IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

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

CAROL STAFFORD HAUGHWOUT
Public Defender

GARY LEE CALDWELL
Assistant Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar No. 256919
Attorney for Andrew Gosciminski
421 Third Street
West Palm Beach, Florida 33401

(561) 355-7600; (561) 624-6560
appeals@pd15.state.fl.us

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ARGUMENT

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

Pages 11-12 of the answer brief (AB) say the this issue Ais unpreserved because the objection was not reraised before the jury [was] sworn@ under Joiner v. State, 618 So. 2d 174 (Fla. 1993). Joiner **accepted** his jury without renewing an objection to a state peremptory challenge. He **did not mention it again** until Aafter receiving the adverse verdict and judgment@, so it was Areasonable to conclude that **events … subsequent to his objection caused him to be satisfied** with the jury about to be sworn.@ Id. at 176. [1] Joiner ensures that Aneither the state nor the court [be] misled into a belief that the voir dire issue was being abandoned by failing to renew it.@ Scott v. State, 920 So. 2d 698, 700 (Fla. 3rd DCA 2006) (quoting Ingrassia v. State, 902 So. 2d 357 (Fla. 4th DCA 2005)).

The state and court were not misled at bar. It is not reasonable to think later events satisfied appellant. Schmidt was the last juror chosen: nothing later in jury selection could make him satisfied with the jury. Just before the jury was sworn, the judge asked if appellant was satisfied, A**except for**

[1] In this brief **bold** emphasis is supplied and underlined emphasis is in the original.

the Court=s rulings concerning any challenges for cause@. R20 1477. Shortly after the jury was sworn, R20 1479-81, appellant asked that an alternate replace Schmidt, R20 1490, renewing the request at the close of the evidence. R36 3510-11. In Joiner, there was no objectionable juror on the jury.[2] It does not bar review here.

Appellant agrees that under Castro v. State, 644 So. 2d 987 (Fla. 1994) the question is whether Schmidt=s views would prevent or substantially impair his performance as a juror.

AB 13 says Schmidt abandoned his belief that death was absolutely appropriate in every case, R4 533, after instruction on sentencing procedure. In fact, **after** the judge gave detailed instructions, R18 1100-03, **after** appellee did the same, R19 1191-95, **after** appellee said Aconvicting someone of first degree murder **does not automatically** give someone the death penalty,@ R19 1275, and **after** appellee discussed other jurors= views on an automatic death sentence, R19 1277, 1278, 1290, 1292, Schmidt told appellee he was A50/50" on the death penalty in that he opposed it for accidental vehicular homicide but favored it for

[2] AB 11 also cites Ault v. State, 866 So. 2d 674 (Fla. 2003), but Ault did not hold that Ault had to renew his objection to a state cause challenge when the jury was sworn: it simply noted that he renewed his objection and preserved the issue. As in Joiner, no objectionable juror remained on the jury in Ault.

felony murder. R19 1297. The state **understood him as meaning he automatically favored death for felony murder**, since it then **yet again** discussed the hearing and weighing process and then asked (id.):

> MR. TAYLOR [ASA]: ... . Do you **still** feel like that if it was proven to you it was premeditation or felony murder, that, in your opinion, you would **automatically want the death penalty**?
>
> MR. SCHMIDT: **Yes. If the evidence is there, yes**.

Thus, if the evidence showed Aa kid [was] recklessly driving down the road or ... a tire blew out and he accidentally hit another car and killed somebody else@, he would not vote for death. R19 1297. But if it showed felony murder he would Aautomatically want the death penalty@. Id. Such was his view after **repeated instructions**. His later saying he was a five out of ten, R20 1404, was not a departure from this "50/50" view. Contrary to AB 16, this is not a case in which later instructions cured initial uninformed comments favoring death. The judge erred in denying the cause challenge. This Court should order a new trial.

> 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.

After the judge first excluded the evidence, appellee told him it was A**crucial to our case**. If we can=t prove this, we have **no argument in closing argument**,@ and Athe **crux of our case**@ was

showing appellant could make it in that time. R24 1881-82. Appellee now tells this Court there is no reasonable likelihood that it affected the verdict, that it was harmless beyond a reasonable doubt. AB 21. But surely appellee did not misrepresent its importance to the judge, and surely the judge could believe appellee=s assertion. In fact the argument at AB 21 shows the evidence=s importance: it went to the state=s time line inculpating appellant.

AB 19 confuses the Aessential similarity@ rule rejected in Johnson v. State, 442 So. 2d 193, 196 (Fla. 1983) with the Asubstantial similarity@ rule of Dempsey v. Shell Oil Co., 589 So. 2d 373, 380 (Fla. 4th DCA 1991). But the rules are different: one case cited in Johnson, Vitt v. Ryder Truck Rentals, Inc., 340 So. 2d 962, 964-65 (Fla. 3rd DCA 1976), **adopted** the substantial similarity rule. The substantial similarity rule avoids the problem arising when Aa slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful.@ General Motors Corp. v. Porritt, 891 So. 2d 1056, 1059 (Fla. 2nd DCA 2004) (finding results inadmissible and citing language arising from Hisler v. State, 52 Fla. 30, 42 So. 692, 695 (1906)).

Under the correct rule, the judge has discretion to admit

the evidence **so long as** the proponent makes the necessary showing of substantial similarities. At bar, the state did not make the necessary showing, and the judge erred in admitting the evidence.

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.

AB 25-26 rely mainly on Gordon v. State, 863 So. 2d 1215, 1219 (Fla. 2003). Gordon contended on post-conviction that counsel was ineffective for not challenging **lay** testimony about phone records that related locations on the records to a cell phone map. Gordon did not involve the issue now before this Court. Here, the purported expert testimony was that one could tell, without test instruments, the area of 100% maximum coverage of cell towers.

