IN THE SUPREME COURT OF FLORIDA

THOMAS W. RIGTERINK,

Appellant, Case No. SC05-2162

vs. Lower Ct. NO. CF03-006982-XX

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

OTHER AUTHORITIES:

TABLE OF CITATIONS

PRELIMINARY STATEMENT

This appeal comes to this Court from a sentence of death imposed by the trial court. Volumes I-V of the record contain the documents supplied by the clerk and will be referenced in the Initial Brief by the volume number, "R", and the page number. Volume V also contains the first 146 pages of voir dire. Volumes V-XXXIII contains the transcripts of the proceedings. The transcripts will be referenced in the Initial Brief by the volume number, "T", and the page number. There is one Supplemental Record of transcripts, which will be referenced in the brief as "SR", followed by the page number. The Appellant, Thomas Rigterink, will be referred to by his proper name. The Appellee, the State of Florida, will be referred to as the "State".

STATEMENT OF THE CASE

The Appellant, Thomas W. Rigterink was indicted by the Grand Jury, in and for the Tenth Judicial Circuit, Polk County, Florida, on November 3, 2003, with two counts of First-Degree Murder, contrary to §782.04 and §775.087 Florida Statutes (2002), in the deaths of Jeremy Jarvis and Allison Sousa on September 24, 2003.(I,R128-129) The State filed a Notice of Intent to Seek the Death Penalty on

November 6, 2003.(I,R136)

Defense counsel filed a Motion to Suppress Statements and Admissions with Attached Exhibits on August 20, 2004.(II,R191-212) A hearing was conducted on the Motion to Suppress on November 24, 2004.(II,R216-339) The trial court entered an order denying the motion on January 19, 2005. (III,R340-342). The defense filed a Motion for Rehearing on January 28, 2005.(III,R343-358) The original denial was adopted by the trial judge.

The defense filed numerous motions challenging the constitutionality of the capital punishment procedure, including motions challenging penalty phase jury instructions, the lack of unanimity in the jury recommendation, judicial imposition of sentence rather than jury, and violations of the Eighth Amendment.(I,R369-371;392-399;409-413;456-481;482-514) The motions were denied. (I,R516-518)

A jury trial was held on August 15 through September 9, 2005, before Judge J. Dale Durrance, Circuit Judge. (IV,T1-146,V-XXXIII). The parties stipulated to the identities of both victims.(IV,R585) The jury returned a verdict of guilty of First-Degree Murder as to both counts on September 9, 2005.(IV,R611-612;XXXI,T4558-4561)

Penalty phase was conducted on September 14-15, 2005. (XXXI,T4570-4695;XXXII) The jury returned a recommendation of death by a vote of 7-5 on each count on September 15, 2005.(IV,R613-614)

Following the penalty phase, both the defense and State submitted sentencing memorandum for the court's consideration.(IV,R615-621(State);622-633(Defense)).

Prior to the scheduled Spencer hearing, defense counsel filed a Motion to Continue both the Spencer and Sentencing Hearings and a Motion to Appoint an Expert Advisor.(IV,R634-638) The defense sought to obtain a neurological examination and assessment of Mr. Rigterink. (IV,R635-638) A hearing was held on the both motions on October 6, 2005.(IV,R639-666) After argument of both parties, the trial court denied both motions.(IV,R666-667;V,R730-733) The parties then proceeded to conduct the Spencer hearing.(IV,R667-678) No additional evidence was submitted and no additional argument made.

The trial court imposed sentence on October 14, 2005. (IV,R678-703) On Count 1 the trial court found the aggravating circumstances of prior violent felony conviction for the contemporaneous crime (great weight) and HAC (great weight).(IV,R684-687) As to Count 2, the trial

court found the aggravating circumstance of prior violent felony conviction for the contemporaneous crime (great weight), murder committed for the purpose of avoiding or preventing a lawful arrest (great weight), and HAC (great weight).(IV,R688-692). The trial court found the following mitigation: no significant prior criminal history (some weight), drug use (little weight), reputation as a peaceful person (some weight), kindness and attention to grandmother (some weight), desire to help other inmates (some weight), religious commitment (some weight), supportive family (moderate weight), capable of kindness (some weight), education (little weight), many friends, love for family, and religious commitment already considered and given some weight, kind to animals (little weight), sympathy for family of Ms. Sousa (little weight), ability to educate and be educated (some weight), and appropriate court room behavior (little weight).(IV,R692-700) The trial court rejected the following proposed mitigation as unproven: remorse, ability to recognize own mistakes, and proof of premeditation not great.(IV,R700-701)

The trial court imposed a sentence of death on Counts 1 and 2. (IV,R702) The written sentencing order was filed on October 17, 2005.(V,R706-729)

A Notice of Appeal was filed on November 4, 2005.(V,R734) An Amended Notice of Appeal was filed on November 30, 2005.(V,R744)

STATEMENT OF THE FACTS

Alexander Bove was driving east on Highway 542 near Winter Haven, Florida around 3:05 p.m. on September 24, 2003.(XV,T1827) Mr. Bove saw two men on a sidewalk in front of a building. One man, clad in a white T-shirt with red on it, was on the ground. (XV,T1829) The second man was standing over the man on the ground and was trying to drag him.(XV,T1828,1831,1843) Mr. Bove testified the man on the ground got up and ran towards him. He pulled off his T-shirt while trying to get away from the second man and left in on the sidewalk.(XV,T1830,1845) Mr. Bove saw the man was injured and observed a large amount of blood on him.(XV,T1830) Then the second man went into the building and returned with a large filet knife in his hand.(XV,T1828,1832,1848) The man with the knife chased the injured man toward Mr. Bove's vehicle.(XV,T1828,1832) Mr. Bove saw the injured man go into another part of the building.(XV,T1846) Mr. Bove drove straight home and contacted 911. (XV,T1834)

Mr. Bove described the injured man as being 5’8”, 150-200 lbs., and with dark brown hair.(XV,T1833) Mr. Bove described the man with the knife as being 6’-6’3”, 150-200 lbs., with dark brown hair and wearing a white shirt and dark colored pants.(XV,T1834) Mr. Bove estimated the ages of both men to be in their 20’s to mid 30’s.(XV,T1834)

Amanda Short testified that in September 2003 she and Mrs. Allison Sousa were employed by Total Construction Management, which occupied units 1 and 2 of an office complex on Highway 542.(XVIII,T2361-62) Mrs. Sousa worked near the reception area in unit 1 and Mrs. Short worked in an adjacent office contained in unit 2.(XVIII,T2364) Both women had telephones in their work areas.(XVIII,T2364)

Around 3:00 p.m. on September 24, 2003, Mrs. Short was on the telephone when Mrs. Sousa came to her with concerns about some noises outside.(XVIII,T2365) They went to the front door and opened it.(XVIII,T2365) Mrs. Short could hear someone screaming.(XVIII,T2366) Mrs. Short watched Mrs. Sousa look toward unit 5, and from her reaction could tell that she saw something.(XVIII,T2369-70) Mrs. Sousa jumped back and almost immediately a dirty, sweaty, and bloody man appeared.(XVIII,T2371) The man was frantic and wanted help.(XVIII,T2371)

Mrs. Short and Mrs. Sousa let the man enter unit 1. (XVIII,T2372) The man was shirtless and was bleeding heavily from his side.(XVIII,T2373) They had the man sit in a chair next to the door.(XVIII,T2373) Mrs. Sousa told Mrs. Short to get some towels from the kitchen while she called 911.(XVIII,T2374)

Mrs. Short was walking to the kitchen when she heard a door slam.(XVIII,T2376) She turned and saw someone cross the reception area and go very quickly toward Mrs. Sousa.(XVIII,T2377;2383) Mrs. Short was able to see a side view of the person. It was not the man who was bleeding. (XVIII,T2380)

Mrs. Short testified the man who entered was wearing a white T-shirt and dark denim shorts.(XVIII,T2380) He was white, with dark hair, six feet tall, slender, somewhat olive skinned, had no hair on his forearms, and appeared to be in his early to late 20's.(XVIII,T2381;2402;2412) Mrs. Short was unable to later identify the person she saw from a police photopak, but did select a photo that looked most like the person.(XVIII,T2399-2405) Mrs. Short thought the man saw her as he crossed the reception area.(XVIII,T2387)

Mrs. Sousa could see the man coming towards her.(XVIII,T2382) Mrs. Short heard Mrs. Sousa scream

“Please don’t hurt me” as the man came toward her. (XVIII,T2384;XIX,T2425)

Mrs. Short turned and ran to the back of the building.(XVIII,T2384) She went into unit 2, dead-bolted the door, and called 911.(XVIII,T2385) Mrs. Short could hear banging and scuffling coming from unit 1. (XVIII,T2386) At one point there was pounding or banging on the door of the office she was in.(XVIII,T2390) The 911 operator told Mrs. Short to stay inside the locked office until the police came.(XVIII,T2391) When the police arrived she was hysterical.(XVIII,T2395)

911 operator Angela Clay received three 911 calls on September 24- two from the crime scene at Highway 542 and one from a different location.(XIX,T2453-2454) The two calls from the crime scene were received almost simultaneously at 3:07 p.m.(XIX,T2456) The first call had an “open line”, meaning that 911 could hear someone, but there was no communication established.(XIX,T2456) The tape of the first call contained the voice of the operator saying “Hello”, followed by a voice saying “Oh, my God. Don’t—don’t hurt me. No.”(XIX,T2460) The operator reported hearing sounds and something being thrown around. (XIX,T2460) The first call lasted four minutes.(XIX,T2457)

The second call was received nine seconds later and reported a break-in.(XIX,T2457) The caller, Amanda Short, was frantic.(XIX,T2457,2461-2484)

Polk County Sheriff Deputy David Jones was dispatched at 3:13 p.m. to respond to a building on Highway 542.(XV,T1854) He arrived at 3:18 p.m.(XV,T1854) Deputy Jones saw that the door of unit 5 was opened and he observed blood on the interior wall.(XV,T1855) Deputy Jones called for backup and Deputy Mackie arrived quickly.(XV,T1855;XVI,T1922) Deputy Mackie stopped at unit 1.(XV,T1855;XVI,T1923) After securing the front of the building, Mackie went to the back of unit 1 and discovered the bodies of Jeremy Jarvis and Allison Sousa. (XV,T1855;XVI,T1925-1928) The bodies were covered in blood.(XVI,T1928) Mr. Jarvis was wearing shorts and did not have a shirt on. Ms. Sousa was fully clothed. (XVI,T1929)

The deputies then began to search unit 1 and unit 5.(XV,T1856) They rattled a locked office door in the back of unit 1.(XV,T1856) Amanda Short opened that door. (XV,T1857;XVI,T1931)

A statement was taken from Ms. Short.(XV,T1859) Ms. Short said the man who came into unit 1 with a knife was a

white male, 27 years old, with straight black collar-length hair and a medium build.(XV,T1862)

Various crime scene technicians processed unit 5, unit 1, and the sidewalk between the two units. (XV,T1868-1895;XVI) A video of the crime scene was made and shown to the jury.(XVI,T1960-1965)

Splashes of blood were found on the sidewalk between unit 5 and unit 1 and were consistent with someone moving quickly.(XV,T1879-1883;XX,T2731) A bloody T-Shirt with apparent knife holes was found on the sidewalk. (XVI,T1912;1916) The shirt belonged to Mr. Jarvis. (XVI,T1913) It was determined that Mr. Jarvis lived in unit 5.(XVI,T2049)

Smeared blood was observed on the exterior and the interior of the doorway to unit 5.(XV,T1884) The miniblinds on the door had blood on them.(XV,T1885) Blood was found on the wall and security system keypad near the door. (XV,T1886;XX,T2741) Blood was found on the floor of the front room of unit 5.(XV,T1887) There were large bloodstains on the wall, woodwork, and baseboard. (XV,T1888;XVI,T1903) The blood on the wall was consistent with a contact stain.(XX,T2737) It appeared that a scuffle had taken place in the front room area of unit 5.

