IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 05-2162

THOMAS W. RIGTERINK

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT IN AND FOR
POLK COUNTY, FLORIDA**

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND OF THE FACTS

Alex Bove was driving east on Highway 542 in Polk County near Winter Haven, Florida, about to turn right onto Jimmy Lee Road, at 3:05 PM on September 24, 2003. (T 1827-28, 1849).[1] On his right was a one-story combination office warehouse building with six units in it. (T 1829). His attention was caught by two men in front of the building. One man was down on the ground and appeared to be covered in red. The second man was standing over him and appeared to be trying to drag him back into the building. (T 1828, 1831, 1843). The man on the ground struggled to try to get away. As he struggled to get up and run, the attacker grabbed him and his shirt came off. (T 1828, 1830).

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1. The record on appeal includes 33 consecutively numbered volumes containing both documents filed in the lower court and transcripts of the trial. Documents filed with the court, including the transcript of the original hearing on Defendant's motion to suppress his confession and a transcript of the *Spencer* hearing are numbered pages 1 through 744. References to information contained in those volumes will be made by the letter R followed by a page number. Transcripts of all proceedings beginning with jury *voir dire* through the penalty phase are numbered pages 1 through 5036. References to information in those transcripts will be made by the letter T followed by a page number. There are two supplemental volumes that each start with page 1. Reference to information contained in those volumes will be referred to as SVI and SVII followed by the page number. There are five volumes of Evidence with numbered pages 1 through 843. References to those volumes will be made by the letter E followed by the page number. The defendant will be referred to as Defendant or Appellant. The prosecution at trial and appeal will be referred to as the State.

When the injured man ran towards the door of the first unit of the building, Mr. Bove could see that a lot of blood was flowing from a wound on his chest. (T 1828). At that point, the second man ran back into the building and came out with a large knife. (T 1828, 1832). Mr. Bove started driving again and turned right. (T 1838). The two men got within about 40 feet of his car as the injured man ran in the direction of Mr. Bove's car, toward the first unit, and the other man chased him with the knife. (T 1832, 1839-40).

Mr. Bove drove the rest of the short distance to the end of Jimmy Lee Road, where he lived, and told his mother what he had seen. She called 911. (T 1833-34). Mr. Bove described the attacker as a Caucasian man in his late twenties to early thirties about 6ft. 3in. tall and about 200 pounds, with dark brown hair, wearing a white short-sleeved T-shirt and dark shorts. (T 1833-34).

Amanda Short and Allison Sousa worked in an office suite made up of units 1 and 2 of the building on the corner of State Road 542 and Jimmy Lee Road. (T 2361, 2363-64). The afternoon of September 23, 2003, the two women heard screaming outside of the office building. (T 2362, 2366, 2419). As they opened the front door to unit 1 and looked out, a dirty, shirtless, bloody man entered, frantically asking for help. (T 2369-71, 2421). A

substantial amount of blood was running down his chest from a wound in the upper right side. (T 2372-73).

As the man sat down in a chair by the door, Ms. Short started down a hallway to the back of unit 1 to get some paper towels. Ms. Sousa went to call 911 to get medical attention for the injured man. (T 2374, 2421-22). The sound of the front door slamming made Ms. Short turn to look back. (T 2376, 2422-23).

She saw Ms. Sousa on the telephone and a man going toward her. (T 2377). The man appeared to notice that Ms. Short was there. (T 2387). The man was Caucasian, in his late 20s to early 30s, with thick dark hair to the middle of his neck, wearing a long white t-shirt and dark shorts, about 6’3” tall, 170 pounds, olive or tan complexion, no facial hair and no hair on his forearms.(T 2378, 2390, 2411, 2437-38).

As the man quickly and menacingly moved toward Ms. Sousa, she screamed: “Don’t hurt me. Don’t hurt me.” (T 2384, 2423). Ms. Short turned back down the hallway, entered an office and dead bolted the door. (T 2384-85). She used one telephone to call 911 and another to reach the business owners. (T 2385, 2398).

No more sounds came from Ms. Sousa. (T 2386). Outside the locked door there were banging, scuffling, and things hitting the walls. (T 2386, 2390). The sounds moved from the front of the unit down the hallway. (T 2430). At some point there was

pounding on the bolted door of the office where Ms. Short was hiding. (T 2390). The noises lasted about a minute. (T 2393-94, 2431). Ms. Short followed the directions of the 911 operator and stayed in the locked office until deputies arrived. (T 2467).

The Polk County Sheriff's communication office received simultaneous 911 calls at 3:07:37 and 3:07:46 p.m. from telephones located in unit 1 and 2 at 5754 State Road 542 in Polk County, the address of the office building. (T 2455 – 2458). In the 4-minute recording of the first call, a female voice can be heard saying "Oh, my God. Don't —- don't hurt me. No. No." The speaking stops, and the 911 operator tells her coworkers all she can hear is "people just throwing something around," then, total silence.(T 2460, 2461).

Amanda Short saw that someone was on the telephone line Ms. Sousa had tried to use and picked it up. She told the 911 operator she was on another line with 911. (T 2461). The second call was the one made by Amanda Short. She told the 911 operator one man was in her office and another man was breaking in. At least one of the men had been stabbed and she feared for her friend and office mate, Allison Sousa. (T 2463-65, 2470). The 911 operator stayed on the line for several minutes after deputies arrived while Ms. Short remained in the locked office. (T 2395). The entire call lasted 16 minutes. (T 2474-84).

Polk County Deputy Sheriff David Jones was the first to arrive at the crime scene, at 3:18 p.m. At unit 5 of the building he saw the door open and blood on the wall. (T 1854). Dep. Angela Mackie arrived next. She stopped at unit 1 where the door also was open. (T 1854-55, 1864). She told Dep. Jones that the dispatch had been for a problem in unit 1, so she went around to the back of unit 1. (T 1924-25). The large garage-type door to the warehouse in the back of the unit was open. (T 1926). Inside she found two bodies covered in blood, later identified as Jeremy Jarvis and Allison Sousa. (T 1855, 1926, 1929). Neither she nor Dep. Jones could find a pulse in the two victims. (T 1856, 1927-1928).

The deputies entered unit 1 from the warehouse area and searched the premises. They found no one in the building or leaving the scene, except Amanda Short. She was in a back office of unit 1, where she had locked herself. (T 1857, 1930-31). Deputy Jones wrote down that the attacker was a white male approximately 27 years old, straight black collar length hair, medium build. (T 1863).

Deputies were posted and remained guarding the building until crime scene technicians finished their work. (T 1935, 1990). Because the crime scene was so massive and so much needed to be processed, unit 1 and unit 5 were treated as separate scenes for the purposes of assigning technicians. (T 1966,

1986). Detective Jerry Connolly was assigned as the lead detective. (T 3316). He arrived at the scene at 3:52 p.m. (T 3317). Crime Scene Technician Paula Maney arrived at 4:16 p.m., just a little more than an hour after the first 911 call. (T 2066). She was designated the lead technician to process the scene in Unit 1, with assistance from Linda Raczynski. Crime Scene Technician Jean Gardner arrived on the scene at 5:59 p.m. (T 1869). Ms. Gardner was the lead technician for unit 5, with assistance from Nancy Shipman. (T 1967, 2068). Ms. Shipman was the crime scene technician supervisor on duty. She arrived at 5:30 p.m. (T 1984). Ms. Shipman and the other technicians worked through the night and into the afternoon of the next day as technicians made a video of the entire scene, took photos in both units and along the sidewalk, and attempted to find latent fingerprints. (T 1870, 1872, 1957, 1964, 1997, 2058). On Friday, September 26, 2003 three officers from the Florida Department of Law Enforcement came to the scene to help preserve and process the blood spatter evidence. (T 1988).

In unit 1, technicians found a bloody scene evidencing a violent attack. (T 2797-99). There had been a large pool of blood in the entrance, as if someone had stood there while bleeding heavily. (T 2742). Heavy blood stains on the walls and doors indicated someone who was bleeding heavily had been pushed against the walls and doors with force. (T 2752, 2787-88). Arcs

of blood spatters were consistent with a bloody knife being used to stab many times. (T 2744, 2748). The inside and outside of the entrance door was smeared with blood. (T 2732-33, 2776). The walls of the entry way were smeared with blood. The hallway and a pass-through window in the hallway were smeared with blood. (T 2741-42, 2749-50). Inside an office off the hallway there was blood pooling under a desk, as if someone who had been bleeding was under the desk (2755-58), and blood spatter on the inside of the pass-through window cast off from someone wielding a bloody weapon. (T 2759). The smeared blood trail continued down the hallway into the kitchen area, where large amounts of blood were smeared on the walls and spatter from a bloody weapon marked storage boxes. (T 2759-63). One last door had a bloody palm print in the smeared blood and had been pushed through the door jamb. (T 2764). After that, the trail ended with the bodies of Jeremy Jarvis and Allison Sousa in the warehouse area at the end of the hallway. (T 2769-2770). The two victims had bled to death from multiple stab wounds with a knife, approximately 10-15 inches long. (T 2824-2875).

In unit 5, the technicians found large blood smears on the wall next to the entryway. (T 2734-38). There was evidence of heavy bleeding on the tile and concrete floor. (T 2734-35). The furniture was overturned and in disarray. Blood drops formed a trail from inside Unit 5 down the sidewalk to unit 1. (T 2777-

78). Florida Department of Law Enforcement officers developed a bloody palm print on the door of unit 5. (T 3324-25). Hidden inside unit 5 was three to five pounds of marijuana, worth thousands of dollars on the street. (T 3075-89, 3505).

Based on the blood trail and Ms. Short's description of Mr. Jarvis being followed into her unit by the attacker, the detectives began their investigation by focusing on Mr. Jarvis and his associates. (T 3317-18). A cell phone found in unit 5 had telephone numbers stored in its memory. (T 2545). Detectives quickly were able to identify one of the numbers they found as belonging to Marshall "Mark" Mullins, whom Det. Connolly recognized as someone associated with drugs. (T 3320). About midnight the day of the crime, Det. Connolly went to Mr. Mullins home, where he roused Mr. Mullins from sleep and asked him where he had been at the time of the crime. (T 3321). Early on September 26, 2003, Det. Connolly confirmed with Mr. Mullins' boss, and the customer, that Mr. Mullins had been 45 minutes away from the scene at the time of the crime. (T 3322-23).

More detailed records subpoenaed from the telephone company showed that at 2:39 p.m. that day Jeremy Jarvis had called the residence of the Defendant. (T 2547-48, 2550, 3328). At 11:30 a.m. the day after the crime, September 25, 2003, two detectives from the cold case squad, who had been called in to help follow up on leads, went to Defendant's home and knocked on the door.

(T 2587, 4222). A dog barked, but no one answered. Detectives could not see anyone through the open kitchen curtains, or when they went to the back of the house to look through the sliding glass doors into the living room. (T 2596-97, 2602, 4223).

The only vehicle detectives saw at the home was a green Jeep Wrangler. A license plate check showed it was registered to the Defendant. (T 2614-15). The detectives parked their car where they could observe the home and waited for several hours. They saw no person or vehicles go to or leave the house. (T 2603-2604, 4224-25, 4231).

While they waited outside the house, detectives contacted the Defendant's parents, who agreed to bring the Defendant back to his home to be interviewed. (T 2604). Defendant arrived at his home at 7:30 p.m. and invited the detectives inside. (T 2604-05). At 7:45 p.m., Dets. Ivan Navarro and Tracy Smith arrived at Defendant's residence. (T 2551-52). Defendant told Det. Navarro that on the day of the crime he had been in classes at Warner Southern College until noon. After he got home he called Jeremy Jarvis, looking for marijuana, and called again shortly after 2:00 p.m. (T 2555-56). During the entire interview he was "cool." He did not exhibit any signs of fear or anxiety, or reaction to the news that his friend or acquaintance had been murdered. (T 2586, 2608-09).

On October 9, 2003, Det. Connolly went to Defendant's home as part of his continuing investigation. (T 3326). Defendant acknowledged that he had spoken by telephone twice to Jeremy Jarvis the day of the murders, first to ask about buying marijuana on Friday, September 26, 2003. (T 3329-31). Defendant agreed to go to the Sheriff's office in Bartow, Florida the next day to be fingerprinted. (T 3334). Detectives were comparing fingerprints of Mr. Jarvis' known associates to those found at the crime scene, particularly the bloody palm print found on the door of unit 5. (T 3324-25).

At 4:30 p.m. on October 10, 2003, Defendant called to say that he would not be able to go to give his fingerprints, and offered to come to the station the following Monday, October 13, 2003. (T 3335-36). Defendant failed to appear Monday. (T 3338). The following Tuesday, at about 3:00 p.m., Dets. Connolly and Raczynski went to Defendant's home. Their knocks were answered by a barking dog. Defendant's car was at the home, but no one answered the door. (T 3339-40). Detectives made multiple telephone calls to Defendant with no answer. They stayed outside the home until about 7:00 p.m. (T 3341). Neither Defendant's girlfriend nor family members could tell detectives where Defendant could be located. (T 3341-42). The same thing happened on October 15, 2003. (T 3343).

Approximately 10:00 a.m. October 16, 2003 Defendant's mother called Det. Connolly to tell him the Defendant was at her home and would be waiting to talk to him. (T 3343-44). Defendant told detectives that he had information about persons he thought might be involved in the murders. Det. Connolly asked him if he could come down to the Sheriff's department station to give his fingerprints. He agreed. His parents drove him to the nearest sheriff's station. (T 3345). While he was at the station, Defendant voluntarily gave a statement to detectives confessing to the murders. (T 3378-3443). He was arrested and taken to jail after he finished a recording of his statement.

As a result, on November 4, 2003, Defendant was indicted for the first degree murders of Jeremy Jarvis and Allison Sousa. (R 128-134). The State gave the Defendant notice of its intent to seek the death penalty on November 6, 2003. November 18, 2003 the Defendant filed his Written Plea of Not Guilty. (R 137).