AB 26 cites Medina v. State, 920 So. 2d 136 (Fla. 3rd DCA 2006) and Still v. State, 917 So. 2d 250 (Fla. 3rd DCA 2005), which involved GPS tracking. The present case **does not:**[3]

[3] Regardless, Medina and Still are doubtful authorities. In Medina, the court wrote it was **unnecessary to decide the issue** below or on appeal, but stated agreement with the trial court without citing any authority. In Still, the only Florida authority cited for admission of GPS testimony was Hicks v. State, 852 So. 2d 954 (Fla. 5th DCA 2003), which decided no such issue. Hicks involved a suppression hearing with only a passing reference to OnStar tracking. Hicks did not challenge the GPS evidence, and it played no role in the analysis.

Q You're not pinpointing it like a GPS?

A Correct.

R29 2612 (see also testimony at R29 2611-12 and R25 1989-90).

AB 27-28 rely on Pullin v. State, 534 S.E.2d 69 (Ga. 2000).[4] Pullin did not involve a rough estimate and hand drawn lines used to show a tower's exact reach. Prosecuted for a 6:30 a.m. murder in Lithonia, Georgia, Pullin claimed he had made a call from his home in a town A**approximately 30 miles from Lithonia**,@ at 5:30 a.m. and stayed home until 7:30 a.m., but phone records showed calls in Lithonia at 5:31 and 7:09 a.m. Id. at 70. The evidence was that a phone A**such as the one Pullin used** is transmitted to" the tower "**geographically closest to the handset**". Id. at 749. The evidence was that Pullin could not have made

[4] AB 26-27 also cite four federal cases in saying that other Ajurisdictions@ accept Acellular technology as a reliable basis to establish the location of the defendant in a criminal case.@ Federal law as to scientific evidence is different from Florida law. Further, in U.S. v. Sepulveda, 115 F.3d 882 (11th Cir. 1997), there was an overlap of tower sites, as at bar, and one **could not** determine the location of calls, so that calls were A**improperly attributed to appellants**.@ Id. at 891. The issue in Sepulveda involved federal sentencing and **did not involve the rules of evidence governing trials**. In U.S. v. Weathers, 169 F.3d 336 (6th Cir. 1999), the issue was only whether use of a cell phone involved interstate commerce. U.S. v. Pervaz, 118 F.3d 1 (1st Cir. 1997), involved a probable cause issue turning on whether phone company employees acted as federal agents tracking cell phone calls. U.S. v. Brady, 13 F.3d 334 (10th Cir. 1993), upheld dismissal of an indictment, and involved no evidentiary issue. These cases do not help appellee.

the calls from his home.

The case at bar is unlike Pullin. Pullin claimed to have made a call from a place many miles outside the tower's range. In Pullin, there was no claim that without standard test instruments one could draw the exact line at which a call would be outside a tower=s range. The evidence at bar was that the closest tower would not necessarily be the one to take a call from appellant=s phone. R25 2027-28. Mr. Lee did not know what towers were down that day. R25 2012-13. There was no evidence as to the range of **appellant=s phone**, unlike in Pullin.

AB 28 cites three other cases with Pullin. U.S. v. Hodges, is cited as A2006 U.S. Dist. LEXIS 68401 (D. Ill. 2006)@. The undersigned cannot access LEXIS, but the case seems to be U.S. Hodges, 2006 WL 2714838 (N.D.Ill. 2006), a trial court order denying a motion for new trial. The judge said Hodges' motion could not attack cell phone testimony because he **made no objection at trial**, he **stipulated** to admission of cell-site records showing his location, and there was only **general testimony** as to how cell towers work. Id at *5. The next case is an opinion of a California middle-level court, People v. Davis, 2006 Cal. App. Unpub. LEXIS 9285 (Cal. Unpublished Opinions 2006). Appellee has served a copy of this unpublished decision. It lacks precedential effect even in California. It did not involve hand

drawn Alines of impossibility@ such as at bar. The testimony was only that it was Aunlikely@ that a call made in Vallejo could hit a site ten miles away, but a call could reach a site 2 **2** miles away. In People v. Martin, 119 Cal.Rptr.2d 679 (Cal. App. 2002), the only legal issue concerned suppression of a statement, with **no challenge** to cell phone testimony.

As in Point II, appellee tells this Court the evidence did not affect the verdict. But **it told the judge** that evidence of appellant=s route, based on the cell phone testimony, was crucial, it had no argument to make to the jury without it, and the crux of its case was showing appellant=s route and times. R24 1881-82. Its use of the evidence in final argument refutes its claim of harmless error. It used the hand-drawn overlay to attack appellant=s credibility and claimed it showed the Martin Highway site was precisely within the line of possibility. R36 3391-92, 3403-04.

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

AB 32 says: AWhen the issue arose, the State did not have the statement, but obtained a copy on April 22, 2005.@ On Monday, April 25, 2005, ASA Park said Awe@ got the A**original statement**@ on AFriday night@ (April 22) when an investigator got it

from Ms. Pelletier. R30 2644-45. She did not directly answer the judge=s question as to when she first had a **copy**, id., but she inarguably had a copy before getting the **original** on Friday **night**, as she gave the defense a copy before court recessed at **1:10** p.m. Friday **afternoon**. R29 2633. She did not say then or ever when she got this copy.[5] It may have been the copy the police got in 2002.

AB 33 claims compliance with discovery Awhere the police evidence books were made available to the defense to copy, and the statement was contained therein (R.30 2653-56).@ Defense counsel told the judge he went to the police department and 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 judge told appellee he needed testimony from the detective about this, but appellee never presented such testimony. R30 2657. As to the evidence book, defense counsel

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[5] At R29 2553, Park said she would Acheck and see if we do have it.@ With no break more significant than a five-minute recess, R29 2579, the trial went on until the state handed over a copy of the credit card bill at R29 2633, shortly before the 1:10 p.m. recess. One cannot tell when she first got this copy; we only know it was in her files by noontime April 22. On the **morning of April 22**, Ben Thomas said he had spoken to Geoffrey Beene the night before, remembered he had bought shorts, and the prosecutors had asked him about the purchase A**some time prior to this**@. R29 2542-43. The defense was clearly unprepared for the testimony.

