that officers arrested Schaffer after talking to an informant: "Where the implication from in-court testimony is that a non-testifying witness has made an out-of-court statement offered to prove the defendant's guilt, the testimony is not admissible." Id. at 498. See also Stokes v. State, 914 So.2d 514, 517 (Fla. 4th DCA 2005); Trotman v. State, 652 So.2d 506, 507 (Fla. 3d DCA 1995). Just as the state may not present direct or indirect hearsay of

the defendant's guilt, so may it not present direct or indirect hearsay of another's innocence.

The stated reason for admitting the evidence shows why it was not harmless beyond a reasonable doubt. The judge said it countered the contention that "they didn't get the right guy." As it went to the defense theory, it was not harmless beyond a reasonable doubt. The convictions and sentences violate the Due Process, Jury, Confrontation, and Cruel Unusual Punishment Clauses of the state and federal constitutions and a new trial is required.

XVII. WHETHER THE COURT ERRED IN FINDING CCP.

The finding of CCP was based on pyramiding inferences. The court said appellant wanted a ring for his girlfriend, noted Loughman's jewelry, had been the to residence and so (it inferred) saw at least a part of the layout and saw the storm shutters, carried a suitcase for Joan and so (it inferred) knew she was physically impaired, knew the father was going to Hospice and so (it inferred) knew his chance of seeing Joan again was rapidly ending. R41 3950-51. It inferred he created an alibi telling Bosworth he had a meeting in Fort Pierce. R41 3953. It inferred from the fact that appellant received and made calls before and <u>after</u> the <u>assumed</u> time of the murder that he was calm, collected and calculating and pursuing a premeditated

plan. R41 3955. It inferred he armed himself with a knife or knife-like object "to commit the murder," before or after arriving. R41 3955-56. It noted that Loughman died of bludgeoning, stabbing and cutting. R41 3956. Admitting that the medical examiner was not certain, it said his opinion was she was stabbed, then bludgeoned and then her throat was cut. R41 3956. His opinion was that she was attacked in the hallway, dragged to the bedroom and bludgeoned, turned over and then her throat was cut. Id. The court inferred someone could have seen through the window, so he dragged her to the bedroom to finish his attack. R41 3957. It gave

> great significance to the fact that Dr. Diggs opined that the cut to the throat just below the jawbone was an unsuccessful attempt at slitting Joan's throat which prompted Gosciminski to do a more thorough slicing further down.

Id. It inferred from the lack of evidence of forced entry and of evidence that at the crime scene that the murder was not prompted by emotional frenzy, panic or fit of rage and no evidence that he spent time at the residence to clean up after the murder. Id.

In Hamilton v. State, 547 So.2d 630 (Fla.1989), the evidence showed that Hamilton murdered his wife and stepson with a series of shotgun blasts. This Court found speculative the judge's findings of aggravation, writing at pages 633-34:

> ... . Although the trial court provided a detailed description of what may have occurred on the night of the shootings, we believe that the record is less than conclusive in this regard. Neither the state nor the trial court has offered any explanation of the events of that night beyond speculation. Nonetheless, the court found that the crimes were heinous, atrocious, or cruel and that they were committed in a cold, calculated manner with a heightened sense of premeditation. There is no basis in the record for either of these findings. Aggravating factors must be proven beyond a reasonable doubt. The degree of speculation present in this case precludes any resolution of that doubt.

See also McKinney v. State, 579 So.2d 80, 84-85 (Fla.1991) (striking HAC and CCP where record "unclear on the exact sequence of events that led to" the murder). The state must prove the circumstances beyond a reasonable doubt, and the sentencer

> may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the State has not met its burden. [Cit.]

Robertson v. State, 611 So. 2d 1228 (Fla. 1993).

The speculation at bar shows at most a careful plan to rob or burglarize, which does not establish CCP. See Barwick v. State, 660 So.2d 685, 696 (Fla.1995) (citing cases), receded from on other grounds Topps v. State, 865 So.2d 1253 (Fla.2004). In Vining v. State, 637 So.2d 921 (Fla.1994), Vining used a false name to contact a woman selling diamonds, shot her at least twice, stole her jewels and dumped her body. This Court struck CCP (id. at 928):

> However, we find that the murder was not cold, calcu-

> lated, and premeditated because the State has failed to prove beyond a reasonable doubt that Vining had a "careful plan or prearranged design" to kill Caruso. Rogers, 511 So.2d at 533. The sentencing order addresses this aggravating circumstance by concluding that the "only explanation of this murder is as a cold and calculated act, far beyond mere premeditation." However, as we explained in Rogers,"[w]hile there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of 'calculation.' " Id. Although there is evidence that Vining calculated to unlawfully obtain the diamonds from Caruso, there is insufficient evidence of heightened premeditation to kill Caruso. Thus, we find that the trial court erred in finding the cold, calculated, and premeditated aggravating circumstance.