Defendant filed a written motion to suppress all statements he made to law enforcement officers on August 20, 2004, stating that evidence had been seized in violation of Defendant's rights under the Fourth and Fourteenth Amendments to the U.S. Constitution, and that statements had been obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 9 and 12 of the Florida Constitution. However, the only fact stated in the motion was

that the *Miranda*[2] warning as given by the detectives and as stated on the Polk County Sheriff's Written Waiver form was deficient because it only told Defendant he had a right to counsel before questioning, without specifically saying he had the right to counsel during questioning. (R 191-93).

At the November 24, 2004, hearing on the motion, Defendant amended the motion both verbally and by written interlineations to be limited to only the audio and video statements of Defendant recorded on October 16, 2003 after the *Miranda* warning was administered. (R 223, 226). Defendant told the trial court that "our argument is very narrow," relying only on cases in the Fourth District Court of Appeals that *Miranda* warnings "must include a warning that the defendant or suspect has the right to have an attorney present during any interrogation." (R 221). Defendant conceded that the interview prior to the warning was not custodial, so no *Miranda* warning was required. (R 223-24).

The State responded that Defendant was not in custody at any time during his interview by detectives, including the time after the *Miranda* warning when he gave his statement. Pointing out that the Defendant conceded he was not in custody prior to the *Miranda* warnings, the trial judge briefly recessed the

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2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

hearing so that the parties could discuss their positions. (R 227-28).

Upon resumption of the hearing, Defendant took the position that the recorded statement was given during a custodial interrogation, and continued to limit his request for suppression to the recorded statement. Defendant argued that because detectives gave a *Miranda* warning, they must have perceived the statement as custodial; and, because the questions asked by the officers after the warning were "designed to lead to an incriminating purpose," there was a custodial interrogation under *Ramirez v. State,* 739 So. 2d 568 (Fla. 1999) (T 229).

The only witness at the suppression hearing was Det. Connolly, who had met with Defendant in an interview room across from the fingerprint station. (R 241). Det. Connolly testified that as a result of looking at the cell telephone records of Mr. Jarvis, Defendant was identified as an associate of the victim. (R 233-34). His fingerprints needed to be taken so that the Defendant could be eliminated as a suspect. (R 235).

Det. Connolly said on October 9, 2003 he went to Defendant's home to follow up on an earlier interview of the defendant done by Det. Ivan Navarro. (R 236). Defendant told Det. Connolly that he would go to the sheriff's office in Bartow, Florida the next day to give his fingerprint samples. (R

237). Late in the day on October 10, 2003 Defendant called Det. Connolly to tell him that he could not keep the appointment and that he would try the following Monday to give his fingerprints. (R 237).

Det. Connolly had no contact with Defendant between October 10 and October 16, 2003, when the Defendant's mother called to alert officers Defendant was at her home. Det. Connolly and Det. Raczynski went to interview the Defendant again. (R 238). When they arrived, both of Defendant's parents were present. Defendant was just coming out of the shower. He volunteered to the detectives that he had information about persons who were involved in the murder – two men from Lake Wales who were dealers in a drug known as "Ice." Defendant again was asked to give a fingerprint sample. (R 239).

Defendant agreed to immediately go to a nearby sheriff's substation to be fingerprinted. He asked his parents would to drive him to the station. They followed the detectives' car because they did not know the way. (R 240, 263). When Defendant arrived at the station at around 11:00 a.m., his parents were asked to wait in the lobby of the station until Defendant was ready to leave. (R 240, 263). Fingerprint examiner Patricia Newton and her supervisor, Bill Thomas, took Defendant's fingerprints. Det. Connolly had pre-arranged with the fingerprint examiners to compare Defendant's fingerprints and

the bloody palm print found at the crime scene immediately. (R 241).

Defendant went to an interview room across the hall from the fingerprint to talk to Dets. Connolly and Raczynski about information he said he had. (R 241). The room usually is used for polygraph examinations, so the walls are covered in foam to keep out noise. It is six feet by eight feet and contained three chairs and a small desk (R 241-42). At no time was the Defendant restrained in any way. The door to the interview room was not locked. (R 242-243). Det. Connolly had no intention of arresting the defendant because he did not believe he had probable cause and did not have the authority to make the decision to arrest Defendant. (R 240, 282).

The detectives wanted to clarify information Defendant had provided in his previous interviews about his activities and whereabouts in the days prior to the murder, beginning on September 21, 2003. (R 243). Defendant said he borrowed his father's truck on September 21, 2003. (R 243). On September 22, 2003 he was at Jeremy Jarvis' place and bought marijuana from him. (T 244). September 23 he came down with food poisoning and stayed home after attending classes. (R 245). September 24 he did not go to school because he was still feeling ill. He admitted to having two telephone conversations that day with Mr. Jarvis about buying some marijuana. (R 245). After that, he went

with his dog to his parent's house, and from there went to his home and watched movies with his girlfriend all evening. (R 248-249).

Detectives questioned Defendant about this version of the events because of inconsistencies with facts they had established from other sources. At that point, Defendant told the investigators that he had, indeed, been to see Jeremy Jarvis on the day of the murders, but that he had spoken to him and left at around 2:30 or 3:00 p.m. and had not seen anything amiss. (R 252-53).

As Defendant was making these first two statements about his activities at the time of the homicides, Det. Connolly received information via text message that the Defendant's fingerprints matched the bloody print at the scene. (R 249). When confronted with the evidence that placed him at the scene and with the bleeding victims, Defendant immediately volunteered yet a third version of the facts: He had arrived after the attack on the victims and followed the bloody trail from Mr. Jarvis' place to unit 1, where he saw Jeremy Jarvis and Ms. Sousa lying on the floor. He checked Ms. Sousa's pulse, saw that he was covered in blood, and ran out and drove away because he was scared. (R 253).

Having heard three different versions within such a short time, the detectives told Defendant they did not believe he had

told them the whole truth. Defendant said he would tell the detectives “everything.” (R 254). Because he had no idea what Defendant might say, Det. Connolly decided the cautious thing to do would be to give the Defendant a *Miranda* warning. (R 255, 274, 275-277). Defendant was not handcuffed, nor was anything else about the course of his interview changed. (R 254, 259).

Det. Connolly did not specifically tell Defendant that he could leave at any time, but Defendant knew his parents had been told to wait in the lobby to drive him home. (R 260, 291). Defendant was never given any indication that he was not allowed to leave or that he was under arrest. (R 257, 279). Det. Connolly, in fact, did not have the authority to make the decision to put Defendant under arrest. (R 282). Defendant had set the pace of the interview. (R 272). Everyone in the room was calm. There was no aggressive action. (R 272). When he went to get the *Miranda* waiver form, Det. Connolly still believed he did not have enough information to arrest the Defendant. He would have let Defendant leave the building if he had gotten up and walked away. (R 278). At no time did Defendant ask if he needed to have an attorney, seek to invoke any of the rights about which he had been informed, or hesitate to answer any questions. (R 256, 292).

Det. Connolly left the room to find a form with the printed warning and signature line to be signed by Defendant if he

agreed to waive his rights. While Det. Connolly was out of the room, he instructed the technician to turn on the video camera and microphone that were installed in the walls of the interview room. (T 256). The Miranda warning on the waiver form read: “I do hereby understand that (1) I have the right to remain silent (2) Anything I say can and will be used against me in court (3) I have the right to have an attorney present prior to questioning (4) If I cannot afford an attorney one will be appointed to represent me by the court.” (Sic). The Defendant signed and dated the waiver acknowledgement and Det. Connolly signed as a witness. (SVII 195, R 256). The same warnings were given verbally by Det. Connolly at the beginning of Defendant’s recorded statement. (R 257).

Defendant had taken a little more than three hours to tell his three different versions of events. He had arrived at the station at 11:00 a.m. The recording began at approximately 2:24 p.m. (R 264). During the recorded statement, Defendant not only confessed to the crime, but also demonstrated some of the activity for detectives. (R 257). After the recording was done, Det. Connolly called Assistant State Attorney John Aguero for an opinion as to whether there was probable cause to place Defendant under arrest. (R 259). Defendant was arrested at 5:30 p.m. and taken to Polk County Jail. (R 265).

Defendant offered no witnesses at the suppression hearing. The trial court admitted as exhibits for Defendant a copy of the *Miranda* waiver card signed by Defendant, and one page of transcript from Defendant's recorded statement:

> Connolly: . . .After we do that, then, we're going to explain, so if you want (inaudible) Okay.
>
> [Defendant]: Okay.
>
> Connolly: And ah . . .go ahead and sign those forms to let it. . . everybody know that, you know, this is your story.
>
> [Defendant]: Um um
> Connolly: And ah. . . I don't want it to be misconstrued or anything like that...
>
> [Defendant]: Sure.
>
> Connolly: . . .at a later date, you know what I'm saying. I want everybody to know what's coming out of your mouth and not what's coming out of my mouth and my mind, you know what I'm saying. (Pause) Okay (Inaudible) I, [Defendant's name]
>
> [Defendant]: Okay.
>
> Connolly: Do you hereby understand that one, I have the right to remain silent. Two, anything I can say, can and will be used against me in court. Three, I have the right to have an attorney present prior to questioning. Four, if I cannot afford an attorney, one will be appointed to represent me by the court. Do you understand that?
>
> [Defendant]: Sure.
>
> Connolly: Okay. (Inaudible) Today's October 16. 2:24 (Inaudible) Okay. Let's start . . . let's start from the beginning (inaudible) On Wednesday umn. .how did your day start? Were you still....were you feeling sick?

[Defendant]: Yeah. I really . . . I had had food poisoning and I was sick as hell.
Connolly: Okay. Were you still vomiting on Wednesday?

[Defendant]: No, no, that was finished Tuesday night.

Connolly: Okay. What time did you get up?

(R 196)

The trial court entered a written ruling January 19, 2005, finding that Defendant was not in custody when he made his statement. The order did not reach the adequacy of the *Miranda* warnings because its finding on custody made them unnecessary. (T 210-12).

Defendant filed a Motion For Rehearing And To Supplement Authority on January 28, 2005. The only authority cited in the motion was *Raysor v. State*, 795 So.2d 1071 (Fla. 4th DCA 2001) and *West v. State*, 876 So.2d 614 (Fla. 4th DCA 2004). (R 343-358). *West* already had been argued at the original hearing on the motion to suppress. (R 221, 314-15). Based on *Raysor*, Defendant argued that once the *Miranda* warning was read, a reasonable person would not believe he or she was free to leave. Therefore, Defendant argued, "[t]he Court erred in its holding as a matter of law that the recorded post-*Miranda* interrogation was non-custodial." (R 345). The judge who heard the original motion had been reassigned before ruling on the motion for rehearing. (SVII 20). The successor judge on February 11, 2005

directed defense to have a transcript prepared so that he could rule on the motion for rehearing (SVII 23).

Pre-trial motions filed on behalf of Defendant were heard on March 18, 2005. (SVI 60). Five motions challenged Florida's death penalty and the procedures associated therewith: 1) Motion to Declare Section 921.141. Florida Statutes Unconstitutional Because It Precludes Consideration of Mitigation By Imposing Improper Burdens Of Proof (sic) (R 392-99) (Denied without comment (R 518)); 2) Motion to Declare Fla. Stat. 921.141(1) Unconstitutional and to Bar the State's Use of Hearsay Evidence in Penalty Phase or at Sentencing (R 409-413) ("Denied without prejudice to refile should new law evolve." (R 517)); 3) Defendant's Motion to Bar Imposition of Death Sentence on Grounds That Florida's Capital Sentencing Procedure is Unconstitutional Under *Ring v. Arizona* and Memorandum in Support(R 456-481)(Denied without comment (R 518)); 4) Motion to Dismiss Indictment, for Specific Jury Findings as to Penalty Issues, and for Related Relief (sic)(R 482-514)(Denied without comment (R 517)), and; 5) Motion in *Limine* and to Strike Portions of Florida Standard Jury Instructions in Criminal Cases Re: *Caldwell v. Mississippi* (R 369-71) (Denied without comment (R 518)).

Three motions sought to limit victim impact evidence: 1) Motion to Limit Victim Impact Evidence (R 406-408) (Denied as

premature. However, the State agreed to present a proffer to the Court." (R 517)); 2) Motion to Allow Victim Impact Evidence Before the Judge Alone (R 437-445) ("Denied as premature. However, the State agreed to present a proffer to the Court." (R 518)), and 3) Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased (R 414-436) ("[D]enied. The Court instructs all counsel to comply with the Rules and the Law." (R 518)).

Two motions sought to create standing objections: 1) Defendant's Standing Objection to and Motion to Preclude Improper Argument (R 359-368) ("Dismissed as an unnecessary motion. The Court instructs all counsel to comply with the Rules, the Law, and all ethical and professional standards." (R518)), and; 2) Motion in Limine Re: Prosecutorial Argument and Misconduct (R 372-384) ("Dismissed as an unnecessary motion. The Court instructs all counsel to comply with the Rules, the Law, and all ethical and professional standards." (R 518)).

The remaining motions were: 1) Motion for Daily Transcripts of Trial (R 385-388) ("[C]onditionally Granted on the basis of daily request and need." (R 517)); 2) Motion for Disclosure of Impeaching Information (R 452-455)) ("Denied. The Court instructs all counsel to comply with the Rules and the Law." (R 517)); 3) Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire (sic) (389-391) ("[S]tipulated, Granted,

but deferred to time of voir dire to determine the timing and content of any published information." (Sic) (R 517-18)), and; 4) Motion for Disclosure of Penalty Phase Evidence (R 446-451) ("Denied. The Court instructs all counsel to comply with the Rules and Law." (R 518))

An unopposed Defense motion for continuance, based on discovery schedule conflicts and terminal illness in defense counsel's family, was granted on April 4, 2005. (SVII p. 31). Trial ultimately was set to begin August 15, 2005. (SVII p. 59).