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. AB 35 says without a record citation that the judge Afound Gosciminski had access to the credit statement when he viewed the police [sic] as it was contained in the evidence which counsel knew to ask to see.@ In fact he **made no such finding**.

The defense argued that the police did not make the bill available to Ainspect, copy, test, and photograph@ as required by Rule 3.220(b). Counsel made specific factual statements in this regard. The judge knew he would have to hear the officer=s explanation, but then failed to inquire into and determine whether or why the police did not make the bill available to the defense.

AB 34 suggests that the defense sought disclosure under Brady v. Maryland, 373 U.S. 83 (1963) and cites post-conviction Brady cases. Counsel said the bill had to be disclosed under Rule 3.220. R30 2642. Rule 3.220(b)(4) requires disclosure of evidence that A**tends** to negate the defendant=s guilt@. The rule is similar to, but broader than, Brady. It does not require a strict showing that the evidence negates guilt. Cf. Perdomo v.

State, 565 So. 2d 1375, 1376 (Fla. 2nd DCA 1990) (AWhile the reports were of **debatable exculpatory value**, appellant should have had the benefit of the information contained within them.@); Giles v. State, 916 So. 2d 55, 58 (Fla. 2nd DCA 2005) (AAlthough the information does not appear to fit any of the other categories listed in rule 3.220(b)(1), it **could** constitute exculpatory information, whose disclosure is required by rule 3.220(b)(4).@); Snelgrove v. State, 921 So. 2d 560, 568, text and n. 15 (Fla. 2005) (differentiating between prejudice under Brady and prejudice for discovery violation). Committee Notes to the 1972 amendment to Rule 3.220 say it Aprovides for automatic disclosures (avoiding judicial labor) by the prosecutor to the defense of almost everything within the prosecutor=s knowledge ... .@ The broad disclosure requirement **avoids** narrower Brady claims involving post-conviction inquiries and judicial labor.

AB 34-35 says the parties stipulated to the bill=s admission Awith the defense noting >We don=t have any objection to that one page coming in, judge.= (R.30 2664).@ Examination of the record shows no waiver. **After** the judge overruled the objections, R30 2663, there **followed** a discussion of whether the state would introduce the **entire** bill without authentication or only the page with the Geoffrey Beene purchase. R30 2663-65. **In this context**, counsel had no objection Ato that one page coming in@. R30

2664. He **did not waive** prior objections: when the bill later came into evidence, he said, ASubject to **previous motions and objections**.@ R30 2676. If appellee or the judge thought he had waived the issue, they would have said so then, but the state was silent, and the judge said, A**Same ruling** on the motions and the objections.@ Id.

AB 35-37 argue there was an adequate inquiry. This ignores that the judge never found out things like: when the prosecutors had a copy of the bill; why the police did not show it to the defense; and whether there was a receipt.[6] Richardson v. State, 246 So. 2d 771 (Fla. 1971), is instructive. A state witness said Dick Davis was the criminals' contact man. Id. 776.

[6] AB 34 says appellant Adoes not allege that a cologne receipt has been located.@ It was **appellee** who brought up the issue of a Areceipt,@ R29 2540-41, and **appellee** who demanded that appellant produce a receipt. R29 2546. Apparently confused by appellee=s talk of a Areceipt@, defense counsel called the paper Pelletier gave the police a receipt. R29 2547. The judge said **appellee** Aleft an impression in the jury=s mind that the defense supposedly has a receipt@. R29 2551. **Appellee** again said there was a Areceipt@: ASA Taylor suggested delaying recross Auntil we retrieve and see if the evidence and police has **the receipt**. And we could state that through him and even through Debra Pelletier, that she provided **this receipt** to the police and the police put it into evidence.@ R29 2552. Ultimately the judge did not make a sufficient inquiry to determine whether there was such a receipt, placing the burden on the defense to produce it: Aif 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.

Although Dick Davis did not testify, the judge had a duty to make a full inquiry about him. This Court wrote:

> And **we should not speculate as to whether there was in fact such a witness as "Dick Davis"**, nor whether, if so, he had information "relevant to the offense charged"or "to any defense of" the petitioner who was "charged with respect thereto."

Id. at 776. At bar also we can only speculate as to whether there was such a receipt or if it bore information relevant to the case. The judge made an insufficient inquiry.

At bar, without a sufficient inquiry, reversal is required under Scipio v. State, 928 So. 2d 1138, 1147 (Fla. 2006) and State v. Schopp, 653 So. 2d 1016, 1020-21 (Fla. 1995) because Athe record is insufficient to determine that the defense was not materially affected".

AB 36 says: AWhile the defense did not have the actual statement, it had all of the information contained therein.@ But as defense counsel noted, he did not have the account number until the state produced the bill (R4 462), and with the account number he could have investigated the matter with the credit card company or Geoffrey Beene. R30 2660. There was procedural prejudice.

AB 35 indicates the judge acted in his discretion in decid-

ing if there was prejudice and fashioning a remedy.[7] It ignores that the judge erroneously found **no discovery violation**. Rule 3.220 (b)(1)(K) requires that the state disclose and make available papers it intends to use at trial. The state did not comply with this requirement. There was a discovery violation. The judge did not inquire adequately, he fashioned no remedy, and he shifted to the defense the burden to show prejudice.