(XVI,T1903) The sofa was turned over and there was blood on the sofa cushions.(XV,T1892-93;XVI,T1898) Blood was also found around and underneath the sofa.(XVI,T1900) A bloody handprint appeared to be on the wall.(XV,T1893) A partial bloody shoe print was observed on the floor. (XV,T1894)

A large quantity of marijuana was found under the bed in unit 5.(XVI,T1905;1913;2018) Marijuana was also found in a laundry basket and inside a backpack.(XVI,T2025-2027) The weight of the first sample was 22.2 grams.(XXII,T3078) The second sample weighed 282.2 grams.(XXII,T3082) The weight of the third sample was 439.9 grams.(XXII,T3085) One pound contains 454 grams.(XXII,T3089)

Attempts were made to collect fingerprints from unit 5.(XVI,T1987) A total of 25 prints were collected from unit 5.(XVI,T2041) All the prints were identified as belonging to Mr. Jarvis.(XXI,T2940-2945)

Unit 1 was the business office for Total Construction. It contained a warehouse unit, storage room, bathroom, kitchen area, three offices, reception area, and lobby.(XVII,T2074)

The bodies of Mr. Jarvis and Mrs. Sousa were found in the warehouse area.(XVII,T2076;2205-2209) Two handprints in

blood were in this area.(XVII,T2080) Several bloody shoe impressions were found.(XVII,T2081) No shoe prints were found leading out of the warehouse.(XVIII,T2287) The door leading into the warehouse was damaged and had a bloody handprint on it.(XVII,T2081)

The lobby area of unit 1 had large amounts of blood on the floor.(XVII,T2094) Blood smears were found on the pass through and reception window.(XVII,T2097) A chair in the lobby had bloodstains on the backrest.(XVII,T2099) A hallway leading to the offices had large amounts of blood on the floor with several shoe impressions.(XVII,T2094) Blood in the lobby was consistent with blunt force trauma occurring in the area.(XX,T2743)

A broken hair clip and blood was found in the first office/reception area.(XVII,T2077) The desk phone was off the hook. Blood was found on the phone and the surrounding area.(XVII,T2078) Blood was found under the desk. (XVII,T2105) Mrs. Sousa's purse was found on the floor next to the telephone.(XVII,T2111)

Blood covered the hallway floor and walls leading toward the warehouse area.(XVII,T2137-2166) A broken gumball machine with vomit around it was in the hall.(XVII,T2137) Partial bloody shoe impressions were

found in this area.(XVII,T2138)

The kitchen area had blood on the refrigerator and trash can.(XVII,T2175) Blood was also on the wall, countertops, cabinets, and floor of the kitchen leading into the warehouse area consistent with contact. (XVII,T2179-2189;XX,T2746) No latent prints were processed from unit 1.(XVIII,T2310-2313)

Dr. Vera Volnikh performed the autopsies.(XXI,T2827-2927) The fingerprints of Mrs. Sousa and Mr. Jarvis were obtained.(XIX,T2491) During the autopsy fingernail scrapings and blood samples were taken from Mrs. Sousa and Mr. Jarvis.(XX,T2659-2669) Dr. Volnikh found numerous stab wounds and abrasions to Mr. Jarvis's face, neck, hand, fingers, torso, and back.(XXI,T2833-2872) Several of the wounds penetrated by depths of six inches or more. (XXI,T2841,2844,2862) Mr. Jarvis lost a significant amount of blood and died due to hypovolemic shock within several minutes.(XIX,T2872-3) Mr. Jarvis had anti-anxiety drugs and marijuana in his blood at the time of his death.(XXI,T2901)

Mrs. Sousa suffered several stab wounds of up to seven inches in depth.(XXI,T2879-2885,2889) Mrs. Sousa bled to death from a stab wound to her chest.(XXI,T2885-2886,2896)

She would have lived for several minutes after the wound was inflicted.(XXI,T2897)

A cell phone belonging to Mr. Jarvis was found in unit 5.(XIX,T2545) A list of numerous outgoing and incoming calls was retrieved from the phone.(XIX,T2547-2549) Eventually every phone number was traced.(XIX,T2550) One phone number was traced to Kate Enriquez at Firestone Place, a Dundee housing development.(XIX,T2550) Several calls were to Marshall Mark Mullins, a potential lead.(XXIV)

Sgt. Jerry Connolly made contact with Mr. Mullins at his home on the evening of September 24.(XXIV,T3321) Mullins was known to be involved in the drug business.(XXV,T3485;3506) Mullins claimed that he was at work at 3:00 p.m. on the 24th.(XXIV,T3322) The next day Sgt. Connolly made contact with Randy Pilkington, Mullins' boss and Richard Champion, the customer Mullins claimed to be working for.(XXIV,T3322) Sgt. Connolly confirmed Mullins' work claim through Mr. Pilkington and Mr. Champion.(XXIV,T3323) Focus then shifted away from Mr. Mullins as a suspect, so Mrs. Short was never shown his photograph.(XXIV,T3323;XXV,T3485)

Sgt. Connolly also made contact with a suspect named

Nathan Roberson.(XXV,T3479-80) Mr. Roberson was found to have cuts and scratches on his arms when interviewed on September 30, 2003.(XXV,T3480) Mr. Roberson had a history of abnormal behavior. He provided an alibi for the 24th, but then recanted the alibi.(XXV,T3481) Mr. Roberson's whereabouts could not be corroborated.(XXV,T3482) Mr. Roberson had body piercings and tattoos that were inconsistent with Mrs. Short's description.(XXV,T3531)

A handful of the people that were interviewed as suspects mentioned that someone might have a problem with Mr. Jarvis over his drug business.(XXV,T3507-09)

On September 24, Sgt. Britt Williams went to Firestone Place, but no one was home. He was told by a neighbor that Mr. Rigterink and Kate Enriques were married, but had separated and Mr. Rigterink was staying in the house with a girlfriend.(XX,T2600-2603) The neighbor gave Williams the phone number for James and Nancy Rigterink, Mr. Rigterink's parents, who then were called.(XX,T2604) Nancy Rigterink brought her son, Mr. Rigterink, back to Firestone Place the next day.(XX,T2604)

On the evening of September 25, Detectives Ivan Navarro and Tracy Smith and Sgt. Williams returned to Firestone Place.(XIX,T2552,2576) They spoke with Mr.

Rigterink at his residence.(XIX,T2553) Navarro told Mr. Rigterink that Jarvis had been murdered.(XIX,T2568) Mr. Rigterink appeared calm and did not have any injuries to his face or hands.(XIX,T2568,2595) According to Sgt. Williams, Mr. Rigterink said that he was expecting the police because he had talked to Mr. Jarvis the day before.(XX,T2606) Sgt. Williams thought Mr. Rigterink was "too cool". (XX,T2608)

Mr. Rigterink told the police that he was involved in a relationship with Ms. Courtney Sheil and was separated from Kate Enriques.(XIX,T2554) Mr. Rigterink said that he was in class at Warner Southern College on September 24 from 8 a.m. until noon.(XIX,T2555) Mr. Rigterink met Mr. Jarvis through mutual friends named Mark Mullins, Bill Giles, and Bobby Cannon.(XIX,T2571) Cannon was a known drug dealer.(XXIV,T3332)

Mr. Rigterink said that he had talked to Mr. Jarvis twice by telephone on the 24th- once around noon and once around two in an effort to buy marijuana from Jarvis.(XIX,T2556,2579) Mr. Rigterink said that he normally bought pot from Jarvis twice a week- on Monday and Friday. Mr. Rigterink said that when he talked to Mr. Jarvis at two, Jarvis was on his way to Lakeland.

(XIX,T2558) This information was consistent with the phone records, which showed a 50 second call from Mr. Rigterink to Mr. Jarvis at 12:25 p.m. and a 19 second call from Mr. Rigterink to Mr. Jarvis at 2:39 p.m. on September 24.(XIX,T2580;XXIV,T3327-3328)

Paul Able testified that he owns The Natives, Inc.(XX,T2711) He employed Mr. Rigterink until August 21, 2003.(XX,T2711) Mr. Rigterink worked outdoors.(XX,T2712) Mr. Rigterink was fired on August 21.(XX,T2712) At that time Mr. Rigterink told Mr. Able he was in dire financial condition and had no money for food or gas.(XX,T2712) Mr. Rigterink confirmed this testimony, stating when he and his wife separated, he had a large revenue loss.(XXVI,T3788) His parents began to provide him with money.(XXVI,T3790) Mr. Rigterink admitted that he was using a Natives company gas card for personal use, thus he was fired.(XXVI,T3794)

Mr. Roger Wardlow testified that he works at Ronnie’s Hair Care Center in Winter Haven.(XXIII,T3270) He cut Mr. Rigterink’s hair twice during September 2003- once on September 9 and once just a few days after the murders.(XXIII,T3272) After the September 9 haircut, Mr. Rigterink’s hair completely covered his ears and was over his collar.(XXIII,T3272) The second hair cut left Mr.

Rigterink's hair off his collar and off his ears.(XXIII,T3273) The first cut was with an appointment, the second cut was a walk-in.(XXIII,T3276) The second cut was a drastic change.(XXIII,T3281)

In early October, detectives learned that a print had been found on the door of unit 5.(XXIV,T3325) This led to a renewed elimination of suspects through the comparison of that print with prints belonging to people who had contact with Jarvis.(XXIV,T3325) Sgt. Connolly learned that there were no prints of Mr. Rigterink's on file and contacted him on October 9, 2003.(XXIV,T3326) Connolly asked Mr. Rigterink to come to the Sheriff's Office the next day, October 10, to give his fingerprints for elimination purposes.(XXIV,T3334) Mr. Rigterink agreed to come in.

Mr. Rigterink called Sgt. Connolly on October 10 to let him know that he had been unable to come in because he didn't have transportation. Mr. Rigterink rescheduled for October 13th. (XXIV,T3336) Mr. Rigterink did not appear on the 13th.(XXIV,T3338)

Sgt. Connolly tried to make contact with Mr. Rigterink in the afternoon on October 14th by going to his residence.(XXIV,T3339) The residence was secure and no one answered his repeated knocks.(XXIV,T3339-33341) An attempt

was made to contact Courtney Sheil and Mr. Rigterink's parents on October 14th and 15th.(XXIV,T3342) All were told that if they had contact from Mr. Rigterink they should contact the police immediately.(XXIV,T3342-43)

Nancy Rigterink called the police about 10:00 a.m. on October 16th. (XXIV,T3343) Sgt. Connolly went to her home, where he found Mr. Rigerterink with his parents. (XXIV,T3344) After Mr. Rigterink got dressed he told Sgt. Connolly that he knew that a couple of drug dealers who sold "Ice" from Lake Wales had killed Mr. Jarvis.(XXIV,T3345) Mr. Rigterink appeared afraid of these people.(XXIV,T3523) Sgt. Connolly asked Mr. Rigterink to come and give his fingerprints.(XXIV,T3345) Mr. Rigerterink was immediately taken to the sheriff's department by his parents for this purpose.(XXIV,T3345)

Mr. Rigerterink's fingerprints were taken upon his arrival at the sheriff's station.(XXIV,T3347) Mr. Rigterink was then placed in an interview room with Sgt. Connolly and Det. Racznyski.(XXIV,T3348) Mr. Rigterink told the officers that he was driving his father's truck on September 22 and he had gone to see Mr. Jarvis to buy marijuana.(XXIV,T3348) He purchased a half ounce for $50.(XXIV,T3351)

Mr. Rigterink said that after he finished class on

September 23rd, he ate something that gave him food poisoning.(XXIV,T3352) Mr. Rigterink spent the remainder of that day and the next day very ill.(XXIV,T3352) He ate only crackers and ginger ale that his mother brought.(XIV,T3352) Mr. Rigterink had contact by phone with Mr. Jarvis twice on the 24th to confirm a marijuana purchase for Friday.(XXIV,T3353) Around 3:00 p.m. Mr. Rigterink took his dog to his parents house and stayed until 4:30.(XXIV,T3354) That evening he watched movies with Courtney Sheil.(XXIV,T3335)

Mr. Rigterink said that he received a telephone call from Mark Mullins on September 24th and Mullins told him that Mr. Jarvis had been shot.(XXIV,T3355) Mr. Rigterink said he did not own a gun.(XXIV,T3356)

After continued questioning Mr. Rigterink recanted portions of his first statement.(XXIV,T3356) Mr. Rigterink said he had contact with Mr. Jarvis on September 24th.(XXIV,T3357) He left his house about 1:00 and went see Mr. Jarvis.(XXIV,T3359) He purchased a quarter ounce of marijuana from Mr. Jarvis and left between 2:30 and 3:00.(XXIV,T3359) Mr. Jarvis was alive when he left.(XXIV,T3359)

Mr. Rigterink modified his second statement after

continued questioning.(XXIV,T3359) Mr. Rigterink said he arrived at the warehouse after the attacks had occurred.(XXIV,T3359) He saw blood in unit 5, so he searched for Mr. Jarvis by following a blood trail. He found both bodies in unit 1. He checked both for pulses and found none. Mr. Rigterink realized that he was covered in blood and ran away because he was scared.(XXIV,T3360) He did not call 911 because he was scared.(XXIV,T3361) He was in the area about five minutes.(XXIV,T3362) At this point in time the police learned that Mr. Rigterink's fingerprint matched a print found in unit 5.(XXIV,T3362) The decision was made to video record the continued interrogation of Mr. Rigterink.(XXIV,T3365) Mr. Rigterink was not told that he would be recorded.(XXIV,T3366)

Mr. Rigterink was told that his fingerprint matched one at the scene.(XXIV,T3367) Mr. Rigterink responded that he wanted to tell the whole story.(XXIV,T3367) He was very calm.(XXIV,T3367) At this point Mr. Rigterink was given his Miranda rights, which he subsequently waived. (XXIV,T3368-3375) Over objection the video tape of his last statement was shown to the jury.(XXIV,T3376) That statement is summarized as follows:

Mr. Rigterink went to see Mr. Jarvis after calling him

around 2:30.(XXIV,T3385) He wore black shorts, a gray t-shirt, tennis shoes, and a floppy hat.(XXIV,T3386) He carried a backpack that contained a 10" hunting knife and extra shirt.(XXIV,T3386-88) Mr. Rigterink drove his father's Toyota truck to where Jarvis lived.(XXIV,T3386)

Mr. Jarvis let Mr. Rigterink into unit 5.(XXIV,T3391) Mr. Rigterink made a drawing of unit 5.(XXIV,T3394) Mr. Rigterink described his subsequent memories as being like Polariod snap shots- he had only three or four of the remaining events.(XXIV,T3403;3436)

Mr. Rigterink remembered Mr. Jarvis reaching under the couch. The next thing he remembered was being up against the wall, locked up with Mr. Jarvis. Mr. Rigterink had the knife in his hand and was covered in blood.(XXIV,T3396-7;3423) He and Mr. Jarvis came outside and Mr. Jarvis had his shirt off. Mr. Rigterink saw the shirt was covered in blood.(XXIV,T3398;3434) Mr. Jarvis was kneeling down on the sidewalk and Mr. Rigterink was standing up.(XXIV,T3398)

Mr. Rigterink next remembered he ran- he chased Mr. Jarvis.(XXIV,T3399) The next image he had was of a hallway and Mr. Jarvis was swinging a gum dispenser at him.(XXIV,T3400)