On August 18, 2003, during a break in the lengthy *voir dire* process, the judge heard argument of counsel on Defendant's motion for rehearing of the order denying suppression of Defendant's Statement. (T 1213). The judge had not heard the original motion to suppress. Prior to argument, the judge reviewed the defendant's Motion to Suppress, the transcript of the hearing, the exhibits, the court's order that was entered on January 19, 2005, Defendant's motion for rehearing, and the cases cited by the parties. (T 1233).

Defendant argued that because the *Raysor* case, a 2001 Fourth District Court of Appeals opinion attached to the motion for rehearing, and cited *supra*, had not been considered prior to the previous ruling, the order denying suppression of the recorded statement made after the *Miranda* warning was wrong. (T 1218-1219). Defendant argued that the trial judge should

"mechanically" apply *Raysor's* statement, that the defendant in that case was subject to custodial interrogation because he had been given a *Miranda* warning after a stop without probable cause, to find that giving Defendant in the case at bar his *Miranda* warnings created a custodial interrogation. Then, applying the *West* holding on the wording of Miranda warnings, the warning given Defendant defective, and the recorded statements following the warning should be suppressed. Defendant argued:

> That's why we asked to rehear this particular case. We do feel that's a fairly mechanical application of the law. If he's in custody —- if he's read his *Miranda* rights, he's in custody. We satisfied that prong. If he's in custody and these rights were read to him were erroneous, anything he says after that is inadmissible. That's the summation of where we are.

(R 1218-1219)

Defendant continued to limit his request for suppression to the recorded statement made after *Miranda* warnings:

> Our motion, and the reason that I listed this out in this fashion, does not relate to that first three hours of interview with those officers who were present. It relates only to the second portion, the recorded portion, that occurred after the erroneous *Miranda* rights form was read to him. The application of the law then in this particular case, as laid out before the Court in our motion, was that for purposes of the *Raysor* decision, the moment he was read his *Miranda* rights, he was deemed to be in custody.

. . .

> And what I would ask the Court to consider doing is to grant the State's -- or the defense motion in this regard regarding only the portion of the interview which occurred in that last 45 minutes to an hour after that triggering event of Miranda. They still have the prior three hours and all of the testimony through those officers who did those interviews. Our motion only relates to that videotape and that portion of the admissibility of it.

(T 1218, 1243)

The State argued that ***Raysor*** is a case based on an illegal detention under the Fourth Amendment to the U. S. Constitution and did not apply. (T 1228-32). The judge reaffirmed the January 10, 2005 order denying the motion to suppress, agreeing Defendant was not in custody when he made his statement, relying on ***Cillo v. State***, 849 So. 2d 353 (Fla. 2d DCA 2003). (T 1243).

The following day, outside the presence of the jury, the trial court held an evidentiary hearing on the State's motion ***in limine*** to prohibit the testimony of Richard Hall. (T 1523). The motion was filed August 16, 2005 after Defendant notified the State that he intended to call Richard Farmer to testify to a hearsay conversation he had with Mark Mullins. (T 517-518). Mr. Hall was expected to testify that Mark Mullins had told Mr. Hall that Mr. Mullins, and another individual named William Farmer, had committed the murders for which Defendant was being tried. (R 518). Defendant argued the testimony should be admitted as a

statement by Mark Mullins against his penal interest, an exception to the prohibition on hearsay testimony. (T 1683).

Mark Mullins had been killed in a traffic accident in 2004, and was therefore not available to testify, satisfying the first requirement for the statement to be admissible. (T 518, 1684). Defendant offered the testimony of Richard Hall and William Farmer to show that the statement by Mark Mullins was against his penal interest and to show some independent corroboration of the statement, to satisfy the remaining requirement of admissibility under Fla. Stat. 90.804(2) (c). (T 1683-84, 1712-13).

At the time of the hearing on the motion in *limine*, Richard Hall was a prison inmate who at various times had been convicted of seven felonies in three different incidents. (T 1526, 1534, 1565). He admitted that he had a grudge against William Farmer, because Mr. Farmer had robbed Mr. Hall of money and drugs. (T 1573, 1575).

Mr. Hall testified that sometime in December 2003 or January 2004, when Mr. Hall was making a drug sale to Mr. Mullins, Mr. Mullins spontaneously divulged to Mr. Hall that he and William Farmer had killed Jeremy Jarvis and a woman. (T 1536-37). He said Mr. Mullins told him that Mr. Farmer was holding Jeremy Jarvis during an attempt by the two men to rob Mr. Jarvis of his money and drugs. (T 1538). When Mr. Jarvis got

loose, Mr. Mullins ran into another unit, where Mr. Mullins repeatedly stabbed him. When he turned to leave, he saw a woman and stabbed her to keep her from being a witness. (T 1538). As he was fleeing the scene, he saw “Tom.” (T 1538).

There were two conversations at the end of 2003 and beginning of 2004. (T 1542, 1544). After Mr. Mullins’ spontaneous confession, he threatened harm to Mr. Hall and his family if Mr. Hall ever told anyone else about it. (T 1541). Mr. Hall said he never told anyone about the information he had until an investigator working for defense counsel contacted him more than a year later, while he was in jail in Polk County. (T 1544-45). On August 5, 2005 Mr. Hall met defense counsel for the first time when he was deposed by the State. (R 1549). Mark Mullins was the only person who had threatened him, Mr. Hall said, until the day before his testimony, when William Farmer threatened him while in the holding cell at the courthouse. (T 1553).

Mr. Hall went on to testify that sometime between the time he started serving his jail term and the time he was contacted by Defendant’s investigator, an unnamed fellow inmate struck up a conversation with him about a stabbing. This unknown inmate said he was told by another unknown person that Mark Mullins and William Farmer had killed Jeremy Farmer and Allison Sousa. (R 1547). This conversation took place when Mr. Hall was out of his

protective custody for 20 minute recreation and the inmate was being brought back from court. (T 1577). Despite his being in fear from Mr. Mullins threats, and knowing that the inmate knew Mr. Farmer, Mr. Hall told the inmate what he knew about the murders. (T 1556). No one saw this conversation. (T 1578).

William Farmer also was a prison inmate at the time of the hearing on the motion in *limine*. (T 1525). After Defendant called him as a witness, Mr. Farmer denied having anything to do with the murders, or even having more than a passing acquaintance with Mark Mullins. (T 1591-1594, 1603). He freely admitted to having been sentenced to three jail terms in the State of Florida and having been a suspect in four homicides. (T 1582-83). He described himself as a debt collector for drug dealers. (T 1587-89).

Mr. Farmer denied ever doing anything together with Mark Mullins, ever speaking to him about a specific collection, or ever speaking to him about Jeremy Jarvis. (T 1591-93). Mr. Farmer said he had attempted to ask Mr. Hall why he was saying that Mr. Farmer had been involved in killing Jeremy Jarvis and Allison Sousa, but that Mr. Hall did not respond to him. He denied every threatening Mr. Hall. (R 1596, 1604).

The State put on the testimony of Mark Mullins' boss at the time of the murders, Randy Pilkington, owner of R&R Heating and Cooling. (T 1632). Mr. Pilkington testified that Mark Mullins

was with him all day the day of the murders, working. (T 1634-35). The customer for whom they were installing an air conditioner, Richard Champion, also testified. (T 1659-1715). He confirmed that Mr. Mullins and Mr. Pelkington arrived at his house, about 45 minutes away from the murder scene, between 12:30 and 1:00 p.m. that day and left between 3:30 and 4:00 p.m. (T 1661-62). Det. Connolly testified that he had confirmed this with Mr. Pelkington and Mr. Champion the day after the murders. (T 1613-14).

The trial court found the hearsay evidence "totally false based on the testimony that has been presented." (T 1744). The judge also ruled that because Mr. Mullins' statement was made to another person while they both were involved in an illegal drug transaction, it was not a statement against penal interest. The State's motion in *limine* was granted, prohibiting the Defendant from offering the proffered testimony at trial. (T 1744).

At trial, in addition to the taped confession, the State established Defendant's physical links to the crime: Defendant's fingerprints were matched to the bloody palm print and fingerprints at the crime scene. (T 2958). Five different DNA reports were prepared by Patricia Bencivenga of the Florida Department of Law Enforcement. (T 33317). She confirmed that the blood found in unit 5 was a match to Jeremy Jarvis, and that the blood smears and pools in Unit 1 were consistent with the DNA of

Mr. Jarvis and Ms. Sousa. (T 3124, 3138, 3180). DNA samples taken from blood found on the arm rest, seat belt and steering wheel of the truck Defendant was driving the day of the murders also were consistent with Mr. Jarvis' DNA. (T 3128, 3133, 3194). The DNA in scrapings taken from under the fingernails of Mr. Jarvis' right hand was consistent with the DNA of Defendant. (T 3140-3141, 3195).

Defendant had lost his job on August 22, 2003 after his employer found out he was using the company credit card for personal purchases. When he was fired, Defendant told his boss that he did not have money for food or gas (T 2712). His wife had been the primary source of financial support, and they had separated in May 2003. (T 3049, 4257). Defendant did not want to tell his parents that he had lost his job because he had promised them he would stop using drugs and go to counseling, and he did not want to lose the financial support providing to him so that he could attend school. (T 4185-86). Defendant had in the past sold drugs for profit. (T 4184-85). He knew that Jeremy Jarvis did not keep guns to protect himself. (T 3356). He confirmed just 30 minutes prior to the murder that Mr. Jarvis had just resupplied himself with marijuana for sale. (T 3353).

Defendant's wife, Katherine Rigterink, told detectives that throughout their marriage, Defendant kept a military knife between their mattress and box spring. She described it as a

double-edged blade eleven inches long, that turned up at the tip. When she returned to the home they had shared in October, after Defendant's arrest, the knife was not in the house. (T 3050-3051). Courtney Sheil gave detectives a large knife she took from Defendant's home on October 15, 2003. (T 2582, 2585).

Two days after the murder, Defendant had walked into his regular barber shop without an appointment and made a "drastic" change in his haircut. (T 3272, 3276). Just two weeks earlier, on September 9, 2003, defendant had a regularly scheduled appointment at which he had his hair cut, leaving it long enough so that it was completely over his ears and over his collar. (T 3272). On his unscheduled visit after the murders, Defendant had his hair cut much shorter, "more like a regular haircut." (T 3273).

During trial, Det. Connolly[3] repeated his testimony at the hearing on the motion to suppress. (T 3313-3499). Initially, another detective was assigned to get elimination prints from Defendant. (T 3319). In early October, 2003 the range of suspects had narrowed, and Det. Connolly needed to get fingerprints from the Defendant to see if he could be eliminated as a suspect. (T 3325-26).

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3. In January, 2005, Det. Jerry Connolly was promoted to sergeant in the Polk County Sheriff's Office. (T 3314). The trial transcript identifies him as Sgt. Connolly. He will be referred to throughout here as Det. Connolly for consistency.

Det. Connolly personally went to Defendant's home and spoke to him on October 9, 2003. (T 3326). Defendant agreed to go the next day to get his fingerprints taken. (T 3333-34). At about 4:30 p.m. October 10, 2003, Defendant called to say he did not have a ride to the station, and that he would come the following Monday. (T 3335-36). Defendant did not appear that day, either. (T 3338). By 3:00 p.m. October 14, 2003 the detectives still had not heard from Defendant. Dets. Connolly and Raczynski went to Defendant's home and found it locked up, with no one answering the door. Defendant's Jeep was parked outside. (T 3340). The detectives stayed outside Defendant's home until 6:30 p.m., when his girlfriend arrived. (T 3341). She could not tell detectives where Defendant was. (T 3342). Defendant's parents could not locate Defendant. (T 3341-42). The same happened on October 15, 2003. (T 3343).

In addition to the facts brought out at the hearing on the motion to suppress, Det. Connolly said that during Defendant's initial contact with detectives on September 24, 2003, Defendant told investigators that he had received telephone calls from Mark Mullins, telling Defendant "I think Jeremy was shot." (T 3355-56). After Defendant was fingerprinted at the sheriff's station, he was allowed to leave the room by himself to go wash his hands and returned to speak to detectives on his own. (T 3468-69).

Det. Connolly testified to the three versions of events Defendant provided prior to receiving any *Miranda* warning. (T 3353-62). At some point during Defendant's interview, Det. Connolly received a text message on his cell phone, telling him that Defendant's fingerprint matched the bloody print found at the crime scene. (T 3362, 3364-65).

After being confronted with the fingerprint evidence, Defendant said he wanted to tell the detectives "everything." (T 3367). Defendant had been calm throughout the interview, and continued to show no emotional response. (T 3367). Det. Connolly decided to video tape the rest of the interview, but did not tell Defendant about the taping. (T 3366).

Before the State introduced the *Miranda* waiver card and the videotape of the confession, Defendant renewed his motion to suppress and objection to introduction of the video. (T 3369). Defendant reiterated his position that once detectives read *Miranda* warnings to Defendant, the interview became a custodial interrogation. The *Miranda* warnings given were legally inadequate, therefore, Defendant argued, the confession was inadmissible:

> So we would reiterate to the Court that we believe as a matter of law at the time that *Miranda* warning was given that has just been testified to -- and I believe the time is shown on the document itself as 2:22 p.m., some three and a half years [sic] approximately after he entered the interrogation room,

> we believe at that point very clearly, Mr. Rigterink was in custody. . . .
>
> Because he lays out the -- in his testimony -- the sequence of the interrogation, some of which occurred before *Miranda*, and he's testified concerning that. And he's testified about a clear factual break in time, that is, the time that he was confronted here and they decided to publish this further testimony on video, that time break is the point at which the *Raysor* case applies. He is clearly in custody at that point. This is a custodial interrogation.

(T 3371-72)

The trial court again denied suppression of the confession. (T 3373). The video tape was admitted as evidence and played for the jury. (T 3377).