Appellant disagrees with argument at AB 36, n. 19 suggesting the rule of full disclosure is limited to statements of the accused. Cf. D.R. v. State, 588 So. 2d 327 (Fla. 4th DCA 1991) (though state made defense aware of **victim=s statement**, it also had to make it available for inspection); Whites v. State, 730 So. 2d 762, 764 (Fla. 5th DCA 1999) (**ballistics report**; Athe state has a continuing duty to disclose evidence held by other state

[7] AB 35 cites State v. Tascarella, 586 So. 2d 154, 157 (Fla. 1991), Lowery v. State, 610 So. 2d 657, 659 (Fla. 1st DCA 1993), Poe v. State, 431 So. 2d 266, 268 (Fla. 5th DCA 1989) and Barrett v. State, 649 So. 2d 219 (Fla. 1994). In State v. Tascarella, federal agents persistently refused to be deposed, so there was no abuse of discretion in ordering them to appear for deposition or be barred from testifying at trial. State v. Tascarella hardly gives unfettered discretion to fashion remedies: a judge has discretion to forbid a witness=s testimony only in the most extraordinary circumstances. Lowery found the judge **did abuse his discretion** in letting the state use **in rebuttal** a check not disclosed in discovery. Poe also **found an abuse of discretion** in letting an undisclosed witness testify **on rebuttal**. Barrett **reversed** for failure to inquire adequately into a discovery violation.

agents, such as law enforcement officers, even if the defendant could have obtained the information by other means@); Hahn v. State, 626 So. 2d 1056 (Fla. 4th DCA 1993) (inquiry into whether defendant knew witness inadequate; state had affirmative duty to disclose witness).

Argument of lack of prejudice under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) at AB 37 is beside the point. Even if the judge had made an adequate inquiry, the test is still one of procedural prejudice. See Cox v. State, 819 So. 2d 705, 712 (Fla. 2002).

V. WHETHER THE EVIDENCE SUPPORTS THE VERDICTS.

AB 38 says the motion for judgment of acquittal as to murder and robbery was inadequate so that this Court may not review the sufficiency of the evidence of those offenses. In capital cases, this Court reviews the evidence's sufficiency even if the defense has not contested the issue. Cf. LeDuc v. State, 365 So. 2d 149 (Fla. 1978) (although LeDuc plead guilty and did not challenge legal sufficiency of convictions on appeal, Supreme Court obligated to ascertain if they were proper; independent review showed sufficient Aunderlying factual foundations@ for plea); Muehleman v. State, 503 So. 2d 310, 314-15 (Fla. 1987) (Ahaving carefully reviewed the record, we find Muehleman=s plea of guilty to charges of first-degree murder to have been freely

and voluntarily given **and amply supported by a factual basis in the record**.@; citing LeDuc); F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003) (in capital cases Court determines Awhether competent, substantial evidence supports the verdict, regardless of whether the issue is preserved for review or even raised on appeal@). Counsel's performance at bar is puzzling, but if appellee thought the motion was inadequate, it could have said so at the time. It did not. Further, in discussing sufficiency of the evidence of burglary, it conceded that AWe need to rebut every reasonable hypothesis of innocence.@ R33 3087.

Even evidence raising "a very strong suspicion" of guilt cannot substitute for proof beyond a reasonable doubt. See Long v. State, 689 So. 2d 1055, 1059 (Fla. 1997). In Ballard v. State, 923 So. 2d 475, 483 (Fla. 2006), the hypothesis was that Ballard

> was not guilty, and that another individual, including perhaps a member of the gang that had shot into [the victims=] apartment a week prior to the murders, or some other unknown assailant, committed the murders.

Forensic evidence put him on the scene, but he had often been there in the past. At bar, appellant=s hypothesis was that he was not guilty, and some unknown person committed the murder. No forensic evidence put him on the scene. Appellee had the burden to show he was guilty and no one else committed the

crimes.

Appellee=s argument is a stack of inferences. AB 46 points to evidence of appellant=s statements, bank records, his meeting with Loughman the night before the murder, his knowing she was leaving, his washing blood from himself and discarding bloody clothes, and having a ring like Loughman=s. Appellee infers that his not very unusual troubled finances would drive him to murder. It infers he decided to kill Loughman when he knew she was leaving soon. It must pyramid these inferences on evidence that he was bloody to infer that the blood had to be Loughman=s. It must infer from these inferences that the ring he had was taken from Loughman and taken from her in the murder. A stack of inferences cannot make up for a lack of proof. Cf. Miller v. State, 770 So. 2d 1144, 1149 (Fla. 2000) (Athe circumstantial evidence test guards against basing a conviction on impermissibly stacked inferences.@). As in Ballard: ASuspicions alone cannot satisfy the State=s burden of proving guilt beyond a reasonable doubt, and the expansive inferences required to justify the verdict in this case are indeed improper.@ 923 So. 2d at 482.

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.

AB 49 argues for the first time on appeal that Acounsel was discussing facts not in evidence, and there was no foundation

laid for the witness= expertise in this area.@ Thus, it asks this Court to pass on a ruling the judge never made on an objection the state never made. These arguments lack merit.

As to the first claim, questions on cross-examination normally bring up matters not yet in evidence. They bring out new facts impeaching or clarifying the witness=s testimony.

As to the second, if the state had made a timely foundation objection, the defense would have been alerted and able to show if there was a foundation for knowledge. Cf. Robertson v. State, 829 So. 2d 901, 908 (Fla. 2002) (appellee could not for first time on appeal argue evidence admissible as collateral crime evidence: ARobertson never received an opportunity to present evidence or make argument as to why the incident involving his ex-wife should not have been admitted under the Williams rule.@); Valley v. State, 860 So. 2d 464, 467 (Fla. 4th DCA 2003) (appellee could not argue for first time on appeal that hearsay was not admitted to prove truth of matter asserted).

A foundation objection must be so framed that the proponent has Aan opportunity to correct the defects, where possible, by asking additional questions of the witness or calling an additional witness who might be able to correct the defects.@ Jackson v. State, 738 So. 2d 382, 386 (Fla. 4th DCA 1999); see also Jackson v. State, 456 So. 2d 916, 919 (Fla. 1st DCA 1984) (predi-

cate objection to blood test did not give notice of claim that witness lacked statutory license; a specific timely objection Acould have been disposed of quite simply by putting one more question to the witness@). Regardless, the witness did not lack of knowledge: she **agreed** such rings are for sale every weekend. R21 1582.

AB 50-51 say the witness did not know how Apopular@ the rings were and, as a Connecticut resident, she could not say what ads were in the paper. Such a foundation objection must be made at trial. She did not know how Apopular@ the rings were, but agreed they were commonly on sale. Popularity is a subjective assessment, but the availability for sale is an objective fact. She was likely often in Florida for case-related matters, and perhaps for vacations, and could know what was advertised in newspapers. We cannot know because the state **did not make an objection at a time which would have led to development of this fact**. Cf. Robertson, Jackson and Jackson.