Mr. Rigterink remembered going into a construction

place.(XXIV,T3402) Mr. Rigterink made a drawing of that location.(XXIV,T3406-7) The last thing he remembered was looking at a girl.(XXIV,T3402) He did not remember stabbing her.(XXIV,T3403) He checked her pulse, then left. (XXIV,T3402)

Mr. Rigterink said his wrist was sore the next day, but he was not injured.(XXIV,T3401) He thought he hurt his wrist by jumping against the warehouse door.(XXIV,T3406)

Mr. Rigterink left the area and drove down Recker Highway.(XXIV,T3417) He recalled looking down and realizing he was covered in blood.(XXIV,T3418;3430) He remembered he threw the knife and bag out the window when he was on a bridge.(XXIV,T3418-19) Mr. Rigterink went to his house and took a shower, then he and his dog went to his parent's house.(XXIV,T3420;3432) He did not recall cleaning out the truck.(XXIV,T3421) Mr. Rigterink disposed of his bloody clothing and shoes in the Friday trash.(XXIV,T3422;3432)

Mr. Rigterink thought he might not remember because of psychological problems.(XXIV,T3414) He had seen a rehab therapist, but discontinued treatment because he was over the therapist's head.(XXIV,T3414) Mr. Rigterink had talked with his wife about his mental concerns.(XXIV,T3415) He had taken several psychology classes and looked up things

on line and made a self-diagnosis. (XXIV,T3415-16)

Mr. Rigterink said he had previously blacked out- once in Miami and once in Tampa.(XXIV,T3424) Both times he beat people up, but didn't recall the specifics.(XXIV,T3425)

Mr. Rigterink said he did not feel bad afterwards. He hadn't had a problem sleeping.(XXIV,T3416) Mr. Rigterink believed that his ability to act normal was indicative that he had a problem.(XXIV,T3441)

Mr. Rigterink stated he felt bad for his parents and for Mrs. Sousa's parents.(XXIV,T3443) His parents worked with her parents and all were good people.(XXIV,T3443)

Mr. Rigterink felt the whole thing was like a dream.(XXIV,T3433;3346) He felt as if the intervening days were like looking through a camera.(XXIV,T3436) Mr. Rigterink didn't realize he'd done it until the Friday he called the detectives about coming in to be printed. (XXIV,T3436-37)

Mr. Rigterink couldn't remember the event, but he knew that it had happened.(XXIV,T3437) He had no emotions when he came to this realization.(XXIV,T3440) That was why he was avoiding the police.(XXIV,T3438) He hid in his apartment and on his parent's roof.(XXIV,T3438-39) He turned himself in so it wouldn't happen again.(XXIV,T3439)

Det. Smith had the Firestone house under surveillance on October 15 because it was felt that Mr. Rigterink was avoiding the police.(XIX,T2582) Det. Smith spoke with Mr. Rigterink's girlfriend, Courtney Sheil when she let the dog out.(XIX,T2584) Courtney Sheil gave Det. Smith a double-edged dagger with a 10" blade from inside the house. (XIX,T2585) No blood was found on the knife.(XXIII,T3186) An effort was made to find the backpack and knife thrown from the car window, but neither could be located. (XXIV,T3446-47)

Katherine Enriques Rigterink testified that she was married to Mr. Rigterink.(XXII,T3049) They had been separated since May 3, 2003.(XXII,T3049) Ms. Rigterink knew that while they lived together Mr. Rigterink kept a military knife from the Marine Corps between the mattress and box spring of their bed.(XXII,T3050) The knife had an 11 inch blade.(XXII,T3050) When Ms. Rigterink returned to the home after Mr. Rigterink was arrested and after the police had been through the house, the knife was not there.(XXII,T3051)

On October 15, crime scene technicians processed a Toyota truck belonging to Nancy and James Rigterink. (XVII,T2230-2236;XVIII,T2252-2254) The search was done

pursuant to the consent from the Rigterink's.(XXIV,T3456) Luminol was applied to the interior of the vehicle and led to the discovery of blood near the driver's door, armrest, seat belt and strap, steering wheel/column, and passenger floor board area. (XVII,T2237,2243-2245;XVIII,T2250)

Mr. Rigterink's known prints (Exhibit 505) were compared to the various prints collected at unit 5. The left ring finger and the left middle finger of Mr. Rigterink were matched to "a blood print, interior door above the lock" found on the door to unit 5.(XXII,T2958-2959,2977) The characteristics of the print indicated that it was made from blood that was on the fingers instead of the fingers touched to a bloody surface. There was motion when the print was left.(XXII,T2962,2977)

There were 69 prints that were lifted from unit 1 and unit 5 that could not be identified.(XXII,T2995) Prints belonging to Marshall (Mark) Mullins were compared, but there were no matches.(XXII,T2998,3003) William Farmer's prints were not compared.(XXII,T2998)

Latent shoe prints from the crime scene (Exhibits 157-161) were compared to a pair of Nike tennis shoes (Exhibit 507).(XXII,T3025) The shoe prints were similar in sole tread and design.(XXII,T3031) Exhibit 507 was a new shoe

and did not belong to Mr. Rigterink.(XXII,T3037) A pair of Nike shoes belonging to Mr. Rigterink did not match the shoe impressions at the scene.(XXII,T3039;XXIV,T3541)

On October 17, 2003 a swab was taken of Mr. Rigterink's cheek and submitted to FDLE for analysis. (XXII,T3091) FDLE prepared a DNA profile for Mr. Jarvis, Mrs. Sousa, and for Mr. Rigterink. (XXII,T3108,3113-3117;XXIII,T3121) The fingernail scrapings of Mr. Jarvis and Mrs. Sousa were subjected to DNA analysis.(XXII,T3108-3110) The blood samples removed from the Toyota truck were subjected to DNA analysis.(XXII,T3111)

Four blood samples taken from the interior door of unit 5 matched that of Mr. Jarvis.(XXIII,T3121-3123) The frequency occurrence of this match was 32 quadrillion to 1 in the Caucasian population. (XXIII,T3124;3241) The blood sample from the steering wheel taken from the Toyota truck contained a mixture of DNA that matched Mr. Jarvis and excluded Mrs. Sousa.(XXIII,T3128) Mr. Jarvis was the main contributor, with matches at 5 loci, with a frequency of 1 in 6 million.(XXIII,T3128-29;3245) Mr. Rigterink could not be excluded as the minor contributor to that stain, but was not a match.(XXIII,T3129,3163) The sample taken from the interior door of the Toyota matched the DNA profile of Mr.

Jarvis at all loci for a frequency of 1 in 32 quadrillion.(XXIII,T3130) The sample taken from the door of the Toyota above the armrest matched the DNA profile of Mr. Jarvis at 3 loci with a frequency of 1 in 480. (XXIII,T3131) The sample taken from the seat belt was a mixture of DNA that identified Mr. Jarvis as the main contributor and excluded Mrs. Sousa.(XXIII,T3132) The frequency of a match to the seat belt sample was 1 in 110 million. (XXIII,T3133;3247) A second sample from the seat belt matched the DNA profile of Mr. Jarvis at all locations for a frequency of 1 in 32 quadrillion.(XXIII,T3134;3243)

DNA analysis was also performed on the cuttings and scrapings of the fingernails of Ms. Sousa.(XXIII,T3134) No foreign DNA profile was found on the left hand samples.(XXIII,T3135) A foreign DNA profile was found in the right hand samples that could not exclude Mr. Jarvis.(XXIII,T3135)

A DNA profile foreign to Mr. Jarvis was found on the fingernail scrapings of his left hand.(XXIII,T3136) Mr. Rigterink could not be excluded as a contributor, as there were matches at 2 loci lending a frequency of 1 in 320,000.(XXIII,T3140-42;3248) A foreign DNA profile was found in the fingernail scrapings of the left hand of Mr.

Jarvis that excluded Mrs. Sousa.(XXIII,T3137)

Dr. Martin Tracey, a professor at Florida International University, testified that the match probabilities calculated by FDLE were correct.(XXIII,T3235) Dr. Tracey testified that matches at two or three loci is insufficient to give certain identification- the general consensus is that unless the odds are in the trillions there is insufficient information to say the DNA came from a specific source.(XXIII,T3266)

Mr. Rigterink testified that he is 33 years old.(XXV,T3624) He grew up in Winter Haven.(XXV,T3624) Mr. Rigterink went to school with Mark Mullins.(XXV,T3630) Mr. Rigterink bought marijuana from Mullins until Mullins introduced him to Mr. Jarvis.(XXV,T3629) He and Mullins got along ok and went out socially a few times.(XXV,T3631)

Mr. Rigterink had been using marijuana since about age 18.(XXVI,T3663;XIX,T4187) He had tried about every other drug.(XXVI,T3664) His main focus throughout his life was to make sure that drugs were available to him.(XIX,T4188) Drug abuse led him to deceive his family.(XIX,T4187-88)

Mr. Rigterink spoke with Mr. Jarvis on September 22nd about buying marijuana.(XXV,T3625) Mr. Jarvis didn't have any to sell, but he and Mr. Rigterink talked about Jarvis's

plans to grow his own.(XXV,T3626) Mr. Rigterink had experience in growing, so looked around Mr. Jarvis's house and gave suggestions.(XXV,T3627-3629)

Mr. Rigterink had food poisoning on September 23rd.(XXV,T3632) He stayed home during the day and that night watched movies with his girlfriend, Courtney Sheil.(XXV,T3633)

On September 24th, he called Mr. Jarvis at noon and made arrangements to go over around 2:30 to pick up marijuana.(XXV,T3634) He drove his father's truck. (XXV,T3638) Mr. Rigterink got to the warehouse where Mr. Jarvis lived around 3:00.(XXV,T3638)

Mr. Rigterink saw a t-shirt on the sidewalk outside unit 5.(XXV,T3639) He picked it up and realized it was bloody.(XXV,T3639) He got blood on his hands. (XXV,T3643;XXVI,T3807) Mr. Rigterink went inside unit 5, calling for Mr. Jarvis.(XXV,T3640) He saw blood and signs of a struggle.(XXV,T3640) He thought Mr. Jarvis might need help, so he left and followed a path of blood to unit 1.(XXV,T3640;XXVI,T3810) Inside unit 1 he saw more blood and a broken gumball machine in the hallway. (XXV,T3640;XXVI,T3813) Mr. Rigterink freaked out and ran down the hall and through a door into a warehouse area.

(XXV,T3641;XXVII,T3821) There he saw the bodies of Mr. Jarvis and Mrs. Sousa.(XXV,T3641)

Mr. Rigterink tried to find a pulse and touched Mr. Jarvis on the neck.(XXV,T3641) Mr. Jarvis grabbed his right hand, looked at him, then slumped to the ground.(XXV,T3641) Mr. Rigterink heard a door slam and freaked out.(XXV,T3641) He thought it might be the killer, so he ran.(XXV,T3641;XXVII,T3827) Mr. Rigterink saw a dirty white van with three people in it leave the parking area.(XXV,T3642) He did not recognize the van or the occupants.(XXVII,T3833) A tall slender guy with a light colored shirt and brown wavy hair was driving.(XXV,T3642) A short, stocky man, who was shirtless and had tattoos was in the passenger seat.(XXV,T3642) Mr. Rigterink saw movement in the back.(XXV,T3642) The van accelerated past him and headed to K-ville Road.(XXV,T3642) Mr. Rigterink ran to his truck and left.(XXV,T3642) Mr. Rigterink ran because he was scared of being attacked and because of his own illegal drug involvement.(XXVI,T3646)

Mr. Rigterink returned to his home. He had to speak with a gate security guard to get into his neighborhood. (XXVI,T3689) The guard didn’t mention seeing any blood on him.(XXVI,T3689) Mr. Rigterink later went to his parents

house and then back to his own house.(XXVI,T3647) He told no one what he had seen.(XXVI,T3647;XXVII,T3839-3842)

Mr. Rigterink denied killing Mr. Jarvis or Mrs. Sousa.(XXVI,T3818;XXVII,T3831;XXVII,T3968;XVIII,T4092;4095; XIX,T4191)

Mr. Rigterink saw a news story on the murders that night.(XXVI,T3648) The next morning, the 25th, he got a call from Mark Mullins. Mullins said he was coming to talk to him.(XXVI,T3648;XXVII,T3834)

Mr. Mullins arrived and told Mr. Rigterink that Mr. Jarvis had been killed. Mullins said “we know you were there, and we know where your parents and girlfriend are, so keep your mouth shut about the situation.” (XXVI,T3648;XXVII,T3849) Mr. Rigterink believed that if he told the police that he, his family, and his girlfriend would be killed.(XXVI,T3648) Mr. Rigterink had seen Mr. Mullins in other violent situations.(XXVII,T3850) Mr. Rigterink was flabbergasted.(XXVII,T3835)

Mr. Rigterink testified that when the police came on September 25th, Mullins was with him.(XXVI,T3650) Mullins wouldn’t let him open the door.(XXVI,T3650) Mullins stayed several hours and kept repeating the threats.(XXVI,T3650) Mr. Rigterink decided there was no way he would give the

police any information about Mullins because he was afraid. He withheld information and did not tell the police he had been at the warehouse when officers came back later that evening.(XXVI,T3653) Mr. Rigterink was very nervous when he talked to the police.(XXVI,T3655)

Over the next 13 days, Mr. Rigterink continued to be threatened by Mullins.(XXVI,T3657) He read the paper about the crime.(XXVI,T3657) He went almost no where.(XXVI,T3657) On October 8 he wrote what amounted to a Will.(XXVI,T3676;XXVII,T3936)