At the beginning of the video tape, Defendant acknowledged he understood his *Miranda* rights. (T 3382-83). In his confession, Defendant explained that as soon as he confirmed with Jeremy Jarvis that he had obtained a new supply of marijuana, he put a 10-inch Gerber hunting knife, which curved up at the tip, and an off-white shirt in a black Jansport backpack and went to Mr. Jarvis' place. (T 3385, 3387-89). The knife was a gift he had received about ten years earlier. (T 3389). He was driving his father's Toyota truck. (T 3386). He was wearing black shorts, a gray shirt and tennis shoes and a desert camouflage hat. (T 3387-88, 3429).

After Mr. Jarvis let him in and began to reach under his sofa for something, Defendant attacked him. (T 3392, 3396). At that point in the confession, Defendant asked detectives for a

piece of paper so he could draw a diagram of the events. (T 3392-93). The location of the attack that he identified was consistent with the blood evidence found by the crime scene technicians in unit 5. (T 3452, E 466). He demonstrated the initial attack in detail for detectives. (T 3434-35).

Defendant then described wrestling with Mr. Jarvis outside, kneeling over him as he pulled off his shirt and tried to drag him back into unit 5, just as Mr. Bove had described. (T 3398-99). Next, he described chasing Mr. Jarvis into unit 1 and Mr. Jarvis' attempts to fend him off with a bubble gum machine. (T 3400). Defendant said he crashed through the warehouse room door going after Mr. Jarvis. (T 3405). Defendant demonstrated for detectives how he ran through the door with the knife in his hand. (T 3405-06). He added the hallway in unit 1 to his drawing, while describing the interior of the unit to the detectives. (T 3407). He said he remembered Allison Sousa was up against the wall near the warehouse area. She had slid down the wall to a position between standing and kneeling, making a blood smear as she did so. (T 3407).

When detectives asked Defendant if he still had the backpack with the knife, he said he threw the knife and the backpack, separately, over a bridge on his route home from the scene of the crime in order to get rid of the evidence. (T 3418, 3420, 3431). He washed the clothes he had been wearing, put them

in Tupperware in his closet, and then put them into the garbage to be collected with the regular trash on the Friday after the murders. (T 3422, 3432).

Defendant had not had any trouble sleeping after the murders, (T 3416). He didn't feel bad about the crime, he said, until the Friday before his confession, when he called Det. Connolly and told him he could not come to give his fingerprints. (T 3416, 3437). That was when Defendant began avoiding investigators, and hid on the roof of his parents' home for at least one night and day. (T 3438). Defendant was trying to figure out what to tell his mother about the crime, but he himself felt no emotion about having committed it. (T 3439-40). The only thing he felt bad about, he said, was his family and the family of Allison Sousa. (T 3443).

Defendant never mentioned Mark Mullins during his interview at the sheriff's station. (T 3453). Det. Connolly denied having told Defendant any of the details described in the videotaped statement. (T 3536-38).

After Defendant made his statement, Det. Connolly formally arrested him. (T 3448). His shoes were confiscated in order to test them against the shoe prints found at the scene. (T 3449-50). Searchers went to the area Defendant described when he said he threw out the evidence, but were unable to find the knife or the backpack. (T 3447). The day before the interview,

Defendant's father had given investigators permission to search the truck Defendant had been driving. (T 3454-55).

After Det. Connolly ended his testimony, the State had a silent videotape of the crime scene played for the jury, then rested. (T 3540).

Before Defendant began presentation of his case, he proffered the testimony of another inmate from the Polk County jail, Norman Cole. (T 3588). Defendant represented that it had come to his attention only as the State concluded its case, that Mr. Cole had some exculpatory evidence, the nature of which was unknown to the Defendant. (T 3556). Mr. Cole took the stand in a hearing outside the presence of the jury so Defendant could make a proffer to the trial court for a ruling on admissibility of his testimony. (T 3550, 3573, 3586).

Mr. Cole testified that in April, 2005, he and Richard Hall were both inmates at the Polk County Jail. The two men were in the same area one day when Mr. Hall was on his way to court. Mr. Cole overheard Mr. Hall talking about William Farmer. (T 3593). For some reason that neither man explained in testimony, Mr. Hall asked Mr. Cole if he knew Mr. Farmer. (T 3594). In response, Mr. Cole said he had a conversation with William Farmer while the two of them were in the same prison dormitory between May and June 2004. (T 3591-93). Mr. Cole said that Mr. Farmer had told Mr. Cole he had "stabbed somebody" in September

or October 2003 at “a warehouse in Kville.” (T 3592). After Mr. Cole told this to Mr. Hall, Mr. Hall called the office of Defendant’s lawyer. (T 3591).

Mr. Cole had no other information about the case. (T 3594). He had not been told by Mr. Farmer any details of the crime. (T 3592). Mr. Cole did not speak to anyone else but Mr. Hall about what Mr. Farmer had told him. (T 3593). The entirety of the proffered testimony consisted of only 158 typed lines in the trial transcript. (T 3588-3594).

Defendant argued to the court that Mr. Cole’s testimony was relevant and showed corroboration of the earlier testimony of Richard Hall. Defendant asked for a reconsideration of the court’s ruling on the hearsay testimony of Richard Hall and William Farmer, and to allow the testimony of Mr. Cole. (T 3595-96). The judge declined to change his ruling. (T 3600).

Defendant took the stand on his own behalf. He testified that his confession had been a lie. (T 3701). He made it up because Mark Mullins had threatened Defendant and his family, because Mr. Mullins knew Defendant had seen the real murderers leaving the scene of the crime. At the time of his confession, Defendant believed that, somehow, investigators would eventually find out he had not committed the murders and, meanwhile, he would be able to figure out some way to deal with Mr. Mullins’ threat. (T 3701). Defendant said he had never had a knife and

there was nothing to connect him to the murders, so he “figured the system would work.” (T 3702).

Defendant had bought marijuana from Jeremy Jarvis on a regular basis for about a year. (T 3630). They had been out together socially and knew each other well enough that Defendant was discussing helping him set up a hydroponic system in his warehouse to grow marijuana. (T 3626, 3631). On Monday, September 22, 2003, Mr. Jarvis told Defendant he did not have enough marijuana to sell to him, but that he would have more on Wednesday, September 24, 2003. (T 3625). On Wednesday, the day of the murders, Defendant called Mr. Jarvis around noon asking if he had gotten more marijuana. (T 3633). Mr. Jarvis called Defendant around 2:30 p.m. to tell him a new supply had arrived. Defendant replied that he would go right over to Mr. Jarvis’ place. (T 3634). Defendant left his home within five minutes. (T 3638). He believed the drive from his home to Jeremy Jarvis’ home would have taken him 25 minutes on a typical day. (T 3637).

On direct examination at trial, Defendant said when he arrived at Mr. Jarvis’ home the front door was partially open, a bloody T-shirt was on the ground in front of the door, and what appeared to be blood was on the front door. (T 3639). He followed a blood trail from unit 5 to unit 1, where he found “blood all over the place.” (T 3640). Defendant ran down the hallway and through a door, where he found Jeremy Jarvis and

Allison Sousa on the ground, covered in blood. (T 3640-41). He found Mr. Jarvis still alive. Mr. Jarvis reached out with his right arm, grabbed Defendant, looked at him, and then slumped to the ground. (T 3641).

Defendant said when he heard a car door slam, he "freaked out" and ran back through the warehouse and out the front door, with the intention of getting away as fast as possible. (T 3641). As he turned left out of the front door of unit 1, he saw a dirty white van with three men in it. The two men in front looked directly at him as the van accelerated past Defendant. (T 3642). Defendant said he would not be able to identify the men again because they had gone by so fast. (T 3644).

When he got back home, Defendant showered to get the blood off himself, got his dog, and went to his parents' house, where he went and sat by the lake. (T 3640-41, 3647). He did not tell anyone about what he had seen. (T 3647).

The next morning, Defendant said, Mark Mullins called him at 9:30 a.m. to tell him he was coming over. When he arrived, he told Defendant "we know you were there," meaning the crime scene, and that if he did not keep his mouth shut, his parents, his girlfriend, and he would be killed. (T 3648). Mr. Mullins was in the house, threatening Defendant and telling him not to open the door, when sheriff's officers first knocked on Defendant's door the day after the murders. He stayed "a couple

of hours." (T 3650). During this visit, Mr. Mullins never admitted to being at the scene of the crime, never said who was involved, never said he would be the one to kill Defendant or his family. (T 3649, 3651). Defendant could not identify Mark Mullins as one of the men in the van. (T 3649).

When Defendant finally met with detectives later that evening, he gave them Mark Mullins' name as someone associated with Jeremy Jarvis. (T 3673, 3946).

Defendant testified that after detectives visited him again on Thursday, October 9, 2003, Defendant told Mr. Mullins that detectives had been to see him. (T 3658, 3660). The following Sunday, Defendant went to Mark Mullins' house. He said he was threatened again. (T 3662). Monday, October 13, 2003, Defendant went to the beach with his girlfriend, rather than going to the sheriff's office as he had promised. (T 3661).

Defendant testified that he was the one who asked his mother to call detectives on October 16, 2003. (T 3690). When the detectives arrived at his parents' house, they did not tell Defendant he was a suspect, only that they wanted to talk to him and get his fingerprints for elimination. (T 3691).

Detectives began questioning the truthfulness of Defendant's statements from the beginning of the interview, he said. (T 3697). He was given a description of an execution, told there was video surveillance tape of the scene, and his shoe was

grabbed his shoe as detectives said they recognized the footprint from the crime scene. (T 3695). But, Defendant said, because the detectives had told him he was not a suspect, he did not ask for a lawyer during the time he was in the interview room. (T 3698).

On cross examination, Defendant could not explain how he had come up with the descriptive details he had provided in his confession, other than to say that he was making them up so the story would sound good. (T 3963). He admitted detectives never told him to say what clothes he was wearing, what the knife looked like, that he had put an off-white t-shirt and the knife in a black Jansport backpack, nor had they given him the other descriptive details he provided. (T 3956-3963, 4158). He admitted that he had owned a knife with an 11-inch-long black blade. (T 3965).

Defendant testified he had no problem lying if it served his purposes. (T 4038-39). He had been deceiving his parents for decades. (T 4186). Lying, he said, had become a way of life for him. (T 4189).

During re-direct examination, Defendant said he did not tell police about the threats made by Mr. Mullins because “I did not trust the police much at all,” (T 4181), despite his earlier testimony that he believed “the system would work” and that investigators would find he had not committed the murders. (T

3702). He was frightened by Mr. Mullins threats, he said, because he had seen others pistol-whipped and been told some persons had their cars blown up. He remembered that Jeremy Jarvis had used an "enforcer," a person employed to collect drug debts, because Mr. Jarvis was a small man. Mr. Jarvis' enforcer had at a party forced a pistol into a person's mouth and threatened to shoot his head off. Defendant did not identify any acts of violence that he witnessed Mark Mullins commit. (T 4169-4171).

After his testimony ended, Defendant proffered the testimony of Richard Hall and William Farmer from the hearing on the motion in *limine*, arguing that Defendant's testimony provided indirect corroboration of the testimony about Mark Mullins' propensity for violence. (T 4200-01). The trial court again denied Defendant's request to reconsider its ruling. (T 4204).

Finally, Defendant argued that the judge's prior ruling on hearsay testimony excluded only the testimony of Richard Hall, but not William Farmer. (T 4206). Defendant sought to call Mr. Farmer to testify about the general reputation of Mark Mullins and "dealings in the drug trade." (T 4207). The State objected to the testimony as not being relevant to the case. The judge offered to hear further proffer on the issue of relevancy. Defense counsel responded by saying he needed to discuss it with

his client. (T 4211). After consultation, Counsel announced his intention not to call more witnesses, and rested the defense case. (T 4217).

The jury rejected Defendant's trial testimony and convicted him of first degree murder for both Jeremy Jarvis and Allison Sousa. (T 611-612).

At the penalty phase, the State presented testimony explaining the physical effects of the victims' injuries and what would have happened as they were pursued, stabbed, and bled to death. Of the 22 wounds inflicted on Mr. Jarvis, at least three were to his back. (T 4614). All of the wounds were inflicted while Mr. Jarvis was still alive. (T 4625). Wounds to his hands and extremities were consistent with an attempt to defend himself from an attack. (T 4634). The one wound that could have been fatal in and of itself penetrated his lung. Mr. Jarvis' lung would have collapsed as he bled internally into his chest, giving him the sensation of drowning. (T 4620).

Ms. Sousa was stabbed in the back of the neck and head and suffered blunt force trauma to her back (4648-49). Her fingertips were raw, as if she had tried to hit someone, or someone stepped on her hands (T 4655). A stab wound punctured her lung and cut a major blood vessel, causing massive internal bleeding. (T 4652). Another potentially fatal wound penetrated her abdomen and liver and appeared to have been made after the

chest wound. (T 4653). No single wound she received would have caused her to immediately lose consciousness. Her death would have occurred over a period of time as she bled to death. (T 4674). Both she and Mr. Jarvis had cuts on their hands consistent with trying to fend off a knife attack. Both victims would have been aware and able to appreciate what was happening to them throughout the attack.

Several victim impact statements were presented through written statements and live testimony.

In mitigation, Defendant presented testimony of Ron Lyons and James L. Martini, Jr., ministers who met him when they went to offer religious counseling at the Polk County jail. (T 4754) They visited him 12 times during 2003-2004 when he was in the Polk county annex in Bartow, in "H" block, which is an "isolated ward."(T 4766, 4767, 4769). They testified that after their third visit, Defendant showed a "change of heart" and began to ask for material for other prisoners, talking only about other prisoners during their one-hour visits. (T 4767, 4772). The last time the two had visited him was a year prior to trial, in October, 2004. (T 4770). Both men said that if given a life term, Defendant could contribute by teaching reading and writing letters for prisoners. (T 4756, 4768).