AB 49-50 say the evidence was Aequivalent to an out of court statement (advertisement) repeated in court to prove the fact asserted (rings similarly designed were sold weekly).@ The AB does not dispute that one can show that such rings are on sale based on observation of their being displayed for sale. It makes no difference whether they are displayed for sale in a

store or a newspaper.

AB 51 briefly claims harmless error. As the initial brief said, identification of the ring was a crucial issue. If similar rings are commonly available, misidentification would be more likely. The error was not harmless beyond a reasonable doubt.

> 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 AB does not try to distinguish Martin v. State, 356 So.2d 320, 321 (Fla. 3rd DCA 1977). It ignores Martin and argues that the issue was not preserved and that the state may comment **in argument** on a defendant=s having sat through the trial before testifying.

Under Martin, appellee=s preservation argument lacks merit. Like Martin, appellant objected that the questioning was argumentative. As in Martin, it was argumentative: it served to make a second argument to the jury.[8] As in Martin, it was prejudicial.

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[8] As Judge Pearson once wrote:

> The functions of cross-examination are to elicit testimony concerning the facts of the case and to test the credibility of the witness. **What a witness did or did not hear other witnesses say in the courtroom tends neither to prove nor disprove any material fact**

AB 52-53 say Portuondo v. Agard, 529 U.S. 61 (2000) rejected the Avery argument@ that such questioning is Aneither argumentative nor an improper comment on the right to remain silent.@ In Portuondo, a federal habeas corpus case, the state said **in final argument** that Portuondo heard the other witnesses and could tailor his testimony. Portuondo made no ruling about cross-examination, did not rule whether such **cross-examination** was argumentative, did not involve Florida=s settled rule forbidding comments fairly susceptible of being interpreted by the jury as a comment on silence,[9] and involved a comment on Portuondo being

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> **in issue and is therefore totally irrelevant unless, which is hardly the case here, the witness=s ability to hear is in issue**. Thus, it is clear that the prosecutor=s foregoing and like questions can lead to no admissible testimony and serve the singular and improper purpose of recapitulating the testimony of the State=s witnesses at a point in the trial when such recapitulation is not called for. I am not aware of any authority which accords to any party the right to make a closing argument in mid-trial and a second at the trial=s conclusion.

Gonzalez v. State, 450 So. 2d 585, 587 (Fla. 3rd DCA 1984) (Pearson, J., concurring).

[9] The rights of the accused in Florida to silence and to counsel long precede the Fourteenth Amendment's application of the Bill of Rights to the states, and in fact precede the Fourteenth Amendment. Cf. Simon v. State, 5 Fla. 285, 296 (1853) (coerced statement inadmissible); Green v. State, 40 Fla. 474, 476, 24 So. 537, 538 (1898) (ABefore being questioned, the accused must be told that >he need not say anything to criminate himself, and what he did say would be taken down and used as evidence against him.=@). See generally Traylor v. State, 596 So.

present at trial rather than referring to the entire period from arrest to 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.

Appellee told jurors Athe first time we@ heard Debra Thomas knew about the jewelry was in appellant=s testimony. The AB says it was referring only to his not telling officers she knew about the jewelry, but it did not alert **jurors** to this limitation. It told **the judge at the bench** it referred to appellant=s police statement. R36 3421. But after the bench conference (and a recess), it **did not tell jurors of this limitation** and turned to discuss circumstantial evidence. R36 3422-23. That it tied **later** remarks to the police statement at R36 3424, does not affect the remark in question: those later remarks came **after a bench conference, a recess, and a discussion of circumstantial**

2d 957, 964 (Fla. 1992) (discussing these and other cases). Our rule against indirect comments on silence likewise arose separately from the Fourteenth Amendment. Cf. Rowe v. State, 87 Fla. 17, 98 So. 613, 617 (1924) (indirect comment on silence); Trafficante v. State, 92 So. 2d 811, 814 (Fla. 1957) (Aour law prohibits any comment to be made, directly or indirectly, upon the failure of the defendant to testify@; discussing Rowe and other cases); State v. Diguilio, 491 So. 2d 1129, 1132-33 (Fla. 1986) (discussing history of rule). The AB does not really dispute that the cross-examination was argumentative under Martin. It was prejudicial as, among other things, it commented on appellant=s rights in violation of Florida law under Martin.

evidence. R36 3422-23. **Even then**, appellee did not tell the jurors the earlier remark referred only to the police statement.

Florida has Aa very liberal rule for determining whether a comment constitutes a comment on silence@, which works closely with the harmless-beyond-reasonable-doubt standard:

> In Florida, we have adopted a very liberal rule for determining whether a comment constitutes a comment on silence: any comment which is Afairly susceptible@ of being interpreted as a comment on silence will be treated as such. [Cit.] One authority has said that A[c]omments or arguments which can be construed as relating to the defendant=s failure to testify are, obviously, of almost unlimited variety.@ [FN omitted] The Afairly susceptible@ test treats this variety of arguable comments as comments on silence. We are no longer only dealing with clear-cut violations where the prosecutor directly comments on the accused=s silence and hammers the point home as in Rowe v. State, 87 Fla. 17, 98 So. 613 (1924). Comments on silence are lumped together in an amorphous mass where no distinction is drawn between the direct or indirect, the advertent from the inadvertent, the emphasized from the casual, the clear from the ambiguous, and, most importantly, the harmful from the harmless. In short, no bright line can be drawn around or within the almost unlimited variety of comments that will place all of the harmful errors on one side and the harmless errors on the other, unless the circumstances of the trial are considered. We must apply harmless error analysis to the Afairly susceptible@ comment in order to obtain the requisite discriminatory capacity.

State v. DiGuilio, 491 So.2d at 1135-36. The comment at bar was improper under this standard.

The AB makes no claim of harmless error. 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.