Mr. Rigterink received a call from the police and was asked to give fingerprints.(XXVI,T3659) Mr. Rigterink tried to give police some names as “red herrings” that might lead to Mullins.(XXVI,T3673) After the call, he went see Mullins and Mullins reiterated the threats. (XXVI,T3660;XXVII,T3383) Mullins knew the police wanted to see Mr. Rigterink. (XXVI,T3660;XXVII,T3883)

Mr. Rigterink didn’t keep the October 13th appointment to give his prints because he was frightened of Mullins.(XXVI,T3661;3663) He knew that people got killed in the drug trade for as little as $20.(XXVI,T3662) Mr. Rigterink had witnessed Mr. Mullins do things like pistol whippings and had seen him force people to the ground with

a gun at their heads to made them pay up.(XIX,T4171) Mr. Rigterink knew that Mr. Cannon and Mr. Jarvis both used an "enforcer" to get their money.(XIX,T4171) Mr. Jarvis had his enforcer put a gun in a guy's mouth at a party and threaten to shoot the guy.(XIX,T4171) Mr. Rigterink found that these people, who dealt in methamphetamine, were far more violent than those who just sold pot.(XIX,T4171) His addiction to marijuana made Mr. Rigterink continue to associate with Mullins and Mr. Jarvis.(XIX,T4172)

Mr. Rigterink barricaded himself in the bathroom when the police came to his house the next day, October 14th. (XXVI,T3661) After the police left his house, Mr. Rigterink went to his parent's home and climbed up on the roof. He stayed there while he tried to figure out what to do.(XXVI,T3676) No one knew he was on the roof. (XXVI,T3677-3679) When he came down on October 16th, he told his mother to call the police.(XXVI,T3679)

When the police arrived, Mr. Rigterink and his parents asked if he needed a lawyer.(XXVI,T3690) The police said no.(XXVI,T3690) Mr. Rigterink rode with his parents to the sheriff's station.(XXVI,T3691) He was not told he was a suspect, but was told the police needed his prints and they wanted to talk to him.(XXVI,T3691) Mr. Rigterink was

fingerprinted upon his arrival at the police station. (XXVI,T3692;XXVII,T3914) He was then questioned by up to three detectives.(XXVI,T3693)

Mr. Rigterink testified he was questioned continually, without breaks.(XXVI,T3693) Mr. Rigterink had been awake for over 48 hours and had taken a Xanax.(XXVI,T3693) He was petrified.(XXVI,T3693) Mr. Rigterink testified that he was threatened by Detective Rench.(XXVI,T3695) The detectives were very accusatory and very rough. (XIX,T4175;XIX,T4192)

Detective Martin grabbed his shoe, looked at the bottom, and said they recognized the track pattern.(XXVI,T3695) At that point Mr. Rigterink admitted to being at the warehouse after the murders.(XXVI,T3696)

The officers never accepted his statements that he was not the killer.(XXVI,T3697-3699) They went over a version of events similar to the taped confession given by Mr. Rigterink.(XXVI,T3700) For example, they told Mr. Rigterink about a Gerber knife and the backpack. (XXVI,T3701;XXVI,T3769) Mr. Rigterink never owned a Gerber hunting knife and he never carried a backpack to the warehouse.(XXVI,T3770;XXVII,T3963-3968)

Finally, Mr. Rigterink gave up and made the statement

on the video.(XXVI,T3699) He felt he had two choices: give up Mullins or say he did it and protect his family. (XIX,T4180) Mr. Rigterink chose to give a false confession and did not mention Mullins in order to protect his parents.(XXVI,T3701;XXVII,T3991;XVIII,T4167;4169-70;XIX, T4174) Mr. Rigterink thought that the police would be able to prove he had nothing to do with the murder and he would be vindicated.(XXVI,T3702;3771;XVIII,T4079-4081;XIX,T4174)

Mr. Rigterink used the “Polaroid” story to cover up what he obviously didn’t know because he wasn’t there and he was trying to make the story believable - it was not done in order to establish any type of psychiatric defense. (XXVI,T3772;3774;XVIII,T4008;4064;XIX,T4177) He knew some limited facts from having walked into the scene, but Mullins had never told him what exactly happened. (XXVI,T3773;XIX,T4177) Mr. Rigterink had no idea why he described events in his statement the way he did and why he repeated them in his statement to the police. (XVIII,T3998;4005;4007;4024;4030;4033;4044-4046;4051;4056-57;4076;4089-4091) Mr. Rigterink denied throwing away his clothes or shoes- the police had them in their possession. (XXVI,T3776;XVIII,T4060-62)

Mr. Rigterink admitted that he made a horrible

decision- he should have stayed at the scene, tried to help, and he should not have admitted to doing something he did not do.(XIX,T4181)

Mr. Rigterink testified that death threats against him have continued since his arrest, even though Mullins was killed in an unrelated traffic accident in April 2004. (XXVI,T3656;XXVII,T3852) Mr. Rigterink never learned who the other people in the van that he saw leaving the murders were.(XXVII,T3852) Mr. Rigterink denied that he felt threatened from statements made by friends of Mr. Jarvis after his death.(XXVII,T3934)

The State called Det. Ken Raczynski in rebuttal. (XIX,T4220) Det. Racznynski testified that on September 25, 2003, he went to Mr. Rigterink's home to meet with him after Mr. Rigterink's phone number appeared on the cellular phone records of Mr. Jarvis.(XIX,T4221) No one appeared to be at the house at 11:30 a.m., but Det. Raczynski admitted he could not see into all the rooms through the windows.(XIX,T4222-23) The house was under surveillance for several hours and no one came or left from the residence through the front door, but the back door was neither visible, nor monitored. (XIX,T4225;4231)

Randy Pilkington testified that Mr. Mullins worked for

R&R Heating and Cooling.(XIX,T4278) He personally worked with Mark Mullins on September 24, 2003.(XIX,T4279) They went to Lake Wales at 1:00 p.m. and remained there for several hours fixing an air conditioner for Mr. Champion.(XIX,T4279) They left Lake Wales between 3:30 and 4:00 and went directly to the office, arriving between 4:30 and 5:00.(XIX,T4280) Mr. Mullins was also paid for working from 8:00-5:00 on September 25, 2003.(XIX,T4281) Employees work on an honor system and do not punch a clock.(XIX,T4283)

Courtney Sheil-Betz testified that she arrived at Mr. Rigterink's home about 7 p.m. on September 24, 2003.(XIX,T4287) She remembered Mr. Mullins called the night of the 24th and left a message that Mr. Jarvis had been shot.(XXIX,T4293-94) The next morning she and Mr. Rigterink saw news reports about the murders.(XXIX,T4289) Ms. Sheil left about 10:30 on the 25th.(XXIX,T4289) No one, including Mr. Mullins, came to the house before she left.(XXIX,T4289) Ms. Sheil came back later in the evening when the police were there and her car was searched.(XXIX,T4291)

Det. Connolly testified in rebuttal that he drove from Mr. Rigterink's house to the warehouse.(XXIX,T4295) The

trip took 23 minutes and 20 seconds.(XXIX,T4296)

Chief W.J. Martin testified he monitored the interrogation of Mr. Rigterink at the police station. (XXIX,T4235) Martin observed Mr. Rigterink have a negative reaction to Detective Rench, who kept calling him a liar, but he did not observe a negative reaction to Detective Connolly.(XXIX,T4236) Rench was removed because Martin was afraid that Mr. Rigterink would stop talking if he remained.(XXIX,T4237) Martin did not observe or hear any threats or mention of the death penalty.(XXIX,T4238) Martin didn't know or not Mr. Rigterink was falsely told that there was a video tape of the crime and that his shoe prints were found at the crime.(XXIX,T4247-48)

Katherine Rigterink testified that she had seen Mr. Rigterink be somewhat confrontational and angry if other men looked at her.(XIX,T4257) When he was angry he could be confrontational and would stare at the person.(XIX,T4258) She never knew him to physically fight.(XIX,T4269)

Katherine had a confrontation on May 3, 2003, with Mr. Rigterink and Courtney Sheil.(XIX,T4260) Katherine stayed home from work and waited at her home because she thought something was going on.(XIX,T4261) When Mr. Rigterink and

Ms. Sheil arrived together, Katherine became upset and asked Ms. Sheil to leave.(XIX,T4261) About a month later when Katherine came for the rest of her things, Mr. Rigterink and she argued.(XIX,T4265) Mr. Rigterink grabbed her arm and threw her out of the house.(XIX,T4267)

The following evidence was presented at penalty phase:

Medical examiner Dr. Stephen Nelson reviewed the autopsies of Mr. Jarvis and Mrs. Sousa.(XXIX,T3610) Despite his injuries, Mr. Jarvis would have been aware of his condition and able to fight for a period of time.(XXIX,T4612) Four of his twenty-two wounds would have been fatal.(XXIX,T4615) The wounds would have been painful and were made while Mr. Jarvis was alive.(XXIX,T4622;4625) Mrs. Sousa's injuries were inflicted while she was alive.(XXIX,T4652)

Mr. James Jarvis testified that his son was a hard worker, a good student, trustworthy, and much loved. (XXX,T4705) James Jarvis II, testified that his brother was a great guy and very much missed.(XXX,T4707-8) Darlena Jarvis testified that her stepson was very caring. The family is not the same since his death.(XXX,T4712) Lee Sweeney, Mr. Jarvis's biological mother, submitted a statement that detailed her pain at her son's death.

(XXX,T4716)

Mrs. Alice Diggett was Mrs. Sousa's mother.(XXX,T4721) Mrs. Sousa left her son, Hunter, who is now four.(XXX,T4722) Mrs. Diggett detailed the pain that she and her husband have suffered as a result of her death.(XXX,T4723-4736) Mrs. Diggett testified that Mrs. Sousa's husband, Tim, is devastated.(XXX,T4726) Mrs. Diggett also read statements from Mrs. Sousa's grandmother, aunt, uncle, two sisters-in-law, and her mother-in-law that detailed the pain felt by themselves and their families over her death.(XXX,T4726-4740) The prosecutor read a statement from Tim Sousa, Mrs. Sousa's husband.(XXX,T4740) Mr. Sousa statement expressed his love for his wife and how devastated he and his son were by her death.(XXX,T4741-42)

Mr. Roy Lyons met Mr. Rigterink since his incarceration.(XXX,T4754) Mr. Lyons had witnessed a spiritual conversion in Mr. Rigterink.(XXX,T4755) Mr. Lyons believed that Mr. Rigterink could make contributions to society while incarcerated by assisting other inmates in learning to read and in sharing his faith.(XXX,T4756) Mr. James Martin, a long time family friend, also ministered to Mr. Rigterink with Mr. Lyons.(XXX,T4765) Mr. Martin was

skeptical at first about Mr. Rigterink's commitment to religion, but over time he became convinced of his sincerity.(XXX,T4767) Mr. Rigterink gave out Bibles to other inmates and helped one to learn to read.(XXX,T4768)

Jonathan Morgan met Mr. Rigterink while they were both incarcerated.(XXX,T4796) Mr. Rigterink helped Mr. Morgan earn his GED and helped him learn to control his temper.(XXX,T4797) Mr. Rigterink would always give things to other inmates without expecting anything in return.(XXX,T4798)

Mrs. Diane Hendrick knew Mr. Rigterink as an infant and was his teacher for two years.(XXX,T4778) He and her daughter were friends.(XXX,T4779) Mrs. Hendrick described Mr. Rigterink as a good student and a teacher's dream.(XXX,T4779) He was always kind to others and to animals.(XXX,T4782) She believed that Mr. Rigterink could contribute to society and that he could help others.(XXX,T4781)

Max Brandon was a friend and colleague of the Rigterink family.(XXX,T4888) He remembered Mr. Rigterink as a perfect child- he was friendly and compassionate. (XXX,T4889) He loved animals and nature.(XXX,T4890) Mr. Brandon knew that Mr. Rigterink was very active in teaching

other inmates since his arrest.(XXX,T4891)

Letters of support were also submitted by Mr. Rigterink's friends, Dustin Pogue and Cara Crumpler. (XXX,T4906-4913)

Dick Rigterink is Mr. Rigterink's uncle.(XXX,T4805) They shared a common interest in the outdoors. He described Mr. Rigterink as a kind, intelligent, thoughtful, and caring person.(XXX,T4808) Mr. Rigterink was very kind and attentive to his grandmother when she suffered from dementia.(XXX,T4811) Mr. Rigterink was never violent. (XXX,T4812)

Mr. Rigterink's drug abuse led to some intervention attempts by the family in July and August 2003.(XXX,T4814) Mr. Rigterink admitted he was a drug addict over Labor Day 2003, but would not go into rehab.(XXX,T4815) He did agree to see a drug counselor.(XXX,T4814)

Dick Rigterink believed that Mr. Rigterink could be very productive and a positive influence in prison. (XXX,T4824-26)

Susan Rigterink, Mr. Rigterink's aunt, submitted a written statement asking the jury to spare Mr. Rigterink. She wrote that Mr. Rigterink always loved the outdoors. He was kind and patient with his little sister. She believed

he could be productive in prison.(XXX,T4894-96)

Wendy Rigterink submitted a letter in support of Mr. Rigterink. She described her cousin as loving and mature, compassionate and helful.(XXX,T4850-51) Deborah Guettler, also a cousin, submitted a letter describing Mr. Rigterink has polite, good-natured, a hard worker, and considerate of others.(XXX,T4853) She described Mr. Rigterink as a child who would even stop traffic to help turtles cross the street.(XXX,T4854) Mrs. Guettler believed he could help others in prison.(XXX,T4856) David Rigterink described his cousin, Mr. Rigterink, as the brother he never had.(XXX,T4857) David wrote that Mr. Rigterink had a sharing and kind nature and was a "presence" in his life.(XXX,T4858) All three cousins believed that drug addiction led to the events laid out in the trial.(XXX,T4852-3;4856;4859)

Stella Erikson testified that she served as the caregiver to Mr. Rigterink's grandmother while she had Alzheimer's disease.(XXX,T4861) Mr. Rigterink was very attentive and affectionate with his grandmother throughout her illness.(XXX,T4862) Ms. Erikson testified that Mr. Rigterink was very loving and respectful and she believed he could be a positive influence in prison.(XXX,T4863)

James Rigterink, Mr. Rigterink's father, testified that he and his wife Nancy adopted Thomas and his sister.(XXX,T4869) He described his son as generous, smart, compassionate, and kind.(XXX,T4870) Mr. Rigterink was popular while growing up, a natural leader, and athlete.(XXX,T4872) Sometime in 2003 he and his wife suspected that Mr. Rigterink was involved in drugs.(XXX,T4876) The family was attempting to help, using voluntary drug tests and offering financial assistance. (XXX,T4878) The family was investigating in-patient treatment when this happened.(XXX,T4881) The family continues to be in shock over these events, as it is so antithetical to their son.(XXX,T4884) James believed that his son could make contributions in prison by helping other inmates with reading.(XXX,T4884)

Mary Rigterink, Mr. Rigterink's sister, submitted a letter that described Mr. Rigterink as her protector.(XXX,T4897) She wrote that Mr. Rigterink loved nature and animals.(XXX,T4897) He worked as a camp counselor and loved children.(XXX,T4897) She expressed her love for her brother.(XXX,T4897-48902)

Nancy Rigterink testified that her son was a wonderful child-quiet, thoughtful, an athlete, and well behaved.