Diane Hendrick, Defendant's sixth and seventh grade teacher and a family friend testified that he was a quiet, well-mannered

student. (T 4778-79). She lost contact with Defendant after she moved in 1988, when he was 16 years old. (T 4780, 4783). She believed he could contribute to society if given a life sentence because he is bright, and "grew into a fine young man." (T 4781). His family, she said, was "the best" support system throughout his life. (T 4785).

Jonathan Morgan, an inmate who had been in protective custody with Defendant for seven months, said Defendant always seemed to be helpful, and that he helped him to get materials to take his high school equivalency examination. (T 4796-4800).

Defendant's Mother, Nancy Rigterink, testified that, after Defendant finished his associate's degree at the local community college right after high school, he drifted, moving to Miami, then Tampa, taking various jobs. After he married in 1999, he and his wife had financial difficulties, even though they had an income equal to Defendant's sister and her husband, who were managing. When Defendant's wife left him in May, 2003, she told Defendant's mother that her son had a serious drug problem. Immediately, Defendant's mother and father began gathering information about how to help their son, and had a meeting with him in June. Defendant agreed he would stop using drugs and attend counseling. But, in late August 2003, a drug test of Defendant's urine, done by the family physician, showed meth, opiates and marijuana. After a family intervention over Labor

Day weekend, Defendant again agreed to regular drug testing and counseling. (T 4921-24, 4928-36). He never did either one. (T 4938). Defendant's parents were especially hurt and shamed about the crimes because Allison Sousa had been a friend of Defendant's father. (T 4940).

The testimony of Defendant's uncle, Dick Rigterink, father, James Rigterink, and letters from Defendant's sister and two cousins all said that Defendant had been a respectful child, he was helpful to others, had helped turtles cross the road, and had been patient and kind to his grandmother as she was dying of Alzheimer's. Everyone agreed that he could contribute to society in some way. His father and mother specified that he could teach other prisoners and contribute to their rehabilitation.

The jury recommended the death penalty for Count I by a vote of 7 to 5 (T 613) and the death penalty for Count II by a vote of 7 to 5. (T 614).

The day before the *Spencer* hearing the defense filed a motion to continue the hearing and to appoint an expert advisor to the defense, asking for a neurological and psychiatric examination of the defendant. (R 634-538). On the scheduled day of the hearing, October 6, 2005, the court heard arguments on the motion. The only fact presented to the judge was defense counsel's proffer that he observed Defendant's lack of emotional response to his trial and conviction, which was unusual. The

court found there was no factual basis for appointing someone to examine the Defendant for competency and mental mitigation, and that the defense had failed to comply with Fla. R. Crim. P. 3.202 requiring written notice of intent to use mental mitigation evidence at least 20 days before trial. The motions were denied. (R 666). Neither the State nor the Defendant presented any additional evidence to the judge.

The Court announced its final judgment and sentence at the noticed hearing on October 14, 2005. The Court found that, for the death of Jeremy Jarvis, the State had proved beyond a reasonable doubt conviction of a contemporaneous capital felony and that the crime was heinous, vicious and cruel. The judge gave great weight to each aggravator. (R 685, 687). In the death of Allison Sousa, the court found that the State had proved beyond a reasonable doubt that the Defendant was convicted of a contemporaneous capital felony, the murder was committed in order to avoid arrest or to escape custody, and that the murder was heinous, vicious and cruel. Each aggravator was given great weight. (R 690, 692). The only statutory mitigator established by Defendant was lack of a significant criminal history. This was given only some weight because of the Defendant's admission to years of law breaking and drug use. (R 692). The court found eleven non-statutory mitigating circumstances as follows: One, use of drugs – little weight; two, reputation with family and

friends as a peaceful person – some weight; three, kindness and attention to grandmother – some weight; four, desire to help other inmates in prison – some weight; five, religious commitment in prison – some weight; six, helps turtles across the street – little weight; seven, Defendant has supportive family – moderate weight; eight, capable of kindness – some weight; nine, one class from completing bachelor of science, degree – little weight; ten, sympathy for the families of the victims – little weight; eleven, exhibited appropriate courtroom behavior – little weight. The court specifically found that the Defendant had established neither remorse and ability to recognize his mistakes, nor that there was a lack of evidence of premeditation. (T 713-729).

This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court properly denied Defendant's motion to suppress his recorded confession. The Defendant voluntarily attended an interview and was not restrained in any way during the interview or told that he could not leave. He was not in custody at the time of his statement. Additionally, the statement of rights and warnings given to Defendant before his recorded statement satisfied the requirements of *Miranda v. Arizona.*

Admission of the recorded statement was harmless error. Sufficient competent evidence apart from the confession was presented to support the conviction.

The trial court did not abuse its discretion by excluding the testimony of William Farmer. The evidence was not relevant to the crime for which Defendant was tried. If exclusion was error, it was harmless.

The trial court properly denied claims based on *Ring v. Arizona.* Defendant failed to preserve objections to penalty phase jury instructions because there was no objection to the instructions at the time they were given. There is no merit to the arguments because this court repeatedly has rejected the claims that the sentencing scheme under Fla. Stat. 921.141 is unconstitutional.

Defendant failed to preserve a claim that death by lethal injection is unconstitutional because no objection to the method of execution was made below. There is no merit to the claim because it already has been rejected by this Court.

There was sufficient evidence to support the conviction and to show that the death penalty is proportional in this case.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE VIDEO AND AUDIO RECORDED STATEMENTS OF DEFENDANT

Defendant asserts that the trial court erred in denying his motion to suppress. He claims that the trial court should not have found that he was not in custody and should have found that the Miranda warnings given to him were defective. However, Defendant does not clearly identify what portions of the statements he made at the time of his interrogation should have been suppressed. At times in his initial brief, he appears to contend that he was in custody from the time he agreed to accompany the police to the station and at other times he appears to claim that custody occurred later in the interrogation. To the extent that Defendant is claiming that he was in custody before the giving of the *Miranda* warning, this issue is not preserved. Defendant specifically asserted below that he was seeking to suppress only the recorded statement made after Defendant received a *Miranda* warning. (R 223, 229). He acknowledged that he was not in custody for the first three and a half hours of the interview before the recording occurred. (R 223-24). Since Defendant did not present an issue regarding the statements he made before the recorded statement, any issue with regard to the admissibility of those statements is not

preserved. *Perez v. State*, 919 So. 2d 347, 359 (Fla. 2005). Thus, it is not properly before this court.

Defendant is not entitled to relief on his claim that his recorded statement should have been suppressed. The trial court properly found that Defendant was not in custody. Moreover, the *Miranda* warnings given to Defendant prior to the recorded statement were adequate. The trial court should be affirmed.

A. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT WAS NOT IN CUSTODY WHEN HE CONFESSED TO COMMITTING THE MURDERS

The only evidence offered at the hearing on the motion to suppress was the testimony of Det. Connolly, presented by the State, and two documents presented by Defendant: a copy of the *Miranda* waiver form, and one page of transcript that included the oral *Miranda* warning given by Det. Connolly and Defendant's acknowledgement of it. Based on Detective Connolly's testimony, the court found that Defendant was not in custody when he made his statement; therefore, no *Miranda* warning was required. The court did not rule on the adequacy of the warning. The trial court entered the following order denying the motion to suppress:

> The Defendant seeks to suppress all tangible evidence obtained from him and statements made by him in his written Motion which was verbally amended on November 24, 2004 to request suppression of all audio and

video recorded statements and emissions made by the defendant on October 16, 2003. Accordingly, only the audio and video recorded statements made by the defendant on October 16, 2003 are considered he ran for the suppression.

A properly noticed hearing on the Motion to Suppress was held on November 24, 2004. Present were Defendant and his attorney and the state's attorney. Testimony was presented.

In considering the totality of the circumstances and current law the Court finds that the October 16, 2003 encounter was a non-custodial. *See Cillo v. State*, 849 So. 2d 353 (Fla. 2d DCA 2003).

As to the facts supporting the conclusion, the Court finds the testimony to be that the defendant was not a minor. For six days before the discussion of the details of his prior statements, law enforcement had been attempting to obtain elimination fingerprints from the defendant. They had asked the defendant to come in and give them the prints and the defendant acquiesced but did not appear at the agreed upon time later stating he had become ill. The defendant also agreed to try again that day but again did not appear. Law enforcement then contacted him on the 16th of October and requested his fingerprints. The defendant went to his parents' home and when law enforcement called, his mother told them the defendant was there. Law enforcement went to his parents' home. When they arrived the defendant was in the shower. The defendant told the detectives that some drug dealers from Lake Wales selling 'ice' were involved in the murders. Law enforcement again asked for his prints and he agreed. His parents agreed to take him to the Sheriff's airbase substation and wait while the prints were processed. Law enforcement said they had no intention at that point to detain the defendant. After the prints were taken and while they were being processed, the detective(s) took the defendant to a

room 6 feet by 8 feet, with foam covered walls for sound control, three chairs and a small desk. The door was not locked and the defendant had no physical restraints placed on his person.

The detectives discussed with the defendant the details of their prior discussions. They discussed the time sequence beginning with defendant's activity on the day of the murders beginning with his activity at Warner Southern College and the borrowing of his father's truck on September 21. The discussion of September 22's activities included defendant's trip to Jarvis' warehouse where defendant purchased marijuana, received marijuana from Jarvis as a gift and a discussion about Jarvis starting a marijuana growing operation. As to his activities on the 23rd, they discussed defendant's class at Warner Southern, his lunch at home and his physical discomfort that lead him to believe he had food poisoning and his mother's trip to his home with some crackers for him to eat. He said he fell asleep and awoke on the 24th. He said he continued to feel sick, had no visitors and only consumed crackers and ginger ale. He said he spoke with Jarvis on his cell phone perhaps more than once. At around two in the afternoon they discussed a shipment of marijuana that Jarvis was expecting. A call made to the defendant was received at his home at 2:39pm. The first 911 call regarding the murders was made at 3:11pm. Defendant called his girlfriend, Courtney Sheil, and left a message. He then went to his parents' home with his dog. He said he left their home around 4:30pm [sic] and returned to his home where he and Courtney watched movies they had rented for the remainder of the day.

Sometime during the review of all the defendant had told them previously, the detectives told him that his prints matched those with blood in them found at the crime scene. One of the detectives told the defendant he was being untruthful.

The defendant then told him he was at Jarvis' warehouse during the time of the murders and said he was afraid to tell them he was there. He then changed his story to say he bought the marijuana at the warehouse and left about 2:30 or 3pm and saw nothing of any murders.

At that point the detectives told the defendant he should tell them the truth.

The defendant then said he got to Jarvis and Sosa just after the attack. He saw blood smeared on the door and that he touched it. He saw the trail of blood to a place a few doors down to the construction office. He saw more blood and two people lying on the floor. He said he checked the female's neck pulse and noticed that he was covered in blood, got scared, ran to his truck and left.

The detectives informed the defendant he was not telling them the whole truth. The defendant said then that he would tell them everything and the detectives decided to give him his *Miranda* rights so the statement would be admissible.

Nearly four hours after the defendant arrived at the substation his rights were read to him. A standard Sheriffs Office form, which the defendant read and signed, was obtained from another room after his rights were read to him. The form was introduced into evidence as Defense Exhibit 1.

While out of the interview room obtaining the form, the detective also arranged for the video taping of the subsequent interview.

After having completed the form the defendant did not invoke any of his rights nor was he told he was in trouble and was not going home.

The defendant gave additional information and even demonstrated some of the activity in which he engaged. No evidence was presented as to the length of the taped portion of the interrogation or of the videotape.

> After the interview, the detective(s) called Assistant State Attorney John Aguero, gave him the evidence and the videotape of the interview. Aguero authorized the arrest. The defendant was arrested. One of the Sheriffs Supervisors informed the parents in the lobby of the substation of the arrest. At about 5:30pm the defendant was transported to the jail.
>
> The defendant was characterized as alert, coherent, very energetic and seemed to understand what he was doing. He was also described as cooperative even though he lied to the detectives from time to time.
>
> At no time during the discussion was the defendant told expressly he was free to leave.
>
> None of the testimony of law enforcement was contradicted by evidence.
>
> The Motion to Suppress is Denied.

(R 340-342)

Defendant's argument that application of the four-part analysis used in *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) results in a finding that he was in custody at the time of his statement relies on assertions of fact that are contrary to the evidence and the trial court's ruling. Det. Connolly's testimony about the circumstances surrounding the interview was unrefuted by any evidence offered by Defendant. (R 212).

First, as to the "manner in which suspect is summoned for questioning," detectives merely were requesting the cooperation by Defendant, a known associate of one of the victims; they did not "summon him for questioning." Each of the several times they contacted Defendant, detectives explained to him that it was

routine procedure to obtain fingerprints from persons known to be associated with the victim to eliminate them as suspects, and requested that he come to the sheriff's station – at his convenience – to give his fingerprints. (R 210, 234-35, 237-38). Each date Defendant was supposed to appear at the sheriff's station was proposed by Defendant, and detectives agreed to each day and every change proposed by Defendant. He was not even given a specific time of day to come. (R 237-38). Even after Defendant failed to show up three different times, detectives still were asking only that he voluntarily come to the station to give his fingerprints. (R 238-39).

Defendant's mother called detectives on October 16, 2003; it was not the investigators that initiated the contact. (R 238) Detectives went to the parents' home, rather than even asking that Defendant come to the sheriff's station. Defendant volunteered to go to the sheriff's station at that time so he could give his fingerprints, which was the only thing detectives requested. (R 238-39). It was Defendant who volunteered that he had additional pertinent information to give detectives. (R 239). Defendant asked his parents to drive him so that they would be able to drive him back from the sheriff's station when the interview was over. Detectives did not object. (R 240). Defendant's parents followed detectives' car because they did not know the route to the station. (R 240). Defendant's parents

were asked to wait in the lobby while fingerprints were processed. (R 240). Defendant never was told he could not leave. (R 257).