The AB says appellant did not preserve this issue as he did not object to **jury argument** on this point. It points to no case in this regard. The jury argument cemented the prejudicial effect of the improper questioning. This Court looks to final argument to determine the prejudicial effect of errors earlier in the trial. Conley v. State, 620 So. 2d 180, 183, n. 4 (Fla. 1993) states:

> The district court distinguished this issue as two separate claims, one as to Officer Brown=s statement, which was objected to, and another as to the prosecutor=s closing argument about Officer Brown=s testimony, which was not objected to. We see no need to draw this distinction. **The error was committed when Officer Brown=s statement was admitted over objection. The prosecutor=s remarks compounded the error and shed light on the purpose for which the evidence was introduced**.

The courts do so **regardless whether there is objection** to the jury argument. Aneiro v. State, 674 So. 2d 913 (Fla. 4th DCA 1996) held:

> We reverse and remand for new trial. The issue on appeal is whether the trial court erroneously admitted harmful hearsay, over objection, then erroneously permitted the state to argue to the jury, **without further objection**, such hearsay to establish the credibility of a CI not available for cross-examination.

See also Garcia v. State, 564 So. 2d 124, 128-29 (Fla. 1990)

(state compounded error in final argument; quotation of state=s argument does not show any objection); Weiand v. State, 732 So. 2d 1044, 1058 (Fla. 1999) (exclusion of evidence let state discredit defense in final argument; quotation of argument does not show any objection); Royster v. State, 741 So. 2d 606, 607 (Fla. 1999) (error in excluding evidence prejudicial Aparticularly in light of statements made by the state attorney during closing"; quotation of argument does not show any objection); Martinez v. State, 761 So. 2d 1074, 1082-83 (Fla. 2000) (court is to Aconsider both the preserved and unpreserved errors in determining whether the preserved error was harmless beyond a reasonable doubt. [Cit.] Thus, these additional closing argument errors further support our determination that the error in admitting the properly preserved opinion of guilt testimony was not harmless beyond a reasonable doubt.@).

AOverwhelming evidence@ is not the standard for harmless error, State v. Diguilio, 491 So.2d at 1139, yet AB 58 argues that standard. Anyway the evidence was not overwhelming: the circumstantial case relied on witnesses whose credibility jurors could have doubted. The jury deliberated for many hours before the verdict. Appellee=s argument is so perfunctory as to be a waiver of the issue.

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.

Appellant relies on his initial brief.

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

The preservation argument at AB 62 is a non-sequitur. It notes that the judge denied a mistrial with leave to renew **if appelleee did not** get the statements to the sister and husband into evidence.[10] But then it says appellant had to renew the motion when **appellee did** get them into evidence. The judge allowed their testimony over objection, so there was no need to renew the mistrial motion. This Court does not require futile acts. See Spurlock v. State, 420 So. 2d 875, 876 (Fla. 1982) (where judge overruled objection, no need to move for mistrial to preserve issue); see generally Hunt v. State, 613 So. 2d 893, 898, n. 4 (Fla. 1992) (Afutile efforts are not required to preserve matters for appeal@); Green v. State, 80 So. 2d 676, 678 (Fla. 1955) (counsel Anot required to do an obviously useless thing@); State v. Davis, 932 So. 2d 1246, 1249, n.2 (Fla. 3rd DCA 2006) (AIt is well settled that the law does not require a useless or futile act.@; citing cases).

[10] AYou can renew it **if the State is not able to get the statement in through another witness**. I=m going to deny the motion for mistrial now. You can reraise it **if the State=s not able to get in the statement at a later time**.@ T24 1905.

AB 65 says Joan=s statement was not offered for the truth asserted. But as the initial brief noted, it was impeachment **only if the hearsay was true** that the conversation occurred. If appellee only sought to put in context appellant=s statements, **it would not have presented** the husband=s and sister=s hearsay that the conversation occurred. Appellee told the judge: AI would also like to add that he=s going to deny that this conversation took place, and we are going to rebut that with the testimony of the sister **that this conversation took place**.@ T24 1904. **In response to this statement**, the judge let it in evidence (id.):

> Well, **if that=s the case**, then, yes, I mean, I can then see that that is going to come in as potential rebuttal. And if that comes in as potential rebuttal, then it would seem to me that this portion of the recording is going to be admissible. But at this point in time until that happens, I=m concerned this is going to be inadmissible.

Thus, the judge relied on appellee=s claim that it sought to prove the conversation **took place**, and such in fact is what it sought to do via the husband and sister. The judge saw appellee was trying to prove the truth of the matter asserted (that the conversation took place), which is why he gave appellant leave to renew the mistrial motion if appellee failed to present their testimony.

AB 66 briefly argues harmless error, pointing to Debra Thomas=s testimony that appellant said he would get a two carat ring

in West Palm Beach, R28 2355, and Studinski=s vague testimony that AJewelry was mentioned@ in a discussion with appellant about Loughman=s family. T32 2937-38. This testimony did not show a specific discussion between Joan and appellant about her ring. Thus, the jury did not already have the same information. Appellee said the evidence impeached appellant=s credibility. The defense depended on his credibility. The error was not harmless beyond a reasonable doubt.

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

Appellee=s argument on this point is like its argument on Point XI. To repeat, appellee introduced the testimony to show that the conversation **did occur** between appellant and Joan. It was impeaching only so far as it proved the conversation took place. It went to prove the truth of the matter asserted and was hearsay.

AB 67-68 make much of the judge=s discussion of a limiting instruction. The instruction was to be delivered during the husband=s testimony on April 25, long after the jury first encountered Joan=s hearsay statement when the tape was played on April 19, so it would have been of little use and its rejection

could not have been a waiver of this issue.[12] Thus Shabazz v. State, 928 So. 2d 1267, 1269 (Fla. 4th DCA 2006) held:

> The state suggests that Shabazz waived the error by rejecting a curative instruction offered by the trial court significantly later in the trial. We find the error was not waived, in that **the delay diminished the sufficiency of a curative instruction and at that point would have only highlighted the error**.