(XXX,T4914-16) As a teenager he was polite, popular, worked as a Christian camp counselor, and was an easy teenager.(XXX,T4016-20) As a young adult he struggled with career choices and finishing college.(XXX,T4922) He worked as a model in Miami.(XXX,T4922) He married Kate in 1999.(XXX,T4925) The marriage was plagued with financial issues.(XXX,T4929) In May 2003, the family suspected a drug problem- Kate and Tom were separated.(XXX,T4932) Before the drug problem was under control, this happened.(XXX,T4933-39) Mrs. Rigterink believed that her son could help others and be productive in prison.(XXX,T4941-3;4948-49)

SUMMARY OF THE ISSUES

ISSUE I: The trial court incorrectly ruled that Miranda warnings were not required in this case, thus the defective nature of the Miranda form given did not require suppression of Mr. Rigterink's statement. This ruling was predicated upon the trial court's incorrect finding that Mr. Rigterink was not in custody at the time of his interrogation. The facts surrounding the circumstances of the police interrogation of Mr. Rigterink support a finding that he was in custody, necessitating the giving of Miranda. The Miranda warning that was given in this case

was defective in that it failed to advise Mr. Rigterink that he had the right to counsel during questioning.

ISSUE II: The trial court erred in prohibiting the defense from calling witness William Farmer, who would have testified about the violent nature of the drug trade that the victim was involved in. Mr. Farmer would have further testified about the reputation for violence in the drug community of Mark Mullins. The defense at trial was that Mr. Mullins was involved in the murders and not Mr. Rigterink. The trial court's ruling excluding the testimony of Mr. Farmer violated the constitutional rights of Mr. Rigterink in presenting evidence that tended to establish a reasonable doubt as to his guilt and supported his theory of defense.

ISSUE III: Florida's capital sentencing process is unconstitutional because a judge rather than jury determines sentence. The Florida process is further flawed because the jury is not required to return a unanimous sentencing recommendation in order for a sentence of death to be imposed.

ISSUE IV: The existence of the prior violent felony aggravator does not circumvent the necessity of a jury finding as to each aggravating factor in capital

proceedings in order to satisfy constitutional requirements under Ring v. Arizona, 536 U.S. 584 (2002).

ISSUE V: The standard penalty phase jury instructions are unconstitutional because they fail to give appropriate guidance to the jury's determination regarding mitigation and impermissibly shift the burden of proving that a life sentence should be imposed to the defendant by requiring him to prove the mitigation outweighs the aggravation.

ISSUE VI: The standard jury instructions impermissibly denigrate the role of the jury in capital sentencing and are unconstitutional.

ISSUE VII: Execution by lethal injection constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution under the current protocols established by Florida and through the use of the three chemicals currently utilized by the state during an execution.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE DEFENDANT'S STATEMENT BY INCORRECTLY RULING THAT MIRANDA WAS NOT REQUIRED BECAUSE THE INTERROGATION WAS NOT CUSTODIAL AND THAT NO ERROR OCCURRED DUE TO THE USE OF A DEFECTIVE MIRANDA WARNING.

Mr. Rigterink first moved to suppress his recorded confession to the police on the grounds that the Miranda rights he was given were defective because the form used did not advise him that he had the right to have an attorney present during questioning.(II,R191-209;221;224-226) A hearing on the motion was held on November 24, 2004. (II,R217-316) At the onset of the hearing the State argued that Miranda was not necessary because the defendant was not in custody.(II,R227-228) The defense countered that Mr. Rigterink was in custody premised upon the belief of the officers that he was in custody and because a reasonable person, under the circumstances, would have believed the questioning would lead to an incriminating purpose.(II,R229) The trial court denied the motion by written order on January 19, 2005, holding that Mr. Rigterink was not in custody when he gave his confession, thus he was not entitled to receive Miranda and any alleged defect in the warning given was immaterial.(II,R210-212;III,R340-342)

A judicial transfer occurred after the denial of the motion to suppress. The successor judge agreed to review the transcript of the hearing and ruling.(II,R327;335-337)

The defense then filed a Motion for Rehearing and to

Supplement Authority [sic] on January 28, 2005.(III,R344-358)

During a break in voir dire on August 16, 2005, the trial court inquired about the status of the Motion for Rehearing on the suppression motion.(X,T871) The court noted that the Motion for Rehearing had been filed with the first judge and according to a transcript from a status conference on February 11, 2005, the Motion for Rehearing had been taken under advisement by the first judge.(X,R877-878) Discussion was held about additional suppression motions, but the trial judge noted that as of this date, none had been received.(X,R883) Defense counsel informed that the court that no additional Motions to Suppress would be filed.(X,R887) Defense counsel explained that the Motion for Rehearing had provided some additional authority on the question of custody.(X,T892) The court noted the confusion with judicial transfers and told defense counsel that he would entertain any additional filings if necessary. (X,T894)

On August 17, 2005, the trial court advised the parties that any remaining issues relating to the Motion to Suppress would be addressed the next morning.(XI,T1198) The court heard additional argument on the Motion for

Rehearing the next day.(XII,T1214) Defense counsel advised the court that they intended to rely "on the four corners of the motion".(XII,T1214-15) Defense counsel argued that the moment Miranda was read, Mr. Rigterink was in custody.(XII,T1218) The State argued the prior holding that Mr. Rigterink was not in custody was correct. (XII,T1220-1238) The defense responded by arguing that any reasonable person, similarly situated as Mr. Rigterink, would have believed themselves to be in custody under the totality of the circumstances.(XII,T1239-1243) The trial court denied the Motion for Rehearing and reaffirmed the order denying the Motion to Suppress.(XII,T1243)

Defense counsel renewed the objection to the admittance of the recorded statement during trial just prior to it's admission as Exhibit 462.(XXIV,T3369-3377)

The testimony at the November 24, 2004 hearing is summarized as follows:

Det. Jerry Connolly testified that he, as lead detective, began the investigation in this case on September 24, 2003.(II,R232) Using numbers retrieved from the cell phone of Mr. Jarvis, Mr. Rigterink was first questioned by the police on September 25th.(II,R234) Connolly first had contact with Mr. Rigterink on October

9th.(II,R234) Connolly was acquiring "elimination" fingerprints from persons to match against a print found at the scene.(II,R235) Connolly and Detective Raczynski spoke to Mr. Rigterink at his home on October 9th about his previous statements regarding his phone calls to Mr. Jarvis on the day of the murders and previous marijuana purchases from Mr. Jarvis.(II,R236) Connolly testified that Mr. Rigterink was not in custody during the October 9th interview.(II,R236) Connolly testified that he asked Mr. Rigterink to come to the police station on October 10th and give a fingerprint sample.(II,R237) Mr. Rigterink said he would have his girlfriend bring him in.(II,R237)

The next day Connolly received a phone call from Mr. Rigterink, who said that he could not come in that day, but would make another attempt.(II,R237) A time was set up for Monday.(II,R238) Mr. Rigterink failed to come in on Monday, October 13th, and did not call.(II,R238)

Connolly next had contact with Mr. Rigterink on October 16th after he received a call from Mr. Rigterink's mother, Nancy.(II,R238) Connolly and Det. Raczynski went to Mr. Rigterink's parents home to talk to him.(II,R238) When Mr. Rigterink got out of the shower he told Connolly that he knew that some "Ice" dealers from Lake Wales had

killed Mr. Jarvis.(II,R239) Connolly requested that Mr. Rigterink come to the police station right then to have his fingerprints taken.(II,R239) Mr. Rigterink went.(II,R240) After some discussion, it was decided that Mr. Rigterink would ride with his parents and they would follow the detectives straight to the station.(II,R240) Connolly maintained there was no intent to arrest Mr. Rigterink, just an intent to obtain his fingerprints.(II,R240) Connolly did admit that at this point in time, Mr. Rigterink was the primary suspect in the double homicide and the police focus was on him.(II,R269)

Upon his arrival, Mr. Rigterink's prints were taken and he was placed in an interview room.(II,R241) The 6' by 9' room is adjacent to a work station and is soundproofed. (II,R241) The room contained three chairs and a desk.(II,R242) Connolly testified that he, Det. Raczynski, and Mr. Rigterink were in the room.(II,R242) The door was not locked, but was closed.(II,R242) Mr. Rigterink was not handcuffed or restrained.(II,R243) At least two other officers- Detective Rench and Chief Martin- were in the room with Mr. Rigterink throughout the day.(II,R266) Rench took an active role in questioning Mr. Rigterink before taping was done.(II,R266) Connolly described Mr.

Rigterink's demeanor as alert, awake, and very energetic and he remained so throughout the course of the interrogation. (II,R288)

Mr. Rigterink was first questioned about the murders and the details of his previous statements of his activities on the day of the murders.(II,R243-249) During the interview Connolly was informed that Mr. Rigterink's prints matched the bloody print found at the murder scene.(II,R249) This fact was significant to Connolly because it indicated that the person leaving the print was at the crime scene.(II,R250) Connolly believed Mr. Rigterink was lying.(II,R250) Connolly confronted Mr. Rigterink with his suspicion that he was lying, but did not tell him about the matching print.(II,R252) Mr. Rigterink changed his story, claiming that he was at the scene and had lied because he was scared.(II,R251) Mr. Rigterink said he bought marijuana from Mr. Jarvis and when he left Mr. Jarvis was alive. (II,R252)

Connolly could not recall the specific questions asked by other persons, including Major Martin.(II,R294) He could not recall if Martin told Mr. Rigterink that he was "going to get the needle" if he didn't cooperate.(II,R294)

Connolly then confronted Mr. Rigterink with the

matching print.(II,R252) Mr. Rigterink changed his statement again, stating that he went to see Mr. Jarvis, but arrived after the attack.(II,R253) He found Mr. Jarvis and Mrs. Sousa dead.(II,R253) Mr. Rigterink claimed to have gotten bloody when he touched both bodies while feeling for a pulse.(II,R253) Three hours and twenty-four minutes had elapsed since Mr. Rigterink arrived at the police station.(II,R264)

Mr. Rigterink then said he was going to tell the truth.(II,R289) At this point Connolly and Raczynski felt they needed to Mirandize Mr. Rigterink and did so.(II,R254) Connolly maintained that at this time Mr. Rigterink was still not in custody, was not handcuffed, and the interview process had not changed.(II,R254) The decision to give Miranda was made because Connolly thought Mr. Rigterink was going to give them the whole true story, so Miranda was given to be on the safe side and to guarantee the statement would be admissible.(II,R255;274) Mr. Rigterink was read a form, which he initialed.(II,R256) Mr. Rigterink did not invoke his rights.(II,R257) Connolly did not tell Mr. Rigterink that he was under arrest or couldn’t leave, but Connolly testified he could have left.(II,R257;278) Connolly admitted that Mr. Rigterink was not told he could

leave.(II,R291) Mr. Rigterink then gave the recorded inculpatory statement that was the subject of the motion to suppress.(II,R257)

After the statement, Connolly contacted the State Attorney to confirm if there was probable cause to arrest Mr. Rigterink.(II,R259) After conferring with the State Attorney, Mr. Rigterink was arrested.(II,R259) According to Connolly, the decision to arrest was made by his supervisors.(II,R282) Connolly admitted that if Mr. Rigterink had not cooperated in giving his fingerprints, a court order to obtain them would have been sought.(II,R291)

Mr. Rigterink was transported to the jail at 5:30 p.m.(II,R265) Mr. Rigterink's parents had remained in the lobby the entire day.(II,R260)

It is Mr. Rigterink's position in this appeal that the trial court erred in denying his Motion to Suppress. The trial court's conclusion that Mr. Rigterink was not in custody is clearly erroneous as the facts support a contrary finding. A custodial interrogation requires a constitutionally correct Miranda warning be given to the defendant. The waiver given in this case was defective because it failed to advise Mr. Rigterink that he had the right to counsel during questioning, requiring the

suppression of the recorded statement.