Second, as to "the purpose, place and manner of the interrogation," Defendant's claims in his brief are contrary to all the evidence and cannot be supported by the record. The uncontradicted purpose of Defendant's presence at the sheriff's station was to give his fingerprints. It was Defendant who volunteered that he had additional pertinent information he wanted to give them. (R 239). After his fingerprints were taken, Defendant went to a convenient interview room that was right across the hall from the fingerprint work station, not a "secured room," as stated in Defendant's brief. (R 241). There was no evidence presented at the hearing on the motion to suppress that Defendant ever requested, or that detectives ever refused, the presence of his parents in the interview. Defendant was not a minor at the time of the interview.[4] (R 210).

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4. As part of his argument that he was in custody at the time he gave his statement, Defendant makes the statement that his "parents were not permitted to be present," without further elaboration. (Initial Brief 60). No claim was ever made below that Defendant's parents should have been or had the right to be present. Defendant testified at trial that he was 31 years old at the time of the crime. (T 3831). His parents drove him to the sheriff's station because his license was suspended. (T 3638).

Defendant claims that he was the only person from whom fingerprints were sought to compare to the evidence from the crime scene. To the contrary, investigators sought fingerprints from all of Jeremy Jarvis' friends and associates whose prints were not already on file for some reason. (R 235). By October 16, 2003, more than three weeks after the crime, Defendant simply was a remaining person from whom investigators needed fingerprints.

At the hearing on the motion to suppress, the only evidence presented as to the participants in the interview was Det. Connolly's testimony that at any time there were no more than two, and sometimes only one, detectives in the room with Defendant. (R 266). As to the taped statement, which is the only evidence Defendant sought to suppress, the only participant other than Defendant and Det. Connolly was Det. Raczynski. (R 257). The only evidence presented as to the method of questioning was Det. Connolly's testimony that everything was calm. (R 252, 272). In fact, the only evidence at the hearing on the motion to suppress was that Defendant did not ever indicate he wanted to leave, and seemed intent on explaining things to the satisfaction of detectives. (R 277-78).

The third circumstance argued by Defendant, "the extent to which the suspect is confronted with evidence of his or her guilt," also is not supported by the record. The only piece of

evidence Defendant has identified with which he was confronted was his fingerprint. Defendant gave detectives one explanation that accounted for that fingerprint. The mere fact that detectives stated that they did not believe his story is not a confrontation with evidence.

Fourth, "whether or not the suspect is informed that he or she is free to leave the place of questioning," clearly supports the finding that Defendant was not in custody. Det. Connolly did not tell Defendant he was free to leave, but he also did not tell him that he could not leave. Defendant was not restrained in any manner or prevented in any manner from expressing a desire to leave. The only evidence is that Defendant knew detectives had asked that Defendant's parents wait for him so they could take him away from the sheriff's office when he was done. (R 240, T 3691).

Applying the law to the facts that are supported by the record of the hearing on the Motion to Suppress, the order denying the motion to suppress must be affirmed. A ruling on a motion to suppress is a mixed question of law and fact that should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting a de novo review of the constitutional issue. The trial court's ruling carries a

presumption it is correct. *Connor v. State*, 803 So. 2d 598 (Fla. 2001).

"In order for a court to conclude that a suspect was in custody, it must be evident that, under the totality of the circumstances, a reasonable person in the suspect's position would feel a restraint of his or her freedom of movement, fairly characterized, so that the suspect would not feel free to leave or to terminate the encounter with police." *Connor,* 803 So. 2d at 605.

The facts in this case are strikingly similar to those in *Fitzpatrick v. State*, 900 So. 2d 495, 513 (Fla. 2005) in which this Court found there was no custodial interrogation. Michael Fitzpatrick was convicted of first degree murder and sexual battery after he stabbed a woman to death. On appeal he argued the trial court had erred when it allowed admission as evidence statements he had made to police. During the course of the investigation police questioned Mr. Fitzpatrick on various occasions. In his first interview with police, Mr. Fitzpatrick drove himself to the station, where he was questioned for 45 minutes to an hour. During that interview police told him that they had satellite photos, that they could tell where Mr. Fitzpatrick had been the night of the crime, and that they could place him at the convenience store where he had been seen with victim. Police did have satellite photos of the crime scene, but

the only evidence they had linking Mr. Fitzpatrick to the convenience store was the video surveillance tape. Mr. Fitzpatrick was allowed to leave. Police subsequently obtained a blood sample from him. This Court found that none of the interviews was a custodial interrogation. In his last interview with police, Mr. Fitzpatrick drove himself to the station in response to a request, where he was questioned for three and a half hours and confronted with the fact that his DNA was found on the victim. Particularly referring to the last interview, the Court said "[t]he evidence surrounding this last interview reveals that Fitzpatrick arrived at the sheriff's office in his own car, was never restrained, and was free to leave at any time. This evidence supports our conclusion that Fitzpatrick voluntarily went to the station and was not in custody." *Fitzpatrick,* 400 So. 2d at 513.

In the instant case, Detectives had contacted Defendant several times prior to the date of his statement. On the day he gave his statement, Defendant was the one who voluntarily initiated contact with the detectives and expressly stated that he had some information to give them. He asked his parents to drive him to the station, where they waited to take him home. He was never restrained. Defendant was asked to give his fingerprints. He was confronted with the fact that his fingerprint matched a bloody print at the scene. Defendant was

never restrained in any way and could have left at any time. He was not in custody.

In *Schoenwetter v. State*, 931 So.2d 857 (Fla. 2006), police arrived at a murder scene early on a Saturday morning and observed the defendant walking around the apartment complex. He was taken to the police station, where he was given *Miranda* warnings once he made some incriminating statements, and a formal statement was made after the warning. This Court affirmed the trial court's finding that the defendant was not in custody when he made his statements. 931 So. 2d at 866. In that decision the Court cited *Taylor v. State*, 855 So. 2d 1 (Fla. 2003), in which the defendant was read his rights at his home and handcuffed briefly before he voluntarily agreed to accompany officers to the police station. Despite being read his rights, briefly being handcuffed, and being taken to the police station in the police car, the Court found that the defendant was not in custody. 855 So. 2d at 17. This Court clearly has decided that in circumstances like the ones in this case, there is no custodial interrogation.

Mansfield v. State, 758 So. 2d 636 (Fla. 2000), the only decision of this Court relied on by Defendant, does not come close to the facts of this case. In *Mansfield,* four law enforcement officers went to the suspect's house and took him to the police station in the police car. Investigators had prepared

extensive evidence against the suspect prior to questioning him. The interrogators told the suspect that he had to convince them of his innocence. They specifically told him he was not free to leave, saying: "You and I are going to talk. We're not going to leave here until we get to the bottom of this. I'm going to help you. That's what I'm going to do. I'm going to help you. I'm going to help you remember and we're going to get this thing cleared." 758 S0. 2d at 644.

Likewise, the appellate court cases relied upon by Defendant are so factually distinct that they cannot be compared. In *Louis v. State,* 855 So. 2d 253 (Fla. 4th DCA 2003) the defendant was an 18-year-old boy who had been in the United States only two years. Police went to his school, told him specifically the allegations against him, and then transported him to the police station in their car. The suspect in *Pollard v. State*, 780 So. 2d 1015 (Fla. 4th DCA 2001), was a passenger in a car that was stopped by police for committing a traffic offense. She was then placed in the police car and taken to the station, where she was put in a restricted access room, without telling her she was free to go if she wished. In both of these cases the way in which the suspects were taken in was obviously similar to an arrest: being informed of specific charges against you, or being stopped by a police officer for infraction of the law.

There simply is nothing in the record to support Defendant's additional factual arguments. Defendant alleges he had no choice about going to the station. Initial Brief of Appellant pages 69-70. The only evidence at the hearing on the motion to suppress, as outlined above, was that Defendant initiated contact with detectives, volunteered to go to the station, and chose his means of transportation without objection from detectives. Defendant simply misstates the record when he tries to imply that Det. Connolly testified he would have immediately gotten a court order to detain Defendant if he refused to give his fingerprints on October 16, 2003. The actual testimony was that, when counsel for Defendant asked Det. Connolly if he would have gotten a court order to obtain Defendant's fingerprints if he refused, Det. Connolly answered: "At some point, yes." (R 291). It is clear from the testimony that under the totality of the circumstances, a reasonable person would not have believed that detectives would or could have kept Defendant from leaving the sheriff station on October 16, 2003.

The trial court must be affirmed.

B. THE WARNING GIVEN TO DEFENDANT SATISFIES THE REQUIREMENTS OF *MIRANDA*

Even if the Court finds that Defendant was in custody when he made his statement, the warning he received satisfied

Constitutional requirements. Defendant's argument is that the *Miranda* warning he received is insufficient because it does not explicitly state that he has the right to an attorney *during* questioning. Instead, the warning Defendant received and the waiver he signed informs him he has the right to speak to an attorney *before* questioning. Defendant's position is contrary to Florida and Federal law.

In *Miranda*, the United States Supreme Court held that under the Fifth and Fourteenth Amendments an individual must be informed of certain rights before any custodial interrogation: ". . . the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). In 1992 this Court determined the extent of the warnings that an individual in custody must receive under Florida law and *Miranda*: "[S]uspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them." *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992). Although the Court in a footnote defined "a lawyer's help" as "the right to consult with a lawyer before being interrogated

and to have the lawyer present during interrogation," 596 So. 2d at 966 at n.13, it specifically did not include the details of what a "lawyer's help" is, in the warnings that must be conveyed to the suspect. The Court chose, instead, to say simply that a suspect must be advised of the right to a lawyer's "help."

In *Traylor,* the Court was following the analysis it had applied to *Miranda* warnings in *Brown v. State*, 565 So. 2d 304 (Fla. 1999*) overruled on other grounds, Jackson v. State*, 648 So. 2d 85 (Fla. 1994).[5] The *Brown* court found that not all of the rights implicit in *Miranda* warnings must be specifically communicated to a person being questioned. The right to cut off questioning at any time, for example, which is implicit in *Miranda*, does not have to be specifically stated because *Miranda* itself does not require it. 565 So. 2d at 306. In *Cooper v. State*, 739 So. 2d 82 (Fla. 1999), this Court found that when police told a suspect: "If you want a lawyer to be present during questioning, at this time or any time thereafter, you are entitled to have a lawyer present. Do you understand?" was sufficient, even though it did not explicitly state that a lawyer would be appointed if the defendant could not afford one,

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5 *Jackson v. State*, 648 So. 2d 85 (Fla. 1994) overruled the holding in *Brown* approving certain penalty phase jury instructions, but did not affect its holding on custodial interrogation.

saying that the language “tracked” the *Miranda* warnings. 739 So. 2d at FN 8.

Defendant’s argument requires a constricted reading of plain language and a “talismanic incantation” that has been rejected. *Anderson v. State,* 863 So. 2d 169 (Fla. 2003). When this Court examined the warnings given in *Anderson,* it found them sufficient. The *Miranda* warning that Fred Anderson was read included the specific admonishment that anything he told the officers could be used against him in court and that he was entitled to a free attorney. When he expressed some doubt that he clearly understood the warning and his rights, the detective told him, "If you say something to me, I'm going to write it down and use it." 863 So. 2d at 182. This Court found that Mr. Anderson, who was college educated, had been given sufficient warning and that there was no evidence to show that any of the statements made by detectives caused him to involuntarily waive his rights. 863 So. 2d at 183.

Likewise, Defendant, who is one class away from receiving his bachelor’s degree (T 3624) and is described as bright and intelligent, has provided no evidence that he was confused by the warning given to him or that he did not understand his rights. On cross examination, when asked if he could point to something in the tape that showed he did not understand what he was doing, Defendant admitted he could not.

Miranda itself requires only that the suspect be informed that he has the "the right to the *presence* of an attorney." It does not specify that a suspect has to be told at what times an attorney will be available to him. *Miranda* at 479 (emphasis added). In *Duckworth v. Eagan,* 492 U.S. 195, 203 (1989), the United States Supreme Court said "[r]eviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably convey to [a suspect] his rights as required by *Miranda."*

The logical consequence of informing a suspect that he has the right to an attorney prior to questioning is that, should he wish to invoke his right, he will be able to do so before any custodial interrogation takes place, which is the goal of the *Miranda* warnings. Having counsel available prior to interrogation gives the defendant the constitutionally required advice and assistance to assert any rights that exist – prior to, during and after interrogation. Therefore, informing a defendant of the right to counsel prior to questioning is constitutionally sufficient and satisfies *Miranda.*

The Fourth District Court of Appeals cases relied upon by Defendant are contrary to this Court's precedent. As stated above, both the Florida Supreme Court and the and United States Supreme Court have rejected the notion that there is a specific

way in which a suspect must be advised of rights under *Miranda* and the United States Constitution, instead, courts look to whether a reasonable person would understand the rights available to them.

To adopt Defendant's position would require concluding that a reasonable person would be led to believe that police could cut off the Constitutional right to an attorney simply by beginning their questioning, because there would be no right to an attorney *during* questioning. There simply is no basis in language, logic or law for such a strained application of *Miranda.*

The trial court must be affirmed.

C. ADMISSION OF THE CONFESSION WAS HARMLESS ERROR

Even if this Court finds that Defendant's statements were incorrectly admitted at trial, it must determine whether the admission was harmless error. *Miranda* violations are subject to harmless error analysis. *Caso v. State*, 524 So. 2d 422, 425 (Fla.), *cert. denied*, 488 U.S. 870, (1988). "Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986).