Regardless, the judge's instruction[13] would have **authorized jurors to consider the hearsay to prove the truth of the matter asserted**, namely that the conversation occurred. Thus, **it would not** limit consideration of the hearsay for the truth of the mat-

[12] AB 68 and 69 also say appellant waived this issue by letting appellee exploit the evidence in final argument without objection and not objecting to its use in the sentencing order. Aneiro and Conley dispose of the state's claim. See also Garcia, Weiand, and Royster. Further, defendants may not use Florida Criminal Rule 3.800(b) to attack a capital sentencing order in the trial court. See Maddox v. State, 760 So. 2d 89, 94, n.3 (Fla. 2000). Hence, appellant had no vehicle to challenge the sentencing order. Regardless, the evidence's use in the sentencing order simply underscores its prejudicial effect.

[13] At R32 2917, the judge said he would say the evidence was to be considered only "as an inconsistent statement," and at page 2921, he said he would say it was "only being introduced for impeachment purposes." Appellant rightly opposed such instructions, which would have jurors use the hearsay as proving the matter asserted and would remind them of the taped statement. The evidence was not "an inconsistent statement" of appellant. It was hearsay that the conversation did occur. For jurors to use the hearsay as impeachment they would have to accept the truth of the matter asserted (that the conversation occurred). The confusing instructions would have improperly commented on the evidence and in no way would have rendered the hearsay admissible or harmless.

ter asserted. Opposition to the instruction did not waive the hearsay objection. Such an instruction would do more harm than good. Cf. Freeman v. State, 630 So. 2d 1225, 1226 (Fla. 4th DCA 1994) (curative instruction "inadvertently had the effect of creating the impression that the victim's statement ... was factual").

AB 68 cites Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005) and Ellis v. State, 622 So. 2d 991 (Fla. 1993) as holding that impeachment is not hearsay. Those cases involved inconsistent statements **of the same person**. In Fitzpatrick, Laura Romines= statements at the hospital impeached **her own statements** at the scene. In holding the statements not hearsay, this Court **emphasized** that section 90.806(1), Florida Statutes, says: AEvidence of a statement or conduct by the declarant at any time inconsistent with the declarant=s hearsay statement is admissible ... .@ 900 So. 2d at 515.

Ellis held witness Feagle's prior statement **was hearsay** since it Awas not simply an attack on Feagle=s credibility,@ but was also used Ato persuade the jury … to believe in the truthfulness of the out-of-court statements@. 622 So. 2d at 996. At bar, appellee sought to persuade the jury to believe the truthfulness of the statements that the conversation did occur.

As the statements were not appellant=s, they were not non-

hearsay impeachment under Fitzpatrick and Ellis. Neither case authorized hearsay of a third person to impeach the defendant.

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.

AB 70-71 say defense counsel=s statements AOkay@ and that he had nothing Aelse@ to put on the record waived this issue. This takes what counsel said out of context. When the judge announced his ruling, counsel said: AOkay. And is that=s Court=s 2 that I could work from **to make sure that I=m abiding by the Court=s ruling**?@ T29 2520-21. Thus, he just said he understood the ruling and desired to obey it. There was no waiver. Cf. People v. Marquez, 963 F.2d 1311 (9th Cir. 1992) (no waiver when counsel said AOkay. Thank you, Judge.@ after judge announced ruling). That he then had nothing Aelse@ to put on the record, T29 2521, hardly shows a waiver.

AB 70 and 72 suggest that at R29 2504-05 defense counsel sought admission of the Asmoking gun@ statement without the gambling statement. Again, the AB takes a statement out of context. At R29 2504-05, counsel was only summarizing the evidence. Shortly afterward, he read the judge the exact statements he sought to introduce **including the gambling statement**. R29 2510.

AB 72 trivializes the gambling statement because the jury heard the Asmoking gun@ statement. The gambling statement would most resonate with Ben Thomas, who brought up the gambling analogy:

> [BEN THOMAS]: How does it look?
>
> MR. HICKOX: Well.
>
> [BEN THOMAS]: **You=re a gambling man**.
>
> MR. HICKOX: It=s - if I were to gamble, I don=t think I=d put my house on it, let me put it that way. ... .

R3 454. Appellant sought to show the effect of Hickox=s statements **on Thomas**.[11] The gambling remark would have had the greatest effect on him as it most directly addressed his question in **his own terms**. He wanted to know the odds, and Hickox said the odds were not good.

Contrary to argument at AB 73-74, an officer's statement of opinion is admissible to show matters other than the truth of the matter asserted. Cf. Worden v. State, 603 So. 2d 581, 583 (Fla. 1992) (officer=s statements not offered for truth, but to place Worden=s answers in context). Appellee was free to seek a

[11] AB 72-73 suggest the evidence went to show Hickox=s bias. In fact, it went to show the remark's effect on Ben Thomas. Thus, the judge summarized: "my understanding, the defense is contending that that is the motivation for Ben Thomas to now plant some evidence, the jewelry, up in the rafters, whatever, where I understand the defense is going in this particular case." R29 2509.

limiting instruction, but did not do so. The specious claim of privilege at AB 74 was waived: Hickox gave Thomas his opinion, the state disclosed it to defense, and there was no claim of privilege below. There is no privilege that lets a state agent make a statement to a witness and then keep it from the jury.

AB 74-75 insists, contrary to Florida law, that the standard for harmless error is one of overwhelming evidence of guilt. Regardless, the evidence of guilt was not overwhelming at bar.

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.

This Court need not revisit prior decisions regarding a judge's discretion to instruct generally on circumstantial evidence to find error at bar. Here, the judge erred when he sustained objections to argument based on the agreed-to instruction, altered the instruction during the defense argument, and told jurors the defense argument was incorrect.