The trial court's order on a Motion to Suppress is clothed with a presumption of correctness and is not subject to reversal unless clearly erroneous. Review is plenary- the review of the law as applied to the facts is reviewed by this Court under a *de novo* standard and the factual findings of the trial court are affirmed if supported by competent substantial evidence. Connor v. State, 803 So.2d 598, 608 (Fla. 2001).

This Court has provided guidelines for the determination of whether or not a person is in custody in Ramirez v. State, 739 So.2d 568, 574 (Fla. 1999). Ramirez adopted a four-factor analytical framework for determining whether or not a suspect is in custody for purposes of Miranda. The four factors to be considered are:(1) the manner in which the police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; and (4) whether the suspect is informed that he or she is free to leave the place of questioning. Each of these four components is analyzed to determine if, under the totality of the circumstances, a reasonable person in the suspect's

position would feel free to leave. As noted by the Second District in State v. Pitts, 936 So.2d 1111 (Fla. 2nd DCA 2006), the whole context of the interrogation must be considered and a factor that in one context might militate strongly toward one conclusion may be viewed entirely differently in a different factual context. When the facts of this case are considered under the four factor analysis, the totality of the circumstances establishes that a reasonable person, placed in the position of Mr. Rigterink, would not have felt that he was free to leave.

A. FACTUAL CIRCUMSTANCES OF THIS CASE APPLICABLE TO RAMIREZ

1. Manner in which suspect is summoned for questioning

The first factor of Ramirez focuses on the manner in which the suspect was summoned for questioning. In this case the police first had contact with Mr. Rigterink at his home on September 25, the day after the crime. Mr. Rigterink was then contacted by phone on October 9, when he was told that it would be necessary for him to come to the police station for the purpose of providing his fingerprints. Mr. Rigterink was told his prints were "elimination" prints and would be compared to a print left at the scene. Mr. Rigterink did not come the next day as

scheduled, but called and was told to come in on October 13. Mr. Rigterink did not come and a concerted effort was then made by police to locate him. His parents and girlfriend were contacted and instructed to call the police if they had contact with him. Nancy Rigterink called the police on October 16th, resulting in two detectives going to the Rigterink home. Mr. Rigterink was questioned at the house and then "arrangements were made" to permit him to be immediately brought to the police station. Mr. Rigterink rode with his parents, who were instructed to follow immediately behind the police cruiser. A reasonable person, under the same facts, would not have felt that they were free to leave or to disregard the directive of the police to immediately report to the police station.

2. The purpose, place and manner of the interrogation

The second factor under Ramirez looks to the purpose, place, and manner of the interrogation. Again, the facts of this case support Mr. Rigterink's position that he was in custody from the time he was instructed to proceed to the police station on October 16th.

In this case the purpose of the interrogation was to not only question Mr. Rigterink, but to obtain fingerprint evidence from him. Mr. Rigterink was told that his prints

were needed so they could be compared to prints found at the scene. When Mr. Rigerink had failed to come on his own on October 10th and 13th , the police went and got him. Upon his arrival at the station, Mr. Rigterink was immediately printed. Mr. Rigterink was not released at this point or allowed to leave with his parents. Instead, he was placed in an interview room with a single door and immediately questioned by multiple detectives.

The "place" factor of Ramirez is straightforward in this case. The interrogation was held in a secured room at the police station. The room was small and soundproofed. Mr. Rigterink's parents were not permitted to be present.

Mr. Rigterink recognizes that the fact that an interrogation takes place at a station house in and of itself does not automatically establish that he was in custody. See, Oregon v. Mathiason, 429 U.S. 492, 495 (1977). However, it cannot be ignored that the location of the interrogation on the 16th, held in a secure office inside the police station in which Mr. Rigterink's parents were excluded from is a circumstance that is certainly more consistent with a custodial interrogation than one in which the defendant is free to leave. The fact that Mr. Rigterink's prior contacts with the police in this case had

occurred in his home or on the telephone serve to highlight the drastically different nature of this interrogation. Obviously, the prior contacts would not have given rise to a reasonable belief of constraint. However, the circumstances of this interrogation in contrast to the earlier contacts would create the reasonable belief that circumstances had changed and Mr. Rigterink was no longer a free man.

The purpose of the interrogation/investigation had also undergone a dramatic change by October 16th. Previously, the purpose of the police contact had been to talk to Mr. Rigterink in an effort to find out information about only telephonic contact with Mr. Jarvis. A large number of persons were contacted in addition to Mr. Rigterink. In their previous contacts the police did not advise Mr. Rigterink of the nature of any evidence collected at the scene which might incriminate him. The purpose of the investigation dramatically changed on October 10th through the 16th- the purpose of the investigation had narrowed and shifted from simply interviewing large numbers of people to obtaining physical evidence from a very few. By the 16th, Mr. Rigterink was characterized by Det. Connolly as the primary suspect. In

fact, Mr. Rigterink is the only person identified in this record from whom prints were sought in order to compare with highly incriminating physical evidence recovered from the crime scene. Mr. Rigterink's contact with the police on the 16th was not just limited to giving a print exemplar and leaving, he was held in the interview room while his fingerprints were compared to those found at the scene. The purpose on the 16th differed greatly from the original purpose.

The manner in which the interrogation is conducted is also a feature to be considered under Ramirez. At the suppression hearing Det. Connolly testified that Mr. Rigterink was questioned by several different law enforcement officers. Different styles of questioning were used, some quite confrontational. At least two and sometimes three police officers were always present during questioning. Mr. Rigterink was accused of lying. Ultimately, he was told that his print was a match to the print found at the scene. The questioning lasted several hours. Mr. Rigterink was not permitted contact with his parents who had remained in the station. In this case, the purpose, place, and manner of the interrogation would not lead a reasonable person to conclude that they were free to

leave.

3. The extent to which to which the suspect is confronted with evidence of his or her guilt.

The third point of analysis under Ramirez analyzes the extent to which the suspect is confronted with evidence of his or her guilt. Mr. Rigterink prints were taken. He was placed in an interview room and immediately confronted with his prior statements. The police accused Mr. Rigterink of lying. After the print comparison was made, Mr. Rigterink was told that his print matched the bloody print found at the scene. Again, Mr. Rigterink was aggressively confronted and again accused of lying. A reasonable person would not feel free to leave after being told that their bloody fingerprint had been found at the scene of a double murder.

4. Whether or not the suspect is informed that he or she is free to leave the place of questioning.

The fourth, and final, point of analysis under Ramirez is whether or not the suspect is informed that he or she is free to leave the place of questioning. In this case, Det. Connolly testified that Mr. Rigterink was not told that he was free to leave.

B. CASE LAW AND ANALYSIS

The focus, under the law, is how a reasonable person perceives his situation. Whether a suspect has been subjected to a restraint on his freedom rising to the level of a custodial interrogation depends on how a reasonable person in the suspect's position understands his position. Yarborough v. Alvarado, 541 U.S. 652 (2004); Berkemer v. McCarty, 468 U.S. 430, 442 (1984).

A prominent feature of the State's argument to the trial court was the perceptions of varying law enforcement officers regarding Mr. Rigterink's status. Officer Connolly testified that in his mind, Mr. Rigterink was free to go and as a trained officer, he did not believe there was probable cause to hold him until his statement subsequent to Miranda. Officer Connolly's perception is not relevant to the question of custody in this case. The focus of the inquiry is not on what police think about a defendant's custody status, but rather how a reasonable person perceives the situation. Davis v. State, 698 So.2d 1182, 1188 (Fla. 1997), cert. denied, 522 U.S. 1127, 118 S.Ct. 1076, 140 L.Ed.2nd 134 (1998). Whether or not a suspect is in custody depends on the objective circumstances of the interrogation and not on the subjective beliefs of the interrogators. Stansbury v.

California, 511 U.S. 318, 320 (1994).

The facts of this case are similar to several cases in which the appellate courts determined that the suspect was in custody under the Ramirez test. In Mansfield v. State, 758 So.2d 636 (Fla. 2000), the defendant was asked to come to the police station, where he was then questioned by three detectives. Mansfield was told that there was strong evidence of his guilt (his beeper was found near the crime scene), Mansfield was not told that he was free to leave, and the tenor of the questioning clearly had indicated that he was the primary suspect. In this case Mr. Rigterink was summoned to the police station, officers went to his parent's home to secure his appearance, and made arrangements for him to be taken to the station. Mr. Rigterink was questioned by two and three detectives at a time. Like Mansfield, he was told there was strong evidence of his guilt (his fingerprint), he was not told he was free to leave, and the tenor of the questioning clearly demonstrated that the police believed him to be the primary suspect. The primary purpose of the interrogation on the 16th was not to just question, but to obtain physical evidence that was believed would incriminate Mr. Rigterink. Like Mansfield, Mr. Rigterink was in custody.

The extent to which a suspect is confronted with evidence of his guilt weighs heavily on the scale of custodial interrogation. A reasonable person understands that once physical evidence links them to a crime, the police will not ordinarily set them free. State v. Pitts, 936 So.2d 1111 (Fla. 2nd DCA 2006). The matching of Mr. Rigterink's fingerprint to a bloody print from the scene is sufficiently strong evidence to convince a reasonable person that he will likely be arrested, given the seriousness of the double homicide.

Likewise, in Louis v. State, 855 So.2d 253 (Fla. 4th DCA 2003), the Fourth District concluded that the defendant was in custody under the following facts: the defendant was met at school by a police officer and told that the police wanted to talk to him. Louis went to the station and was questioned with specificity about sexual abuse allegations. Louis was not told that he was free to leave. After giving an inculpatory statement, Louis was advised of Miranda. Like Louis, Mr. Rigterink was confronted by police, summoned for questioning and to give evidence, was questioned with specificity, and was not told that he was free to leave.

The Fourth District in Pollard v. State, 780 So.2d

1015 (Fla. 4th DCA 2001), found that the defendant was in custody and suppressed her statements in a murder prosecution due to the failure of law enforcement to administer Miranda at the outset of questioning. As in this case, the police maintained that Pollard was free to leave. Pollard had been taken to the station, interviewed in a "restricted access" room, and had been confronted with incriminating evidence. Two hours after her initial statement, she was given Miranda and gave a second statement. In addition to the similar nature of the interrogation, Mr. Rigterink was also not given Miranda until several hours after a first incriminating statement. Under Mansfield, Louis, and Pollard, the statement in this case should have been suppressed as the facts support a decision by this Court that Mr. Rigterink was subjected to a custodial interrogation which required the administration of Miranda.

Other cases in which the appellate courts have determined that a defendant was not in custody are useful for comparative purposes to this case. This Court addressed the question of custody in Schoenwetter v. State, 931 So.2d 857 (Fla. 2006). Schoenwetter was asked by the police to come to the station for questioning after being

told that a blood trail led from the victim's apartment to his apartment. Schoenwetter agreed to go, noting to his mother that he would need to be back by 4:00 p.m. for work. While en route, Schoenwetter got out of the police car to get a snack. In rejecting his argument that Schoenwetter was in *de facto* custody, this Court found that a reasonable person would not have felt they were not free to leave, as clearly evidenced by the defendant's own statements that he expected to be back for work. In contrast, Mr. Rigterink was not permitted to deviate from his route to custody, was not told he was free to leave or gave any statement indicating this belief, and was confronted with physical evidence of his presence at the scene as opposed to a general description of evidence.

Similarly, in Taylor v. State, 855 So.2d 1 (Fla. 2003), the defendant claimed a *de facto* arrest after he voluntarily went to the station for questioning, was handcuffed briefly for security, and it was explained to the defendant that he was not under arrest. This Court held that the interrogation was not custodial. Taylor contrasts sharply with the circumstances in this case.

Finally, in Connor v. State, 803 So.2d 598 (Fla. 2001), this Court rejected a custodial setting where the

defendant was approached by law enforcement at his home and asked if he would agree to come to the station for questioning. The defendant was allowed to dress and rode in the front seat to the station. He was advised of Miranda upon arrival. Mr. Rigterink was not afforded a choice about going to the station as was the defendant in Connor and he was not given Miranda until several hours and several statements after his arrival.

Several District Court decisions are also useful for comparative purposes to this case. In Bedoya v. State, 779 So.2d 574 (Fla. 5th DCA 2001), no custodial interrogation was found where the defendant was asked to come to the police station and given the choice of riding with the police or his brother. Bedoya was absolutely informed by the police that he was free to leave. Similarly, in Cillo V. State, 849 So.2d 353, 355(Fla. 2nd DCA 2003), the defendant was "never told he had to go to the [substation] and never indicated that he did not want to go." Mr. Rigterink, in contrast, was not given the option of whether he would go to the station and he was not told he was free to leave. Mr. Rigterink did not have any choice but to accompany the officers. Det. Connolly admitted that if he had refused, Connolly would have secured a court order to

require Mr. Rigterink provide his fingerprints.

In Loredo v. State, 836 So.2d 1103 (Fla. 2nd DCA 2003), the appellate court found that Loredo was not in custody. Loredo had driven himself to the police station, was specifically told he was free to leave, and was even given directions on how to leave the police facility. Mr. Rigterink was not able to choose whether or leave or not and was not told he could leave.

Under a totality of the circumstances and in accord with prior decisions of Florida courts, the findings of the trial court on the issue of custody should not be upheld. This Court should conclude that Mr. Rigterink was in custody and entitled to be correctly advised of his Miranda rights. The trial court's finding that Miranda was not required due to a lack of custody was error.

C. DEFECTIVE MIRANDA WARNINGS

This Court must consider whether or not the defective Miranda form used in this case would require suppression of the recorded statement. The basis for the trial court's ruling in this case turned on the custody requirement. However, the original basis for the motion to suppress, the defective Miranda warnings, must also be scrutinized under the "tipsy coachman" doctrine. This doctrine would require

affirmance if the record established a proper basis for the trial court's ruling even if the grounds enunciated by the trial court were wrong. Robertson v. State, 829 So.2d 901, 906-7 (Fla. 2002). The defective warning does not support an alternative basis for affirmance, instead it mandates reversal.