The evidence presented at trial overwhelmingly proved Defendant's guilt, without Defendant's confession. At 2:39 p.m., just 30 minutes before the murders, Defendant called one of the victims to confirm that he had just acquired a new supply of marijuana for sale. (T 2547-48, 2550, 3328, 3353, 3385). Defendant was out of work and had no money to support his acknowledged drug habit. (T 2712, 3049, 4185-86, 4257). Two witnesses described the attacker in a way that matched the Defendant. (T 1833-34, 2378, 2390, 2411, 2437-38). The victims' blood was found in the truck that Defendant was driving the day of the murders. (T 3128, 3133, 3194). DNA consistent with the Defendant's was found under the fingernails of the victim who suffered the brunt of the brutal attack. (T 3140-41, 3194). Defendant's bloody fingerprints were found at the scene. (R249, T 2985, 3362-65). Defendant made changes to his appearance shortly after the crime. (T 3372-73). He avoided giving fingerprint samples to detectives and hid from questioning. (T 3335-36, 3338, 3343). When finally questioned by detectives, Defendant gave inconsistent explanations of his behavior on the day of and on days after the crime. (T 3353-62). Defendant's ultimate confession contained specific details consistent with the physical evidence gathered by crime scene technicians. (T 2752, 2759-63, 2797-99, 3405-07, 3452, E 466). Evidence gathered by detectives conclusively refuted Defendant's testimony about

receiving threats from a specific person at a specific time. (T 1613-14, 3322-23). The version of events presented by Defendant at trial came only after the death of the person Defendant identified as being able to corroborate his version of events. (T 518, 1684). Defendant admitted to being a habitual liar. (T 4189). To accept his explanation of his fingerprints at the scene, the jury would have had to believe: Defendant left his house at least five minutes, and maybe more, after he spoke on the telephone to Mr. Jarvis at 2:39 p.m.; made a 30-minute drive to the crime scene; got there after the killer had left, which would have been some time after 3:07 when Ms. Sousa called 911; went inside Mr. Jarvis' home and looked around; followed a blood trail to unit 1; looked all over unit 1; went into the back area of unit 1; found two bloody bodies; checked both for a pulse; been grabbed by Mr. Jarvis; heard a car door slam; ran back to his truck and left; all before the first deputy, who saw no cars leaving the scene, got there at 3:18 p.m.

There is no reasonable possibility that the jury could have found Defendant not guilty even in the absence of his confession. Therefore, admission of the confession was harmless error. *State v. DiGuilio,* 491 So. 2d 1129, 1138 (Fla. 1986); *Ponticelli v. State*, 941 So. 2d 1073, 1088 (Fla. 2006). Defendant's conviction must be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING THE TESTIMONY OF WILLIAM FARMER.

Defendant argues the trial court abused its discretion by not admitting the testimony of William Farmer. Mr. Farmer testified at the hearing on the State's Motion in *Limine* to prohibit Defendant from introducing hearsay evidence that Mr. Mullins and Mr. Farmer were responsible for the murders for which Defendant was tried. Mr. Farmer denied having anything to do with the murders. (T 1561). The court granted the States' motion and ruled that the proposed hearsay testimony could not be introduced.

At the beginning of the defense case, Defendant sought a ruling from the court on admission of Mr. Farmer's testimony for "A, his knowledge of the interaction of individuals involved in the drug trade in the immediate area, and his knowledge of many, many of the witnesses that were named in this case; and, B, his reputation knowledge of Marshall Mark Mullins." (T 4208-4209). In his brief, Defendant argues that the testimony would have "supported the defense that Mark Mullins was the instrument that led to the deaths of Mr. Jarvis and Mrs. Sousa." (Initial Brief 79).

When the State objected to Mr. Farmer's testimony as irrelevant if based solely on proffer of Mr. Farmer's testimony at the hearing on the Motion in *Limine*, (T 4206-4207), Defendant

offered to make a proffer to show relevance. The trial court agreed to hear any proffers Defendant wanted to make. After consultation with Defendant, however, defense counsel declined to call Mr. Farmer or make further proffer:

> MR. CARMICHAEL: And, Judge, I mean, obviously we'll be happy to do a proffer in that regard. It seemed to me he testified on general knowledge of the local drug trade. That would be certainly relevant. It seems to me he testified as to reputation evidence that may be related to some of the witnesses or even Mr. Mullins in this case, and that could, upon ruling of the Court, be relevant.
>
> Therefore, I think that, you know, we make that determination of relevance in the defense case in chief, and if we decide to call him without putting him into the situation where we're simply asking to impeach him, we should be allowed to do so. **So we may be seeking to do a Proffer,** but I need to discuss that with my client briefly.
>
> . . .
>
> THE COURT: Why don't you call the witness then?
>
> MR. CARMICHAEL: Okay. That will be a decision then I just have to ask my client about. That's why I needed that clarification.
>
> . . .
>
> MR. HILEMAN: Your Honor, in light of all the Court's rulings, I think we've resolved the matter. During the brief recess that you gave us, we discussed once again with our client the witnesses available to call, the consequences of calling them, the limitations that the Court has imposed upon us with regard to some of these witnesses which we've just discussed in our renewal of our arguments from earlier.
>
> My client indicates that he believes it is not in his best interest to call further

> witnesses in light of those decisions. And, therefore, the defendant will at this time rest.

(T 4207-4208, 4211, 4217-4218)(emphasis added)

Defendant made a tactical decision to allow the judge's ruling on Mr. Farmer's testimony regarding the hearsay issue to stand, and not to pursue a ruling on his motion to allow Mr. Farmer's testimony for relevance. As a result, he cannot raise the issue on appeal. Failure to obtain a ruling waives the issue on appeal. *Armstrong v. State,* 642 So. 2d 730, 740 (Fla. 1994) (holding that the defendant's pretrial request for a Magnetic Resonance Imaging (MRI) test was procedurally barred because the trial judge reserved ruling on the issue and never issued a ruling) (citing *Richardson v. State,* 437 So. 2d 1091, 1093 (Fla. 1983)).

In *Farina v. State*, 937 So. 2d 612 (Fla. 2006), this Court barred a defendant from raising on appeal the admission of evidence when Defendant failed to obtain a ruling on his objection. A prosecutor sought to introduce parts of the bible at trial. The defense objected based on relevancy. The trial court reserved judgment, allowing the prosecutor to make an attempt to show relevance, subject to the defense's further objection. Because the defense never renewed its objection, or obtained a ruling, the issue was not preserved. *See also Rose v.*

State, 787 So. 2d 786 (Fla. 2001) (Trial counsel's decision not to pursue a ruling resolved the issue, making court's failure to rule harmless.)

To the extent this Court determines that the record preserves Defendant's claim for admission of this testimony for purposes of establishing the reputation of Mark Mullins, it should find the evidence was properly excluded. Defendant's argument again relies on completely incorrect statements of the evidence.

The *only* testimony Mr. Farmer offered about Mark Mullins was:

> "Mark had a much more forceful way when it come to collecting money from people than I was down with. . . . I'm a firm believer that if you can take care of something without incident, then that's the route to take. Mark pretty much didn't care. . . . He was much more aggressive in his approach to collecting money. . . . Mark – Mark was a little – little too off the chain when it came to, you know, how he wanted to collect money. "

(T 1591-1592).

Mr. Farmer was offering only his personal opinion of Mark Mullins, based only on the "few occasions" that Mr. Farmer met with Mr. Mullins and talked about business. (T 1584). Contrary to the Defendant's assertions in his Initial Brief at page 78, there is absolutely no testimony from Mr. Farmer that he had knowledge of Mr. Mullins' use of an "enforcer." His only testimony to that issue is that Mr. Mullins never asked him (Mr.

Farmer) to do any collections for him. (T 1584). There is no testimony as to Mr. Mullins' general reputation, that Mr. Mullins had killed anyone in the course of his drug trade or any specific forms of violence he had used, or that Mr. Farmer had *heard from any other source* that Mr. Mullins had violent tendencies or a reputation for violence.

Because Mr. Farmer's testimony did not show that he knew what other persons in the drug trade thought of Mr. Mullins, and did not define the "community" that included Mr. Mullins, the testimony is not admissible as relevant reputation evidence under Fla. Stat. § 90.405 (2003). To be admissible reputation evidence, the witness offered must be aware of the person's general reputation in the community, and that community must be sufficiently broad to provide adequate knowledge and a reliable assessment. *See, Ibar v. State*, 938 So. 2d 451 (Fla. 2006), *cert. denied,* 127 S. Ct. 1326 (Feb. 20, 2007); *Larzelere v. State*, 676 So. 2d 394 (Fla. 1996); Charles W. Ehrhardt, *Florida Evidence*, § 405.1, at 257-58 (2005 ed.).

Neither did Mr. Farmer testify as to the "interaction of individuals involved in the drug trade in the immediate area." The only statement he made that could be interpreted to be about the drug trade in general was "You know, there's a lot of guys out there that do what we do, and I don't agree with a lot of their tactics, you know." (T 1592). In fact, Mr. Farmer

testified that he preferred to resolve things without incident. (T 1586, 1591-1592). He mentioned only two individuals he believed were violent. (T 1592). This testimony did not establish any pattern of behavior or reputation and therefore also is not relevant and is not admissible.

Finally, none of Mr. Farmer's testimony satisfies the standard a defendant must meet in order to introduce evidence tending to support the theory that another person is responsible for the crime of which the defendant is accused:

> If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense. Evidence of bad character or propensity to commit a crime by another would not be admitted; such evidence should benefit a criminal defendant no more than it should benefit the state.

State v. Savino, 567 So. 2d 892 (Fla. 1990).

The testimony of Mr. Farmer about his own experience and limited interaction with Mark Mullins included no evidence relevant to the crimes charged against Defendant. To allow Defendant to introduce the testimony to support his theory that Mark Mullins was responsible for the murders would require "stacking one inference upon another, which we decline to do." *Merck v. State,* 664 So. 2d 939, 942 (Fla. 1995) (defendant could not demonstrate evidence was material or exculpatory without

impermissibly stacking inferences)." *Mendoza v. State*, __ So. 2d ___32 Fla. L. Weekly 278 (Fla. May 24, 2007). Neither can Defendant introduce general "bad character" evidence. *State v. Savino*, 567 So. 2d 892 (Fla. 1990).

Defendant misstates even his own trial testimony when he argues that Mr. Farmer's testimony should be admitted to corroborate Defendant. Defendant did not testify to seeing Mark Mullins hold a gun to anyone's head. Defendant's testimony was that he had seen someone who worked for Jeremy Jarvis put a gun in someone's mouth and threaten him. (T 4171). Defendant's testimony was that he "had seen a couple of incidents" of violence and heard stories about other people. (T 4170). When his own counsel asked him if he had seen "that kind of behavior" with Mark Mullins, his answer went no farther than "Yes. Yes I have."(T 4171).

A trial court has broad discretion to determine if evidence is relevant. Its findings should not be disturbed absent an abuse of that discretion. *Taylor v. State,* 855 So. 2d 1, 21 (Fla. 2003). *Ray v. State,* 755 So. 2d 604 (Fla. 2000). A trial court's rulings as to the excluded evidence should be reviewed under the abuse of discretion standard. *See, e.g., LaMarca v. State*, 785 So. 2d 1209, 1212 (Fla. 2001) (explaining that a trial judge's rulings on the admission or exclusion of evidence are reviewed under the abuse of discretion standard). Under the

abuse of discretion standard, "[d]iscretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" *Trease v. State*, 768 So. 2d 1050, 1053 n. 2 (Fla. 2000) (quoting *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990)).

Defendant incorrectly states the standard when he argues in his brief that due process is violated if any evidence supporting a defendant's theory is excluded. *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990) states specifically: "the admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant." 561 So. 2d at 539. *U.S. v. Scheffer*, 523 U.S. 303 (1998) and *Chambers v. Mississippi*, 410 U.S. 284 (1973) apply the same standard. "[T]he accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers,* 410 U.S. at 302.

The trial court's ruling excluding the testimony of William Farmer should be affirmed.

Even if exclusion of William Farmer's testimony was error, it did not affect the outcome of the trial and was therefore harmless error. In *Reynolds v. State*, 935 So. 2d 1128 (Fla.

2006) this Court upheld a conviction when DNA evidence connected the defendant to the crime and other circumstantial evidence showed motive and the presence of the defendant at the crime, despite the trial court's erroneous evidentiary ruling excluding what the Defense contended were exculpatory statements by other persons. Because of the substantial evidence, the Court found that the error was harmless beyond a reasonable doubt. 935 So. 2d at 1140.

In this case, Defendant confessed to the crime. Overwhelming physical evidence placed Defendant at the scene of the crime. Evidence established that Mark Mullins, the person Defendant sought to associate with the crime through the proffered evidence, could not have been at the scene of the crime. The mere inference that some other persons in the drug trade are violent could not create reasonable doubt as to the Defendant's guilt. Because there is no reasonable possibility that the exclusion of Mr. Farmer's testimony contributed to the conviction, error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129.

III & IV. THE TRIAL COURT PROPERLY DENIED THE CLAIMS UNDER *RING*

Defendant contends in issues III and IV that Florida's capital sentencing statute is facially unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002), because the judge rather than the jury makes the findings of fact necessary to impose the death sentence. He also asserts that this Court is incorrect to hold that the presence of the prior felony aggravator satisfies *Ring*. Defendant filed a pretrial motion challenging the legality of Florida's death penalty under *Ring* because the judge rather than the jury imposes sentence, jury unanimity is not required as to the sentence recommendation, and there is no requirement for a jury finding for each aggravator.