The AB=s argument is based on supposed comments that **defense counsel never made**. AB 76 says counsel said Aa ›chain of circumstances= was the same as the State=s ›circumstances.= (R.35 3340).@ He said no such thing. At R35 3336-40 there was a discussion of Aparagraph 1@ of the defense proposal which said, AThe circumstances themselves must be proved beyond a reasonable doubt.@ R6

1017. The judge wanted to drop paragraph 1 and use the state=s proposal, and counsel did not oppose the judge's plan (R35 3340):

> THE COURT: Well, ... [the state=s proposal][12] does say, and the circumstantial evidence rebuts every reasonable hypothesis of innocence. That allows to you to then argue, here=s a hypothesis of innocence, that=s reasonable, so therefore the circumstantial evidence doesn=t rebut that.
>
> MR. HARLLEE [APD]: Well, if you=re going to permit us to actually use the language in our proposed and just give this as the instruction, this being the State=s, we don=t have a problem with that. Because **if they both mean the same thing** but you=re hung up on the language a little bit, it seems like you=re hung up on **Paragraph 1** of defense proposal and not the bottom paragraphs.

The judge proposed deleting paragraph 1 and keeping paragraphs 2 and 3.[13] R35 3340-41. Counsel replied that they were Apretty

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[12] The state=s entire proposed instruction was (R6 1016):

> Circumstantial Evidence is sufficient to convict the defendant of the crimes charged if the circumstantial evidence proves each element of each crime charged beyond and to the exclusion of every reasonable doubt and the circumstantial evidence rebuts every reasonable hypothesis of innocence.

[13] These were (R6 1017):

> 2. The circumstances must be consistent with guilt and inconsistent with innocence.
>
> 3. The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of defendant=s guilt or the fact to be proved.

much the same at that point, but I like the language better.@ R35 3341. **Nowhere** in this discussion was there anything about equating the terms Achain of circumstances@ and Acircumstances."

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

AB 79 says Athe judge found@ that appellant Anever set forth a particularized need for the material@. In fact, the judge made no such finding.

AB 82 says Keen v. State, 639 So. 2d 597 (Fla. 1994) does not apply as the state=s eyewitness there gave Aconflicting accounts@, and Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987) does not apply as in that case Aconflicting testimony was given under oath by key eyewitnesses@. Yet AB 81 concedes that the state=s main witness, Debra Thomas, **made conflicting statements**, as did other state witnesses. The state had **no eyewitness**, so the credibility of the witnesses making up the circumstantial case was crucial. The defense was entitled to review and disclosure of grand jury testimony.

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

AB 83 says the court limited the question to whether the person was interviewed and eliminated as a suspect, so that there was no Ahearsay problem.@ Det. Hickox said he **interviewed**

the suspect, which led him to **talk to** people **who talked to** the suspect, and the suspect A**told us** what he did the day of the homicide, who he was with, what he was doing; some other construction type work and -@ R23 1796. After the hearsay objection was overruled, he said his A**interviews** and investigation@ eliminated the man as a suspect. R23 1797. It defies common sense to say jurors would not understand that the suspect gave an alibi and that the alibi checked out with other persons. Thus, appellee presented the jury with hearsay. As the judge noted, the hearsay attacked the theory of defense, R23 1797, so that it was prejudicial.

XVII. WHETHER THE COURT ERRED IN FINDING CCP.

The AB cites only two cases as supporting CCP. In Philmore v. State, 820 So. 2d 919, 933-34 (Fla. 2002), Philmore and Spann planned to steal a car and **discussed with each other** A**that the car owner would have to be killed.**@ Id. at 934. They **then** went looking for someone to rob and kill, kidnapped the victim and **took her to a remote area** where Philmore shot her. Philmore **did not dispute** the calculated nature of the crime: he said CCP did not apply to him because of mental problems and said Spann did the planning. Unlike in Philmore, the evidence at bar did not show a careful, cold-blooded plan to kill. The brief discussion in Mason v. State, 438 So. 2d 374 (Fla. 1983), shows that Mason

entered a home through the window at night, armed himself in the kitchen, then entered a bedroom and stabbed a woman in the heart. He had committed a somewhat similar burglary in which he threatened to stab a woman two nights before in the same neighborhood. Id. at 376-77. Thus the evidence showed he snuck in the house intending to commit an assault, searched up a weapon, then stabbed a sleeping woman with no motive except a careful, cold-blooded decision to kill. Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987) refutes any claim that Mason applies CCP to all burglary murders: Aa murder committed during a residential burglary, without more, does not justify a finding of cold, calculated, and premeditated murder.@

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

Contrary to the AB, courts may not rewrite unambiguous statutes. See Montgomery v. State, 897 So. 2d 1282, 1285 (Fla. 2005). The statutory mandate is clear at bar. Under the statute, a life sentence is required. Cf. Layman v. State, 652 So. 2d 373 (Fla. 1995) (reducing sentence for failure to meet former requirement of written findings by time of sentencing).

XIX. WHETHER THE COURT ERRED IN FINDING HAC.

The cases at AB 94 do not cover the facts at bar. Boyd v. State, 910 So. 2d 167 (Fla. 2005) and Owen v. State, 862 So. 2d

687 (Fla. 2003) involved deliberate torture, and the other cases involved much longer suffering than the case at bar. AB 5 and 93 say there was a defensive wound to the hand after Loughman was dragged to the bedroom. Dr. Driggs said this was **possible** based on assumptions "[i]f you want to reason from" appellee's hypothesis of the facts. R33 3048-51, 3063-64. He also said she might have lost consciousness **before** reaching the bedroom. R33 3043. He could not tell the sequence of injuries. R33 3055. "[M]ere speculation derived from equivocal evidence or testimony" cannot support an aggravator. Brooks v. State, 918 So. 2d 181 (Fla. 2005).

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,

CAROL STAFFORD HAUGHWOUT
Public Defender

_____
GARY LEE CALDWELL
Assistant Public Defender
Florida Bar No. 256919
15th Judicial Circuit of Florida
Attorney for Andrew M. Gosci-
minski

421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600; 624-6560
appeals@pd15.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Reply Brief has been furnished to Leslie Campbell, Assistant Attorney General, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299 by courier ____ February, 2007.

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Attorney for Andrew M. Gosci-
minski

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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Attorney for Andrew M. Gosci-
minski