Mr. Rigterink argued that the Miranda warning given in this case was defective because it failed to advise him that he had the right to have an attorney present during questioning. The Miranda warning used in this case was attached as an exhibit to the motion and does not contain the caution that an attorney may be present during questioning; neither does the verbal rendition contain that advice.(II,R195-196)

The Fourth District Court of Appeal in West v. State, 876 So.2d 614 (Fla. 4th DCA 2004), rev. denied, 892 So.2d 1014 (Fla. 2005), held that a Miranda warning which fails to advise the defendant of his right to counsel during questioning makes a confession inadmissible as a matter of law. A defendant must at least be advised of the functional equivalent of having an attorney present during questioning in order to sustain a finding that the confession is admissible. M.A.B v. State, 957 So. 2d 1219 (Fla. 2nd

2007)(question certified: Does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advise of both (A)the right to talk to a lawyer "before questioning" and (B)the right to consult a lawyer "at any time" during the questioning?); Canete v. State, 921 So.2d 687 (Fla. 4th DCA 2006). In this case the record unequivocally supports suppression of the confession. Mr. Rigterink was not advised that he had the right to have counsel present during questioning or of the functional equivalent. Mr. Rigterink was only told that he had the right to have a lawyer present prior to questioning. (II,R196)

Neither was the admission of the statement in this case harmless error. Roberts v. State, 874 So.2d 1225 (Fla. 4th DCA 2004) The State clearly benefited from the admission of the recorded confession and it cannot be said that the admission of that statement did not affect the verdict. The order denying suppression should be reversed and this case remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE DEFENSE TO PRESENT EVIDENCE WHICH CORROBORATED THE DEFENDANT'S TESTIMONY ABOUT THE VIOLENT NATURE OF THE DRUG TRADE

AND THE REPUTATION FOR VIOLENCE
OF THE PERSON THE DEFENSE ARGUED
WAS INVOLVED IN THE MURDERS.

During the course of the trial, Mr. Rigterink testified that he failed to go the police and identify Mark Mullins as being involved in the murders was because he was afraid of Mullins.(XXVI,T2661-3) Mr. Rigterink testified that the day after the murders Mullins confronted him and threatened to kill him, his family, and girlfriend. (XXVI,T3648) These threats were repeated over the next month.(XXVI,T3650;3657;3360;XXVII,T3383) Mr. Rigterink testified that he met Mullins through his dealing of illegal drugs and that Mullins had a reputation for violence in the drug community.(XXVI,T3662) Mr. Rigterink stated that he had seen Mullins hold a gun to the head of someone over a debt for marijuana.(XIX,T4171;XXVII,T3850)

Over the objections from the State, Mr. Rigterink sought to introduce the testimony of William Farmer. Farmer's testimony was proffered to the court and is summarized:

Farmer testified his nickname is "Tattoo".(XIV,T1581) Farmer worked as a self-described "security/enforcer" for drug dealers.(XIV,T1582) Farmer personally knew Mullins, but would not work for him because Mullins was more

forceful at having his money collected than Farmer was comfortable with.(XIV,T1583,1591) Farmer knew that Mullins carried a gun.(XIV,T1586) Farmer acknowledged that he had been under suspicion for murder four different time.(XIV,T1587) At the time of his testimony, Farmer was in jail.

Evidence of Mullin's drug dealing had been briefly alluded to during the State's case in chief. Several law enforcement officers testified that they were aware that Mullins and some of his friends sold drugs. Thus, testimony from the State corroborated Farmer's testimony. The trial court would not allow the defense to call Farmer as part of the defense.

In rebuttal the State called the former employer of Mr. Mullins, who testified that Mullins was with him at work at the time of the murders and that Mullins was not required to clock in his time, but was allowed to use the honor system.

The trial court's ruling prohibiting the defense from presenting the testimony of William Farmer was a significant limitation on Mr. Rigterink's ability to present his defense. Defense counsel sought to call Farmer

to testify about the propensity for violence in the drug trade and the reputation of Mullins in that community for violence. (XXIX,T4205-4211) This testimony was critical to the defense because it supported and corroborated the testimony of Mr. Rigterink that he had reason to fear Mullins. The testimony further corroborated the testimony of Mr. Rigterink that Mullins was capable of using a high level of violence himself or through a third person to ensure his customers/drug cohorts met their obligations to him. The trial court ruled that Farmer would not be permitted to testify regarding his knowledge of the violent nature of the local drug trade or Mullins' reputation for violence in the drug community and his use of an enforcer. (XXIX,T4209) The trial court's exclusion of Farmer's testimony was reversible error.

The general rule is that all relevant evidence is admissible unless when excluded by law, constitutional right, or privilege. Johnson v. State, 595 So.2d 132, 134 (Fla. 1st DCA 1992), rev.denied, 601 So.2d 553 (Fla. 1992). A criminal defendant has the constitutional right under the Sixth Amendment to the United States Constitution to present evidence in his own defense, subject only to reasonable restriction. Alexander v. State, 931 So.2d 946

(Fla. 4th DCA 2006) As Ehrhardt notes "Evidentiary rules do not abridge the right to present a defense 'so long as they are not "arbitrary" or "disproportionate to the purpose they are designed to serve."' Ehrhardt, Charles W., Florida Evidence 2006, §402.2, p.179, quoting, U.S. v. Scheffer, 523 U.S. 303, 118 S.Ct. 2704, 97 L.Ed.2d 413 (1998). If there is any possibility that the tendered evidence will support a reasonable doubt, the rules of evidence should be construed as to allow admissibility. Vannier v. State, 714 So.2d 470 (Fla. 4th DCA 1998); Rivera v. State, 561 So.2d 536, 539 (Fla. 1990). Paramount over the evidence code are the constitutional rights of the defendant. Curtis v. State, 876 So.2d 13 (Fla. 1st DCA 2004).

While a trial judge has great discretion in determining which evidence should be admitted and appellate review is governed by an abuse of discretion standard, the trial court's discretion is not unlimited. Jones v. State, __ So.2d __ 2007 WL 2002483 (Fla. July 12, 2007); Alexander v. State, *Ibid*. When the trial court is called to make an evidentiary ruling on evidence offered by the defendant to support his defense, it should be admitted if it proves or supports the theory of defense. Jacobs v. State, 32 Fla. Law Weekly D1682 (Fla. 4th DCA July 11, 2007). Regardless of

how the evidence is viewed by the trial court, it should be admitted as relevant if it tends to support or prove the theory of defense. *Ibid,* Jacobs v. State*.* Fundamental due process rights are violated when the defendant is prohibited from introducing evidence which supports his theory of the case. Sluyter v. State, 941 So.2d 1178 (Fla. 2nd DCA 2006), Washington v. State, 737 So.2d 1208 (Fla. 1st DCA 1999); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

In this case, the exclusion of the proffered testimony of William Farmer was an abuse of discretion and violated Mr. Rigterink's right to present a defense and his right to due process of law under the United States and Florida Constitutions.

Mr. Rigterink's defense at trial was that he was not the person who killed Mr. Jarvis and Ms. Sousa. His defense was that Marshall Mark Mullins had involvement in the deaths, likely thorough the procurement of an "enforcer" due to problems with Mr. Jarvis over drugs. Mr. Rigterink testified that Mullins made incriminatory statements about the murders and threatened Mr. Rigterink and his family with harm if Mr. Rigterink cooperated with the police. Mr. Rigterink testified as to the reasons he

feared Mullins and identified specific instances of violence he had witnessed at the hands of Mullins over drug debts. The testimony of William Farmer was critical to the defense because it corroborated the claims that Mr. Rigterink made about Mullins. Farmer did not claim to know Mr. Rigterink and had no motivation to lie about the activities of the drug underworld Mullins was heavily involved in. Farmer had personal knowledge of Mullin's use of an enforcer and his reputation for violence in running his drug dealing. Farmer's testimony was critical because it independently corroborated Mr. Rigterink's testimony. Without the testimony of Farmer, Mr. Rigterink's testimony regarding violence in the local drug trade and Mullin's vioence was susceptible of being viewed as fanciful, overwrought, exaggerated, or simply untrue. Mr. Rigterink's position is supported by several recent District Court appellate opinions.

In Wagoner v. State, 921 So. 2d 38 (Fla. 4th DCA 2006), the court reversed where the defense was prohibit from admitting evidence of the deceased co-defendant's state of mind prior to the agreed armed robbery with the defendant. The court held that in doing so, the defendant was prohibited from establishing his defense of "suicide by

cop" to the charge of second degree murder.

The defendant in Alexander v. State, 931 So.2d 936 supra., secured a new trial where the trial court prohibited him from introducing DNA evidence in his DUI manslaughter trial. The defendant had maintained that the blood samples relied upon by the state to prove the alcohol limit were not his blood samples. The trial court excluded the DNA evidence, which garnered a reversal from the Fourth District.

In Jacobs v. State, 32 Fla. Law Weekly D1682, supra., the defendant was charged with the second-degree murder of his wife. He was awarded a new trial because the trial judge would not permit him to introduce letters between his wife and her lover as evidence, evidence of hundreds of telephone calls between his lover and wife, and evidence the lover and his wife had opened joint bank and postal accounts to support the defense of insanity. In reversing, the Fourth District held that such evidence was relevant to the defense of insanity as it put in proper context the defendant's state of mind.

In this case, the testimony of William Farmer supported the defense that Mark Mullins was the instrument that led to the deaths of Mr. Jarvis and Mrs. Sousa. The

trial court's refusal to allow Mr. Rigterink to present evidence to the jury that supported his theory of defense and helped to establish a reasonable doubt of guilt was a violation of Mr. Rigterink's constitutional rights. A new trial is required.

ISSUE III

FLORIDA'S CAPITAL SENTENCING PROCESS IS UNCONSTITUTIONAL BECAUSE A JUDGE RATHER THAN JURY DETERMINS SENTENCE AND THE JURY RECOMMENDATION NEED NOT BE UNANIMOUS IN ORDER TO IMPOSE A DEATH SENTENCE.

Defense counsel attacked the constitutionality of Florida's capital sentencing statutes under the holding of the United States Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002) during the lower court proceedings.(III,R456-514) Defense counsel further requested that jury instructions consistent with the arguments presented in the pretrial motions under the Ring argument be given.

In Ring the United States Supreme Court struck the death penalty statute in Arizona because it permitted a death sentence to be imposed by a judge who made the factual determination that an aggravating factor existed, overruling it prior decision in Walton v. Arizona, 497 U.S.

639 (1990). The Court held that Arizona's enumerated aggravating factors operated as the "functional equivalent of an element of a greater offense" under Apprendi v. New Jersey, 530 U.S. 466 (2000). Absent the presence of aggravating factors, a defendant in Arizona would not be exposed to the death penalty. Subsequent noncapital cases have adhered to the principle that sentencing aggravators require a specific jury determination as opposed to one performed solely by the court. Blakely v. Washington, 124 S. Ct. 2531 (2004).

Similar to Arizona, Florida is also a "hybrid state", and the aggravating circumstances are matters of substantive law which actually "define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So.2d 146, 149 (Fla. 1982). See also, State v. Dixon, 283 So.2d 1,9 (Fla. 1973). Under Florida's statute the jury submits a penalty recommendation, but is not required to make specific findings as to the aggravating or mitigating factors. Nor is jury unanimity required as to the specific finding of which mitigator or aggravator is found. Unanimity of the jury is not required in order for a death sentence to be imposed.

Ultimately, in Florida it is the judge who makes the findings of which aggravators and mitigators apply. It is the judge who is required to independently weigh the aggravating factors he has found against the mitigating factors he has found, and thereupon determine whether to sentence the defendant to death or life imprisonment. See, King v. State, 623 So.2d 486, 489 (Fla. 1993). While the jury recommendation is to be given great weight, this Court has said "We are not persuaded that the weight given the jury's advisory recommendation is so heavy as to make it the *de facto* sentence… Not withstanding the jury recommendation, whether it be for life imprisonment or death, the judge is required to make an independent determination, based on the aggravating and mitigating factors." Grossman v. State, 525 So.2d 833, 840 (Fla. 1988)(emphasis added).

Since, just as in Arizona, it is the Florida trial judge who makes the crucial findings of fact necessary to impose a death sentence, it logically flows that Ring should apply to the State of Florida. Mr. Rigterink recognizes that this position was not ruled upon favorably by the plurality of the Court in Bottson v. Moore, 833 So.2d 693 (Fla. 2002), cert. denied, 123 S.Ct. (2002), and

subsequent cases, but this Court has yet to garner a majority vote as to the applicability of Ring. See, Windom v. State, 866 So.2d 915 (Fla. 2004)(Cantero, J., concurring opinion) and Johnson v. State, 904 So.2d 400 (Fla. 2005). Mr. Rigterink respectfully argues that the plurality rejection of Ring is erroneous and that the Florida capital sentencing statute does not meet constitutional requirements. The fundamental defect under Ring still exists in this case- the ultimate determination in this case of what sentence was to be imposed was determined by the trial court and done so without unanimity from the jury. The lack of jury unanimity vitiates the reliability of the death sentence, especially when the judge is the ultimate sentencer.