As this Court only recently stated:

> However, in over fifty cases since *Ring*'s release, this Court has rejected similar *Ring* claims. *See Marshall v. Crosby*, 911 So. 2d 1129, 1134 n.5 (Fla. 2005), *cert. denied*, 126 S. Ct. 2059 (2006). As the Court's plurality opinion in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), noted, "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." *Id.* at 695 & n.4 (listing as examples *Hildwin v. Florida*, 490 U.S. 638 (1989), *Spaziano v. Florida*, 468 U.S. 447 (1984), *Barclay v. Florida*, 463 U.S. 939 (1983), and *Proffitt v. Florida*, 428 U.S. 242 (1976)); *see also King v. Moore,* 831 So. 2d 143 (Fla. 2002) (denying relief under *Ring*).
>
> *Ring* did not alter the express exemption in *Apprendi v. New Jersey*, 530

> U.S. 466 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the cases. This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying *Ring* claims. See, e.g., *Smith v. State*, 866 So. 2d 51, 68 (Fla. 2004) (denying relief on *Ring* claim and "specifically not[ing] that one of the aggravating factors present in this matter is a prior violent felony conviction"); *Davis v. State*, 875 So. 2d 359, 374 (Fla. 2003) ("We have denied relief in direct appeals where there has been a prior violent felony aggravator."); *Johnston v. State*, 863 So. 2d 271, 286 (Fla. 2003) (stating that the existence of a "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt"); *Henry v. State,* 862 So. 2d 679, 687 (Fla. 2003) (stating in postconviction case that this Court has previously rejected *Ring* claims "in cases involving the aggravating factor of a previous violent felony conviction").
>
> Additionally, this Court has rejected claims that *Ring* requires the aggravating circumstances to be individually found by a unanimous jury verdict. *See Hodges v. State*, 885 So. 2d 338, 359 nn.9-10 (Fla. 2004); *Blackwelder v. State*, 851 So. 2d 650, 654 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003).

Frances v. State, __ So. 2d __, 32 Fla. L. Weekly 613 (Fla. Oct. 11, 2007).

The trial court's denial of the claims under *Ring* should be affirmed.

V & VI. DEFENDANT HAS NOT PRESERVED FOR APPEAL AN OBJECTION TO PENALTY PHASE JURY INSTRUCTIONS.

Issues V and VI of Defendant's Initial Brief attack the constitutionality of penalty phase jury instructions. Defendant has waived these arguments by failing to object when the penalty phase jury instructions were given.

To preserve for review by the appellate court an objection to jury instructions, objections must be made at the time the instruction is given. Jury instructions "are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred." *Walls v. State*, 926 So. 2d 1156, 1180 (Fla. 2006). In *Nelson v. State*, 850 So. 2d 514, 525 (Fla. 2003) this Court reiterated the necessity for making a contemporaneous objection, even if a pre-trial motion has been filed:

> As to the avoid arrest aggravator instruction, we agree with the State that Nelson did not properly preserve this issue for review. Although the record reflects that Nelson filed a motion to declare sections 921.141 and 921.141(5)(e), Florida Statutes (1997), unconstitutional, Nelson did not specifically address the avoid arrest jury instruction in that motion. Further, Nelson did not object to the adequacy of the avoid arrest jury instruction at trial. This Court has held that the contemporaneous objection rule applies to *Espinosa* challenges. See *Hodges v. State*, 619 So. 2d 272, 273 (Fla. 1993). **Failure to make an objection at trial about a jury instruction will render it**

> **procedurally barred.** *See id*. **Because the record reflects that Nelson did not object to the avoid arrest aggravator jury instruction at trial, we find this issue procedurally barred.**

850 So. 2d 525 (emphasis added).

In *Walls* this Court found that only the jury instructions that were objected to at the time they were given were properly preserved for review on appeal, and re-adopted the rule in *Hodges v. State,* 619 So. 2d 272, 273 (Fla. 1993). In *Hodges*, this Court reviewed the case on remand from the United States Supreme Court in light of its ruling that jury instructions on the heinous, atrocious or cruel aggravator were unconstitutionally vague. The Court noted both that the specific aggravators ruled on by the United States Supreme Court had not been at issue in Mr. Hodges' case, and that no objection to the penalty phase jury instructions had been made at the time they were given:

> The trial court gave the standard instruction on the cold, calculated, and premeditated aggravator, but Hodges did not object to the form of that instruction, nor did he request an expanded instruction on this aggravator.
>
> The contemporaneous objection rule applies to *Espinosa* error, i.e., a specific objection on the form of the instruction must be made to the trial court to preserve the issue for appeal. *E.g.*, *Thompson v. State*, 619 So. 2d 261, 1993 Fla. LEXIS 587, 18 Fla. Law W. S 212 (Fla. 1993); *Burns v. State*, 609 So. 2d 600 (Fla. 1992); *Melendez v. State,* 612 So. 2d 1366, 1992 Fla. LEXIS

> 1931, 17 Fla. Law W. S 699 (Fla. 1992); *see Sochor v. Florida*, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992). **Despite the failure to object at trial, Hodges challenged the constitutionality of the cold, calculated instruction on appeal. We summarily found the issue meritless, but we should have held it procedurally barred because Hodges did not preserve it for review by objecting at trial. Therefore, we now hold that the sufficiency of the cold, calculated instruction has not been preserved for review.**

619 So. 2d 273.

The charging conference for the penalty phase of the trial was brief, and is reproduced here in its entirety:

> CHARGE CONFERENCE
>
> THE COURT: You all have a packet of the instructions?
>
> MR. CASTILLO: Yes, sir.
>
> THE COURT: I have reviewed them. They appear to be standard. Is there any additions or corrections by the State?
>
> MR. CASTILLO: No, sir.
>
> THE COURT: Any additions or corrections by the defense?
>
> MR. HILEMAN: I'll defer to Mr. Carmichael on that one, Judge.
>
> MR. CARMICHAEL: Judge, I have reviewed those, and we have no additions or deletions.
>
> THE COURT: Okay. And closing arguments. The State will open their argument?
>
> MR. CASTILLO: Yes, sir.

(T 4960)

Defendant was given another opportunity to object after the judge had finished giving the jury the standard instructions, and the Defendant again declined to do so:

> [THE COURT] . . . Are there any additional instructions or corrections by the State?
>
> MR. CASTILLO: No, sir.
>
> THE COURT: Any by the defense?
>
> MR. HILEMAN: No, Your Honor.

(T 5023)

Defendant failed to object to the jury instructions at the time they were given. The issue is barred from consideration on appeal.

Even if the argument that the penalty phase jury instructions unconstitutionally shift the burden of proof had been preserved, it is without merit. This Court has repeatedly rejected the argument that the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence. *See, e.g., Elledge v. State*, 911 So. 2d 57, 79 (Fla. 2005); *Sweet v. Moore*, 822 So. 2d 1269, 1274 (Fla. 2002).

Neither do the jury instructions improperly minimize the role of the jury. Informing the jury that their recommendation is advisory is a correct statement of Florida law and does not

violate *Caldwell v. Mississippi*. *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988). The trial court should be affirmed.

VII. DEFENDANT HAS NOT PRESERVED FOR APPEAL HIS CLAIM THAT EXECUTION BY LETHAL INJECTION IS CRUEL AND UNUSUAL PUNISHMENT.

In the trial court, defendant made no claim that execution by lethal injection is unconstitutional. The only claims made by Defendant that were at all related to imposing the death penalty was a claim that Florida's procedures for imposing the death sentence are unconstitutional. (R 456). Defendant's claim is procedurally barred. If the specific claim raised on appeal is not raised to the trial court, the claim is not preserved for appeal. *Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003) ("[T]he specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal."); *Finney v. State,* 660 So. 2d 674, 683 (Fla. 1995)(citing *Harmon v. State*, 527 So. 2d 182, 185(Fla. 1988); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982).

Even if the issue were not procedurally barred, this Court has found over and over again that death by lethal injection is not cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution and under the Florida Constitution. *Diaz v. State*, 945 So. 2d 1136 (Fla.), *cert. denied*, 127 S. Ct. 850 (2006); *See Sims v. State,* 754 So. 2d 657, 668 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment); *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000); *Johnson v. State*, 904

So. 2d 400, 412 (Fla. 2005); *Robinson v. State*, 913 So. 2d 514 (Fla. 2005). This Court has consistently rejected arguments this method of execution is unconstitutional. *See, e.g., Suggs v. State,* 923 So. 2d 419, 441 (Fla. 2005); *Sochor v. State*, 883 So. 2d 766, 789 (Fla. 2004) (rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); *Provenzano v. Moore*, 744 So. 2d 413, 414-15 (Fla. 1999) (holding that execution by electrocution is not cruel and unusual punishment).

Not only has this Court found that lethal injection is not cruel and unusual punishment, it has ruled against Defendant's argument that the specific procedures followed by Florida in administering the lethal injection is not cruel and unusual punishment The question was definitively settled in the Court's recent opinions. *Lightbourne v. McCollum*, _____ So. 2d __, 32 Fla. L. Weekly 707 (Fla. Nov. 1, 2007) and Schwab *v. State*, _____ So. 2d __, 32 Fla. L. Weekly 707 (Fla. Nov. 1, 2007).

Defendant's argument must be rejected and the trial court's sentence must be affirmed.

VIII. THERE WAS SUFFICIENT COMPETENT EVIDENCE TO CONVICT THE DEFENDANT OF FIRST DEGREE MURDER

This Court addresses the sufficiency of evidence in each capital case, even in the absence of argument by Defendant. *Ferguson v. State*, 417 So. 2d 639, 642 (Fla. 1982). In this case there is more than ample evidence to sustain the conviction.

An appellate court will not reverse a conviction that is supported by competent, substantial evidence. *Donaldson v. State*, 722 So. 2d 177 (Fla. 1998); *Terry v. State*, 668 So. 2d 954, 964 (Fla. 1996)). If, after viewing the evidence in a light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. *Reynolds v. State*, 934 So. 2d 1128, 1145 (Fla. 2006); *Banks v. State*, 732 So. 2d 1065 (Fla. 1999).

In this case, Defendant confessed to the crime, providing details available only to the killer. (T 3777). DNA evidence showed the victims' blood was in the truck Defendant was driving the day of the murders. DNA consistent with Defendant's was under the fingernails of one of the victims. (T 3128-33, 3140-41, 3193). Witnesses described the killer's appearance in a way that fit Defendant. (T 1833-34, 2378, 2390, 2411, 2437-38). Defendant had a motive to rob Jeremy Jarvis of the marijuana he knew would be worth thousands of dollars. (T 3049, 4185-86,

4257). Defendant admitted to being at the crime scene. (T 3640-41). He admitted having a knife similar to the murder weapon. (T 3965). He tried to change his appearance shortly after the crime. (T 3272, 3276). Defendant gave inconsistent explanations of his actions on the day of the murder and the days following. (T 3353-62). There is more than sufficient evidence to sustain Defendant's conviction. *See Reynolds*, 934 So. 2d 1128.

IX. THE DEATH SENTENCE IN THIS CASE IS PROPORTIONATE

In deciding whether a death sentence is proportionate, this Court must consider the totality of the circumstances and compare the case with other similar capital cases. *See Sexton v. State,* 775 So. 2d 923, 935 (Fla. 2000). This analysis "is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). Instead, this Court must look to the nature of, and the weight given to, the aggravating and mitigating circumstances. For purposes of proportionality review, this Court accepts the jury's recommendation and the weight the trial judge gives to the aggravating and mitigating evidence. *See Bates v. State,* 750 So. 2d 6, 12 (Fla. 1999).

The evidence during the guilt and penalty phase proved that Defendant carried out a bloody knife attack against the two victims. Allison Sousa was eliminated so she could not be a witness. She was a bystander who had no connection to the crime other than that she could identify Defendant. Defendant's face was clearly visible to Ms. Sousa. Defendant interrupted her as she was making a 911 call. To make his escape, Defendant could easily have simply pushed aside the 110 pound woman or locked her into an office. Instead, Defendant chased and stabbed Ms. Sousa repeatedly, even as she pleaded "don't hurt me."

This evidence supports the trial court's determination that the aggravators had been established and the judge's decision to give great weight to the heinous atrocious and cruel aggravator and the prior violent felony aggravator regarding both murders, and giving great weight to the avoid arrest aggravator regarding Ms. Sousa.

The only statutory mitigator that Defendant could establish was lack of a significant criminal history, which the court gave little weight because Defendant testified that he had broken the law for years to indulge his drug habit. The non-statutory mitigators established by Defendant based on his relationship with his family and his education were given little weight. The ministers' testimony that Defendant had found religion in jail was given little weight.

This Court has found the death to be the appropriate penalty in other cases involving similar aggravating and mitigating circumstances. *See e.g., Frances v. State,* ____ So. 2d ___, 32 Fla. L. Weekly 613 (Fla. Oct. 11, 2007)(Sentence of death for two murders was proportionate, even though trial court found statutory mitigating factor of age and nonstatutory mitigating factors relating to defendant's history, personality, and conduct and gave "serious weight" to them. Crimes involved murder of two victims by manual and ligature strangulation.); *Schoenwetter v. State*, 931 So.2d 857 (Fla. 2006)(Death sentences

imposed on defendant following convictions for two counts of first-degree murder were proportional compared to death sentences imposed in similar capital cases; three aggravators, prior violent felony, murder committed during a burglary, and murder committed to avoid arrest, where applicable to both murders, aggravator of victim being less than twelve years old applied to one of the murders, and aggravator that murder was heinous atrocious of cruel applied to other murder). *Duest v. State,* 855 So.2d 33 (Fla. 2003) (finding death sentence proportionate where victim was stabbed multiple times and the trial court found several aggravators including prior violent felony and HAC, no statutory mitigators and twelve nonstatutory mitigators, including a history of drug and alcohol abuse, willingness and ability for rehabilitation, lack of intent to kill, and a physically and mentally abusive childhood); *Overton v. State,* 801 So.2d 877 (Fla. 2001)(Two victims died from strangulation and had numerous defensive wounds indicating a struggle; court found five aggravators-- HAC, CCP, prior violent felony, felony murder, and avoid arrest--no statutory mitigators).

CONCLUSION

There is sufficient evidence to support the trial court's rulings and the conviction and sentence. The Defendant has failed to show any abuse of discretion in the trial court's evidentiary rulings. The conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by United States Mail to Robert A, Norgard and Andrea M. Norgard, attorneys for the Appellant, P.O. Box 811, Bartow, Florida 33831 this ___ day of December, 2007.

_____
Stormie Stafford
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

_____
Assistant Attorney General