In Power v. State, 605 So.2d 856 (Fla.1992), Power confronted a girl in her home before school, waited while she sent away a friend's father who had come to take her to school (she told him Power would kill them if she tried to leave), took her from her house, bound, gagged, raped, and stabbed her. He then ate the sandwich from her school lunch. This Court struck CCP, writing the evidence showed only a prearranged plan to rape, that Power's prior crimes did not involve killing, and "eating of the victim's sandwich, an event that occurred after the commission of the murder, cannot sustain the necessary finding of heightened premeditation before the murder." Id. at 864.

In Wyatt v. State, 641 So.2d 1336 (Fla.1994), two escaped convicts from North Carolina armed themselves with guns and entered a restaurant. One stayed in front while Wyatt had the

manager William) open the safe. William's wife Frances and another employee (Bornoosh) were locked in the bathroom. Taking the money, Wyatt raped the wife, then shot all three. Id. at 1338. They "were subjected to at least twenty minutes of abuse prior to their deaths." Id. at 1340. After seeing his wife raped, William

> begged for his life and stated that he and Frances, his wife, had a two-year-old daughter at home. Wyatt shot him in the chest. Upon seeing her husband shot, Frances Edwards began to cry and Wyatt then shot her in the head while she was in a kneeling position. Having witnessed the shooting of his co-workers, Michael Bornoosh started to pray. Wyatt put his gun to Bornoosh's ear and before he pulled the trigger told him to listen real close to hear the bullet coming. When Wyatt realized William Edwards was still alive he went back and shot him in the head.

Id. at 1340-41. This Court struck CCP, saying the evidence did not show calculation before the murder and citing prior cases. Id.

In Street v. State, 636 So.2d 1297 (Fla.1994), Street, just out of prison, disarmed Officer Boles, shot another officer three times, shot Boles three times, ran out of ammunition, got the other officer's gun, chased Boles, who was already shot in the chest and face, and killed him. One shot was in firm contact with his shirt and pushed under his bulletproof vest. Id. at 1299. The judge found CCP because Street disarmed Boles, could escape in the police car, but then shot Boles three times,

then got another gun and shot him again. Id. at 1303. This Court struck CCP. Id.

This case shows a less cold calculated killing than the foregoing ones. It does not show the level involved as Powers waited while the terrified girl turned away a potential rescuer saying their lives were in danger, then abducted, bound, gagged, raped and stabbed her. It does not show the level involved in shooting a man begging in front of his wife, then turning the gun on the wife, then shooting a clerk, saying he could hear the bullet coming then shooting the first man again. It does not involve disarming someone, shooting him three times, and getting another gun to finish the job. The sentence violates the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order resentencing.

XVIII. WHETHER THE JUDGE ERRED BY NOT FINDING IN WRITING SUFFICIENT AGGRAVATING CIRCUMSTANCES TO SUPPORT A DEATH SENTENCE.

The court must "set forth in writing" findings that "sufficient aggravating circumstances exist." §921.141(3), Fla. Stat. It shall impose a life sentence if it does not make "the findings requiring the death sentence within 30 days" after rendition. Id. Even if there is no mitigation, there must be sufficient aggravating circumstances to justify the sentence. Cf. Terry v. State, 668 So.2d 954 (Fla.1996) (reducing sentence

where there were two aggravators and judge found did not find mitigation) and Rembert v. State, 445 So.2d 337 (Fla.1989) (same, one aggravator).

The judge did not find in writing "sufficient aggravating circumstances" to support the sentence. Appellant must be sentenced to life imprisonment. Failure to make the predicate finding violates the Due Process, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

XIX. WHETHER THE COURT ERRED IN FINDING HAC.

In finding HAC, the judge focussed on the nature of the injuries, but did not (because he could not) determine how long Loughman was conscious of being attacked. This Court will generally uphold HAC for such an attack, but not if one cannot determine the crucial facts as to the consciousness of being attacked. Speculation cannot substitute for proof. See Knight v. State, 746 So.2d 423, 435-36 (Fla.1998). Cf. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993) ("logical inferences" an aggravator if state has not met burden of proof).

In Elam v. State, 636 So. 2d 1312 (Fla. 1994), Elam knocked Beard to the ground and beat him to death with a brick. This Court struck HAC because, though Beard had defensive wounds, the attack took place in perhaps less than a minute and he was unconscious at the end of this period, so there was no prolonged

suffering or anticipation of death. Id. 1314. The same is true at bar. The judge largely relied on injuries that may have occurred after loss of consciousness. But "events occurring after victim loses consciousness may not be considered in finding HAC." Cherry v. State, 781 So.2d 1040, 1055 (Fla.2000); Jackson v. State, 451 So.2d 458, 463 (Fla.1984) ("when the victim becomes unconscious, … further acts contributing to his death cannot support" HAC).

"A trial court's ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record." Ford v. State, 802 So.2d 1121, 1133 (Fla.2001). The ruling is contrary to the law and evidence. It relied on speculation and acts that may have occurred after loss of consciousness. The sentence is unconstitutional under the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should reverse appellant's convictions and sentences and remand with appropriate instructions, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief has been furnished to Leslie Campbell, Assistant Attorney General, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299 by courier ____ July, 2006.

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12

point Courier, a font that is not spaced proportionately.

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