This Court recognized in State v. Steele, 921 So.2d 538 (Fla. 2005), that Florida is now the only state in the country to permit a death sentence to be imposed where a jury may determine by a majority vote whether or not to recommend death. Despite urgings from this Court, the Florida legislature has failed to address the infirmity of the Florida statute. Both Justice Pariente and Justice Anstead recognized in their dissenting opinions in Butler v. State, 842 So.2d 817 (Fla. 2003), that a unanimous

recommendation of death by the jury is necessary to meet the constitutional safeguards expressed in Ring. The reasoning of the dissent is that "the right to a jury trial in Florida would be senselessly diminished if the jury is required to return a unanimous verdict of every fact necessary to render a defendant eligible for the death penalty with the exception of the final and irrevocable sanction of death." Butler, at 824.

This Court has little choice but to ensure that constitutional rights are protected and to hold that Ring applies to Florida. The failure of the Florida Capital sentencing scheme to require a unanimous recommendation of death violates the constitutional guarantees of due process under the Fourteenth Amendment to the United States Constitution and corresponding provisions of the Florida Constitution and the Sixth Amendment right to jury trial under the United States Constitution and corresponding provisions of the Florida Constitution.

ISSUE IV

THE EXISTENCE OF THE PRIOR VIOLENT FELONY AGGRAVATOR SHOULD NOT BAR THE APPLICATION OF RING V. ARIZONA.

This Court has frequently used the existence of the defendant's prior violent felony aggravator as an alternative basis for rejecting Ring v. Arizona, 536 U.S. 584 (2002) challenges. This Court has concluded in majority opinions since 2003 that the constitutional requirements of Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000) are satisfied when one of the aggravating circumstances is a prior conviction of one or more violent felonies. No distinction is made as to whether the felony satisfying the aggravator was committed previously, contemporaneously, or subsequent to the charged offense. See, Floyd v. State, 913 So.2d 564 (Fla. 2005); Marshall v. Crosby, 911 So.2d 1129 (Fla. 2005). In this case Mr. Rigterink had a contemporaneous felony conviction and objected to its use as a bar to Ring.

The concept that recidivism findings might be exempt from otherwise applicable constitutional principles regarding the right to a trial by jury or the standard of proof required for conviction "represents at best an exceptional departure from historic practice." Apprendi v. New Jersy, supra., 530 U.S. at 487. The recidivism exception was recognized in the context of non-capital

sentencing by a 5-4 vote of the United States Supreme Court in Alamendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed 2d 350 (1988). In his dissenting opinion, Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg asserted "there is no rational basis for making recidivism an exception." 523 U.S. at 258 (emphasis in opinion). In Apprendi, the majority consisted of the four dissenting Justices from Alamendarez-Torres, with the addition of Justice Thomas (who had been in the Alamendarez-Torres majority). The opinion of the Court in Apprendi states:

> Even though it is arguable that Alamendarez-Torres was incorrectly decided,[footnote omitted], and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today.

530 U.S. at 489-90.

The Apprendi Court further remarked that "given its unique facts, [Alamendarez-Torres] surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence." 530 U.S. at 490. In his concurring opinion in Apprendi, Justice Scalia wrote: This authority establishes that a "crime" includes every fact that is by law a basis for imposing or

increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some sort of aggravating fact---of whatever sort, including the fact of a prior conviction- the core crime and the aggravating factors together constitute the aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature has provided for setting the punishment of a crime based on some fact-such as a fine that is proportional to the value of the stolen goods-that fact is also an element. No multifactor parsing of statutes, of the sort we have attempted since McMillan, is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

530 U.S. at 501 [emphasis supplied].

In addition, it is noteworthy that the majority in Alamendarez-Torres adopted the recidivism exception at least partially based on its assumption that a contrary

ruling would be difficult to overrule with the now overruled precedent of Walton v. Arizona, 497 U.S. 639 (1990) and the implicitly overruled Hildwin v. Florida, 490 U.S. 638 (1990). See, 523 U.S. at 247. It appear highly doubtful whether the Alamendarez-Torres exception for the "fact of a prior conviction" is still good law.

Even if this exception still survives in noncapital cases, it plainly, but its own rationale, cannot apply to capital sentencing and it cannot apply to Florida's "prior violent felony" aggravator which involves much more-and puts facts before the jury- than the simple fact of conviction under Alamendarez-Torres.

Alamendarez-Torres provided unique facts, as termed by the Apprendi Court. Because Alamendarez-Torres had admitted his three earlier convictions for aggravated felonies, which had been subject to proceedings with their own substantial procedural safeguards, "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court." Apprendi, 530 U.S. at 488 [emphasis supplied].

Unlike the noncapital sentencing enhancement provision of Alamendarez-Torres, which authorized a longer sentence for a deported alien who returns to the United States

without permission when the original deportation "was subsequent to a conviction for the commission of an aggravated felony", Florida's prior violent felony aggravator focuses at least as much, if not more, on the nature and details of the prior, contemporaneous, or subsequent criminal episode as it does on the mere fact of conviction. Even more importantly, one of the main reasons given for Justice Breyer's majority opinion in Alamendarez-Torres for allowing a recidivism exception in noncapital sentencing was the importance of keeping the fact and details of the prior conviction from prejudicing the jury.

In this case, and in Florida death penalty proceedings, both the fact of the prior conviction and the details of the prior conviction are routinely introduced to the jury through documentary evidence, testimony from victims, law enforcement, or other parties. Even if the defense offers to stipulate to the existence of the prior violent felony, the state is entitled to "decline the offer and present evidence concerning the prior felonies." Cox v. State, 819 So.2d 705,715 (Fla. 2002).

When Cox argued before this Court that the presentation of this evidence was unduly prejudicial contrary to the holding of Old Chief v. United States, 519

U.S. 172 (1997), this Court rejected that assertion. This Court determined that such evidence would aid the jury in evaluating the character of the accused and the circumstances of the crime so that the jury could make an informed recommendation as to the appropriate sentence. This Court rejected the holding of Old Chief in the capital sentencing proceeding where "the 'point at issue' is much more than just the defendant's 'legal status'". Cox, 819 So.2d at 716.

In this case, the prosecutor presented the additional testimony of the medical examiner to provide additional facts not presented in guilt phase. The jury learned more of the contemporaneous conviction in penalty phase than it had during guilt phase. For the same reason that Old Chief is not analogous to Florida's capital sentencing procedure, neither is the Alamendarez-Torres exception. The issue in a capital sentencing proceeding is much more than the defendant's legal status or the bare fact of the prior conviction. If the jury is allowed to hear the details of the prior conviction, there is no rationale for carving out an exception to Ring's holding that the findings of the aggravating factors necessary for the imposition of a death sentence be made by a jury. Thus, the existence of a prior

violent felony conviction does not relieve the need for a jury finding under Ring as to each aggravating factor in order to meet constitutional safeguards and ensure due process is protected.

ISSUE V

THE PENALTY PHASE JURY INSTRUCTIONS UNCONSTITUTIONALLY SHIFT THE BURDEN OF PROOF TO THE DEFENDANT TO ESTABLISH MITIGATING FACTORS AND TO SHOW THAT THE MITIGATING FACTORS OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

The Florida death penalty sentencing scheme is constitutionally infirm because it permits a sentence of death to be predicated upon unconstitutional jury instructions which shift the burden of proof to the defendant to establish mitigating factors and to then establish that the mitigating factors outweigh the aggravating factors. This unconstitutional burden shifting was objected to below.(III,R392-399)

Under Florida law a capital sentencing jury must be told that:

> "… the State must establish the existence of one or more aggravating circumstances before the death penalty could be imposed… [S]uch a sentence could be given if the State showed the aggravating circumstances outweighed the mitigating circumstances."

State v. Dixon, 283 So.2d 1 (Fla. 1973); Mullaney v. Wilbur, 421 U.S. 684 (1975). This straight forward standard was never applied to the sentencing phase of Mr. Rigterink's trial over the objections of defense counsel. The standard jury instructions given in this case were inaccurate and provided misleading information as to whether a death recommendation or life sentence recommendation should be returned.

The standard jury instructions shift the burden of proving whether he should live or die to Mr. Rigterink by directing the jury that was their duty to render an opinion on life or death by deciding "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." In Hamblen v. Dugger, 546 So.2d 1039 (Fla. 1989), a capital post-conviction case, this Court addressed the question of whether the standard jury instructions shifted the burden to the defendant as to the question of whether or not he should live or die. The Hamblen opinion can be construed as requiring the resolution of this issue on a case by case basis.

The jury instructions in this case required that the jury impose death unless Mr. Rigterink could both produce mitigation and prove that the mitigation outweighed and

overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Rigterink to death. This standard obviously shifted the burden to Mr. Rigterink to establish that life was the appropriate sentence. The standard jury instructions further limited consideration of the mitigating evidence to only those factors which Mr. Rigterink proved were sufficient to overcome or outweigh aggravation. Because the standard jury instructions conflict with the standard established in Dixon and Mullaney, they violate Florida law.

The jury in this case was precluded from "fully considering" and "giving full effect to" mitigating evidence. Penty v. Lynaugh, 109 S.Ct. 2934, 2952 (1989). This burden shifting resulted in an unconstitutional restriction upon the jury's consideration of any relevant circumstance that could be used to decline the imposition of the death penalty. McCoy v. North Carolina, 110 S.Ct. 1227, 1239 (1990)[Kennedy, J., concurring]. The effect of the standard jury instructions is that the jury can conclude that they need not consider mitigating factors unless then are sufficient to outweigh aggravating factors and from evaluating the totality of the circumstances as required under Dixon. Mr. Rigterink was required to prove

to the jury that he should live instead of the State having to prove that he should die. This violated the Eighth Amendment under Mullaney.

The standard jury instructions are further flawed because the jury is instructed that mitigating evidence can be found only if the juror is "reasonably convinced" that the mitigating factor has been established. The "reasonably convinced" standard is contrary to the constitutional requirement that all mitigating evidence must be considered. Continued use of the standard jury penalty phase jury instructions runs afoul of the Fifth, Eighth, and Fourteenth Amendments to the Untied States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution.

ISSUE VI

THE PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY DENIGRATE AND MINIMIZE THE ROLE OF THE JURY IN CAPITAL SENTENCING IN VIOLATION OF CALDWELL V. MISSISSIPPI.

The defense objected to the use of the standard jury instructions as being in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).(III,R369-371) Caldwell prohibits the giving of any jury instruction which denigrates the role of the jury in the sentencing process

in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The penalty phase instructions in Florida not only violate federal constitutional standards, but also violate Article I, Sections 6,16, and 17 of the Florida Constitution.

By repeatedly advising the jury that their verdict is merely advisory and a recommendation and by being repeatedly told that the decision rests solely with the court as to sentence, the jury is not adequately and correctly informed as to their role in the Florida sentencing process. These instructions minimize the jury's sense of responsibility for determining the appropriateness of a death sentence.

Mr. Rigterink acknowledges that this Court has ruled against his position previously. See, for example, Thomas v. State, 838 So.2d 535 (Fla. 2003).

ISSUE VII

DEATH BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Florida uses a system of lethal injection whose protocols have been presented to this Court by the State as an attachment to the pleadings in Rutherford v. Crist,

945 So.2d 1113(Fla. 2006) and have been previously published by this Court in Sims v. State, 754 So.2d 657 (Fla. 2000). A moratorium on executions had been ordered by Governor Crist, pending review and analysis of the three chemical cocktail and other protocols surrounding the training and expertise of those carrying out an execution. Although the moratorium has been lifted, litigation on this question is ongoing. The combination of chemical agents and the lack of medical training and experience of the execution personnel utilized in the lethal injection process by the State of Florida cause undue pain and suffering in violation of the Eighth and Fourteenth Amendments to the United States Constitution. A defendant is subjected to needless and excruciating pain prior to death.

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 173 (1976),(citing Furman v. Georgia, 408 U.S. 238, 392 (1972)). The United States Supreme Court has long held that the protections of the Eighth Amendment shield prisoners from "the gratuitous infliction of suffering". Gregg, 428 U.S. at 183 [citing Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) and In Re: Kemmler, 136 U.S. 436, 437

(1890)]. In the capital punishment context, when the suffering inflicted in executing a condemned prisoner is caused by procedures involving "something more that the mere extinguishment of life", the Eighth Amendment's prohibition against cruel an unusual punishment is implicated." See, Furman v. Georgia, 408 U.S. 238, 265 (1972) [quoting Kemmler, 136 U.s. at 447].

The method of execution by lethal injection as set forth by the filings of the Attorney General and as set forth in Sims v. State, 754 So.2d 657 (Fla. 2000), as well as further amplification in the 2006-07 inquiry of recent executions and in the operating and procedures manuals of the Florida Department of Corrections violates these constitutional principles. Florida's method of execution is similar to procedures that federal district courts has recently found to raise serious questions based on the Eighth Amendment. See, Morales v. Hickman, __ F. Supp 2d __[2006 WL 335427 (N.D.Cal. Feb. 14, 2006)], aff'd. ___ F.3d __ (2006)(finding that the three chemical substance sequence raises "substantial questions" that the condemned would be subjected to "an undue risk of extreme pain".) and Anderson v. Evans, No. Civ. 05-8-0825-F, [2006 WL 38903,(W.D. Okla. Jan. 11, 2006)](accepting it its entirety

a Magistrate Judge's report holding that death-sentenced inmates state a valid claims that Oklahoma's administration of the same three chemical sequence for lethal injection "creates an excessive risk of substantial injury and pain" under the Eighth Amendment.)

While this Court has rejected this argument in Rutherford v. Crist, supra., further review is appropriate in light of the pending inquiry. This Court's rejection of these claims is erroneous.

CONCLUSION

Based upon the foregoing arguments, citations of law, and other authorities, the Appellant, Thomas William Rigterink, respectfully requests that this Court reverse the judgment and sentence and order a new trial, or alternatively reduce the sentence to life in prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the Office of the Attorney General, AAG Candance Sabella, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013 this ____ day of September, 2007.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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